

**HAWAII  
CONSTITUTIONAL  
CONVENTION STUDIES  
1978**

**Article XIII:  
State Boundaries,  
Capital, Flag**

**Revised by Russell S. Kato**

**Article XIV:  
General and Miscellaneous  
Provisions**

**Yvonne Y. Izu**

**Article XVI:  
Schedule**

**Russell S. Kato**

**Legislative Reference Bureau  
State Capitol  
Honolulu, Hawaii 96813**

**Price \$1.50  
May 1978**

**Richard F. Kahle, Jr.  
*Editor***

**Samuel B. K. Chang  
*Director***

# TABLE OF CONTENTS

	<u>Page</u>
ARTICLE XIII, STATE BOUNDARIES, CAPITAL, FLAG . . . .	vi
ARTICLE XIV, GENERAL AND MISCELLANEOUS PROVISIONS . .	vii
ARTICLE XVI, SCHEDULE . . . . .	x

## P A R T O N E

### ARTICLE XIII: STATE BOUNDARIES, CAPITAL, FLAG

#### Chapter

1	BOUNDARIES . . . . .	3
	Introduction . . . . .	3
	Islands Included . . . . .	4
	The Seaward Boundaries . . . . .	4
	Power of the State to Set Boundaries . . . . .	7
2	STATE CAPITAL SITE . . . . .	9
	Present State Capital Site . . . . .	9
	Relocation of the State Capital . . . . .	10
	Continuity of Government . . . . .	11
3	HERALDIC SYMBOL . . . . .	14
	State Flag . . . . .	14
	State Seal . . . . .	15
	State Motto . . . . .	15
	State Song . . . . .	16
	State Flower . . . . .	16
	State Nickname . . . . .	17
	State Tree . . . . .	17
	State Bird . . . . .	18

	<u>Page</u>
State Marine Mammal . . . . .	18
State Color and Birthstone . . . . .	18
FOOTNOTES . . . . .	20
APPENDIX . . . . .	22

P A R T   T W O

ARTICLE XIV:  
GENERAL AND MISCELLANEOUS PROVISIONS

Chapter

1	INTRODUCTION . . . . .	27
2	CIVIL SERVICE . . . . .	29
	Part I. Introduction . . . . .	29
	Part II. Civil Service Personnel Coverage . . . . .	31
	Single or Multiple Systems . . . . .	33
	State and/or Local Coverage . . . . .	35
	Governing the Civil Service System . . . . .	36
	Development of the Merit System . . . . .	36
	Part III. Merit Principle vs. Other . . . . .	
	Public Policies . . . . .	38
	Equal Employment Opportunity . . . . .	38
	Veterans Preference . . . . .	40
	Residency Requirement . . . . .	41
	Collective Bargaining . . . . .	42
	Part IV. Merit Principle vs. Civil Service Procedures . . . . .	43
	Job Security: Tenure and Promotion . . . . .	43
	Removal . . . . .	45
	Recruiting . . . . .	46
	Equal Pay for Equal Work . . . . .	47
	Part V. Summary . . . . .	51

		<u>Page</u>
3	PUBLIC EMPLOYEES RETIREMENT SYSTEM . . . . .	53
	Employees Retirement System and Social Security . . . . .	58
4	OATHS AND LOYALTY . . . . .	62
	Part I. Introduction . . . . .	62
	Part II. Disqualification from Public Office or Employment . . . . .	62
	Part III. Loyalty Oath . . . . .	66
5	ETHICS . . . . .	69
6	INTERGOVERNMENTAL COOPERATION . . . . .	74
7	FEDERAL REQUIREMENTS . . . . .	81
8	CONSTRUCTION . . . . .	85
9	GENERAL POWERS . . . . .	86
10	SELF-EXECUTION . . . . .	89
	FOOTNOTES . . . . .	91

