

The Hawai'i-United States Treaty of 1826

Robert H. Stauffer

INTRODUCTION

The islands comprising the Hawaiian archipelago are the most isolated in the world. As such, it is not surprising that as late as the signing of the United States Declaration of Independence the Islands remained unknown to the West and maps of the central Pacific showed only vast and empty seas. Capt. James Cook, "boldly going where no [Western] man had gone before,"¹ bumped into the Islands in 1778 as he was sailing from Tahiti in an unsuccessful attempt at finding the fabled (and illusionary) "North-West Passage" from Alaska to Hudson Bay.

It was the Napoleonic Wars more than anything else which allowed Hawai'i to begin to shift from the British to the American sphere of influence. In 1792, in 1793, and again in 1794—while the French Revolution was spilling only French blood and the future Admiral Lord Nelson had no cause to marshal His Majesty's ships at home—Capt. George Vancouver visited the budding conqueror Ka-mehameha and accepted his offer on behalf of George III of a pseudo-protectorate over Hawai'i.

But then the armies of reaction and revolution were unleashed across Europe and the Royal Navy came no more to the Islands. Ka-mehameha's chief foreign advisors, the British subjects Isaac Davis and John Young, continued their efforts to maintain close relations with their homeland by building on the great initial relations and understanding between the two nations, and as late as the 1810s Western naval officers recognized a special relationship, a *de facto* protectorate or alliance as some wrote, existing between Great Britain and Hawai'i.²

Into the breach created by the withdrawal of the British came the spirited American merchants, dissuaded from American-European trade

Robert H. Stauffer is Lecturer in Ethnic Studies at the University of Hawaii and Legislative Aide for the Hawaii State Senate.

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by Jefferson's embargo on Napoleonic combatants. Although delayed slightly by the American-British War of 1812, American merchants experienced an economic boom through the sandalwood trade at the war's close.

By 1820, the year of the establishment of the American-dominated whaling industry centered in Hawai'i as well as the landing of the first American missionaries there, Americans associated with Hawai'i played a key role in the political economy of the northern Pacific. From the wild fur-trading camps of Astoria and Portland to the rollicking ports of Lahaina and Honolulu to the Chinese markets at Canton, business came increasingly under the domination of American traders.

Like the British during the previous hundred years, the Americans spread their political relations behind the advance formations of their merchants. Only after decades of American commerce being established in the Pacific did the United States Navy follow. In 1825 a Pacific Squadron made up of the single frigate *United States* and the small schooners *Dolphin* and *Peacock* was mobilized and sent to Peru to guard the routes of American shipping around the Cape. And, as commerce had brought the Navy that far, it was not surprising when, one year later, commerce brought first one and then the other of those schooners to Hawai'i to address the concerns of American whalers and traders.

And so it was that just 50 years after its Declaration of Independence the United States came to sign a most peculiar document with the Kingdom of the Sandwich Islands. The 54th foreign agreement of the American nation was for the Kingdom its first written agreement with a foreign government.

The matter of this unique document, the man responsible for it, and its significance in both American diplomatic and Hawaiian history are the subject of this article.

TOM JONES, A BRIEF BIOGRAPHY

Thomas ap Catesby Jones (1790?-1858) served as a midshipman and later as a lieutenant aboard United States naval gunboats in the Louisiana area and fought with Andrew Jackson in the Battle of New Orleans. Ordered to the Pacific Squadron in 1826, Jones, with the rank of Master Commandant (i.e., Commander) was in command of the sloop *Peacock* when he was sent to the South Seas and Hawai'i later that year. In Tahiti Jones negotiated a commercial and friendship treaty, recorded as the United States' 52nd international accord by State Department reckoning. He then attempted the same thing with the government of

Raiatea but was only partially successful. Sailing on to Hawai'i, he drew up the Hawai'i-United States 1826 treaty, settled matters concerning commercial elements there, and instigated a standing order that civilian deserters in the Hawaiian Islands be rounded up. Jones returned with the *Peacock* to Peru in 1827.

In 1836 Jones's old friend Jackson, now President, offered him command of the proposed United States world-wide exploring expedition. Jones turned down the offer, and the command instead passed to Captain Charles Wilkes. In 1842 Jones was given command of the Pacific Squadron, by now composed of five sloops under the command of the flagship *United States*.

Jones had an Anglophobia tracing back to the 1812 war which plagued him all his life. In October 1842 he mistakenly surmised that the British were about to seize California and, to preempt such a move, ordered his Squadron north and stormed peaceful Monterey, then California's capital, only to have to return it embarrassingly to Mexican sovereignty. Jones, having poisoned American-Mexican relations and hastening the Mexican-American War, was chastised and relieved of his command.

Hearing that the British had placed an abortive protectorate over the Hawaiian Islands, Jones refused to give up his command and sailed for Honolulu to try to assist in the restoration of Hawaiian sovereignty. Finally hunted down by the Navy, the renegade Commodore was sent home aboard his flagship. Arriving stateside in professed splendor, he laid a bill before Congress for alleged debts owed him from his 1826-27 voyage and by October 1847 was again in command of the Pacific Squadron. Later recalled once more for headstrong conduct, he was court-martialed and suspended from duty for five years (until 1855), whereupon he retired from the service.

In the early 1840s Herman Melville, the celebrated American novelist, crewed aboard an American whaler bound for the South Pacific. There he jumped ship, eventually making his way to Honolulu. When the *United States* arrived in port with the then Commodore Jones, Melville was rounded up and put aboard the frigate. He sailed home with Jones by way of Peru and the Cape.

White Jacket, Melville's novel based upon this voyage, was subtitled *The World in a Man-of-War*. It is a great, democratic salvo against the despotisms of his day, being a view of the self-contained "world" of the ship, the life of the "people" (crew) aboard her, the feudal oppression wrought against them by an ancient social system based on the "Articles of War," a set of maritime regulations rooted in pre-Independence

antiquity, and the autocrats, including Jones, who carried out that system. Wrote Melville:

Our Commodore was a gallant old man, who had seen service in his time. When a lieutenant, he served in the Late War with England; and in the gun-boat actions on the Lakes near New Orleans, just previous to the grand land engagements, received a musket-ball in his shoulder; which, with the two balls in his eyes, he carries about with him to this day.³

A hint of the Commodore's vanity is seen in this passage concerning the send-off and receipt of the officers of the *United States* while in port:

But these ceremonies [described for the Captain's trips] are nothing to those in homage of the Commodore's arrival, even should he depart and arrive twenty times a day. Upon such occasions, the whole marine guard, except the sentries on duty, are marshaled on the quarter-deck, presenting arms as the Commodore passes them; while their commanding officer gives the military salute with his sword, as if making masonic signs. Meanwhile, the boatswain himself—not a *boatswain's mate*—is keeping up a persevering whistling with his silver pipe; for the Commodore is never greeted with the rude whistle of a boatswain's subaltern; *that* would be positively insulting. All the Lieutenants and Midshipmen, besides the Captain himself, are drawn up in a phalanx, and off hat together; and the *side-boys*, whose number is now increased to ten or twelve, make an imposing display at the gangway; while the whole brass band, elevated upon the poop, strike-up "See! the Conquering Hero comes!" At least, this was the tune that our Captain always hinted, by a gesture, to the captain of the band, whenever the Commodore arrived from shore. It conveyed a complimentary appreciation, on the Captain's part, of the Commodore's heroism during the Late War.⁴

Jones's tendency to listen to rumors of war, at least in regards to the hated British, persisted even on this trip home, which had been brought on by his rash actions at Monterey. Wrote Melville:

While lying in the [Squadron's home port of] Callao, in Peru, certain rumors had come to us touching a war with England, growing out of the long-vexed Northeastern [i.e., Northwestern] Boundary Question. In Rio these rumors were increased; and the probability of hostilities induced our Commodore to authorize proceedings that closely brought home to every man on board the *Neversink* [i.e., the novel's name for Jones' frigate] his liability at any time to be killed at his gun.

