A SLIPPERY PATH TOWARD HAWAIIAN INDIGENEITY: An Analysis Pertaining to the Terminology of Indigenous Hawaiian and its Use and Practice in Hawai`i today

Presented by Keanu Sai, Ph.D. candidate (Political Science)
Indigenous Politics Colloquium, Department of Political Science
University of Hawai`i at Manoa
January 30, 2007

The aboriginal Hawaiian population, both pure and part, currently comprises a quarter of a million people here in these islands. Roughly the same amount resides in the United States and elsewhere. As a people, our history goes back to pre-western contact in 1778 and we are part of the Polynesian race, but where the chaff separates from the grain, so to speak, is the historical interpretation from Captain James Cook's arrival to the present, and its affect on the native Hawaiian political orientation of today. This has given rise to two distinct political identities: *Hawaiian indigeneity*, which is attributable to a common indigenous Hawaiian ancestry, language and culture; and, *Hawaiian nationality*, which is the citizenry of a particular State not dependent upon indigenous Hawaiian ethnicity. *Hawaiian indigeneity* has also been linked to the global movement of indigenous people who reject colonial "arrangements in exchange for indigenous modes of self-determination that sharply curtail the legitimacy and jurisdiction of the State while bolstering indigenous jurisdiction over land, identity and political voice."[1]

Hawaiian nationality, on the other hand, does not rely on a political movement for its existence and/or validity; but is determined by the national laws of the Hawaiian Kingdom as a State relative to the acquisition of its nationality, either by *jus soli* (born on the soil), *jus sanguinis* (parentage), or *naturalization*. Essential to the question of *Hawaiian nationality*, though, is whether or not the Hawaiian Kingdom as an independent State continues to exist as a subject of international law. This particular issue would not enter political discourse until after 1995 when two partnership companies, the Perfect Title Company and the Hawaiian Kingdom Trust Company, would establish themselves under and by virtue of Kingdom laws. And these same individuals would find themselves representing the Hawaiian Kingdom in an arbitration case at the Permanent Court of Arbitration in The Hague between 1999-2001.

In 2001, the Permanent Court of Arbitration in The Hague verified that Hawai`i, in the nineteenth century, "existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States."[2] And in 2004, the 9th Circuit Court of Appeals also verified Hawai`i status in the 19th century as a "co-equal sovereign alongside the United States."[3] In order to fully appreciate and understand the term "independent State" and "co-equal sovereign," we need to know these terms as they understood then. Sovereignty understood in the 19th century was of two types—*internal* and *external*, and defined in the 1836 renowned treatise of international law by Henry Wheaton.

> Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. …External sovereignty consists in the independence of one political

---

[1] Duncan Ivison, Paul Patton & Will Sanders, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000), p. 89.

[2] *Larsen Case (Lance Larsen vs. Hawaiian Kingdom)*, 119 International Law Reports (5 February 2001) 581. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 244-283.

[3] *Kahawaiola`a, et al., v. Norton* (2004), p. 15225.

> society are maintained, in peace and in war, with all other political societies. …The recognition of any State by other States, and its admission into the general society of nations, may depend…upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever be its ruler, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.[4]

The terms sovereignty and government are not synonymous, but rather are distinct and separate from each other. The former refers to authority, whether *internal* or *external*, while the latter is the physical agent that exercises that authority, both *internal* and *external*. In other words, sovereignty is a legal construct while the government exercising it is its physical manifestation. Therefore sovereignty would continue to exist in spite of its government being overthrown by military force. Case in point, Afghanistan in 2001 and Iraq in 2003, whereby the former was a recognized sovereign State since 1919 and the latter since 1932.

With regard to the recognition of external sovereignty that Wheaton makes mention of, there are two aspects—recognition of sovereignty and the recognition of government. Recognition of sovereignty is a political act with legal consequences, and once recognition is afforded to a State, and given entry into the "the general society of nations," it cannot be retracted. But the recognition of governments, also known as diplomatic recognition, is a purely political act, and can be retracted by another government for strictly political reasons. Cuba is a clear example of this principle, where the U.S. withdrew the recognition of Cuba's government under Fidel Castro, but at the same time the non-recognition of governance did not mean that Cuba ceased to exist as a sovereign State. In other words, sovereignty of an independent State is not dependent upon the political will of other governments, but rather principles of international law.

International law in the 19th century provided that only by way of a treaty of conquest or a treaty of cession could an independent State's entire sovereignty be extinguished, thereby merging the former State into that of a successor State. The establishment of the United States is a prime example of this principle at work through a voluntary cession of sovereignty. After the revolution, Great Britain recognized the former British colonies as independent and sovereign States in a confederation by the 1782 Treaty of Paris, but these States later relinquished their sovereignties by virtue of the 1787 constitution into a single federated State, which was to be thereafter referred to as the United States of America. The United States was the successor State of the thirteen former sovereign States by voluntary merger or cession.

