

Executive Agreement

Cleveland—Lili`uokalani Agreement of Restoration (1893)

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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. Embassy 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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When United States forces and its diplomatic representative overthrew the Hawaiian Kingdom government on January 17, 1893 with its aim of establishing military bases in the Hawaiian Islands, it constituted a serious breach of the Hawaiian Kingdom's dominion over its territory and the corresponding duty of non-intervention by other countries [States]. Non-interference was a recognized general rule of international law, or peremptory norm, in the nineteenth century as it is now, unless the interference was justifiable under the right of the intervening State's self-preservation.¹ But in order to qualify a State's intervention, the danger to the intervening State "must be great, distinct, and imminent, and not rest on vague and uncertain suspicion."² The Hawaiian Kingdom posed no threat to the preservation of the United States and when a Presidential investigation into the circumstances that led to the overthrow of the Hawaiian government was completed on October 18, 1893,³ President Cleveland delivered a message to the Congress where he stated that "the military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."⁴ He concluded that the "lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives."⁵ 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."⁶

¹Henry Wheaton, *Elements of International Law*, ed. George Grafton Wilson (Oxford: Clarendon Press, 1936), 100; James Kent, *Commentaries on American Law*, 12th Edition (Littleton, Colorado: F.B. Rothman, 1989), 21; William Edward Hall, *A Treatise on International Law*, 8th ed. (Oxford: Oxford University Press, 1924), 55; George B. Davis, *The Elements of International Law* (New York & London: Harper & Brothers Publishers, 1902), 99; Theodore Dwight Woolsey, *Introduction to the Study of International Law*, 4th ed. (Littleton, Colorado: F.B. Rothman, 1981), 50.

² *Id.*, Kent, *Commentaries*, 24.

³ "Executive Documents on Affairs in Hawaii: 1894-95," *U.S. House of Representatives, 53rd Congress* (Washington: Government Printing Office, 1895), 459-463 (hereafter Executive Documents) [Exhibit A].

⁴ *Id.*, 452.

⁵ *Id.*, 455.

⁶ Lassa Oppenheim, *International Law: A Treatise*, 3rd ed., ed. Ronald F. Roxburgh, Vol. II (London: Longmans Green and Co., 1921), 252.

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

In a follow-up dispatch to Willis, Gresham adamantly stated, "You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration."¹⁴ In another communication on December 3rd 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."¹⁵ Gresham acknowledged that the 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."¹⁶ 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."¹⁷

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 24th of the restoration by dispatch from Lorrin Thurston who was in Washington, D.C.¹⁸ 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."¹⁹ Clearly they were determined to give the

¹² *Id.*

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

¹⁴ Executive Documents, 1191 [Exhibit D].

¹⁵ *Id.* [Exhibit E].

¹⁶ *Id.*

¹⁷ *Id.*, 1192.

¹⁸ "Executive Council Minutes," *Republic of Hawai'i* (November 24, 1893), 111.

¹⁹ *Id.* (November 28, 1893), 115.

Prior to the revolution, the Queen was confirmed as the lawful successor to the throne of her brother King Kalakaua on April 10th 1877,²⁶ 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,"²⁷ 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)."²⁸ As a constitutional monarchy, the Queen's decision to pardon, unlike the President, 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."²⁹ 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."³⁰ 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.

²⁶ 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..."

²⁷"U.S. Constitution" (1787), Article II, §2.

²⁸ "Hawaiian Constitution" (1864), Article 27.

²⁹ *Id.*, Article 45.

³⁰ *Id.*, Article 80.

restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.³³

United States Obligation Established by Executive Agreement

The ability for the U.S. to enter into agreements with foreign States is not limited to treaties, but includes executive agreements, whether jointly with Congress or under the President's sole constitutional authority.³⁴ 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."³⁵ 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 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.³⁶

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.'"³⁷ The agreement with the Queen evidently stemmed from the President's role as "chief executive," "commander in chief," and his duty to "take care that the laws be faithfully executed;" and the binding nature of the agreement must be considered confirmed, so long as the agreement is not "inconsistent with legislation enacted by Congress in

³³ *Id.*

³⁴ "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."

³⁵ Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (Oxford: Clarendon Press, 1996), 215.

³⁶ *Id.*, 219.

³⁷ U.S. Government, "Foreign Affairs Manual," Vol. XI (October 25, 1974), 721.2(b)(3).

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.⁵²

United States Breach of the 1893 Cleveland-Lili'uokalani Agreement

In the United States, Congress took deliberate steps to prevent the President from following through with his obligation to restore, which included hearings before the Senate Foreign Relations Committee headed by Senator Morgan, a pro-annexationist and its Chairman in 1894. These Senate hearings sought to circumvent the requirement of international law, where "a crime committed by the envoy on the territory of the receiving State must be punished by his home State."⁵³ 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 14th, 16th, and 17th of January, 1893."⁵⁴ 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. Cleveland's failure to fulfill his obligation of the agreement allowed the provisional government to gain strength, and on July 4th 1894, they renamed themselves the Republic of Hawai'i. For the next three years they would maintain their 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.⁵⁵ 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 12th 1898, McKinley unilaterally annexed the Hawaiian Islands for military purposes during the Spanish-American War under the guise of a Congressional joint resolution.

⁵² *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).

⁵³ Oppenheim, *International Law* (3rd ed), 252.

⁵⁴ U.S. Senate, "Senate Report 227," *Reports of Committee on Foreign Relations 1789-1901*, Vol. VI (53rd Congress, February 26, 1894), 363.

⁵⁵ 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.

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."⁶⁴ 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.⁶⁵

It is self-evident that the 1893 Cleveland-Lili'uokalani agreement meets the requirements of the first two essentials establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidenced in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27th 1893. As stated in the memorial:

And while waiting for the result of [the investigation], with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government. The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.⁶⁶

Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the second treaty of annexation signed in Washington, D.C., on June 16th 1897, between the McKinley administration and the self-proclaimed Republic of Hawai'i. These protests were received and filed in the office of Secretary of State Sherman and continue to remain a record of both dissent and evidence of reliance upon the conclusion of the investigation by President Cleveland and his obligation and commitment to *restitutio in integrum*—restoration of the Hawaiian government. A memorial of the Hawaiian Patriotic League was filed with the United States "Hawaiian Commission" for the creation of the territorial government in September and appears to be the last public act of reliance made by a large majority of the Hawaiian citizenry.⁶⁷ The commission was established on July 9th 1898 after President McKinley signed the joint resolution of annexation on July 7th 1898, and was holding meetings in Honolulu from August

⁶⁴ Ian Brownlie, *Principles of Public International Law*, 4th ed. (New York: Clarendon Press, 1990), 641.

⁶⁵ Bowett, 202.

⁶⁶ Executive Documents, 1295.

⁶⁷ Munroe Smith, "Record of Political Events," *Political Science Quarterly* 13, no. 4 (December 1898): 745-776, 752.

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Executive Agreement: Cleveland—Lili`uokalani Agreement of Restoration (1893)

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

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