Among other things, a number of men were detailed to pass up the rusty cannon-balls from the shot-lockers in the hold, and scrape them clean for service. The Commodore was a very neat gentleman, and would not fire a dirty shot into his foe.⁵

BACKGROUND TO THE 1826 EVENTS

One of the major outcomes of Jones's visit to Honolulu in 1826 was the settling of American commercial debts allegedly owed by native chiefs. Thus it is not unreasonable to suggest, as have some historians, that his voyage was precipitated by commercial concerns raised over these "debts." A study of the background clearly shows, however, that

while an overall commercial interest was the principal motivation for mobilizing the Pacific Squadron and dispatching Jones to the Sandwich Islands, the specific concern of the “debts” played almost no role in the events leading to the voyage.

The background to our story traces rather to a petition⁶ written in December 1824 and addressed to lame-duck President James Monroe by 137 “merchants and others, engaged in the whale fishery” from Nantucket, which called for a military force to control the crews of the American ships in the Pacific which were showing a lack of discipline. The petitioners specifically mentioned the mutiny on the *Globe* of which they had been apprised when the non-mutineer members of that ship’s crew had misgivings over the actions of the mutineers, put them ashore on a Pacific island, and then sailed the ship safely back to Nantucket minus its captain and first three mates who had perished in the mutiny.

The petition asked for the apprehension of the *Globe* mutineers and for the establishment of a “naval force in those [Pacific] seas, where so much property and so many lives are exposed.” Stressing the risk to their management personnel and investment, the petitioners pointed out that American ships were now traversing “the greater part of that ocean, which has increased the danger of which they [the shipowners] complain to a very considerable degree.” While no direct mention of Hawai‘i was made, the petitioners requested that the naval force should, in addition to being “properly distributed” through the Pacific, “visit the remote parts of it, and occasionally touch at those islands to which their ships resort for refreshments, &c.”

This initial petition was followed by another,⁷ also triggered by the *Globe* case, from 44 “merchants and others engaged in the whale fishery from the island of Nantucket.” The second petition called on President John Quincy Adams on April 5, 1825, for controls against the “over one hundred and fifty seamen (principally deserters from the whale-ships) prowling about the country [of Hawai‘i], naked and destitute, associating themselves with the natives, assuming their habits and acquiring their vices.” “Their number was constantly increasing,” continued the petition, “and serious apprehensions existed that necessity would induce those lawless deserters to commit some act of a piratical nature.”

It was this second petition which zeroed in on the Sandwich Islands as the center of the businessmen’s problems. The odds, they claimed, were probable that the mutiny aboard the *Globe* was “matured by people” taken aboard in Hawai‘i. The shipowners were afraid that such mutinies “may be attempted by others of the same character” and they felt it vital, therefore, that a ship from the Navy “be ordered to visit those

islands, for the protection, not only of their commerce, but of American commerce generally," under such conditions as may be "imperiously" demanded. Calling for action, they asked: "Is there not reason to believe that the Sandwich islands, if [the United States] government does not interfere, will soon become a nest of pirates and murderers?"

Yet a third petition⁸ was sent to Washington, this one from 13 "citizens of the town of New Bedford, shipowners, and others interested in the whale fishery, beyond Cape Horn." The second petition had directly called for "interferring" in Hawaiian affairs; this one appealed to the American sense of national pride: "It has been stated to your petitioners that these natives have imbibed a belief that the Americans are destitute of maritime force. 'The English,' they say, 'have men-of-war, but the Americans have only whalers and trading-vessels.' " Stating that such an impression should not "remain uncorrected," the petitioners made clear their belief that "the occasional presence of a national armed force . . . can be the only safe ground of reliance for the security of American property." Pointing out that they had separate whaling fleets canvassing both the northern and southern hemispheres of the Pacific, the shipowners asked for protection at the two berthing stations used by the fleets and requested "one or more armed vessels to proceed to the Sandwich and Society islands, with instructions to render such protection, and afford such aid, to American shipping distributed at those places, as circumstances may render necessary and proper."

The results of the first petition had been the creation and dispatching of the Pacific Squadron, home-ported at Callao, Peru. As the second and third petitions came in to the White House with their specific requests for intervention in Hawai'i, orders were drafted by the Secretary of the Navy to Isaac Hull,⁹ the war hero and now Commodore of the Squadron.

Hull was ordered to set off with his flagship from Peru, leaving the sloop *Peacock* behind under the command of Commander Jones, just arrived via Panama. The Secretary's orders, which contained the petitions, were essentially to carry out the wishes of the shipowners. Specifically, Hull was to:

1. Sail for the Society and then the Sandwich Islands, returning to Peru via California and Mexico;
2. Appraise himself thoroughly of commercial matters in all areas visited, and report on same to Washington;
3. Ascertain at Honolulu the status of all Americans there, and arranged for the banishment of all Americans of bad character by placing those willing aboard naval or commercial vessels at the port and those

unwilling under summary arrest aboard his frigate pending their return to the United States; and

4. Maintain cordial relations with the Hawaiian government, informing it that other American naval vessels would be stopping by occasionally in the years to come.

It is interesting that these orders, which bordered on direct diplomacy, originated in the Department of the Navy rather than of State, and that Hull was given wide latitude in carrying out the wishes of the shipowners: "The general objects of your cruise are explained in the memorials [petitions]; the manner in which you shall endeavor to accomplish them, must be left almost entirely to your own discretion and prudence."

Commodore Hull had kept his forces along the west coast of South America due to the presence of pirates there which were preying upon American shipping near Cape Horn. As the area remained unstable in Hull's mind, upon receipt of these orders he decided to stay there with the *United States* and ordered Jones and his *Peacock* to undertake the duties assigned by the Naval Secretary.¹⁰ To what degree the Secretary had trusted only the well-known Commodore Hull with his *carte blanche* diplomatic orders, and to what degree the Secretary would have revoked such license had he known the obstreperous Jones would be carrying them out, we will never know. Hull had been given such wide latitude that he was simply acting within orders when he deputized Jones to command the Honolulu expedition.

For the most part Hull's orders to Jones merely relayed the instructions from the shipowners and the Navy Department. As before, Jones was given great flexibility in carrying out his appointed duties. Hull made only a few additions. Noting that Jones's crew members were nearing the end of their contracts, Hull commented that Jones might have to cut his cruise short by skipping the tour of California and Mexico in order to get back to base at Peru before the contracts expired. Diplomatically repeating his superior's inclination to believe that the job in Honolulu would take only three or four weeks, Hull then cautioned Jones that it might indeed take longer and gave Jones free rein to stretch out, as he deemed fit, his stay at the various ports he was destined for.

An interesting further addition to Washington's orders was Hull's passing reference that Jones should address those "claims for property belonging to citizens of the United States, on persons now residing at the Sandwich Islands." As this matter of the "debts" was not referred to in the Navy Department's and the shipowners' instructions, we must

surmise that Hull had been appraised of the situation and was acting under his own authority.

