

CULTURE INTO LAW THE CONVEYANCE OF KAHO'OLAWE ISLAND

By
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The views expressed here are wholly his own and do not necessarily represent those entities represented during or since the enactment of the Kaho'olawe Legislation. This paper was presented to the Symposium on Native Hawaiian Land Rights, Eminent Domain and Regulatory Takings (Honolulu, Hawaii), January 12, 1995, sponsored by the University of Hawaii Law School, the Native Hawaiian Bar Association, Pacific Law Institute and the Kamehameha Schools/Bernice Pauahi ate.

INTRODUCTION THE HISTORICAL SETTING

In 1976, a group of Native Hawaiians - among them Dr. Emmett Aluli - left the shores of Maui with the singular intention of occupying the Island of Kaho'olawe. It was not just a challenge to authority. It was an act of defiance to the United States. The Navy held it as a bombing range. National preparedness and the means for assuring it were in jeopardy. Also in jeopardy was a deep belief in the Hawaiian culture. Kaho'olawe had religious meaning. There was virtue embodied in the land.

For those who made that journey, and those - like John Waihee - who defended their actions, their spirit held tenaciously to the Island until, finally, in May 1994, the United States conveyed its title to Hawaii in a ceremony of power and beauty on Maui's shore. The transfer is now embodied in law. The Deputy Assistant Secretary of the Navy, William Cassidy, Jr., signed the conveyance document on behalf of the United States. So, too, did Dr. Aluli and Governor Waihee. Much more than symbolism was at stake.



It has been more than 200 years since Captain James Cook arrived in Hawaii. He brought with him an Anglo-Saxon culture and an unflinching determination, characteristic of its origins, to assure that culture was expressed powerfully and pervasively and with an absolute certainty about its correctness for all to follow. In its presumption of universality came a capacity to smother those that were different. It reflected a deep parochialism when it traveled abroad. It did not share; at least not easily. It did not do so here. Cook did not arrive with a culture that would encourage Native Hawaii to preserve, enhance and share the virtues of its own way of life with a larger world.

What emerged on these Islands during the ensuing decades following Cook's arrival is well known to those in this room. It is no accident of history that within England and within the United States, the relevance of Hawaii to both cultures was found only in commerce and in war. Within the United States, particularly as it emerged from a continental mentality at the end of the 19th Century, the single institution that studied, molded and defined Hawaii to America was the United States Navy. The presence of Assistant Secretary Cassidy at the conveyance ceremony reflected a long history.



Naval Captain
Alfred Thayer Mahan

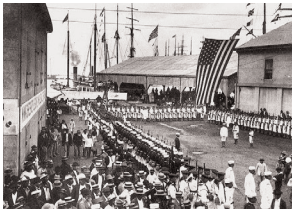
Writing in 1890, Naval Captain Alfred Thayer Mahan - a widely read geopolitical practitioner - memorialized a principle that tempered American's perception of Hawaii for generations that followed.

He wrote:¹

Within [the United States], the home market [for American industries] is secured; but outside, beyond the broad seas, there are the markets of the world, that can be entered and controlled only by a vigorous contest... The interesting and significant feature of this changing attitude is the turning of the eyes outward, instead of inward only, to seek the welfare of the country. To affirm the importance of distant markets, and the relation of them of our own immense powers of production, implies logically the recognition of the link that joins the products and the markets, - that is, the carrying trade...

* * * * *

There is no sound reason for believing that the world has passed into a period of assured peace outside the limits of Europe. Unsettled political conditions, such as exist in Haiti, Central America, and many of the Pacific Islands, especially the Hawaii group, when combined with great military or commercial importance as is the case with most of these positions, involve, now as always, dangerous germs of quarrel...



Mahan's fear was for the vulnerability of the western coast of the United States to British imperialist and military interests and, as he and others believed, the potential for Chinese expansion eastward. Missing, of course, was any recognition of the relevance of the Native people that occupied Hawaii.

In our infancy we bordered upon the Atlantic only; our youth carried our boundary to the Gulf of Mexico; to-day maturity sees us upon the Pacific... [T]he Hawaii group possesses unique importance - not from its intrinsic commercial value, but from its favorable position for maritime and military control.

The Navy's role during the formation of the Republic of Hawaii also is well known in this room. It is not a commendable chapter in its history. For Mahan, writing back home in the *New York Times*, in 1893, to a considerable audience, the Navy had done precisely what it had to do. At stake, Mahan believed, was our future as a sea power. What he characterized as "The Revolution in Hawaii" was critical to America's security. He described it in this manner:

The Navy's and the Nation's position on this perspective of Hawaii's relevance remained unchanged. There are many examples of it. Within the Nation's capital, the relevance of Hawaii was not found in the culture or cultural integrity or political or property rights of its Native people. It was found on the Island's maritime position and strategic military relevance.