Hawai`i was the first non-European nation to be recognized as an independent and sovereign State by the French, British and the United States. France and Great Britain explicitly and formally recognized Hawaiian sovereignty on November 28, 1843 by joint proclamation in London, and the United States on December 20, 1849 by treaty. As a recognized State, the Hawaiian Kingdom entered into extensive diplomatic and treaty relations with other States.[5] In

---

[4] Henry Wheaton, *Elements of International Law*, reproduction of the edition of 1836 (Oxford: Clarendon Press, 1936), p. 27.

[5] Great Britain (Nov. 16, 1836 and July 10, 1851), The Free Cities of Bremen (Aug. 7, 1851) and Hamburg (Jan. 8, 1848), France (July 17, 1839), Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Germany (March 25, 1879), France (Oct. 29, 1857), Japan (Aug. 19, 1871), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 16, 1862), Russia (June 19, 1869), Samoa (March 20, 1887), Switzerland (July 20, 1864),

particular, the Hawaiian Kingdom has five treaties with the United States of America: December 20, 1849,[6] May 4, 1870,[7] January 30, 1875,[8] September 11, 1883,[9] and December 6, 1884.[10] Hawai`i was not annexed by treaty, whether by conquest or cession. Instead, after two failed attempts to acquire Hawai`i by a treaty of cession in 1893 and 1897 from a puppet government it installed through intervention, the President, with the authority of Congress, unilaterally seized Hawai`i for military purposes during the Spanish-American war on August 12, 1898. Political action taken by Queen Lili`uokalani and Hawaiian nationals prevented the U.S. from acquiring Hawai`i's sovereignty through fraud and deception, but it couldn't prevent the seizure and subsequent occupation of the islands for military purposes.[11]

On April 25, 1898, the U.S. Congress declared war on Spain and made it retroactive to April 21. The following day, President McKinley issued a proclamation that stated, "it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."[12] The U.S. Supreme Court explained that, "the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations."[13] Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After U.S. Admiral Dewey defeated the Spanish Fleet in the Philippines on May 1, 1898, the *U.S.S. Charleston*, a protected cruiser, was re-commissioned on May 5, 1898, and ordered to lead a convoy of 2,500 troops to reinforce Admiral Dewey in the Philippines and Guam. These troops were boarded on the transport ships of the *City of Peking*, the *City of Sidney* and the *Australia*. In a deliberate violation of Hawaiian neutrality during the war as well as international law, the convoy, on May 21st, set a course to the Hawaiian Islands for re-coaling purposes. The convoy arrived in Honolulu on June 1st, taking on 1,943 tons of coal before it left the islands on the 4th of June.[14] A second convoy of troops bound for the Philippines, on the transport ships the *China*, *Zelandia*, *Colon*, and the *Senator*, arrived in Honolulu on June 23rd and took on 1,667 tons of coal.[15]

Spain (Oct. 29, 1863), Sweden and Norway (July 1, 1852). These treaties can be found in their original form at the Hawai`i State Archives, Honolulu, Hawaiian Islands.

[6] 9 Stat. 178. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115-122.

[7] 16 Stat. 1113. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 123-125.

[8] 19 Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126-128.

[9] 23 Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129-133.

[10] 25 Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134-135.

[11] For an analysis of the 1893 U.S. intervention see my article "American Occupation of the Hawaiian State: A Century Unchecked," *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 56-58.

[12] 30 Stat. 1770.

[13] *The Paquete Habana*, (1900) 175 U.S. 712.

[14] U.S. Minister to Hawai`i Harold Sewall to U.S. Secretary of State William R. Day, No. 167, 4 June 1898, Dispatches, Hawai`i Archives.

[15] *Id.*, No. 175, 27 June 1898.

As soon as it became apparent that the so-called Republic of Hawai`i, a puppet government of the U.S. since 1893, had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged with the Republic by H. Renjes, Spanish Vice-Counsel in Honolulu on June 1, 1898. U.S. Minister Harold Sewall, from the U.S. Legation in Honolulu, notified Secretary of State William R. Day of the Spanish protest in a dispatch dated June 8.[16] Renjes declared,

> In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America.[17]

The 1871 Treaty of Washington between the United States and Great Britain[18] addressed the issue of State neutrality by providing, *inter alia*, that "A Neutral Government is bound…not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purposes of the renewal or augmentation of military supplies or arms, or the recruitment of men." In an article published by the *American Historical Review* in 1931, Bailey stated, "although the United States had given formal notice of the existence of war to the other powers, in order that they might proclaim neutrality, and was jealously watching their behavior, she was flagrantly violating the neutrality of Hawaii."[19] Because of U.S. intervention in 1893 and the subsequent creation of puppet governments, the United States took complete advantage of its own creation in the islands during the Spanish-American war and violated Hawaiian neutrality. Marek states

> puppet governments are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.[20]

On July 6, 1898, the United States Congress passed a joint resolution purporting to annex the Hawaiian State. President McKinley signed the resolution the following day. The joint resolution also attempted to abrogate the international treaties the Hawaiian Kingdom had with other States by stating, that "the existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations." In 1996, a legal opinion from the U.S. Department of Justice rebuked the notion that congressional acts are superior to international treaties, and opined that "the unilateral modification or repeal of a provision of a treaty by Act of Congress, although effective as a matter of domestic law, will not generally relieve the United

---

[16] *Id*., No. 168, 8 June 1898.