Within a month Jones was at Guayaquil fitting out the *Peacock*. Aware that his crew's contracts were more dangerously short than Hull had surmised, Jones formed up a new crew before he left the coast.¹¹

Jones sailed west, making first for the Society Islands. He provisioned at the Marquesas and then anchored at Tahiti. Aware of a strong British influence there, including the appointment of a British consul with no American equivalent, Jones on his own authority authored and enacted a treaty with the Tahitian rulers. This document was never presented to the Senate nor ratified by the United States. More importantly, it was not followed or respected to any great degree in Tahiti, and it lapsed with the colonization of the Society Islands by France in the 1830s. The abortive treaty with Tahiti however, is significant because of its close resemblance to the 1826 Hawai'i-United States treaty which was to follow.¹²

OF DESERTERS AND "DEBTS"

Jones' sloop-of-war *Peacock* made good time from the Society Islands, arriving at Honolulu after a trip of just 22 days. Spying the whaler *Foster* out from Nantucket anchored off the mouth of Honolulu harbor, Jones boarded her at four o'clock in the afternoon of October 10, 1826, to gain a background report on the Islands. By 3:30 p.m. the next day the *Peacock* had been brought into the harbor and was at anchor. Jones by now had heard enough to have some idea just how difficult his task would be.

Lord Byron had put into port a year earlier and, while not bringing a cession treaty from London, he had reaffirmed the special interest and feelings existing between Great Britain and Hawai'i. In contrast, the American Navy had not been well represented in the Islands. In the War of 1812 an American privateer holding authentic Letters of Marque and Reprisal¹³ had sailed into Honolulu harbor only to be captured, together with several merchant ships, by the British warship *Cherub*. The next American military ship to enter Honolulu was the sloop *Dolphin*, commanded by Lieutenant John "Mad Jack" Percival, dispatched by Commodore Hull specifically to look into the matter of the alleged "debts," and received at port on January 26, 1826.

Percival never got very far with his orders and only managed to add to the general problems of the town by his consistent demands for the legalization of prostitution which had been outlawed under the Christian rule of the chiefs converted to American puritanism. The Reverend

Hiram Bingham, leader of the Honolulu mission station, was attacked by sailors from the *Dolphin* as he performed services on February 26. The good missionaries prayed as Percival, not to mention his men, continued to attempt to break down the new morality until finally the *Dolphin* set sail on May 11, its mission an unabashed disaster.

In comparison, Jones apparently got along well with the missionaries, and perhaps it was on their advice that he approached matters in Honolulu with these reasonable principles:

1. "The Sandwich Islanders, as legislators, are a cautious, grave, deliberate people, extremely jealous of their rights as a nation, and are slow to enter into any treaty or compact with foreigners by which the latter can gain any foothold or claim to their soil;"

2. "The precaution" was taken "to have all official communications translated into the Oahuan language [probably done for Jones by the missionaries], which translation always accompanied the original in English;"

3. As the native rulers had an "abhorrence at impetuosity in any person with whom they have to transact business," he "made it an invariable rule never to press a point when I could discover the slightest disinclination on their part to discuss the subject;" and

4. "By giving them their own time to canvass and consult together, . . . [I] found no difficulty in carrying every measure . . . [I] proposed;" indeed, he felt that his "success would have been complete in any undertaking" asked of him in regards to the natives.¹⁴

Jones's first order of business was the matter of the deserters who had so worried the shipowners at Nantucket and New Bedford. Accordingly, after initial discussions with local Hawaiian officials about a comprehensive treaty, Jones proposed on October 31, 1826, that a "rule" be established, "which ought never to be departed from" regarding foreigners in Hawai'i. It was this "rule" that, 17 years later, apparently tripped up Herman Melville.

Under the proposed "rule," all American sailors who had deserted their ships would be immediately removed from the Islands no matter under what circumstances or how far back in the past the desertion had occurred. Secondly, any American otherwise living in Hawai'i who had no "visible means of making an honest livelihood" would be removed. Finally, Jones proposed that "all other foreigners who did not support a good character" should likewise be banished.

It was a bold move on Jones's part. He defended his action against potential critics by stating in his report that, as his objective was of such "high national importance" and as that objective had been "left entirely to [his] own judgment" in implementation, that his proposed "rule" was required "upon the grounds of imperious necessity, in a situation altogether novel and without precedent."¹⁵

Jones's Anglophobia remained true to form as he also reported "a great influx of English renegadoes from New South Wales into the Sandwich, as well as the Society Islands." Jones had been rebuffed in Tahiti in his attempts at rounding up these "refuse of the human species" for he "was informed by the English Consul General for those Islands that his orders were not to molest these scape-gallows', who, as soon as out of reach of the halter, according to the views of the British Ministry, are fit subjects for encreasing His Majesty's influence." The ultimate goal of the perceived conspiracy was obvious to Jones:

Their number is quite sufficient now at the different Islands, and I know it to have been their design, in the event of War between the United States and England to fit out the small vessels of the Islands for the purpose of predatory warfare upon our defenceless commerce and Whale Fishery in the Pacific Ocean, which, with the assistance of the Islanders, they would have annihilated before protection could be sent to it's relief. . . .¹⁶

Nor was Great Britain the only perceived enemy Jones had to deal with, for he added that "the Russians have ever longed for the sovereignty of the Sandwich Islands, as well as of Otaheite, both of which, at different times, they have attempted, by various artifices, to possess themselves of."¹⁷

Jones was luckier in Honolulu, for the day after his suggested "rule" was transmitted ashore he found the Island's Governor Boki as well as both the American *and* British representatives in favor of the proposal, and indeed some renegades already rounded up. Says Jones, "most of them, were ultimately disposed of to the Whale ships in Port, while the remainder, with the exception of one or two who are of notorious bad character"—and who were put in his hold, it might be surmised—"were permitted to sign articles for, and now compose a part of the Peacock's crew."¹⁸

With the problem of the deserters taken care of by November 1, Jones proposed a settlement of the "debts" three days later. This matter was rapidly settled, and final ratification occurred on December 27.

The "debts" situation traced to the years following the establishment of the sandalwood trade, some 15 years previous, at which time native rulers had accepted prior "payments" from traders in return for

promised sandalwood deliveries which had then allegedly not been made in full. As the sandalwood trade originally had been the sole concern of Ka-mehameha, the "debts" resolved to him and later his son Ka-mehameha II. No one, of course, claimed that the cheap goods given the Ka-mehameha family were anywhere close to the value of the promised sandalwood. Furthermore, as the Hawaiians did not keep written records, the "debts" owed existed solely in the minds of the merchants making the claims, which tended to prejudice their figures. To top things off, Ka-mehameha had died in 1819, his son in 1824, and the Kingdom was now ruled by a collection of high chiefs, nearly all of whom had taken no part in any of the alleged trade nor felt any moral or financial debt to the American traders.

Indeed, Hull's and Jones's concern for the "debts" may have been influenced by the fact that the largest alleged "debt" was owed to John C. Jones, Jr. (apparently no relation to the naval captain), agent of the Boston firm of Marshall and Wildes and the only governmentally accredited American commercial agent in Hawai'i.

In any case, into this ticklish situation Jones managed to step delicately and pull off the financial coup of getting the existing chiefs to agree to pay all of the "debts" in full.¹⁹ Jones later claimed that the settlement was worth \$500,000 to the traders, though research suggests it was worth more in the vicinity of \$120,000.²⁰

Thus, less than a month after arriving at Honolulu, Jones had essentially settled both the matter of the deserters and the "debts." He now could complete work on his commercial treaty.

THE TREATY

It can be said that even before attention was placed upon matters directly delineated in his orders Jones had begun to negotiate a commercial treaty with the Hawaiian government. Following an initial two weeks of cautious deliberations with the chiefs, missionaries, and principal American merchants, and more than a week before he proposed his deserters "rule," Jones had begun discussion of a set of "regulations" patterned on his Tahiti treaty.