The occupation of Kaho'olawe in 1976 challenged that perception like no other action before it. It pierced the seeming comfort of the Navy and laid bare the law and custom that allowed those in the Nation's capital to view Hawaii as a place void of Native peoples. It was an assertion of culture and integrity and rights under the law that, when viewed in its broader history vis-a-vis the United States, reflected the emergence of Native Hawaiian rights in a form now permanent.

It is in this context, in this historical moment and cultural emergence, that the Legislation to convey title to Kaho'olawe occurred and its meaning must be evaluated. It is my purpose here to do so; to identify some of those factors that tempered the fate of Kaho'olawe in Washington, D.C. and the choices that were made that formed and yielded the Legislation that directed the Island's conveyance to Hawaii. I also intend to describe, in more general terms, the broader challenge, legal and perceptual, that I believe confronts those who seek to mold and define Native Hawaiian property rights.

¹"The United States Looking Outward," *The Interest of America in Sea Power, Present and Future*, Boston, Little, Brown and Co., 1897.

I want to emphasize at the outset, however, that although I will focus primarily on the Legislation, and some of the factors we weighed and considered, it should be borne in mind - and many of you will need no reminder of this - that, at base, a special tribute is due those in public and private life who contributed in small and big ways to the success of this effort long before my participation and that of my colleagues. It was not done easily. The United States, especially the Navy, does not yield sovereignty, except in the face of compelling reason and the reasoned use of power. It does not do so based on popular sentimentality or moral imperative, although both forces were at play here. I have mentioned Dr. Emmet Aluli and Governor Waihee. They, in turn, would attribute this success to others; those whose passion and commitment to the spiritual meaning of Kaho'olawe antedated and informed their own.



Senator Akaka

Within the Nation's capital, almost exclusively within Congress, success was due to the commitment of Hawaii's Representatives and both Senator Akaka and Senator Inouye; especially Senator Inouye. It was there, however, that the success of this effort took on a different character, with high risks, amidst less than friendly influences and with the need to be imaginative with the law and disciplined and watchful about assuring that the words selected for the Legislation - by us and others - conveyed precisely the meaning that accomplished our purpose without jeopardizing the practical need to get it enacted.



Senator Inouye

I turn first to the Legislation.

I.

THE TRANSFER OF KAHO'OLAWA ISLAND: THE LEGAL AND POLITICAL FRAMEWORK

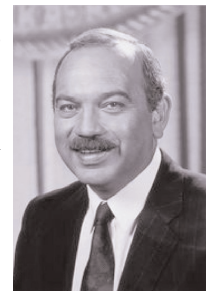
The Broad Imperatives. Four broad, explicit imperatives, historical, legal and practical in nature, determined our mandate as lawyers. The first was that Kaho'olawe had to be returned to Hawaii's sovereignty. Second, was that the Island had to be returned with a degree of clean-up that made it useable for the purposes intended. The first imperative required its conveyance from the United States, particularly its military; and the second imperative required substantial public funding, by any fiscal or political standard, as well as the determination of liability for the duty and cost of clean-up and for the cost and risk of accidents. Implicated in both these broad imperatives was the nation's Defense policy and the authority within Congress and the Executive to control and direct appropriations from the national treasury.

There was a third broad imperative, more subtly expressed: the conveyance needed to be timely. It needed to happen in a time frame that reflected the juxtaposition of forces here in Hawaii and within the Nation's Capital, without being deflected by other, less hospitable forces. Collectively, such hospitable and inhospitable forces included, among others:

- the public approval, within the State of Hawaii, for the conveyance;
- the visible, organizational effort and discernable emergence of Native Hawaiian political and cultural interests;
- the election and special commitment of a Native Hawaiian Governor, John Waihee, and his personal and formal commitment to use the State's resources to accomplish the conveyance; and



- the Hawaii Legislature's commitment, expressed formally in April 1993, to set forth the terms and conditions under which the Island would be governed and the State's commitment that sovereignty over the Island could pass to a Native Hawaiian Nation.