## P A R T   T H R E E

### ARTICLE XVI: SCHEDULE

#### Chapter

1	INTRODUCTION . . . . .	99
---	------------------------	----

	<u>Page</u>
2 DISCUSSION OF THE ARTICLE . . . . .	101
Part I. Districting and Legislative Provisions . . . . .	101
Section 1 . . . . .	101
Section 2 . . . . .	104
Section 3 . . . . .	105
Section 4 . . . . .	106
Section 5 . . . . .	106
Section 6 . . . . .	107
Section 7 . . . . .	107
Part II. Miscellaneous Provisions . . . . .	109
Section 8 . . . . .	109
Section 9 . . . . .	110
Section 10 . . . . .	111
Section 11 . . . . .	112
Section 12 . . . . .	113
Section 13 . . . . .	114
FOOTNOTES . . . . .	119

## **Article XIII**

### **STATE BOUNDARIES, CAPITAL, FLAG**

#### **BOUNDARIES**

**Section 1.** The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of [the Admission Act]; except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters. [Am 73 Stat 4 and election June 27, 1959]

#### **CAPITAL**

**Section 2.** Honolulu, on the Island of Oahu, shall be the capital of the State.

#### **STATE FLAG**

**Section 3.** The Hawaiian flag shall be the flag of the State.

## **Article XIV GENERAL AND MISCELLANEOUS PROVISIONS**

### **CIVIL SERVICE**

**Section 1.** The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle.

### **EMPLOYEES' RETIREMENT SYSTEM**

**Section 2.** Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.

### **DISQUALIFICATIONS FROM PUBLIC OFFICE OR EMPLOYMENT**

**Section 3.** No person shall hold any public office or employment who, knowingly and intentionally, does any act to overthrow, or attempts to overthrow, or conspires with any person to overthrow the government of this State or of the United States by force or violence. [Am Const Con 1968 and election Nov 5, 1968]

### **OATH OF OFFICE**

**Section 4.** All public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as ..... to the best of my ability." The legislature may prescribe further oaths or affirmations.

### **CODES OF ETHICS**

**Section 5.** The legislature and each political subdivision shall adopt a code of ethics, which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies. [Add Const Con 1968 and election Nov 5, 1968]

## **INTERGOVERNMENTAL RELATIONS**

**Section 6.** The legislature may provide for cooperation on the part of this State and its political subdivisions with the United States, or other states and territories, or their political subdivisions, in matters affecting the public health, safety and general welfare, and funds may be appropriated to effect such cooperation. [§5, ren Const Con 1968 and election Nov 5, 1968]

## **FEDERAL LANDS**

**Section 7.** The United States shall be vested with or retain title to or an interest in or shall hold the property in the Territory of Hawaii set aside for the use of the United States and remaining so set aside immediately prior to the admission of this State, in all respects as and to the extent set forth in the act or resolution providing for the admission of this State to the Union. [§6, ren Const Con 1968 and election Nov 5, 1968]

## **COMPLIANCE WITH TRUST**

**Section 8.** Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. [§7, ren Const Con 1968 and election Nov 5, 1968]

## **ADMINISTRATION OF UNDISPOSED LANDS**

**Section 9.** All provisions of the Act of Congress approved March 18, 1959 reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people. [§8, am 73 Stat 4 and election June 27, 1959; ren Const Con 1968 and election Nov 5, 1968]

## **FEDERAL PROPERTY; TAX EXEMPTION**

**Section 10.** No taxes shall be imposed by the State upon any lands or other property now owned or hereafter acquired by the United States, except as the same shall become taxable by reason of disposition thereof by the United States or by reason of the consent of the United States to such taxation. [§9, ren Const Con 1968 and election Nov 5, 1968]



## **HAWAII NATIONAL PARK**

**Section 11.** All provisions of the act or resolution admitting this State to the Union, or providing for such admission, which reserve to the United States jurisdiction of Hawaii National Park, or the ownership or control of lands within Hawaii National Park, are consented to fully by the State and its people. [§10, ren Const Con 1968 and election Nov 5, 1968]