[17] *Id*.

[18] 17 Stat. 863.

[19] Thomas A. Bailey, "The United States and Hawaii During the Spanish-American War," *The American Historical Review* 36, issue 3 (April 1931): 557.

[20] Marek, *supra* note 14, 114.

States of the international legal obligations that it may have under that provision."[21] The opinion also quoted a 1923 letter from then Secretary of State Charles Evan Hughes (later Chief Justice of the U.S. Supreme Court) to the Secretary of the Treasury. Hughes wrote that

> a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which is established by our legislative and judicial decisions and may be inconsistent with an existing Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is arbitration in which international rules of action and obligations would be the subject of consideration.[22]

While Hawai`i was clearly not a participant in the hostilities of the Spanish-American War, the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain, as well as fortifying the islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed in 1893. Even more disturbing is that the United States Senate, in secret session on May 31, 1898, admitted to violating Hawaiian neutrality. The Senate admission of violating international law was made more than a month before it voted to pass the so-called annexation resolution on July 6th. Senator Henry Cabot Lodge stated that,

> …the [McKinley] Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity.[23]

For nearly seventy years constitutional scholars and the U.S. Supreme Court, itself, were at a loss in explaining how a joint resolution could have extra-territorial force in annexing a foreign and sovereign State. In previous cases, the U.S. Supreme Court already determined "that the legislation of every country is territorial,"[24] and that that "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."[25] U.S. Representative Thomas H. Ball, of Texas, characterized the effort to annex the Hawaiian State by joint resolution as "a deliberate attempt to do unlawfully that which can not be lawfully done."[26] And United States constitutional scholar Westel Willoughby wrote,

---

[21] Christopher Schroeder, "Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligation Under an Existing Treaty," *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 19 (1995): 393.

[22] "Letter from the Secretary of State to the Secretary of the Treasury, Feb. 19, 1923," quoted in Green Haywood Hackworth, *Digest of International Law* 5 (1943): 194-195.

[23] "Senate Secret Debate on Seizure of the Hawaiian Islands, May 31, 1898," reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 230-284, 280.

[24] *Rose v. Himely*, 8 U.S. 241, 279 (1807).

[25] *The Apollon*, 22 U.S. 362, 370 (1824).

[26] United States Congressional Record, 55th Congress, 2nd Session, vol. XXXI, 5975.

> The constitutionality of the annexation of Hawai`i, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act...Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted." [27]

The transcripts of these secret hearings were suppressed for more than seventy years and could not be accessed by the public until the last week of January 1969, after a historian noted there were gaps in the Congressional Records. The Senate later passed a resolution authorizing the U.S. National Archives to open the records, and the Associated Press in Washington, D.C., reported, that "the secrecy was clamped on during a debate over whether to seize the Hawaiian Islands—called the Sandwich Islands then—or merely developing leased areas of Pearl Harbor to reinforce the U.S. fleet at Manila Bay." [28] What the transcripts did provide, which was not accessible to constitutional scholars and the other branches of the U.S. government until 1969, was the true intent and purpose of the joint resolution. The joint resolution was never intended to have any extra-territorial force, but was simply an "enabler" for the President to occupy Hawai`i in conformity with the law of nations or international law. It was not a matter of U.S. constitutional law, but merely served as consent on the part of the Congress to support the President as their commander-in-chief in the war. The annexation took place, not on July 7, 1898, the date of the joint resolution, but rather August 12, 1898, before a U.S. military ceremony on the grounds of the `Iolani Palace. In the secret hearings, Senator John Morgan explained the purpose of the joint resolution.