Jones then proceeded to address the matter of the deserters on October 31 and the "debts" on November 4. By then, having more than adequately made up for the depredations of the *Dolphin* as well as completing his orders in near record time, Jones was ready for his one final action. On November 13 he resumed negotiations on a treaty by submitting to the assembled ruling chiefs a formal diplomatic proposal of "regulations of

general interest to our [i.e. American] commerce in the Pacific,"²¹ again based on his Tahitian treaty. His proposal was accepted by the chiefs, and an ornate ratification and promulgation ceremony occurred on December 23 when all the necessary high chiefs could be assembled.

Jones called his regulations "articles of arrangement" as he felt he had not "been authorized to make treaties." The document was, however, obviously a commercial and friendship treaty in all but name.²²

The treaty's first article established perpetual peace between the two countries: "*the peace and friendship* subsisting between the United States, and their Majesties, the Queen Regent, and Kaiukiaouli,²³ King of the Sandwich Islands, and their subjects and people, *are hereby confirmed, and declared to be perpetual.*"

Article 2 of the treaty was a "neutrality clause" under the definition then in use of a "neutral state." In the wars of the time, a third power such as Hawai'i could continue trading with other countries at war, such as the U.S. and Great Britain, and still remain free from any conflict. Indeed, warring nations by being bound to respect the territorial waters of the neutral third power (i.e., Hawai'i in this case) could not seize ships or engage in martial acts within those "neutral" waters. Recognizing the vulnerability of the unarmed American commercial shipping in the area, a fact brought home by the events in the 1812 war, Jones went one step further by gaining a promise of protection for that shipping in case of further war: "The ships and vessels of the United States (as well as their Consuls and all other citizens) within the territorial jurisdiction of the Sandwich Islands, together with all their property, shall be inviolably protected against *all* Enemies of the United States in time of war."

The middle articles 3 through 5 of the treaty were clearly commercial clauses. The first showed the missionary-inspired viewpoint that Christianity and capitalism were inherently connected by calling on "the contracting parties" to promote "the *commercial intercourse* and friendship subsisting between the respective nations," and thereby "avail themselves of the bounties of Divine Providence."

Chiefs in both Tahiti and Hawai'i had in the past accumulated occasional financial windfalls through salvage operations of locally wrecked commercial shipping, using the international legal concept that a salvager gets to keep the wealth of a deserted vessel. Jones addressed this matter in the fourth article of the Hawaiian treaty—which also appeared as article 5 in the Tahitian treaty—by having the native chiefs promise to lend full protection to United States vessels and commerce, and to assist in salvage operations at a total fee not to exceed one-third

of the value salvaged, thus returning two-thirds to the deserted ship's owners.

The next commercial clause (article 5) stated that the "citizens of the United States, whether resident or transient, engaged in commerce, or trading to the Sandwich Islands, shall be inviolably protected in their lawful pursuits," thus forcing the Hawaiian government to provide protection that the United States Navy still was unable to consistently provide. To top things off, the article went on to state that such businessmen "shall be allowed to sue for, and recover, by judgment, all claims against the subjects of His Majesty The King, according to strict principles of equity, and the acknowledged practice of civilized nations," thus extending rights of claims to the businessmen against the natives and under foreign rather than local law. While this clause was not extraterritorial in the strict sense (i.e., the concept of extending one nation's laws and sovereignty over a geographical enclave within another nation's boundaries), it came close to it and laid the foundation for claims to be enforced in the 1830s against the Hawaiian government in the gunboat diplomacy of the United States, Great Britain, and France.

The sixth article of the treaty, based on section 6 of the Tahitian treaty, addressed the problem of deserters, which Jones correctly figured would be a continuing matter of concern to the American businessmen in the Pacific. The article stated that "their majesties do further agree and bind themselves to discontenance and use all practicable means to *prevent desertion* from all American ships which visit the Sandwich Islands." Again, Jones got the relatively bankrupt Hawaiian government to provide protection for American commercial interests on behalf of his Navy. Furthermore, the article continued, the King was to make it "the *duty* of all Governors, Magistrates, Chiefs of Districts, and all others in authority, to *apprehend all deserters* and to *deliver them* over to the master of the vessel from which they have deserted." In order to add some pecuniary motive for such chiefs to carry out this portion of the treaty, Jones included a complex set of payments which would be made by the American captain to the Hawaiians for the apprehension of any deserters. Jones completed the affair by allowing any such payments to be considered by the respective captain as "a just charge *against the wages* of every such deserter."

The final (seventh) article of the treaty is a so-called "most-favored nation clause," which guaranteed equal treatment of American commerce with any other nation trading with or through Hawai'i. It stated that "no tonnage dues or impost shall be exacted of any Citizen of the United States which is not paid by the Citizens or subjects of *the nation*

most favoured in commerce with the Sandwich Islands," a right which was reciprocally granted to Hawaiian trade in the American market.

LATER DIPLOMATIC HISTORY

In the State Department's first review (1894) of Jones's treaty and the full history of United States-Hawaiian diplomatic relations, the statement is made that "this was the first treaty formally negotiated by the Hawaiians with any foreign power, and although it was never ratified by this Government, certain of its stipulations appear to have embodied friendly views and purposes of the United States which were considered *morally binding* by both parties."²⁴

A 1933 State Department statement put things this way:

Neither in the correspondence nor in the report of Jones nor in the articles themselves is there any mention of the matter of ratification; and as this was the first international agreement ever made by the Hawaiian Government with a foreign power, it may well be that little, or perhaps nothing, was then known at Honolulu regarding ratification as a step in treaty-making procedure. So far as Hawaii was concerned, no ratification was required, the assent of the Hawaiian Government was complete upon signature; as a practical matter, this Government was warranted in regarding the paper as sufficient without further action; ratification was a step that could be taken later, if it should become desirable or essential; in the meantime the agreement was *de facto* in force at Hawaii and was doubtless there regarded as in force *de jure*.²⁵

De jure it may have been—in Hawai'i—but some two years after Jones had sailed from Honolulu the Secretary of the Navy, in a letter to the King, failed even to mention the treaty.²⁶

But Americans in Honolulu as well as the chiefs continued to consider the treaty in full force. In September 1831 the treaty was discussed in detail in the context of an unrelated matter concerning the rights of other foreigners in Hawai'i to protection. And in 1832 the United States Navy again visited Hawai'i, this time informing the King that the treaty was a binding one. In October 1836 Commodore E. P. Kennedy of the Pacific Squadron twice more told the King that the treaty was binding, a point repeated again in May of 1837. Later that year Prime Minister Kina'u referred to the Hawaiian government's belief in the propriety of the treaty in a letter to President Van Buren.²⁷

Moreover, the proposed Hawai'i-United States treaty of 1838, drawn up by the Reverend William Richards on behalf of the Hawaiian government, was built upon the foundation of Jones's treaty.²⁸ And in 1842, with Hawai'i perilously close to domination by the British, a delegation headed by Richards arrived in Washington and submitted the following statement to Secretary of State Daniel Webster on December 14:

The undersigned having been duly commissioned by His Majesty Kamehameha III King of all the Hawaiian Islands, to represent his Government and promote its interests in the United States, wish to call the attention of your government to *the existing relations* between the two countries.

