# KAHO'OLAWE
# THE LAWYER'S DUTY

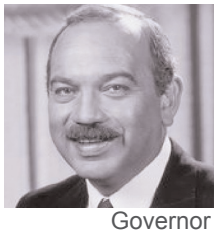
## I
## THE IDEA BROACHED

In the winter of 1992 Denis Dwyer, a colleague and friend, asked me to craft the bill that would transfer the Island of Kaho 'olawe from the United States to Hawai'i. Crafting legislation was not in my experience.

My experience was in federal litigation; primarily environmental law, broadly defined, and in Native American law. Denis Dwyer was not a lawyer. He was a highly skilled and highly regarded legislative lobbyist. He understood Congress like few others among his peers. His client was John Waihe'e, the first Native Hawai'ian Governor in the State's history. One fact emerged immediately from who he was and what he had done: our client would include the Native Hawai'ian community.

Denis Dwyer

Governor Waihe'e was in his second term.. He wanted the transfer to occur in his term of office. It would end in 1994. Put differently, we were in a hurry. Denis' understanding of Congress' legislative cycle would be critical.



Governor
John Waihe'e

The question ,of course, was what did I need to know ? and how to learn it? What was my duty as a lawyer? As you are thinking about that, keep in mind that what I was seeking to do was craft legisltion, not prepare for litigation although, as you'll see, I was not unmindful of my duty to anticipate it.

I turned first to Hawai'i.

## II

## HAWAI'I

It is an engaging and hard history especially before statehood. But, for my purpose, the critical time period is between 1893 and 1898. Before I explain why, I want you focus on the reality of "Memory"; that is, among those Native Hawai'ians still alive, whether through parents or grandparents or in their daily lives, the consequences of this time period - 1893 to 1898 -continue to resonate among them; to affect their lives in important ways. There is nothing distant about these events. I was mindful of that.

In 1893, Hawai'i was a Constitutional Monarchy. Queen Lilio'oukalani has ascended the throne. Hawai'i had a two house legislature and an independent judiciary. In 1893, a *coup d'etat* occurred.

The United States Navy, anchored offshore, moved cannons and troops and gattling guns onto the grounds next to the Iolani Palace. A Provisional Government was created. Within moments, the United States Minister - by prearrangement - recognized the Provisional Government. Confronted by overwhelming force, and the willingness of Hawai'i's citizens and police to engage the Navy in battle, the Queen declared:

> that, "I, Lili'uokalani, … do hereby… yield to the superior force of the United States of America, … to avoid any collision of armed forces and perhaps the loss of life [.] I do under protest and impelled by said force, yield my authority until such time as the government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawai'ian Islands."

It was a fateful decision -not to fight or shed blood. It has an important and problematic meaning in the case law that I will get to later in my presentation.

The Queen got her formal inquiry by President Cleveland. He denounced the Minister's conduct, and the Navy's action, as "unauthorized" and an "act of war". He wanted the Monarchy restored and so informed the Queen.

**It was here that I learned my first critical lesson: Distance made a difference.** The distance between the Nation's capital and Honolulu affected how these events were viewed. The Provisional Government declared a Republic.

It also put the following provision in its Constitution directly affecting the Queen's property:

> That portion of the Public Domain heretofore known as Crown Land is hereby declared to have been heretofore, and now to be, the Property of the Hawai'ian government….

The Queen was later arrested, tried and found guilty of knowing about if not encouraging a counter-offensive.

The Republic was annexed by the United States in 1898. In Washington, D.C. the commercial view of the merchants and coup leaders and the military view of the Navy prevailed. It was a disquieting chapter in America's history. It had a counterpart in the case law.

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I then turned to Kaho 'olawe.

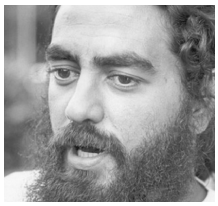
## III
## KAHO'OLAWE

The critical event is the 1976 occupation of the Island. The Native Hawai'ians involved were members of the Protect Kaho'olawe O'hana ; the "ohana" the family of Kaho olawe.

Two matters of consequence emerge:

First, the sacred nature of the Island and the overt disdain many in the Native community held for the Navy became visible and public. In a setting where the Navy's presence had seemed unassailable, it was now subject

to a new and uncertain force: a stigma concerning its historical role and its inability or unwillingness to respect the land and the culture that imbued it.


George Helm

Second, the emergence of Native Hawai'ian leaders in a publicly discernable form; men and women, young, educated, articulate and irreverent except for the strength they derived from their elders. Among them was Noa Emmett Aluli; a Native Hawai'ian, 32 years old, born on the Island of Ohau; and a recent graduate of the University of Hawai'i Medical School.