John Waihee

At this same time, within the Nation's capital was:

- the presence, skill and strategic sense of Senator Inouye and his experience, tenure and chairmanship of the Senate's Appropriation Subcommittee on Defense;
- the assumptions about the need to restructure America's defense capability following the demise of the Soviet Union, including a seemingly “lesser” need for traditional military functions and a seeming “uncertainty” within the military, albeit transient, about its precise global mission and the means for assuring it;
- the growing awareness and sensitivity within Congress and elsewhere of the environmental degradation prevailing at many of America's military installations and Congress' recognition of its duty to clean it up;
- the competing financial demands of state governments and municipalities throughout the nation to obtain federal clean-up funds for defense facilities contaminated, made unusable and scheduled for abandonment. Put differently, Hawaii was not alone; and
- finally, looming over the conveyance of title and the clean-up of Kaho'olawe was the existence of environmental and statutory requirements and the likely exertion of jurisdiction by those agencies with the authority to implement those requirements, especially the Federal Environmental Protection Agency (EPA) and Interior Department, that could delay the transfer of title and compel a level of clean-up that would be beyond the existing technology, beyond anyone's financial capability and beyond the time frame reflected in the moral and spiritual imperative of those who believed, at base, that protecting and enhancing the Native Hawaiian culture - not the conventional clean-up of land - was at stake.

It was essential that we analyzed, regularly revisited and understood fully the fluctuating relevance of each of these forces, and broad imperatives, as we moved forward in drafting and seeking the enactment of the Legislation. Delay in doing so meant unpredictability. The thoughtful perspective of all those individuals involved was solicited, or at times provided unsolicited, throughout the entire process.

The Fourth Board Imperative: The Need For Caution.

There was a fourth, broad imperative that warranted special attention, especially for someone like myself, whose experience in law was - and continues to be - molded and tempered by the federal Judiciary and the conduct of the Department of Justice. From the outset of this process, that is, seeking to transform cultural imperatives into law, we were especially thoughtful and concerned about the unsettled, if not inhospitable nature of the federal Judiciary and the federal Executive to Native Hawaiian property rights.

As those in this room know better than I, the precise nature, origin, tenure and meaning of Hawaiian property rights is complex and the subject of considerable litigation and contentious dispute. From the outset of Hawaii's acquisition by the United States, the federal Judiciary has not considered the history of the Native Hawaiians or of Hawaii's problematic, early relationship with the United States a relevant factor in interpreting the meaning of words in statutes or of acts of government or the nature of the federal duty toward Native Hawaiians. The 1910 decision of the United States Court of Claims, in denying any relief to the land claims of Queen Liliuokalani, in *Liliuokalani. v. United States*, 45 Ct. Cl. 418 (1910), reflected such a narrowly drawn, if not ideologically driven attitude. The jurisprudence that has evolved, in the District Court here and in the Ninth Circuit, sustained that perspective and stands in stark contrast to that jurisprudence which has governed Native Americans.

Within the Executive Branch, a similar, inhospitable perspective has prevailed. In late 1992, in *Han v. Department of Justice*, the United States - speaking through the Justice Department - took the position it had no trust or fiduciary responsibility toward Native Hawaiians under the Hawaii Admissions Act of 1959 or the Hawaii Homes Commission Act of 1920. In January 1993 - on the last day of the Bush Administration - the Solicitor of the Interior Department, Thomas Sansonetti, issued a formal opinion also denying any trust or fiduciary responsibility. Neither expression of position reflected an acknowledgement of the manner of this nation's acquisition of Hawaii or the same moral factors that have governed the jurisprudence of Native Americans. The District Court affirmed this position in March 1993, in *Han v. Department of Justice*, 824 F. Supp. 1480 (D. Haw. 1993). The plaintiffs appealed to the Ninth Circuit. The newly appointed Attorney General, Janet Reno, and the newly appointed Solicitor at Interior chose to continue unchanged the position of the United States. They did so despite the assertion in the Democratic Party Platform of July 14, 1992 that:

we will reverse the Bush administration's assault on civil rights [and]...require the United States government to recognize its trustee obligations to the inhabitants of Hawaii generally and to Native Hawaiians in particular.

In September 1993, the Justice Department informed the Ninth Circuit in the *Han* case, which is still pending, that the United States has no fiduciary or trust duty to Native Hawaiians. It did so primarily by arguing that “the plain language” of the 1920 and 1959 Acts and the principles embodied in the law of trusts governed the outcome. Interior did not dispute that position.

I recount these factors - the inhospitable nature of the federal Executive and Judicial Branches - not as the basis for judgment about the legal or jurisprudential propriety for the conduct of either (although I have such a view and will discuss it later) but as a broad reality; a practical imperative that prevailed at the time and helped mold our thinking about the content of the Legislation; what it should and what it should not address.