## **JUDICIAL RIGHTS**

**Section 12.** All those provisions of the act or resolution admitting this State to the Union, or providing for such admission, which reserve to the United States judicial rights or powers are consented to fully by the State and its people; and those provisions of said act or resolution which preserve for the State judicial rights and powers are hereby accepted and adopted, and such rights and powers are hereby assumed, to be exercised and discharged pursuant to this constitution and the laws of the State. [§11, ren Const Con 1968 and election Nov 5, 1968]

## **TITLES, SUBTITLES, PERSONAL PRONOUNS; CONSTRUCTION**

**Section 13.** Titles and subtitles shall not be used for purposes of construing this constitution.

Whenever any personal pronoun appears in this constitution, it shall be construed to mean either sex. [§12, ren Const Con 1968 and election Nov 5, 1968]

## **GENERAL POWER**

**Section 14.** The enumeration in this constitution of specified powers shall not be construed as limitations upon the power of the State to provide for the general welfare of the people. [§13, ren Const Con 1968 and election Nov 5, 1968]

## **PROVISIONS SELF-EXECUTING**

**Section 15.** The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit. [§14, ren Const Con 1968 and election Nov 5, 1968]

## **Article XVI SCHEDULE**

### **DISTRICTING AND APPORTIONMENT**

**Section 1.** [Omitted as obsolete. For current districts and apportionment, see note appended to HRS Chapter 25.]

### **1968 SENATORIAL ELECTIONS**

**Section 2.** Senators elected in the 1968 general election shall serve for two-year terms. [Add Const Con 1968 and election Nov 5, 1968]

### **TWENTY-SIXTH SENATOR, ALLOCATED TO KAUAI**

**Section 3.** Effective for the first general election following ratification of the twelfth paragraph of Section 4 of Article III and until the next reapportionment, one senator shall be added to the twenty-five members of the senate as provided and with the effect set out in the twelfth paragraph of Section 4 of Article III and such senator shall be allocated to the basic island unit of Kauai. [Add Const Con 1968 and election Nov 5, 1968]

### **EFFECTIVE DATE FOR APPORTIONMENT AND DISTRICTING**

**Section 4.** The senatorial and representative districts and the numbers to be elected from each as set forth in Sections 1A and 1B of this article shall become effective for the first general election following ratification of the amendment to Section 2 of Article III and of Sections 1A and 1B of this article. [Add Const Con 1968 and election Nov 5, 1968]

### **REAPPORTIONMENT COMMISSION; ACTIVATION**

**Section 5.** Anything in this constitution to the contrary notwithstanding, if Sections 1A and 1B of this article are not ratified, the reapportionment commission shall be constituted on or before March 1, 1969. [Add Const Con 1968 and election Nov 5, 1968]

#### **CONFLICTS BETWEEN APPORTIONMENT PROVISIONS**

**Section 6.** Sections 2 and 4 of Article III and Sections 1A, 2, 3, 4 and 5 of Article XVI, as amended and added by the constitutional convention of 1968, upon ratification, shall supersede Senate Bill No. 1102 of the Regular Session of 1967 even if the latter shall also be ratified. If less than all of the above sections are ratified, then those ratified shall supersede Senate Bill No. 1102 to the extent they are in conflict therewith, even if the latter should be ratified. [Add Const Con 1968 and election Nov 5, 1968]

#### **SALARIES OF LEGISLATORS**

**Section 7.** Until otherwise provided by law in accordance with Section 10 of Article III, the salary of each member of the legislature shall be twelve thousand dollars a year. [§17, ren and am Const Con 1968 and election Nov 5, 1968]

#### **START OF BIENNIAL BUDGETING AND APPROPRIATIONS**

**Section 8.** Anything in this constitution to the contrary notwithstanding, the provisions relating to biennial budgeting and appropriations in Article VI shall take effect for the biennial period beginning July 1, 1971. [Add Const Con 1968 and election Nov 5, 1968]

#### **EFFECTIVE DATE AND APPLICATION OF ARTICLE VII, SECTION 2**

**Section 9.** The amendments to Section 2 of Article VII shall take effect on the first day of January after three full calendar years have elapsed following their ratification. When the amendments take effect, Article VII shall apply to all county charters, whether adopted before or after the admission of Hawaii into the Union as a state. [Add Const Con 1968 and election Nov. 5, 1968]

#### **CONTINUITY OF LAWS**

**Section 10.** All laws in force at the time amendments to this constitution take effect that are not inconsistent with the constitution as amended shall remain in force, mutatis mutandis, until they expire by their own limitations or are amended or repealed by the legislature.