Noa Emmett Aluli

In early 1993, my readings told me two things: the Navy was in an awkward position in Hawai'i. It was not 1893 any longer. I needed to understand what that meant. And second, to understand Kaho 'olawe's meaning, I would have to walk it. But not yet.

Now, I turned to the case law: the judicial view.

## IV

## THE JUDICIAL VIEW

As I talk about the case law, keep in mind that what I was examining was history and attitude; that is, not the precedential meaning for the purpose of litigation but what they told me about how the judiciary viewed Native Hawai'ians and the history and culture I've described. My duty was to craft legislation.

I discussed Aluli v. Brown (D. Hawai'i, 1977) reversed in part, 602 F.2d 876 (9th Cir.1979), in the 1995 Paper. Put the claims and the opinions aside for a moment. When the controversy had made its way through the judicial system, a Consent Decree was entered into between the United States Navy and the O'hana.

The Decree required that the 'Ohana could have periodic access to the Island for religious and cultural ceremonies and the Navy had to assure its safety.

Here is what was critical: the O'hana emerged as a private group with a special place in Law: in a Consent Decree, recognized by the Navy. Emmett Aluli was its Chairman. And, the Consent Decree was still in existence when I became involved in the winter of 1992.

The case law also was disconcerting.

I discussed, in 1995, the 1978 decision in United States v. Mowat, by the Ninth Circuit, 582 F.2d 1194 (9th Cir. 1978) ; the affirmation of criminal wrongdoing for trespass onto the Island. One defense raised was that the illegal takeover in 1893 and the subsequent, unilateral taking of Hawai'i' s land -- including Kaho'olawe -- by the Republic during the 1893 to 1898 period, meant that the United States was not legally in control of the Island.

It was demeaned by the Ninth Circuit with a special harshness: “We reject this challenge as frivolous,” the Court stated. The property was transferred properly to the United States. The Ninth Circuit was going no deeper.

Why was there so little inquisitiveness? Were not these the kind of events, large, momentous in nature – conquest, war, a *coup d'etat*, cultural disruptions, the dramatic change in the status of huge amounts of land – that had so occupied the intellect and historical perspective of Justice Marshall in the 1830's with respect to Native American's ? What did it say about the judicial attitude that the Navy view - Hawai'i as the way station for com-

merce and for projecting prowess - had so easily precluded serious inquiry? It was a reason for a special caution, as I thought about the words for the law and how they would be understood, if challenged judicially. It led me back, into *Lili'uokalani v. United States*, 45 Ct. Cl. 418, decided in 1910 by the United States Court of Claims. In 1910, the Queen was making fundamentally, a 14th or 5th amendment "takings" claim. She sought to recover the value of her privately owned lands unilaterally taken by the Republic and the United States. It failed. The Court of Claims characterized the critical history – this period between 1893 and 1898 – with a perfunctory abruptness:

[The Queen] yielded her authority over the islands by an instrument in writing, abdicated her throne, and was succeeded in authority by a provisional government. [S]aid provisional government was succeeded by a government known as the Republic of Hawaii, and thereafter the Hawaiian Islands were peacefully, upon request,...annexed to and became part of the United States of America.

It was the Ninth Circuit view 70 years earlier.

I thought the decision was flat-out wrong, legally, historically and culturally. So it had, for me and in a different way for Denis Dwyer, another meaning; that is, about attitude about law and how it is made.

Here, I want you to bear in mind this question of distance and what it means; the distance between Washington, D.C. and the Hawai'ian Islands.

Perhaps it was in the cultural and political bias of the Court, located in Washington, D.C., or , in those who imbued the Nation's capital at the time . How the farther you were removed from the Island the more the geopolitical imperatives of naval strategists, and the commercial imperatives of a merchant class held sway. We believed it was our duty not to allow that to happen again; to be vigilent against any effort, however seemingly benign, to move the fate of the Island to a hostile and unfavorable forum.

Here was the challenge:the larger picture. The events I described; the events between 1893 and 1898, and the 1976 occupation had different meaning in different places. In Hawai'i, the historical imperative was moving towards the values and rights of Native Hawai'ians. The case law,and the farther you got away from there, had moved and continued to move in a decidely different direction. The question was, how to benefit from one; to be on the cutting edge of one but not invoke it so formally that you would confront the other ?

We turned next to the Executive Branch. We were looking for allies and adversaries.

## V

## THE EXECUTIVE'S VIEW

It was an easy exercise. There were no allies.