Put differently, the potential for generating opposition from the use of the wrong words, however unwittingly written, was significant. Considerable care, a clear understanding of timing, purpose and the cultural and moral imperatives at stake, was required. So, too, was the discipline not to engage in challenges that would distract from or dilute our duty or place us in the midst of someone else's agenda. The challenge for us was to assure the Legislation, in all ways possible, resolved all the fundamental property rights issues we could contemplate; and sought, to the extent possible, to limit the prospect of a judicial role or to restrict the jurisdiction of a court of law. We did not view it or the Executive Branch, Justice or Interior, as a hospitable forum for protecting the fundamental property rights of Native Hawaiians.

II.

THE CONTENT OF THE LEGISLATION: SEVEN (7) ISSUES, RESOLVED IN WORDS

The drafting of the Legislation occurred largely under the guidance of Senator Inouye and his staff on the Appropriation's Subcommittee and in a manner consistent with his legislative acumen and knowledge of the proper and timely exercise of power. My colleagues and I kept the Navy informed only informally and through its representatives here. The Governor's Office worked closely with Dr. Aluli and The Protect Kaho'olawe Ohana.



Norma Wong

During the drafting, over many months, at least seven general issues arose that warranted close attention, often with a care and depth of concern that, in the vortex of the legislative process, drew heavily on everyone's experience in law and government. Although I will separate them for purposes of analysis, you will sense readily that each touches the other.

1. Keeping The Legislation In The Appropriations Committee. There was never a question about the political need to keep the proposed Legislation within the purview and authority of the Senate Appropriations Committee. Hawaii's influence was considerable, Senator Inouye's staff had sensible relations with the Navy; the Legislation could be fashioned in a hospitable forum and the timing of its formal introduction controlled.



Senator Inouye

It could have started, in theory, elsewhere; for example, within Committees dealing with the Environment or with the Interior Department or with Native Americans. The entire Island, as you know, is on the National Register of Historic Places. In each of these other settings, however, there was an uncertainty about the agenda's of other agencies of government and other members of Congress. The challenge, in the end, was to protect the Legislation's integrity from other forces, some of which I mentioned earlier, and to assure that its special history and the moral imperative that had formed its uniqueness, was not lost in the “give-and-take” traditionally reflective of the legislative process or the “inside-the-beltway” power fights rarely understood outside the confines of the Nation's capital.

It meant, in the end, that all the factors and forces at play in Hawaii, and all the confidence this state has shown in Senator Inouye and his own ability and skill in mastering the legislative process, could be - and was - utilized fully. There was every indication that the Navy accepted, as sensible and essential, the initiation and retention of this Legislation within the Appropriations Committee.

2. **Separating Title From Control.** From the outset, we were confronted with a practical and legal dilemma. The Navy had two concerns, both legitimate. Its duty was to clear the Island of unexploded ordinance. Until it did so, it wanted to retain control so as to protect against interference with the clean-up and any accidents involving non-Navy personnel that might give rise to tort liability. Because clean-up would, under any circumstance, take years to accomplish, and given the time constraints that required the conveyance of title much sooner, we looked to analogues, including within the law and history of the public lands of the United States, where title and control of various interests in property have been widely shared or, when necessary, made distinct, one from the other, often to serve special traditions unique to that part of America. Consequently, we drafted a provision, contained in Section 10001(b) of the Act, that conveyed title to Hawaii within 180 days but retained “control of access” in the United States for the ten years necessary to clean-up the Island.

3. **Exemption from Section 120(h) of CERCLA. Concerning the conveyance of Title; and**

4. **Exemption From The Base Closure Requirements.** Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, requires that the United States cannot convey title to its own property until clean-up is complete and certified. This restriction on conveyance had two likely effects: (i) it would effectively preclude precisely the timely transfer of title we sought; and (ii) it would create a general environmental orientation to the Legislation that would, at a minimum, assure an initiating role for EPA and, for those Congressional committees that oversee EPA's conduct, authority and appropriations. This latter consideration, if it became a reality, would materially dilute our ability to fashion the content, purpose, timing and appropriations for the Legislation, especially to keep it from falling prey to a wide range of statutory mandates and clean-up standards never before applied and tested vis-a-vis unexploded ordinance. At the same time, we wanted to be certain adequate standards did exist in the Legislation to assure the requisite level of clean-up.