Except as otherwise provided by amendments to this constitution, all existing writs, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, sentences, orders, decrees, appeals, causes of action, contracts, claims, demands, titles and rights shall continue unaffected notwithstanding the taking effect of the amendments and may be maintained, enforced or prosecuted, as the case may be, before the appropriate or corresponding tribunals or agencies of or under the State or of the United States, in all respects as fully as could have been done prior to the taking effect of the amendments. [§2, ren and am Const Con 1968 and election Nov 5, 1968]

## **DEBTS**

**Section 11.** *The debts and liabilities of the Territory shall be assumed and paid by the State, and all debts owed to the Territory shall be collected by the State. [§3, ren Const Con 1968 and election Nov 5, 1968]*

## **RESIDENCE, OTHER QUALIFICATIONS**

**Section 12.** *Requirements as to residence, citizenship or other status or qualifications in or under the State prescribed by this constitution shall be satisfied pro tanto by corresponding residence, citizenship or other status or qualifications in or under the Territory. [§7, ren Const Con 1968 and election Nov 5, 1968]*

## **CONDEMNATION OF FISHERIES**

**Section 13.** *All vested rights in fisheries in the sea waters not included in any fish pond or artificial inclosure shall be condemned to the use of the public upon payment of just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the State not otherwise appropriated. [§9, ren Const Con 1968 and election Nov 5, 1968]*

## **EFFECTIVE DATE**

*This constitution shall take effect and be in full force immediately upon the admission of Hawaii into the Union as a State. Done in Convention, at Iolani Palace, Honolulu, Hawaii, on the twenty-second day of July, in the year one thousand nine hundred fifty and of the Independence of the United States of America the one hundred and seventy-fifth.*

## PART ONE

### **Article XIII: State Boundaries, Capital, Flag**



## Chapter 1

# BOUNDARIES

### Introduction

The boundaries of Hawaii contain 8 principal islands plus a number of small islands, atolls, shoals, and reefs. A principal question concerning the boundaries of the State has centered around the seaward boundaries. It has been judicially ruled that the seaward boundaries extend only to a 3-mile belt around the islands.

While the Constitution of the State of Hawaii contains a statement of the Hawaiian boundaries, these boundaries actually were set by Congress and the State cannot alter the boundaries without the consent of Congress.

The Constitution of the State of Hawaii, reflecting the language of section 2 of the Admission Act which established the boundaries for the State, declares:<sup>1</sup>

The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of [the Admission Act]; except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

The generality of the above provision presents certain problems because at the time of the admission of Hawaii into the Union, there was no authoritative description of the islands or waters included in the Territory of Hawaii. The Organic Act establishing the Territory<sup>2</sup> described the Territory as consisting of the islands acquired under the

joint resolution of annexation. That resolution, in turn, refers merely to "The Hawaiian Islands and their Dependencies".<sup>3</sup>

### Islands Included

A study based primarily on the Report of the Commission on Annexation<sup>4</sup> indicates that presently the following islands, atolls, shoals, and reefs are included in the State of Hawaii: Hawaii, Maui, Molokai, Lanai, Kahoolawe, Oahu, Kauai, Niihau, Molokini, Lehua, Kaula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Lapan, Lisianski, Kure, Pearl and Hermes Reefs and Maro Reef.<sup>5</sup>

### The Seaward Boundaries

Assistant U.S. Attorney General J. Lee Rankin<sup>6</sup> aptly characterized the questions and controversy concerning the seaward boundaries of Hawaii when he wrote:

...There is similar doubt as to the water area of the Territory. The Second Act of Kamehameha III (1846) and a Privy Council resolution of 1850 asserted jurisdiction over interisland channel waters, the former even asserting the right by proclamation to exclude foreign shipping, apparently indicating that the waters were regarded as inland rather than merely Territorial. However, the statute was repealed by section 1491 of the Civil Code of 1859, and the Privy Council resolution has been held to have been ultra vires (Territory of Hawaii v. Liliuokalani, 14 Hawaii 88, 1902). Nevertheless, the view has often been expressed that the interisland channels remain part of the Territory. In view of these doubts, it may be considered desirable to define the new State explicitly.