In the year 1826 articles of agreement, in the form of a treaty, were entered into between His Majesty's Government and Thomas ap Catesby Jones, commanding the United States sloop of war *Peacock*. His Majesty has never received any notice of that treaty's being ratified, nor intimation that it was approved by the Government of the United States. *His Majesty has, nevertheless, during the last sixteen years, governed himself by the regulations of that treaty in all his intercourse with citizens of the United States.*²⁹

At that point most diplomatic discussion of the 1826 treaty ceased, as President Tyler issued a decree two weeks later declaring the Monroe Doctrine to include the Hawaiian Islands and stating the United States' intention to prevent Hawai'i from falling under foreign domination. For the purposes of the 1842 delegation, this was sufficient diplomatic guarantee for them, pending ratification of a formal treaty seven years later.³⁰

CONCLUSION

In December 1826, Jones—having completed negotiations on all points of interest—witnessed the gathering in Honolulu of the high chiefs and “exchanged signatures” on the treaty with them, on behalf of the United States Government, and ensured the promulgation of the documents he had helped draw up settling the debts matter. Wrote Jones:

Having on the 23d of December successfully closed my correspondence with the authorities of the Sandwich Islands, I had nothing more to detain me at Honolulu but the departure of several Whale ships and Indiamen [i.e., he wished to ensure they got to sea safely and without any more desertions; an “Indiaman” is a commerce carrier plying the East Indian and Chinese trade routes] which only waited a favourable time to put to sea; accordingly every preparation was made by us for sailing; but as the wind proved adverse for several days it was the sixth day of January 1827 before I found it expedient to leave Woahoo [O'ahu], when in the afternoon of that day, in company with the Parthian, [an] Indiaman, and Convoy, [a] trader, I crossed the [sand] Bar [at the mouth of the harbor], leaving only one Whale ship, undergoing repairs, and three of the coast traders in port.³¹

Jones then made for San Blas, Mexico, where he remained from February 1 until March 9 in order to exchange word with Joel R. Poinsett, the American Minister to Mexico. He then sailed for Peru, and the cruise concluded with the *Peacock* anchoring at Callao Bay on May 14, 1827, after a trip of approximately ten months.

The United States House of Representatives in 1845 had this to say of his voyage:

Notwithstanding the difficulties which he had to encounter, Captain Jones was entirely successful. He negotiated a commercial arrangement with the authorities of the Sandwich islands, eminently beneficial to us; and he prevailed upon them to adopt a plan of raising a revenue to satisfy claims of our citizens. . . . These two measures were the first essay of those islands in negotiation and legislation; and it is believed the success of them tended to no small extent to generate in them a feeling of independence and self-reliance; which alone, it is more than probable, has prevented these islands from being numbered, by this time, among the colonial possessions of Great Britain. . . . The one has ever been regarded by all nations having intercourse with these islanders as a solemn treaty; has been respected as such; and been made the basis of all similar arrangements entered into with them. The other was so efficient as to secure to our citizens some \$500,000, the recovery of which, until it was adopted, had been desired of.³²

The treaty also stands out as an almost unique example of a legally binding American international accord negotiated without Senate approval (indeed, without State Department direction or approval). One expert on international law has commented that he knows of no other such example in the history of American diplomacy.³³ But the style of action which characterized Jones in the negotiations for his treaty—as with so many of the exploits in his colorful career—led finally to his disgrace and court-martial, as the institutional powers within the United States Government eventually came down upon this ambitious and unofficial (if not sometimes undiplomatic) diplomat.

Appendix A: The Treaty of 1826

*Articles of Arrangement with the King of the Sandwich Islands (Hawaii), signed at Honolulu December 23, 1826.*³⁴

Articles of arrangement made and concluded at Oahu between Thomas ap Catesby Jones appointed by the United States, of the one part, and Kauikeaouli King of the Sandwich Islands, and his Guardians, on the other part.

ART: 1ST

The peace and friendship subsisting between the United States, and their Majesties, the Queen Regent, and Kaiukiaouli, King of the Sandwich Islands, and their subjects and people, are hereby confirmed, and declared to be perpetual.

Na olelo keia i hooponoponoia'i a i hoopaaia'i i Oahu nei e Thomas ap Catesby Jones, kekahi, ko Amerika luna i hoounaia mai nei mai ka United States mai, a me ke alii o ko Hawaii nei pae aina o Kauikeaouli o laua me kona kahu, kekahi.

PAUKU I.

Eia kekahi olelo, ke olelo pu nei kakou e hoopaa loa i ke kuikahi pu ana a me ke aloha pu ana o ko Amerika a me ko Hawaii kahu alii wahine a me ke alii nui o Hawaii nei o Kauikeaouli a me ko laua poe kanaka a me na makaainana a pau loa; eai ka hoailona e mau loa ai ua kuikahi nei.

ART: 2nd

The ships and vessels of the United States (as well as their Consuls and all other citizens within the territorial jurisdiction of the Sandwich Islands, together with all their property, shall be inviolably protected against *all* Enemies of the United States in time of war.

ART: 3rd

The contracting parties being desirous to avail themselves of the bounties of Divine Providence, by promoting the commercial intercourse and friendship subsisting between the respective nations, for the better security of these desirable objects, Their Majesties bind themselves to receive into their Ports and Harbours all ships and vessels of the United States; and to protect, to the uttermost of their capacity, all such ships and vessels, their cargoes, officers and crews, so long as they shall behave themselves peacefully, and not infringe the established laws of the land, the citizens of the United States being permitted to trade freely with the people of the Sandwich Islands.

ART: 4th

Their Majesties do further agree to extend the fullest protection, within their control, to all ships and vessels of the United States which may be wrecked on their shores; and to render every assistance in their power to save the wreck and her apparel and cargo; and as a reward for the assistance and protection which the people of the Sandwich Islands shall afford to all such distressed vessels of the United States, they shall be entitled to a salvage, or a portion of the property so saved; but such salvage shall, in no case, exceed one third of the value saved; which valuation is to be fixed by a commission of disinterested persons who shall be chosen equally by the Parties.

PAUKU 2.

Eia hou neia, a o ko Amerika poe moku mai a me ko laila Kanikele a me ko laila kanaka ma keia pae aina a me ko lakou waiwai a i hiki i ka wa kaula, e pau ia mau mea i ka malama pono ia e ko Hawaii nei i ko Amerika enemi a *pau loa*.

PAUKU 3.

Eia hou neia, e makemakeana keia mau poe e loa mai ia lakou ka waiwai a ke Akua i haawi mai aiika hookuai pu ana a me ke aloha pu ana o na aina o ka poe nana keia olelo, no laila hoi, no ka paa pono ana o keia mau mea mahalo, e ae mai ua mai alii o Hawaii nei e pono ia laua e komo no i loko o ko laua awa a me ko laua mau wahi e ku ai ka moku, o na moku Amerika a pau, a e malama nui aku i ua mau moku la a me na ukana ma luna a me na alii a me na kanaka o ua mau moku la oi hana pono mai lakou a i haki ole ia lakou na kanawai o keia aina i kau ai, e kuai no hoi ko Amerika me ko Hawaii nei poe kanaka.

PAUKU 4.

Eia hou neia ke olelo io nei ua mau alii nei e malama nui laua i ko Amerika poe moku ke ili mai ma ko laua pae aina e hooikaika pono aku laua i pakele ai ka moku ili a mekana mau mea a pau a me kona ukana. He pono no e loa mai i ko Hawaii nei poe ka uku no ko lakou hooikaika ana i pakele ai ua moku ili la a i malama pono ia ai ka mau mea ana. Eia ka uku, he mau kala paha, a i ole ia, o kekahi puu o ka waiwai i hoopakele ia ai, ka uku. Ina e kolu puu waiwai ua like, hookahi puu paha ka uku aka aole loa e nui aku ko lakou uku i kekahi oua puu waiwai akolu la. A o ka mea nona ka moku a o ka poe i hoopakeleia ai ka waiwai e kuhikuhi pu lakou i kekahi mau kanaka e aole no lakou ka waiwai na lakou hoi e hoike mai i ka nui o ka waiwai i malama ia ai.