These same concerns also related to a fourth issue: keeping the Kaho'olawe Legislation distinct from the Base Closure and Environmental Clean-up requirements recently enacted by Congress and subject to various forms of amendment at that time. If the clean-up of Kaho'olawe were viewed as a “Base Closure” - as some thought it could be - we would find ourselves subject to a broad range of generic requirements applicable to settings wholly unlike our own, subject to a broad range of other agency agenda's and most problematic, having to get in line for appropriations and competing for priority attention, within the Executive Branch, with numerous states, municipalities and other branches of the military. In the end, we wanted only three participants: the Navy, Hawaii and Congress; and within Congress, only the Committee where Hawaii's strength was the strongest and where we could minimize the prospect of competing requests for funding.

Accordingly, the Legislation - in the form introduced in the Senate - was drafted to effectively “exempt” the conveyance from the requirements of CERCLA's Section 120(h) by exempting it from placement on EPA's National Priorities List (Section 110(B)), (b)); to create what was characterized as Tier One Restoration Areas and Tier Two Restoration Enclaves with defined geographic boundaries and stringent clean-up standards related to their use (Section 110(A) (a) (2)); to assure that no other federal permits or approvals - except those required explicitly by the Legislation - were required for “any portion of the removal, restoration and clean-up work” required by the Legislation (Section 110 (A) (a) (b)); and to add a degree of reasonableness and opportunity for imagination to this approach by designating the entire Legislation as a “Model Demonstration Project” with special characteristics (Section 110(b)).

Although this scheme, and the balance and prerogatives it sought to establish, was challenged in the House of Representatives - which I will describe momentarily - we were able to preserve its essential integrity in the Legislation, as enacted.

5. **Government Accountability; and 6. Defining Judicial Review.** We sought to hold the Navy - and Hawaii - accountable for the Legislation's proper implementation in three ways. The first was to be precise about the mandatory conveyance of title to the Island from the United States to Hawaii; and to set forth, as precisely as we could, what had to be cleaned-up, in accordance with which standard and to meet what kind of use. Second, we required the Navy to report annually to Congress, “describing compliance with the provisions of this Act” and including in the Report the comments of the State of Hawaii. Third, we established a Judicial Review provision. Our intention was twofold. There seemed little doubt that under federal question jurisdiction, 28 U.S.C. S 1331, a federal court could exercise its authority in some fashion. We also assumed that under such a circumstance the Court would avail itself fully of all its equitable prerogatives and the standards for review available under the Administrative Procedures Act. In addition, our steadfastly held

purpose - agreed to by all those involved - was to minimize if not eliminate any disruption to the timing of conveyance or of the clean-up, especially the latter. The Navy was responsible for only ten years from the date of enactment. The restrictions we sought to place on judicial review were intended to diminish the possibility serious legal impediments would alter the Legislation's requirements or preclude clean-up within the ten year time frame. Put differently, the Navy had a mandate and a duty. We wanted there to be no basis for it not to fulfill both.

It was, of course, in this same context that we included deliberately our own judicial review provision. This was the sixth issue. Generally, we were uneasy with what a federal district court would do, given the broad range of statutory claims that could be brought, in the absence of as much guidance and direction as we could provide. Although this provision of the Legislation was altered from the Senate version, the final bill, as enacted, retained a distinct judicial review provision and requires the court to give "due regard to the need for expeditious clean-up under the terms and conditions of this Act." (Section 10004. (b))).

7. **Technology.** Finally, we were confronted by a seventh issue: the uncertain state of the technology necessary to detect and remove unexploded ordnance from the Island or portions of it to standards necessary for human visitation or human habitation.

Kaho'olawe posed a special technological problem, obvious to anyone who visited the Island. Unexploded ordnance was buried deeply, randomly and, in light of constant soil erosion and wind currents, ordnance placement moved over time so that its location, quantity and magnitude defied any form of reasoned prediction. Moreover, the more sophisticated the technology in detecting and removing ordnance - or, exploding it in place - the greater the cost would be to the United States and the more problematic such cost would be to the Legislation's real efficacy to serve its purpose. The cost uncertainty was enhanced further by the need to remove some ordnance without exploding it. In some settings, the goal was to protect religious and cultural sites that would be destroyed if the ordnance were detonated in place.

Two considerations helped mold our thinking about this issue. The first was our visit to the Island. Once observing ordnance removal and talking to those directly responsible for it, we were able to discern that a benefit to the Navy existed in the form of special training and experience useful in military and combat settings. The second consideration loomed large throughout our drafting of the Legislation. In June 1993, in a condemnation proceeding initiated by the United States, *United States v. 1871.356 Acres of Land* (No. 89-00063, unpublished opinion) situated in the Waikane Valley, the United States District Court for the District of Hawaii considered the Army's claim that it must acquire the land - used as a munitions training area - because "it does not have the technology to locate unexploded ordnance on the property and/or because the cost to clear and restore the property would be unreasonably high."