> What I mean is, the President having no prerogative powers, but deriving his powers from the law, that Congress shall enact a law to enable him to do it, and not leave it to his unbridled will and judgment. …[H]is constitutional powers as Commander-in-Chief of the Army and the Navy are not defined in that instrument. When he is in foreign countries he draws his powers from the laws of nations, but when he is at home fighting rebels or Indians, or the like of that, he draws them from the laws of the United States, for the enabling power comes from Congress, and without it he cannot turn a wheel.[29]

Also in this secret session, one of the topics discussed was the admitted violation of Hawaiian neutrality by the McKinley Administration and the liability it incurred due to the precedent set by the United States in the *Alabama claims* arbitration against Great Britain just after the American Civil War.[30] The international arbitration case centered on the damages incurred by warships built for the Confederate Navy in Liverpool, England. One of these ships, the *C.S.S. Alabama*, captured fifty-eight Union merchant ships before it was finally sunk in a sea battle against the U.S.S. *Kearsarge* in 1864. In 1871, under the Presidency of Ulysses S. Grant, the United States was able to secure Great Britain's consent to submit the dispute to arbitration in Geneva, Switzerland. The Tribunal determined that Great Britain violated its neutrality under international law and found the British government liable to the United States in the amount of

---

[27] Westel Willoughby, *The Constitutional Law of the United States*, *2nd Ed.,* (New York: Baker, Voorhis and Co., 1929), 427.

[28] "Secret Debate on U.S. Seizure of Hawaii Revealed," *Honolulu Star-Bulletin newspaper*, (1 February 1969), A1-2.

[29] "Senate Secret Debate on Seizure of the Hawaiian Islands, May 31, 1898," reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 269.

[30] See Caleb Cushing, *The Treaty of Washington: its Negotiation, Execution, and the Discussions Relating Thereto*, (New York: Harper & Brothers, 1873), 280.

$15,500,000.00 in gold. U.S. actions regarding Hawai`i, show clear intent, *in fraudem legis*, to mask the violation of international law by a disguised annexation. Marek asserts that, "a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State."[31]

Since 1900, Hawai`i has played a role in every U.S. armed conflict. Because of this, it has been used as the headquarters, since 1947, of the single largest combined U.S. military presence in the world, the U.S. Pacific Command.[32] Brigadier General Macomb, U.S. Army Commander, District of Hawai`i, stated, "O`ahu is to be encircled with a ring of steel, with mortar batteries at Diamond Head, big guns at Waikiki and Pearl Harbor, and a series of redoubts from Koko Head around the island to Wai`anae."[33] U.S. Territorial Governor Wallace Rider Farrington also stated, "Every day is national defense in Hawai`i."[34]

On April 30, 1900, the U.S. Congress passed *"An Act to Provide a Government for the Territory of Hawaii*.[35] Regarding U.S. nationals, section 4 of the 1900 Act stated that

> all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.

In addition to this Act, the 14th Amendment of the United States Constitution also provided that individuals born in the Hawaiian islands since 1900 would acquire U.S. citizenship. It states, in part, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."[36] Under these American municipal laws, the putative U.S. national population exploded in the Hawaiian Kingdom from a meager 1,928 out of a total population of 89,990, in 1890, to 423,174 out of a total population of 499,794 in 1950.[37] In 1890,

---

[31] Marek, *supra* note 14, 110.

[32] U.S. Pacific Command was established in the Hawaiian Islands as a unified command on January 1, 1947, as an outgrowth of the command structure used during World War II, *available at* http://www.pacom.mil/ Located at Camp Smith, which overlooks Pearl Harbor on the island of O'ahu, the Pacific Command is headed by a four star Admiral who reports directly to the Secretary of Defense concerning operations and the Joint Chiefs of Staff for administrative purposes. That Admiral is the Commander-in-Chief, Pacific Command. The Pacific Command's responsibility stretches from North America's west coast to Africa's east coast and both the North and South Poles. It is the oldest and largest of the United States' nine unified military commands, and is comprised of Army, Navy, Marine Corps, and Air Force service components, all headquartered in Hawai`i. Additional commands that report to the Pacific Command include U.S. Forces Japan, U.S. Forces Korea, Special Operations Command Pacific, U.S. Alaska Command, Joint Task Force Full-Accounting, Joint Interagency Task Force West, the Asia-Pacific Center for Security Studies, and the Joint Intelligence Center Pacific in Pearl Harbor.

[33] William C. Addleman, *History of the United States Army in Hawai`i, 1849-1939*, (Hawaii War Records Depository, Hamilton Library, University of Hawaii, Manoa), 9.

[34] I.Y. Lind, "Ring of Steel: Notes on the Militarization of Hawai`i," *Social Process in Hawai`i* 31, (1984-85), 25.

[35] 31 Stat. 141.

[36] On the subject of the occupying State unilaterally imposing its national laws within the territory of the occupied State, e.g. see Feilchenfeld, *infra* note 86.

[37] "Table 8, Race and Nativity, by sex, for Hawaii, Urban and Rural, 1950 and for Hawaii, 1900 to 1950," *supra* note 63, 52-13.

the aboriginal Hawaiian constituted 85% of the Hawaiian national population, whereas in 1950, the aboriginal Hawaiian population, now being categorized as U.S. nationals, numbered 86,091[38] out of 423,174, being a mere 20%.