ART: 5th

Citizens of the United States, whether resident or transient, engaged in commerce, or trading to the Sandwich Islands, shall be inviolably protected in their lawful pursuits; and shall be allowed to sue for, and recover, by judgment, all claims against the subjects of His Majesty The King, according to strict principles of equity, and the acknowledged practice of civilized nations.

ART: 6th

Their majesties do further agree and bind themselves to discountenance and use all practicable means to prevent desertion from all American ships which visit the Sandwich Islands; and to that end it shall be made the duty of all Governors, Magistrates, Chiefs of Districts, and all others in authority, to apprehend all deserters; and to deliver them over to the master of the vessel from which they have deserted; and for the apprehension of every such deserter, who shall be delivered over as aforesaid, the master, owner, or agent, shall pay to the person or persons apprehending such deserter, the sum of six Dollars, if taken on the side of the Island near which the vessel is anchored; but if taken on the opposite side of the Island, the sum shall be twelve Dollars; and if taken on any other Island, the reward shall be twenty four Dollars, and shall be a just charge against the wages of every such deserter.

ART: 7th

No tonnage dues or impost shall be exacted of any Citizen of the United States which is not paid by the Citizens or subjects of the nation most favoured in commerce with the Sandwich Islands; and the citizens or subjects of the Sandwich Islands shall be allowed to trade with the United States, and her territories, upon principles of equal advantage with the most favoured nation.

PAUKU 5.

A o ko Amerika poe kanaka e kuai ana ma ko Hawaii nei pae aina, ka poe e noho ana, a me ka poe e holoholo ana, e pau lakou i ka malama pono ia i ka lakou hana ana i ka mea i ku i ke kanawai. A he pono no lakou e hoopaa i ka poe lawehala ma ke kanawai, a ma ka ahaolelo e loa mai ai ia lakou ka uku e pau ai ka aie pono a pau a na kanaka o ko Hawaii nei alii e like ai me ke kanawai pololei a me ka oihana a ka aina naau ao i ikeka ai.

PAUKU 6.

Eia hou neia, ke olelo io nei kealii nui laua o kona kahu i ka olelo i paa ai laua i ka hooikaika aku laua e pau ai ka mahuka ana mai o na kanaka o ko Amerika mau moku e hiki mai ana i ko Hawaii nei pae aina e alai aku no i ka mahuka ana mai. No ia mea he pono no na alii malama aina a me na kilo a me na kia-aina a me na kau alii a pau e hopu aku a paa ka poe mahuka a pau a e hoihoi aku i ka mea nona ka moku i haalele ia aku ai. A e uku ia mai ko onei poe i hopu aku e ka mea nona ka moku. Ina ma ka aoao o ka aina e kuai ka moku e paa ai ka mea i mahuka e ono kala ka uku. A ina ma kela aoao o ka aina e paa ai umi a me kumamalu kala ka uku—a ina ma ka aina e i moku i ke kai e paa ai a i hoihoi i kona moku, iwa kalua kala a me kumamaha ka uku, no loko pono keia uku o ka waiwai a ka mea mahuka i hoolimalimaia'i, ma laila e kau pono ia'i.

PAUKU 7.

Eia hou neia; aole e oi aku ka uku mai no ka awa o ko Amerika poe kanaka i ko ka aina punahele kanaka e kuai ana ma ko Hawaii pae aina, aole kii hou ia aku ka uku nui ae o ko Amerika kanaka. A e kuai no ko Hawaii nei poe kanaka me ko Amerika e like ka oihana a me ka pono e pono ai ko ka aina punahele loa i ka kuai pu ana mai me ko Hawaii nei pae aina.

Done in council at Honolulu; Island of Woahoo, this 23rd day of December in the year of our Lord 1826.

Ua hoopaaia i ka ahaolelo ma Honolulu i ka aina Oahu nei i keia la 23 o Detemaba i ka makahiki o ko kakou Haku 1826.

THOS. AP CATESBY JONES	[Seal]	THOS. AP CATESBY JONES	[Seal]
ELISABETA KAAHUMANU	[Seal]	ELISABETA KAAHUMANU	[Seal]
KARAIMOKU	[Seal]	KARAIMOKU	[Seal]
POKI	[Seal]	POKI	[Seal]
HOWAPILI	[Seal]	HOWAPILI	[Seal]
LIDIA NAMAHAHA	[Seal]	LIDIA NAMAHAHA	[Seal]

Appendix B: A Note on International Law and Native Claims

It has been long known that the unwarranted landing of United States marines onto the peaceful streets of Honolulu, then the capital of the Kingdom of Hawai'i, in January 1893 was a violation of normal international law as the armed force was not invited and was, as President Cleveland labelled the action 11 months later, "an act of war." But international law is more precisely based upon its own particular statutes—in this case treaties—and so any information on the peace treaties (including Jones' perpetual peace clause in 1826) existing between the two peoples is of prime importance in establishing any international claim for restitution.

While native Hawaiians cannot realistically expect compensation from the international arena, there is more particularly the matter of claims under national constitutional and statutory law. The landing of the marines was in violation of the Constitution's war-making clause as the act was not sanctioned by Congress. More importantly, under the Constitution and the *Federalist Papers*, treaties are regarded as some of the highest laws of the land. The violation of the peace clause of the 1826 and other United States-Hawai'i treaties is thus clear grounds for restitution.

Additionally, this writer and such thoughtful researchers on Hawaiian claims as Sidney M. Quintal and Keoni Agard have written for many years about the possibility of Hawaiians petitioning for autonomous rights under the United States' native American (i.e. "Indian") "dependent domestic nation" doctrine. The Constitution prohibits "States within States" and autonomy for any group from State and local taxation and jurisdiction in all cases save one: native peoples who enjoyed treaties or similar relations with the Federal government. The 1826 and related United States-Hawai'i treaties therefore take on a much broader role than simple historical curiosity.

To refute any claims that Jones's document was not a true "treaty," let us review the record. Historian Ralph Kuykendall called the "articles of arrangement" "a treaty of friendship, commerce, and navigation."³⁵ The U.S. State Department commented, in its definitive statement on the matter:

While the view of Captain Jones as to the character of the articles signed . . . at Honolulu is not wholly clear, he writes of . . . [them] as "regulations of general interest to our commerce in the Pacific," and adds that "the regulations received the signatures of the ruling Princes and chiefs." The form of the document is such that it may properly be called a "Treaty of Friendship, Commerce, and Navigation between the United States and the Sandwich Islands" (as in British and Foreign State Papers, XIX, 1430-32, published in 1834; . . .)

The articles were clearly an international act, signed as such by the authorities of the then independent Hawaiian Government, and by a representative of the United States, whose instructions, while vague, must be regarded as sufficient authority for his signature, in view of the then remoteness of the region from the seat of [the United States] Government and the general discretion which those instructions granted. . . .³⁶

In a recent interview Werner Levi, a scholar of international law,³⁷ agreed with this position in some respects. But the 1894 assertion by the State Department that the Jones treaty was “morally binding” upon the United States is fallacious, Levi states, because there is no such thing as “morality” in international law, “there being obviously no morals in international relations.”

It might be argued that the document was nevertheless valid under the concept of it being an “implied treaty,” though this is a somewhat dubious institution in international law. More importantly, the matter should be considered to have become “customary law,” which is a recognized international principle of law.

For a parallel to the Hawaiian situation, Levi gives the example of the Portuguese enclave at Goa on the Indian subcontinent. For centuries the Portuguese had enjoyed transit rights across Indian territory between Goa and another enclave, despite this right not being in any form guaranteed by a ratified treaty. When this was protested and the matter taken to an international court, the Court ruled that the right of transit had been protected under “customary law.”