The District Court engaged in a very thoughtful inquiry to determine the legitimacy of the Army's claim. It concluded, however, that "because [the United States] does not have the technology to locate and absolutely eliminate the danger of unexploded ordnance...[and]...the cost to clear the ordnance is unreasonably high in relation to the estimated value of the subject property," the United States would be allowed to acquire the land.

Although critical factors distinguished the acts and law in the Waikane Valley case from those involving the possible condemnation of Kaho'olawe - not the least of which was the importance of conveyance to Native Hawaiians and the legal interest of the State of Hawaii - nonetheless, the inadequacy of the technology and its critical role in the case's disposition caused us discomfort. In the absence of legislation, or in the presence of legislation poorly drafted, the technology, cost of clean-up, or the Navy's insistence that it would be impossible to attain clean-up standards, could yield the most unacceptable outcome: namely, the legitimate, supportable decision by the Navy not to convey title at all or to seek to acquire, through eminent domain, whatever property interest Hawaii retained in the Island since its acquisition by the United States in 1941. We avoided such an outcome.

In the end, we sought to accomplish the following goals:

- (i) expeditious and certain conveyance of title;
- (ii) the clean-up of the Island by the Navy, at federal expense, and in accordance with reasonable standards and its intended use;

- (iii) the preservation of the Island as a cultural and religious site; and
- (iv) the avoidance of unnecessary controversy with the Navy and with other state or local governments; the avoidance of jurisdictional disputes with EPA, Interior and Justice; and, to the extent possible, defining the jurisdiction and providing guidance concerning the exercise of equitable discretion by the federal Judiciary.

On October 21, 1993 - in a subtle manner, and in accordance with the arcane maneuvering customary of the Senate and well-known to Senator Inouye - the bill was passed, unanimously, by the United States Senate as part of the 1994 Defense Appropriations Bill.

The Late Afternoon Challenge. We then waited. The annual Defense Appropriations Bill, like other Appropriations bills, must, under the Constitution originate in the House of Representatives. For the reasons I stated at the outset, we had decided deliberately to introduce the Kaho'olawe bill in the Senate.

The House of Representatives already had enacted a different Appropriations bill without any reference to Kaho'olawe Island. In a manner also within the arcane traditions of both Houses of Congress, the House of Representatives objected to the Kaho'olawe Island conveyance. It came from Congressman John Dingell, whose Energy and Commerce Committee on the House side had jurisdiction over conventional environmental clean-up legislation. The Senate bill was stuck; held in place; unmovable.



Congressman
John Dingell

I will not attempt to describe the motives or substantive basis for Congressman Dingell's objection. He spoke only to Senator Inouye. It was an exercise in power; an "insider's" exercise of power, where personality and temperament and political skill are brought to bear. What I can say is that what we confronted early, one afternoon was that the Legislation could survive but only with changes that were acceptable to the House. Because of the special nature of the appropriations process and time constraints related to it - the final bill needed to be printed, agreed to by a Joint House-Senate Conference Committee and reported out and approved by both Houses - I was invited to the Offices of the Appropriations Committee, conferred with Senator Inouye's and Congressman Dingell's staff and, within a prescribed time frame of two hours to alter, abandon and change the terms of the Legislation, did so.

Others in that room, that afternoon, focused on the political machinations of the legislative process and the temperament and power of those who define it. My task was to be the lawyer; to be especially conscious of how, if there was a judicial challenge, which words, in what order, based on which principles, would allow me to argue successfully on behalf of those cultural imperatives that underlie our reason for being there. That frame of reference never left me. The challenge was to seek quietude and the long view; to preserve the basic principles of the Legislation, as I described them above; not to disrupt the conveyance of title in the right time frame and not to dilute the mechanism for funding the clean-up or the authorized amount.

Let there be no doubt, the precision and explicitly arranged and drafted balance and care reflected in the Senate Bill was tempered by the late afternoon challenge posed by Congressman Dingell that we confronted and sought to resolve. It is, in that sense, a Washington story not likely to appear in any recitation of the official legislative history. It occurred far from the shores of Hawaii; in a setting that does not tolerate uncertainty and at a time when those whose interests were at stake had not yet started their day. We preserved the basic principles of the Legislation.

The House agreed to the bill, as so modified. It was passed by both Houses of Congress on November 9, 1993 and signed, thereafter, by President Clinton.