Beginning in 1900, the putative U.S. nationals in the occupied *State* of the Hawaiian Kingdom sought inclusion of the Territory of Hawai`i as an American State in the United States union. The first statehood bill was introduced in Congress in 1919, but was not able to pass because the U.S. Congress did not view the Hawaiian Islands as a fully incorporated territory, but rather as a territorial possession. This attitude by the United States toward Hawai`i is what prompted the legislature of the Territory of Hawai`i to enact a "Bill of Rights," on April 26, 1923,[39] asserting the Territory's right to U.S. Statehood. Beginning with the passage of this statute, a concerted effort by the American nationals residing in the Hawaiian Kingdom sought U.S. Statehood. By 1950 the U.S. migration allegedly reached a total 293,379. These migrations stand in direct violation of Article 49 of the Fourth Geneva Convention, which provides that the "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[40]

The object of U.S. Statehood was finally accomplished in 1950 when two special elections were held amongst the occupier's population for 63 delegates to draft a constitution for the State of Hawaii in convention. Registered voters constituted 141,319, and votes cast for the delegates were 118,704.[41] A draft constitution for the State of Hawaii was ratified by a vote of 82,788 to 27,109 on November 7, 1950. On March 12th, 1959, the U.S. Congress approved the statehood bill and it was signed into law on March 18th, 1959.[42] In a special election held on June 27th, 1959, three propositions were submitted to vote. First, "Shall Hawaii immediately be admitted into the Union as a State?"; second, "The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved March 18, 1959, and all claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States"; third, "All provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people." The U.S. nationals accepted all three propositions by 132,938 votes to 7,854. On July 28th, 1959, two U.S. Hawaii Senators and one Representative were elected to office, and on August 21, 1959, the President of the United States proclaimed that the process of admitting Hawaii as a State of the U.S. Union was complete.

Another case of fraud occurred in 1946, when the United States ambassador to the United Nations identified Hawai`i as a non-self-governing territory under the administration of the United States since 1898, and, in accordance with Article 73(e) of the U.N. Charter, submitted Hawai`i on a list of non-self-governing territories that would ultimately achieve a form of self-governance. The

---

[38] *Id*.

[39] Act 86 (H.B. No. 425), 26 April 1923.

[40] See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. Hereinafter "Fourth Geneva Convention."

[41] "Population and Voting Data by County, Territory of Hawai'i, 1900-1950," *University of Hawai'i*, (28 October 1955).

[42] 73 Stat. 4.

initial list comprised territories that were colonized by Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and the United States. In addition to Hawai`i, the U.S. also submitted to the list American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands.[43] The U.N. Generally Assembly, in a resolution entitled *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter*, defined self-governance as (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.[44] None of the territories on the U.N. list of non-self-governing territories, with the exception of Hawai`i, were recognized sovereign States.

On September 17, 1959, the permanent representative of the United States to the United Nations reported to the Secretary General that the Hawaiian Islands had achieved self-governance as the 50th State of the United States, and was thereafter removed from the list of non-self-governing territories. The problem here is that Hawai`i should have never been placed on the list in the first place, because it already achieved self-governance as a "sovereign independent State" since 1843. The action taken by the U.S. at the U.N. in 1946 is a direct contradiction of the 2004 decision of the 9th Circuit Court of Appeals that stated the Hawaiian Kingdom was a "co-equal sovereign alongside the United States." Hawai`i was occupied as of 1946, but treated by the U.S. as a colonial possession in order to conceal its prolonged occupation of an independent and sovereign State. And this action would later fuel the sovereignty movement, which I explain later in this paper, and its use of colonial theory and the rights of indigenous peoples. Individuals within the sovereignty movement even promote the idea of re-inscribing Hawai`i back on to this list of colonial territories in order to be properly de-colonized—a prospect that does not coincide with Hawai`i's status and history under international law.

Every action taken within the territory of the Hawaiian Islands by the United States since January 17, 1893 directly violates the 1849 Hawaiian-American treaty, in particular, Article VIII:

> and each of the two contracting parties engage that the citizens or subjects of the other residing in their respective States shall enjoy their property and personal security, in as full and ample manner of their own citizens or subjects, of the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively.[45]

In 1988, Kmiec, *acting* Assistant Attorney General, Office of Legal Counsel for the Department of Justice, raised questions about Congress's authority to annex the Hawaiian Islands by municipal legislation. He concluded that it was "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[46] Consistent with the question of Congress's legal ability to annex the Hawaiian Islands, the Opinion also raises questions of Congressional authority concerning the 1959 Statehood Act and the boundaries of the State of Hawai`i as

---

[43] United Nations Resolution 66 (I), *Transmission of Information under Article 73e of the Charter*, December 14, 1946.

[44] United Nations Resolution 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter*, December 15, 1960.