From this example comes the concept of local or even regional customary law in international relations: if powers respect the agreement over time on a regional basis, as was the case in Hawai‘i with Jones’s treaty, then it can have regional customary recognition as being binding international law, even without a ratified document backing the matter up.

The requirement under the “customary law” doctrine is that the treaty had to have been recognized by the powers in the region. At the time of the treaty British representatives accused Jones of assuming consulship without recognition by Great Britain, and urged their government to take diplomatic action. But though backhanded, this was still a recognition of the treaty. Indeed, the British Foreign Ministry printed the first international copy of Jones’s treaty in its *British and Foreign State Papers* (Volume XIX) in 1834. Meanwhile the French described the treaty in later years as a political act and described Jones as “guided by wise foresight.”³⁸

The treaty was at all times scrupulously enforced by the Hawaiians, often under nudging from American missionaries, businessmen, and naval commanders. Citizens of other foreign powers living in Hawai‘i accepted the treaty and urged their own governments to proceed with similar diplomatic negotiations with the natives. In 1831 for example, when the Hawaiians tried to evict two Catholic priests present in Hawai‘i under French auspices, the French attempted to make use of Jones’ treaty to prevent the eviction, giving an acknowledgment and acceptance of the treaty itself, even if the ploy failed.³⁹

In sum, it could be argued, noted Levi, that Jones’s “articles of arrangement” were a *de facto* and internationally-recognized treaty on the basis of customary law. Supporting this argument is the related legal principle of military commanders acting as diplomatic representatives:

Moreover, the actions of military or naval commanders must be to a certain extent left without positive restrictions, and usage might be pleaded for many transactions of this nature.⁴⁰

An international accord, such as Jones’s treaty, would not have normal “restrictions” of ratification and proclamation placed upon it. Rather, “usage” (or “customary law,”

as referred to above in modern terminology) may be pleaded or argued on behalf of such an accord.

A final point of international law of relevance to Jones's treaty is the concept of *sponsio* (or *sponsions*), which are accords executed (especially by naval or military commanders in times of war) whose authors either lacked authority or acted beyond their allowed authority. If Jones's treaty were only a *sponsion*, then international law requires some form of at least tacit ratification to occur for it to be considered binding. But Jones's treaty appears to have been executed by a naval officer in a relaxed atmosphere of peace, acting with full authority (if unintentionally granted), given the distances of the day, to undertake such diplomatic action. In any case, the State Department has already ruled (above) that the treaty was not a *sponsion* but clearly an international treaty.

While these preliminary notes strengthen the case for Jones's document to be considered a legally binding international accord, whether such arguments would succeed in a court of international law remains to be seen, notes Levi. The same would apply to any suit for restitution filed directly with the United States Supreme Court, the only tribunal in the United States qualified to hear such a case from a wronged and once fully sovereign native nation.

NOTES

- ¹ The text quotes from the television exploits of *Star Trek's* future-day Starship Capt. James Kirk of the *Enterprise*, patterned after Cook.
- ² See Ralph S. Kuykendall, *The Hawaiian Kingdom*, vol. I, (Honolulu, University of Hawaii Press: 1947), p. 54.
- ³ Herman Melville, *White Jacket, or The World in a Man-of-War*, (New York, The New American Library: 1979), p. 20.
- ⁴ *Ibid.*, pp. 165-6.
- ⁵ *Ibid.*, p. 211.
- ⁶ Petition to James Monroe, December 1824. Variousy cited. See United States Congress, House of Representatives, *Report No. 108*, 29th Congress, 1st Session, 16 January 1846 (to accompany H.R. 122).
- ⁷ Petition to John Quincy Adams, 5 April 1825. Variousy cited. See House *Report No. 108*.
- ⁸ Petition to John Quincy Adams, *circa* April 1825. Variousy cited. See *Report No. 108*.
- ⁹ Letter, Samuel L. Southard to Isaac Hull, 24 May 1825. Variousy cited. See House *Report No. 108*.
- ¹⁰ Letter, Isaac Hull to Thomas Jones, 25 May 1826. Variousy cited. See House *Report No. 108*.
- ¹¹ See Jones to the Secretary of Navy, 24 June 1826, from the U.S. sloop-of-war *Peacock*, at anchor at Guayaquil, Grand Columbia (present-day Ecuador). An extract from the letter is contained in House *Report No. 108*, p. 15.
- ¹² Articles 1, 3-7 of the Tahiti treaty are generally identical to articles 1-4, 6-7 of the Hawai'i treaty. Article 2 of the former agreement stipulated that the Tahitian Kingdom would receive and protect a U.S. consul, and grant him all the privileges of the consul of the most favored nation. As Honolulu already had an American commercial agent, this article was apparently dropped as unnecessary when Jones wrote the Hawaiian treaty. Jones added a new article 5 to the latter treaty, dealing with suing for claims, possibly a matter brought up by American merchants and their peculiar problems in Honolulu. See Appendix A for a full text of the Hawaiian treaty.

A discussion of the Tahiti and Raiatea treaties is included in Hunter Miller (ed.), *Treaties and Other International Acts of the United States of America* (Washington: State Department, 1933), III, 249–260.

¹³ American “Letters of Marque and Reprisal” are permissible under the United States Constitution, Article I, Section 8(11); they essentially allow for “legal piracy,” and were last issued by the Congress in the War of 1812.

¹⁴ Quotations are all from Miller, *Treaties*, pp. 278–9.

¹⁵ *Ibid.*, p. 277.

¹⁶ *Ibid.*, pp. 277–8. No attempt has been made to correct Jones’ report; “scape-gallows,” “encreasing,” and “releif” are *sic*.

¹⁷ *Ibid.*, pp. 278–9.

¹⁸ *Ibid.*, p. 278.

¹⁹ Jones’ letter proposing the “debts” settlement is Jones to Kamehameha III, 4 November 1826. The final ratification of the settlement is found in *Decree in Council* [also known as *Regulations*], hereafter *Decree*, 27 December 1826. Both are variously cited. See Miller, *Treaties*, and *House Report No. 108*. The *Decree* was signed by five chiefs as the young (12 years old) King Ka-mehameha III was at that time only a figurehead, power instead being held by a royal council.

Leading that council were the high chiefs Ka-’ahu-manu and Ka-lani-moku. The former had been a favorite wife of the conqueror Ka-mehameha I (though not—because the old man had many wives—the mother of the young King); the latter had been a trusted and wise advisor to the old King, and now shared power, though as a second among equals, with Ka-’ahu-manu. Both signed the *Decree*. Also signing was Boki, Ka-lani-moku’s younger brother, a high chief and Governor of O’ahu who, unlike the former two, was a non-supporter and curse upon the American missionaries. The fourth signatory was Hoapili, stepfather to Ka-mehameha III, a good Christian, father to Boki’s wife Liliha, and Governor of the island of Maui where the important whaling port of Lahaina, the Kingdom’s capital, was located. The final signatory was Nā-māhana, a female high chief, daughter of the conqueror’s advisor Ke’e-au-moku, and herself another missionary supporter.

Altogether the five signed for, and indeed *were*, the central government of the Hawaiian Islands.

²⁰ See Kuykendall, *The Hawaiian Kingdom*, pp. 434–436.

²¹ Miller, *Treaties*, p. 278.

²² The treaty is quoted in full in Appendix A. The quotations following in the text are from *ibid.*, pp. 269–72, with some emphasis added.