The Navy's animosity was plain and unequivocal. It would not relinquish title as long as it had responsibility for clean-up and liability for any harm that resulted from the bombing. It wanted to move within established procedures; under Section 120(h) of CERCLA , to retain title and control until clean-up was finished. That was unacceptable to us; the Navy would never finish.


Admiral Inspection

Denis' duty was to keep everyone away while I crafted the law.

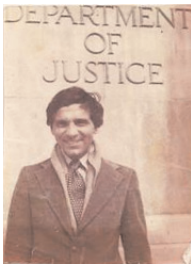
Central to the Navy's attitude, and I discuss this in my 1995 Paper, was Hawai'i Senior Senator,

Daniel Inoyue. He controlled the Navy. His position and power, and his strong commitment to the transfer, added to the Navy's awkwardness. That is, in an important way, Senator Inoyue was the historical imperative , in Hawai'i, manifesting itself in Washington, D.C. Here was the lesson: the participants, if it could be done, had to be only the Navy, Hawai'i and Native Hawai'ians through the state and the O'hana.

I'm moving closer now to drafting.

## VI
## PUBLIC LAND LAW

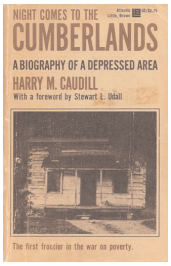
The United States had title to Kaho'olawe. Congress was acting under Article IV, Section 3 of the Constitution.[1] Its authority to act was at its height. This was the jurisprudence that governed the Public Lands. It was in my experience.



Proto

In *Transwestern Pipeline v. Kerr-McGee Corporation*, 492 F.2d 878(10th Cir. 1974), decided in 1974 by the 10th Circuit, the United States had granted Kerr-McGee the right to mine for potash on Public Land in New Mexico, while the United States retained title to the land and reserved the surface as long as its use did not interfere with Kerr-McGee's mining operation. It later granted to Transwestern Pipeline the right to construct a gas pipeline and compressor station on the surface of the same land. Kerr-McGee sought to mine under the station. Transwestern sued Kerr-McGee. The United States intervened. I argued the case before the 10th Circuit; I was at the Justice Department at the time.

Kerr-McGee prevailed. Its rights were manifest and known. The lesson was clear: interests in land could be divided. The United States retained title and separated the surface and access to it from the mineral interest and access to it. The consequences could even be harsh. Transwestern still had the duty to provide gas, and to pay a fee for the use of the land.




It also brought me back to an earlier experience: a visit I had made to Appalachia; Harlan County, Kentucky, in the fall of 1971, while still in law school. Two readings preceded it that I now revisited : the Supreme Court decision in *Pennslyvania Coal Co. v. Mahon*, 260 U.S. 393 (1922 ), in 1922, written by Justice Holmes with a dissenting opinion by Justice Brandeis , and Harry Caudill's *Night Comes to the Cumberlands*, published in 1963.Caudill was a lawyer. The book helped define the Kennedy-Johnson era War on Poverty in that part of America.

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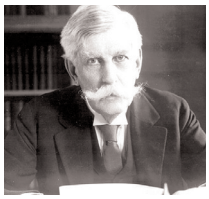
Justice Holmes

I will come back to Mahon.Caudill focused on the long form property deed; a private transaction between the coal company and the land owner. The former took title to the anthracite coal and the right to extract it. The latter retained title to the surface; as a practical matter, his home and access to it. The deception or misrepresentation or the inequity in knowledge or power that often tempered such a transaction was irrelevant to the Kentucky Courts, When the landowner sued to retain mere access to his home. The Kentucky Courts upheld the rights of the coal companies.[2]


Justice Brandeis

Justice Holmes affirmed the same outcome in *Mahon*; making plain that any attempt by the Pennsylvania legislature to prohibit the coal's extraction – even to protect a home – was a constitutional taking . But it wasn't the taking issue that was of consequence to me. It was the legitimacy of separating interests in the same property to serve a social purpose. It made a difference to Justice Brandeis; that is, that such harm could have occurred to a church, or a school or a hospital.

[1] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

[2] Caudill said it this way: "Now the trees that shaded him were no longer his property, and he was little more than a trespasser upon the soil beneath his feet." The visit to Harlan confirmed it. Houses and churches and school rooms were abandoned, boarded, only partially visible, collapsing into a sunken or ruptured foundation, gray and tinged with soot.

It did to me

Title and control of access were malleable. They could be separated in the same property. They had been separated to serve economic purposes in Transwestern and to serve the coal companies of Kentucky and Pennsylvania. Kalo'olawe was public land. No rules constrained the social and cultural purposes to be served. The skill was in the drafting.