[45] 1849 Hawaiian-American Treaty, *supra* note 25.

[46] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 12 (1988): 262.

provided in the second proposition of the special election held on June 27, 1959. The Attorney General's office apparently did have access to the Senate's secret debate, but it wasn't mentioned or even alluded to in the opinion. It would appear that the transcript would have had a more damaging affect than the Office of Legal Counsel was willing to admit. Craven, also concluded "the [1959] plebiscite did not attempt to distinguish between 'native' Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident 'colonial' population who vastly outnumbered them."[47]

The *Hawaiian indigenous* movement appears to have grown out of a social movement in the islands in the early 1970's. Native Hawaiians at the time were experiencing a sense of revival of Hawaiian culture, arts and music—euphoria of native Hawaiian pride. This movement "paralleled the activism surrounding the civil rights movement, women's liberation, student uprisings and the anti-Vietnam War movement."[48] Agard and Dudley credited John Dominis Holt and his 1964 book *On Being Hawaiian* for igniting the resurgence of native Hawaiian consciousness.[49] Holt initially wrote an angry response to a newspaper article that belittled the native Hawaiian community, and when the newspaper declined to publish his response, he decided to publish the book instead.

Tom Coffman, a local author, explained that when he "arrived in Hawai`i in 1965, the effective definition of history had been reduced to a few years. December 7, 1941, was practically the beginning of time, and anything that might have happened before that was prehistory."[50] Coffman admits that when he wrote his first book in 1970 he used Statehood in 1959 as an important benchmark in Hawaiian history. The first sentence in chapter one of this book read, "The year 1970 was only the eleventh year of statehood, so that as a state Hawaii's was still young, still enthralled by the right to self-government, still feeling out its role as America's newest state."[51] He later recollected in a subsequent book that

> Many years passed before I realized that for Native Hawaiians to survive as a people, they needed a definition of time that spanned something more than eleven years. The demand for a changed understanding of time was always implicit in what became known as the Hawaiian movement or the Hawaiian Renaissance because Hawaiians so systematically turned to the past whenever the subject of Hawaiian life was glimpsed.[52]

---

[47] Dr. Matthew Craven, Reader in International Law, University of London, SOAS, authored a legal opinion for the *acting* Hawaiian Government concerning the continuity of the Hawaiian Kingdom, and the United States' failure to properly extinguish the Hawaiian State under international law (12 July 2002), para. 5.3.6. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 311-347, 341.

[48] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Dunedin: University of Otago Press, 1999), p. 113.

[49] Michael Dudley & Keoni Agard, *A Call for Hawaiian Sovereignty* (Honolulu: Na Kane O Ka Malo Press, 1990), p. 107.

[50] Ibid, p. xii.

[51] Tom Coffman, *Catch a Wave: A Case Study of Hawai`i's New Politics* (Honolulu: University of Hawaii's Press, 1973), p. 1.

[52] Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai`i's*, Kane'ohe: Tom Coffman/Epicenter, 1999, p. xii.

The native Hawaiian community had been the subject of extreme prejudice and political exclusion since the United States annexed the Hawaiian Islands in 1898, and the history books that followed routinely portrayed the native Hawaiian as weak and inept. This stereotyping became institutionalized, and is evidenced in the writings by Gavan Daws, who, in 1974, wrote a book entitled *Shoal of Time: A History of the Hawaiian Islands*.

> The Hawaiians had lost much of their reason for living long ago, when the kapus were abolished; since then a good many of them had lost their lives through disease; the survivors lost their land; they lost their leaders, because many of the chiefs withdrew from politics in favor of nostalgic self-indulgence; and now at last they lost their independence. Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization.[53]

Although the Hawaiian Renaissance movement originally had no clear political objectives it did foster a genuine sense of inquiry and thirst for true Hawaiian history that was otherwise absent in contemporary history books. Silva states:

> How do a people come to know who they are? How do a colonized people recover from the violence done to their past by the linguicide that accompanies colonialism? Although stories are passed on individually in families, much is lost, especially during times of mass death due to epidemics. When the stories told at home do not match up with the texts at school, students are taught to doubt the oral versions. The epistemology of the school system is firmly Western in nature: what is written counts. When the stories can be validated, as happens when scholars read the literature in Hawaiian and make the findings available to the community, people begin to recover from the wounds cause by that disjuncture in their consciousness.[54]

Following the course Congress set under the *1971 Alaska Native Claims Settlement Act*, which "the United States returned 40 million acres of land to the Alaskan natives and paid $1 billion cash for land titles they did not return,"[55] it became common practice for Native Hawaiians to associate themselves with the plight of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated by Europe or the United States. The Hawaiian Renaissance gradually branched to include a political wing often referred to as Hawaiian sovereignty. Up to this point, Hawaiian *statehood* of the 19th century, as defined by international law then and now, was no longer a known variable in the sovereignty equation. Instead, the sovereignty movement operated within an ethnic or tribal optic based actually on the Native American movement in the United States and soon expanded itself to become a part of the indigenous movement at the international venue.