On or about the 180th day after enactment, and in accordance with Section 10001(b) of the Act, title to the Island was conveyed from the United States to the State of Hawaii. The change in sovereignty was effectuated in law.



II.

REVISITING THE JUDICIAL ROLE: AN OBSERVATION

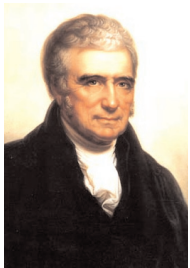
Based, in part, on this experience and what we learned, I would like to make an observation, alluded to throughout my presentation, about the broader challenge confronting Native Hawaiians. It is, first and foremost, that the emergence of Native Hawaiian rights and culture is still precariously balanced, in a manner not yet content with its fulfillment, but capable, if exercised imprudently, of irreparably harming itself. The reason for such concern is plain: it is founded in the jurisprudence of the federal Judiciary.

It is true, in 1977 the United States District Court for the District of Hawaii in *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977), agreed largely with the position of Dr. Aluli and others that the National Environmental Policy Act and the Historic Preservation statutes had application to Kaho'olawe. The Ninth Circuit largely affirmed in *Aluli v. Brown*, 602 F.2d 876 (9th Cir. 1979). I believe it is fair to say that, today, given the decidedly conservative nature of the federal Judiciary, and a review of more recent precedents dealing with both NEPA and the historic preservation requirements, it is unclear whether the federal Judiciary or the Executive branch would be so willing to construe the law in the manner it did 16 years ago or to acquiesce in a similar outcome.

More revealing about the judicial perspective, however, was the Ninth Circuit's unwillingness at approximately the same time, in 1978, in *United States v. Mowat and others*, 582 F.2d 1194 (9th Cir. 1978), cert. den., 439 U.S. 967 (1978) (a criminal prosecution also stemming from the occupation of the Island) to question the legitimacy of, Hawaii's take-over and annexation by the United States. The Ninth Circuit was confronted with the defense that "illegal revolutionaries," acting from 1893 to 1900, wrote and approved the documents that conveyed Hawaii to the United States and that, in examining the basis for the defendant Mowat's alleged wrongdoing, the Court first must determine "the sufficiency of the Government[']s claim to] Possession of Kaho'olawe."

The Court chose not to accept the precise invitation at historical inquiry posed by the defendant. The Ninth Circuit chided Mowat's counsel for his failure "to make a record" of the "illegal revolutionaries" argument in the court below. Instead of remanding on this issue, however, the Court upheld, nonetheless and in summary fashion, the legitimacy of Hawaii's acquisition in the same manner the United States Court of Claims had summarily dismissed an almost identical opportunity to question the same history and conduct of the United States in 1910, when Queen Liliuokalani sought, without success, to recover her own lands, taken with discernable coercion and over her objection. *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

The telling story is to be found not only in the outcome of these cases - 70 years apart - but in the methodology and principles applied to the analysis. Compared to the principles that have governed Native American cases, especially since the Supreme Court's recognition in the mid-19th Century that the United States had won the war against Native Americans and was obligated - in legal principle - to assume a wardship responsibility, the federal Judiciary has shown no willingness to engage in precisely the kind of historical analysis that has transformed essentially moral duties into law in America's relationship with the Native Americans.



Justice
John Marshall

Listen to the Supreme Court of the United States, speaking in 1831 in *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831), through Justice John Marshall:

A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties...

They may...perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will... Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

In 1883, the Supreme Court reiterated this same principle in *Ex Parte Grow Dog* (Kan-Gi-Shun-Ca), 109 U.S. 556, 570 (1883), and again in 1886, in *United States v. Kagama*, 118 U.S. 375 (1886).

In 1942, the Supreme Court also spoke directly to the “moral obligations” that inform any interpretation of the duty of the United States. It stated, in *Seminole Nation v. United States*, 316 U.S. 286, 296-298 (1942):

This court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited peoples... In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which found expression in many acts of Congress (fn. omitted) and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

In March 1993, moved by a decidedly different tradition, the District Court in Hawaii in *Han v. Justice Department*, 824 F. Supp. at 1486, n.2, stated the following, when confronted with the question whether the United States has a trust or fiduciary obligation toward Native Hawaiians:

The question before the court today is not whether the United States has a moral obligation to native Hawaiians as a result of acts committed by representatives of the United States or those active in concert with them at some previous time. The issue here is whether the United States is under a legally enforceable statutory duty to act as suggested by the plaintiffs.