It was time to visit Hawai'i.

## VII
## HAWAI'I VISIT

We met with Governor Wahie'e and then took a helicopter to Kaho'olawe; and a jeep, under the escort of a military munitions expert, to its highest elevation. The land was barren of vegetation. The wind was brisk, the sand red and parched; the gullies deep and dangerous and the erosion sweeping in its effect. The coastline was stunning and steep, and largely impenetrable. Beneath it all, in the waters around it and below the topsoil, were thousands of unexploded ordnance; 50 years of indiscriminate, unrecorded bombing.

Navy personnel were walking in groups, picking up shrapnel and looking for exposed ordnance. They found the top of what was described by the expert as an unexploded bomb that, to assure safety, needed to be blown in place. We moved away the required distance. The explosion was loud and the land beneath us shuttered. We returned to find a huge crater; 30 feet in width and equally as deep. Numerous bombs were now exposed. The risk they posed had been hidden and was now a danger.

Within that crater was the most enduring lesson I learned and needed to craft, somehow, into law: ordnance moves. Whether it's from the wind or the geology or the explosion of other ordnance or the simple pressure from unwitting footsteps over a period of time, any pronouncement that an area was “clean” or “safe” could only be transitory in certainty.

We went to Maui. In an evening gathering intended as an introduction to me and Denis, we meet for the first time with the 'Ohana members. They included Emmett Aluli, Dr.Davianna McGregor , a professor of Hawaiian history at the University of Hawai'i ; and Auntie Frenhcy DeSoto. “Auntie”; a term of cultural endearment , respect and admiration; held for those who had persevered; who did not , in their own private or public manner, relent in their commitment .Both the reverence in which she was held and her directness in preserving what was valued was quite plain that evening.

So. It was not, at first, a warm embrace. Who were these two men ? From Washington, D.C. ? Can we entrust them with the fate of this sacred Island ? The cordiality of the Hawai'ian culture – which we felt on every visit after this first one – was tested repeatedly late into the evening. Each among them had to be assured we understood precisely what they wanted and why it was important.

What made it engaging was that we also posed our own questions; not to diminish or limit their choices but to be certain, as we crafted the law and worked through the legal and political arguments, nothing was lost in our ability to reach wide and deep to seek the words and the means to accomplish what they sought. Put differently, and it happened, we would know when a adversary was proposing something, seemingly practical or even oblique in its purpose, that we needed to counter.

Let's now look at what emerged, in time, as some contentious provisions in the statute. Come back, if you would, to the notion of duty and how to think about it.

## VIII
## TENSION AND REVISITING THE NOTION OF DUTY

**Memorandum of Understanding.** Under **[Section 10002(a)(2) of]** the Act, the Navy and Hawai'i were required to enter into a Memorandum of Understanding (MOU) governing the various terms and conditions : the methodology of the clean-up, the protection of archeological , cultural and religious sites, public safety and a two-tier standard of clean-up. Such agreements were entered into within the year following the Act's enactment.

What the parties agreed to postpone was an Memorandum of Understanding governing "the means for regular interval clean-ups and removal of newly discovered previously undetected ordnance by the Navy," **[reflected in Section 10002(a)(2)].** It would apply after the closure of the ten year period.

**Liability.** At the same time, two facts were unassailable: the Navy had caused the harm, which was inherently dangerous and pervasive, and ordnance moves in unsuspected and undetectable ways. The responsibility for clean-up and the liability for any harm caused to people or places remained exclusively with the Navy for as long as there is a Kaho 'lawe. Neither the failure to clean-up nor the expiration of ten years or the transfer of control of access to Hawai'i altered that obligation. **[This obligation is reflected in Section 10002(a)(4).]**

**Tension and State Law**. Such an obligation also laid the pathway for a new paradigm. As Congress was acting, the Hawai'i Legislature created the Kaho'olawe Island Reserve Commission to manage the Island . Its membership would include, by law, members of the 'Ohana. It also gave the 'Ohana a "continuing stewardship role". Finally, it obligated the State to " transfer management and control of the island … to the sovereign native Hawaiian entity upon its recognition by the United States and the state of Hawaii." Together, these two laws fundamentally altered the relationship between the United States and Native Hawai'ians.

It did not go unnoticed, especially by the Navy.
It was the requirement that would place the Navy into direct dealings with Native Hawaii'ians.

## IX
## NEGOTIATIONS

It was the negotiation over this Memorandum of Understanding that brought me and Denis Dwyer back into the process in the fall of 2002.