²³ All names in the text are quoted as they appear in the original treaty. Due to various spellings early Hawaiians often appear with different names on different papers. Hence Tamehameha III in the letter in note 26 below (i.e., Ka-mehameha III); Kaikiouli (contained in Jones letter of November 4th), the King’s given name, for Kau-i-ke-ao-uli; Karaimoku (as signed in the *Decree* and the treaty) for Ka-lani-moku; Poki (Boki) signer of the treaty; Howapili for Hoa-pili on the treaty; Lidia (on the *Decree*) or Likia (on the treaty) Nā-māhana; even Woahoo for the island of O’ahu (in Jones’ letter of November 4th, and on the treaty). This whole matter is aggravated somewhat by misspellings in the original documents, as with Kaikiouli (for Kau-i-ke-ao-uli) in article 1 of the treaty. In this regard, see also note 34 below.

²⁴ *Foreign Relations*, (Washington: U.S. Government, 1894), appendix II, pp. 8–28, which is a copy of the “Report upon the Official Relations of the United States with the Hawaiian Islands from the First Appointment of a Consular Officer There by This Government,” 9 February 1893, by Andrew H. Allen, Chief of the Bureau of Rolls and Library of the Department of State. Emphasis added. (*Note*: pp. 35–6 of the appendix refers erroneously to the Jones treaty as an “alliance,” which it was not.)

- ²⁵ Miller, *Treaties*, p. 275.
- ²⁶ Southard to Tamehameha the 3rd, 20 January 1829, in Naval Records and Library, 17 General Letter Book, pp. 87-89, reprinted in *ibid.*, p. 276. The Secretary wrote on behalf of the President, with the letter delivered later that year by Capt. William Bolton Finch, commanding the *U.S.S. Vincennes*. The *Vincennes* was dispatched to Hawai'i when the promised payments under Jones' *Decree* were not made to American commercial interests on time. Captain Finch arranged for new notes to be signed.
- ²⁷ Harold W. Bradley, "Thomas ap Catesby Jones and the Hawaiian Islands, 1826-1827," *HHS, 39th Annual Report*, (Honolulu: 1930), pp. 25-26.
- ²⁸ In 1837-38 the Reverend William Richards visited the United States and was introduced briefly to then U.S. Attorney General Benjamin Franklin Butler. Returning to Hawai'i where Richards had held the Lahaina mission station since 1823, the good Reverend became appointed as a leading advisor to the Hawaiian government, teaching its leaders economics and political science and helping to write a set of statutes, the proposed treaty with the U.S., and the country's first Constitution.
- Taking his post as advisor to the King and chiefs on July 3, 1838, Richards wrote Attorney General Butler on August 21 enclosing his proposed treaty, asking that it be submitted to the President. Butler had, by the time the letter arrived, left the Administration and was instead the U.S. Attorney for the Southern District of New York, from whence, on March 29th of the following year, he forwarded Richards' request and treaty to Secretary of State Forsyth (letters, Richards to Butler, 21 August 1838, and Butler to Forsyth, 29 March 1839, Department of State Archives, Miscellaneous Letters, January-April 1839; cited in Miller, *Treaties*, V, 623-9). Butler concluded his letter with a statement that:

The suggestion of Mr. R[ichards] in regard to the possible desire of one or both of the great powers [i.e. Great Britain and Russia] named in his letter, to possess these Islands, seems to me, also, to be very deserving of consideration.

I need scarcely add, that should it be thought needful by the [State] Department, it will give me great pleasure to be the medium of communication with any of the parties.

Butler was never given the chance: there is no further record of any diplomatic or intra-governmental exchange on the matter, and the documents were apparently simply referred to the Archives.

Richards' letter was extensive and referred to Jones's 1826 treaty and other correspondence with American consular officials, some of which the agents had gotten signed by persons in authority in the Hawaiian government "not by the fairest of means," as Richards put it. The letter was co-signed by the King. The fact that it allowed for advance authority for alterations in the proposed treaty at the American end is "unusual perhaps to the extent of being without precedent" in diplomatic annals (Miller's comments, Miller, *Treaties*, V, 625). The proposed treaty appears in both Hawaiian and English, consisting of 12 articles generally based on Jones' 1826 treaty; it is entitled a "Treaty of Peace, Amity & Commerce between the United States of America and his Majesty, the King of the Sandwich Islands." It was signed by King Ka-mehameha III and by "Kaahumanu 2."

Ka-mehameha III, having reached majority, signed on his own behalf. Of the former council members who had signed Jones's *Decree* and treaty, Ka-'ahu-manu, Ka-lani-moku, and Boki (and perhaps Nā-māhana) were by this time deceased. Kīna'u, half-sister to the King (as a daughter of the conqueror), and one of the widows of Ka-mehameha II, had become an adjunct to the throne with the passing of the Queen Regent, and co-signed matters of state. She took the formal title of Ka-'ahu-manu II, and was to die in April of 1839.

- ²⁹ Various citations exist on this matter. See *Foreign Relations*, pp. 41-4.

³⁰ The ratified 1849 Hawai'i-United States treaty built upon Jones's treaty as well as Richards' proposed 1838 treaty and again dealt primarily with friendship and commerce. The treaty has various citations. Miller, *Treaties*, V, 591-629, gives a long discussion of it, provides a copy, and includes drafts of the several abortive agreements which preceded it.

The treaty is the 138th international accord of the United States, signed at Washington December 20, 1849. It was drafted only in English, and was ratified by the United States February 4, 1850, by Hawai'i August 24, 1850, and was proclaimed November 9, 1850. Entitled a "Treaty of Friendship, Commerce, and Navigation," it has 17 articles and was drafted in Washington by John M. Clayton, sole plenipotentiary for the Kingdom, and Secretary of State James Jackson Jarves on behalf of the United States.

³¹ Miller, *Treaties*, III, 279.

³² *Ibid.*, p. 273.

³³ Interview with Dr. Werner Levi, Honolulu, December 1981. Note that Jones's Tahitian treaty of 1826 would be a second such example, had it become respected under customary international law (see Appendix B) and had Tahiti not come under French domination.

³⁴ The document appears without the preliminary material inserted by the State Department. From Miller, *Treaties*, III, 269. See copy published by Governor J. Adams Kua-kini, 1831, in HMCS Library. Also note copy in U.S. Navy Department Archives (Naval Records and Library), cited in Miller, *Treaties*, pp. 269-72. It also exists (English text only) in House *Report No. 108*.

Errors such as the misspelling of the King's name in Article 1, the lack of a closed parenthesis in Article 2, etc., are *sic*. Note that the same five high chiefs who executed this document acted again four days later with Jones's "debts" *Decree*, acting "in council." See notes 19 and 23, above.

³⁵ Kuykendall, *The Hawaiian Kingdom*, p. 99.

³⁶ Miller, *Treaties*, III, 274.

³⁷ Levi interview. Dr. Levi is a respected expert on international law and a professor emeritus at the University of Hawaii.

³⁸ The reference to the British appeal for diplomatic action is from Pat Saiki, "Thomas ap Catesby Jones, The Anxious Diplomat," unpublished ms., Hawaiian-Pacific collection, Hamilton Library, University of Hawaii, 1966. The reference to the French is from Samuel C. Damon, *F*, 15 November 1950, (Honolulu), pp. 89-90, quoted in Saiki, p. 9.

³⁹ See Bradley, "Jones and the Hawaiian Islands." Kuykendall, *Hawaiian Kingdom*, pp. 143-4, discusses the case in some detail, including the appeals made in regards to Jones's treaty.

⁴⁰ Theodore D. Woolsey, *Introduction to the Study of International Law* (New York: Scribner's Sons, 1894), p. 159. The citation is supplied by Dr. Levi.