We know that the plea of Queen Liliuokalani's counsel, in 1910, that “a court of equity is primarily a court of conscience,” fell on ears deaf only to history and to a judicial duty the Court, in its discretion, chose not to exercise. That plea, in various forms and through different voices, continues to echo. It has been heard; and it has been answered, but not in a way that reflects either equity or conscience. In its own jurisprudential manner, on the hard questions, the Alfred Thayer Mahan view of Hawaii continues to find its strongest adherents in the federal Judiciary.

In the context of any such litigation, Native Hawaiian claims also have no allies in the Executive Branch to advocate or bolster their position. I have described the Justice Department's position in *Han*. It relied on essentially the same legal arguments as Solicitor Sansonetti did in his 1993 Opinion and it reached the same result. Although Interior withdrew that 1993 opinion, it did not do so until November 1993 - after the Justice Department's brief was filed - and it deferred, without substantive dispute, to the arguments in that brief.

The United States now has pressed its argument on the absence of a fiduciary duty in the Ninth Circuit and, in fact, made it the lead argument in its brief. It wants the issue decided. It had two alternatives. The first, to inform the Ninth Circuit the trust issue did not have to be reached; that it was sufficient for the Court to decide the more fundamental and easily resolved issue: does the Attorney General of the United States have the discretion to enforce the terms of the Hawaii Homes Commission Act of 1920. It is hard to imagine an issue more clearly governed by well-established legal principles and easily resolved in the government's favor. The second alternative, and these two are not mutually exclusive, would have been to file an enforcement action against those responsible for assuring the terms and conditions of the Homes Commission Act are administered fairly and in the interests of Native Hawaiians. The United States chose not to do so.

Finally, in making its argument to the Ninth Circuit that no trust or fiduciary duty existed, the United States began with the so-called “plain meaning” rule; that is, a statute's meaning must “be sought in the language in which the act is framed, and if that is plain...the sole function of the courts is to enforce it according to its terms.” In the context of the Native Hawaiian peoples and culture, their relationship to the United States, beginning certainly in 1893, if not before, and especially their treatment since Annexation, it is a simpleminded, and insidious argument. It seeks to define the meaning of the word “trust” by ignoring history and the special context that gave rise to choosing to actually use the word at all. Put differently, the “plain meaning” rule is relevant only in its broad historical context, if it is relevant at all.

In *United States v. Mitchell*, 463 U.S. 206, 225 (1983), for example, the Supreme Court was confronted with determining whether a fiduciary relationship existed between the United States and the Quinalt Indians. In concluding such a relationship and corresponding duty existed, the Court stated:

[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with the respect to such monies or properties...even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” (Emphasis added.)

Defining American's fiduciary duty toward Native Hawaiians, as a matter of law, should be derived, as it is in other settings, from history, from the success of America's military power and from the moral obligation imposed upon us as a Nation. It is not a duty derived from the “plain meaning” of a statutory word. The mere use of the argument by the United States is reflective of a deeply held, problematic disposition towards Native Hawaiians.

The lesson is clear. Given the dependence of Native Hawaiians on the jurisprudence of only one federal district court and one United States Court of Appeals, efforts to vindicate property rights in such forums must be approached with great care. Moreover, approaching the Executive must be done with comparable care and with more than a deep conviction that a wrong has, or will continue to be, committed against Native Hawaiians, their culture and property rights. Imprudent choices in litigation, its timing, content and choice of forum – especially especially today – may yield unwelcomed outcomes.

IV.

CONCLUSION

In the end, the conveyance of Kaho'olawe was an event of historic consequence. Title to the Island resides now in the State of Hawaii and may, someday, reside within the authority of the Native Hawaiian Nation. The Navy also now finds itself with interests that coalesce, although perhaps not in the details, with the interests of the State. Both must seek the funding necessary to assure compliance with the law. Such coalescence is a dramatic departure from the Navy's historic posture in Hawaii and especially its posture when Emmet Aluli and his colleagues occupied the Island in 1976.



The harder challenge, however, will be in details; one in particular that may add special definition to the emergence of Native Hawaiians as seen from the Nation's capital. It is the fact that the United States, through the Navy, must cooperate in this venture not with the Governor's Office but with the Kaho'olawe Island Reserve Commission. Today, that means cooperating, negotiating, and resolving disputes directly with Native Hawaiians. It also means explaining within the Executive Branch and Congress that funds are being expended in a manner consistent with the Legislation's purpose. Native Hawaiians have an expertise in providing such an explanation in both forums that is unique and now protected by law. It should be exercised fully. It is a right they have earned. It is a subtle but historically consequential form of recognition.