Proto and Aluli (Kahoolawe, 2007)

Two facts had emerged during the previous nine years.

First, by any standard, the Navy was going to fail substantially to meet its obligation to clean-up the Island.[3]

Second, the Navy sought repeatedly and notoriously to deal directly with the Governor's Office and to minimize it relationship with the Commission. Its Chairman was Dr. Emmett Aluli.


Dr. Emmett Aluli

What loomed large - given the failure - was the Judicial Review provision; that is, the ability to enforce the law.

[3] Thirty percent of the Island, and all of the surrounding waters remained wholly untouched and unsafe. Less than nine percent of the Island would be safe for human use and habitation in the overnight camps the Commission had planned. And, of course, in time, none of it - including on the 70% cleared only on the surface-- was permanently safe, no matter how defined.

The federal courts were affirmatively granted jurisdiction to enforce the terms and conditions of the Act and the MOU . Sovereign immunity had been waived. Suit could be filed by anyone who had standing. That included Hawai'i and Native Hawai'ians.

**The Tension.** Late in the negotiations, the Navy proposed a provision entitled "NO PRIVATE CAUSE OF ACTION". It read:

> Neither this MOU, nor any provision in this MOU, nor any agreements, plans , or protocols required by or called for in this MOU shall create or give rise to, nor are they intended to create or give rise to, any private cause of action by any person or entity of any kind other than the Navy and the State or any successor or assign.

The language was virtually identical to the language in President Clinton's Executive Order on Environmental Justice issued in 1993 that imposed duties on Executive Branch agencies to assess the impact of their actions on the poor, the elderly and minority communities. In a brief period of time, agencies paid it only modest attention and courts of law dismissed it as unenforceable. No one had standing to enforce its terms.

Earlier cases, beginning in the mid 1960's had examined Executive Orders – with or without similar language – with considerable scrutiny. In the absence of such language, some courts were willing to require that Executive agencies complied with its terms. That had changed decisively by the mid-1980's. In the current Judicial climate -often hostile to environmental cases, hostile to Native Hawai'ians and seeking, at times in strained ways, to limit federal jurisdiction whether construing an Executive Order or a statute – the Navy's effort could only be intended deliberately to muddle the clarity of the Judidical Review Provision and create a circumstance where "strained reasoning" might find an audience.

The Navy's second proposal was titled ENFORCEABILITY: It read:

> This MOU, and any document or written protocol prepared pursuant to this MOU and the terms, conditions and provisions of Title X…shall be judicially enforceable by both the Navy and the State in federal court….

No reference was made to comparable rights for Native Hawai'ians or the 'Ohana or other third parties.

As a textual matter both provisions conflicted with the plain words of the Title X. As a legal matter, no matter how their meaning might be parsed around a negotiation table or prognosticated by a detached observer or a learned scholar, in the vortex of a contentious legal conflict, the Navy – in an administrative setting - and the Justice Department – in a judicial one - would use its presence to limit their duty and federal jurisdiction.

Here was the moment of vigilance; the meaning of Lili'uokalani v. United States to me and Denis. Our task was to preserve the integrity of the Act's legal obligations; to ensure that whatever the Navy's failure or discomfort or its future exercise of power - including its desire to postpone for a different time or a more favorable forum the resolution of a critical issue affecting its duty - their proposal was not translated into words that would undermine what had been crafted into law

Fully apprised of the risks by me and Denis, the Attorney General of Hawai'i, weighed in directly. Both provisions were dropped by the Navy.

It was the last legal dispute over the content of the last document to be signed. The Navy was still a captive of its own historical and cultural imperatives. The Navy revealed only the discomfort and the disquiet that had and would continue to temper its relationship with Native Hawai'ians.

## CONCLUSION

The formal transfer ceremony was held on the afternoon of November 12th on the grounds of the 'Iolani Palace. We were only a few steps from where the Navy had set its Gatling guns and cannon in 1893.

The day before, by operation of law, Hawai'i took control of Kaho'olawe and for the first time in its history had unequivocal title to all its Islands.

As the formal ceremony began, I could see Auntie Frenchy DeSoto. She was seated alongside Governor Lingle and former Governor Waihe'e, and the Navy Admirals in the dress whites worn in tropical climates. She was in a wheelchair, grayer and more fragile than a decade ago when I first met her. But she was grand in her stature and her Native dress; and the history evolving before her - the return of Kaho'olawe and all that implied – had been witnessed in her lifetime.

It was one of those moments that hopefully you will all have, when the study of law and your skill as a lawyer, come together and touch you in a special way. Affecting a person's life. On that day, in that moment, it did for me.