The movement evolved into political resistance and certain native Hawaiians began to organize. In 1972, an organization called A.L.O.H.A. (Aboriginal Lands of Hawaiian Ancestry) was founded to seek reparations from the United States for its involvement in the illegal overthrow of the Hawaiian Kingdom government in 1893. Frustrated with inaction by the United States it

---

[53] Gavan Daws, *Shoal of Time* (Honolulu: University of Hawaii's Press, 1974), p. 291.

[54] Noenoe Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Durham & London: Duke University Press, 2004), p. 3.

[55] *Hawaiians: Organizing Our People*, a pamphlet produced by the students in "ES221—The Hawaiians" in the Ethnic Studies Program at the University of Hawaii's, at Manoa, in May1974, p. 37. The pamphlet is available in the Hamilton Library at the University of Hawaii's, at Manoa.

joined another group called *Hui Ala Loa* (Long Road Organization) and formed *Protect Kaho'olawe 'Ohana* (P.K.O.) in 1975.[56] P.K.O. was organized to stop the U.S. Navy from utilizing the island of Kaho'olawe, off the southern coast of Maui, as a target range, by openly occupying the island in defiance of the U.S. military. The U.S. Navy had been using the entire island as a target range for naval gunfire since World War II, and, as a result of P.K.O., the Navy terminated its use of the island in 1994. Another organization called *'Ohana O Hawaii's* (Family of Hawaii's), which was formed in 1974, even went to the extreme by proclaiming an *empty* declaration of war against the United States of America. The political movement also served as the impetus for native Hawaiians to participate in the State of Hawaii's Constitutional Convention in 1978, which created an Office of Hawaiian Affairs (O.H.A.). As a governmental agency, O.H.A.'s mission is:

> To malama (protect) Hawai`i's people and environmental resources and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.

In addition, the movement also generated the creation of a multitude of diverse sovereignty groups, each having a separate agenda as well as varying interpretations of Hawaiian history. For all intents and purposes, the Hawaiian Kingdom, as an independent *State* and the protection it has under international law, was absent within the movement, while the historiography of European and American colonialism consumed the Hawaiian psyche. Kent concludes:

> The Hawaiian sovereignty movement is now clearly the most potent catalyst for change. During the late 1980s and early 1990s sovereignty was transformed from an outlandish idea propagated by marginal groups into a legitimate political position supported by a majority of native Hawaiians. The vast outpouring around the events in January 1993 commemorating the centennial of the overthrow of the monarchy was a convincing demonstration of this rising consciousness.[57]

In 1993, the U.S. government, keeping an indigenous and historically inaccurate focus, apologized only to the native Hawaiian people, rather than the citizenry of the Hawaiian Kingdom, for the United States role in the overthrow of the Hawaiian government.[58] This implied that only ethnic Hawaiians constituted the Kingdom,[59] and fertilized the incipient ethnocentrism of the movement. The Resolution provided that "Congress…apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai`i on January 17, 1893 with the participation of agents and citizens of the United States, and the

---

[56] Michael Dudley & Keoni Agard, *A Call for Hawaiian Sovereignty* (Honolulu: Na Kane O Ka Malo Press, 1990), pp. 113-114.

[57] Noel Kent, *Hawaii's: Islands under the Influence* (Honolulu: University of Hawaii's Press, 1993), pp. 198-199.

[58] See U.S. Apology Resolution for the Illegal Overthrow of the Hawaiian Kingdom, 107 Stat. 1510. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 235-240.

[59] According to the 1890 census done by the Hawaiian Kingdom, the population comprised 48,107 Hawaiian nationals and 41,873 Aliens. Of the Hawaiian national population 40,622 were ethnic Hawaiian and 7,495 were not ethnically Hawaiian. This latter group of Hawaiian nationals comprised, but were not limited, to ethnic Chinese, varied ethnicities of Europeans, Japanese, and Polynesians. According to Hawaiian law a person born on Hawaiian territory acquired Hawaiian nationality, but international law prevents the citizenry of the occupying State from acquiring the nationality of the occupied State, which includes migrants who arrived in Hawai`i during the American occupation.

deprivation of the rights of Native Hawaiians to self-determination."[60] The congressional apology rallied many native Hawaiians, but it also implied that the Hawaiian Kingdom was a *non-sovereign* nation of native Hawaiians overthrown and legally replaced by the State of Hawai`i, being similar to Native American tribes in the 19th century. The Resolution also created a vacuum for many in the movement to pursue a native Hawaiian nation that centers on Hawaiian ethnicity and culture. Consistent with the Resolution in 2003, Senator Daniel Akaka submitted Senate Bill 344, also known as the Akaka Bill, to the 108th Congress. The Bill's stated purpose is to provide "a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct aboriginal, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance."[61] The bill failed to reach the floor of the Senate for vote, but was re-introduced by Senator Akaka on January 17, 2007.

The Akaka Bill's definition of native Hawaiians as indigenous peoples and their right to self-determination is tempered by the U.S. National Security Council's position on indigenous peoples. On January 18, 2001, the Council made known its position to its delegations assigned to the U.N. Commission on Human Rights, the Commission's Working Group on the United Nations (U.N.) Draft Declaration on Indigenous Rights and to the Organization of American States (O.A.S.) Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations. The Council directed the U.S. delegations to "read a prepared statement that expresses the U.S. understanding of the term 'internal self-determination' and indicates that it does not include a right of independence or permanent sovereignty over natural resources." The Council also directed the U.S. delegation should support use of the term "internal self-determination" in both the U.N. and O.A.S. declarations on indigenous rights, and defined it as follows:

> 'Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development.'"[62]

After years of occupation, indoctrination has been so complete that a power relationship between the occupier and the occupied, that was once evident, has now become blurred, if not, effaced. Today, amnesia of Hawaiian State *sovereignty* is pervasive and colonization, as a social and political theory, has dominated the scholarly work of social and political scientists regarding Hawai`i. Recently, though, orientation has shifted from an indigenous optic that has operated within the U.S. State apparatus and its municipal legislation, to one of a national optic that operates within the framework of international law *between* established States. Together with the counter-historiography that international relations and state theory is able to bring to the Hawaiian struggle, so follows counter-terminology, which is an important element in developing measures so that the prolonged occupation can come to an end. The following terms carry entirely different meanings and consequences; and, if these terms were used in the wrong context it would present itself as a contradiction. In other words, the terms are mutually exclusive.

---

[60] Apology Resolution, *supra* note 12, p. 1513.

[61] S. 344, 108th Cong. §19 (2003).

[62] "*Resolution of the U.S. National Security Council' position on Indigenous peoples*," (18 January 2001).

Hawaiian nationality	*vs.*	Hawaiian Indigeneity
Sovereign State		Non-Sovereign Nation
Independent		Dependent
Sovereignty Established		Sovereignty Sought
Citizenship (multi-ethnic)		Ethnicity (native Hawaiian)
Occupation		Colonization
De-Occupation		De-Colonization

The underline difference between the terms *colonization/de-colonization* and *occupation/de-occupation*, is that under the former the colonized must negotiate with the colonizer in order to obtain sovereignty (e.g. India from Great Britain, Rwanda from Belgium, and Indonesia from the Dutch); while under the latter, there is a presumption of the continuity of sovereignty that is not dependant upon the occupier (e.g. Soviet occupation of the Baltic States, and the American occupation of Afghanistan and Iraq). *Colonization/de-colonization* is a matter that concerns the internal laws of the colonizing state, while *occupation/de-occupation* is a matter of international law, as between sovereign States. Hawai`i's sovereignty is maintained and protected under international law, in spite of the absence of a diplomatically recognized government since 1893, and international law mandates that during an occupation, the occupying State must administer the laws of the occupied State, not the other way around. In other words, the United States military must administer Hawaiian Kingdom law, as defined by its constitution and statutory laws, which is no different then when the United States military administered Japanese law during the post-World War II American occupation of Japan, despite the absence of a Japanese government. And a more recent example is the United States military's administration of Iraqi law in Iraq and Afghani law in Afghanistan. According to §358 of the U.S. Army Field Manual 27-10,

> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.

While under U.S. occupation, international relations, as a political theory, was not used to investigate and/or to understand the Hawaiian-American situation. Instead, the United States confined the Hawaiian psyche to the tropes of U.S. domestic politics, by enacting Congressional laws that systematically relegated the Hawaiian situation from an issue of State sovereignty to a race-based political platform that is limited to work within the U.S. apparatus, both at the national and international levels. This situation has been maintained, until now, behind the reified veil of U.S. sovereignty. Aboriginal Hawaiians are not an indigenous people within the United States with a right to *internal* self-determination similar to Native American tribes, but rather are the indigenous people within the Hawaiian Kingdom who comprise the majority of the citizenry of an occupied State with a right to end the prolonged occupation of their country. The focus here at the University of Hawai`i, at this point, is to expose the occupation through multi-disciplinary research by applying appropriate theoretical frameworks, which serve to further elucidate and clarify the present situation in order to develop prescriptive and practical measures that address Hawai`i's unique situation. It is here in the field of Political Science, that the application of *Public Law*, *Comparative Politics*, *International Relations* and *Political Theory* regarding Hawai`i are crucial frameworks that can be employed toward this endeavor.