The Admission Act, nonetheless, was silent with respect to the seaward boundaries of Hawaii. Although the reasons for this are not immediately apparent, it is possible, considering that Congress by the



## BOUNDARIES

Submerged Lands Act of 1953 had already set the seaward boundaries of the states at 3 miles and considering that the Submerged Lands Act was incorporated into the Admission Act,<sup>7</sup> that a 3-mile limit was implicit in the Admission Act.<sup>8</sup>

Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line.... Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed....<sup>9</sup>

This argument is weak, however, in view of the fact that Rankin and others had specifically advised Congress on the uncertainty which could occur over historical Hawaiian claims on the seaward boundaries.

Judicially, the question of the seaward boundaries was examined in Civil Aeronautics Board v. Island Airlines.<sup>10</sup> That dispute arose over the authority of the Civil Aeronautics Board (CAB) to regulate interisland air travel. Under the provisions of the Federal Aviation Act of 1958, the CAB exercised economic regulatory power over air transportation between places in the same state through airspace outside of that state. Since interisland flights must necessarily leave the 3-mile seaward limit then claimed by the United States, the CAB asserted that such flights were properly within its jurisdiction.

Island Airlines, on the other hand, sought to show that there was precedent in historical documents for state control of the channels beyond the 3-mile boundary. The Court, however, held that Hawaii had not established a historic claim to interisland channels and that the seaward boundaries of Hawaii "were fixed at three nautical miles from the line of ordinary low water surrounding each and every one of the islands composing the State of Hawaii".<sup>11</sup> That decision was affirmed on appeal to the U.S. Court of Appeals of the Ninth Circuit.<sup>12</sup>

## STATE BOUNDARIES, CAPITAL, FLAG

A major impact of the Island Airlines decision is that by holding that the channel waters outside the 3-mile limit are international waters, the role of the United States in regulating interstate and international commerce under the Commerce Clause of the United States Constitution is brought into being.

As one commentator has noted:<sup>13</sup>

Apart from the land areas of Hawaii, as discussed above, the boundaries of the new state include the territorial waters (a 3-mile belt) that surround the various islands and reefs but do not include the waters separating them. Thus, where the channel between two islands is greater than 6 nautical miles, a strip of high seas remains. Vessels plying between two such islands are therefore for a part of the time on the high seas which are not under the jurisdiction of the State of Hawaii. This raises the question of the effect of the commerce clause of the Constitution on interisland commerce. It has been held by the Supreme Court that transportation necessitating passage through waters not under the jurisdiction of a state, even though both termini of the voyage lie within the borders of that state, is not intrastate commerce, but rather foreign commerce for the purpose of the commerce clause of the Constitution. The net effect of this is to vest in Congress full authority to regulate interisland traffic in Hawaii; however, under a well-established principle of constitutional law, the state could exercise such authority should Congress choose to refrain from exercising its own superior authority.

For a detailed study of the application of the Commerce Clause to interisland transactions, see Appendix.

Another major impact of the Island Airlines decision is with respect to the effect of the control over the waters and resources of the channels. The submerged portions of the Hawaiian archipelago contain such valuable geological and biological resources as precious coral, manganese, fisheries, and sand.<sup>14</sup> Should management of these resources be ill-defined, uncontrolled exploitation or interference may occur ruining the channel areas and even endangering the environment and economy of the areas presently within the jurisdiction of the State.<sup>15</sup>

## BOUNDARIES

Currently, the U.S. Supreme Court's position on the 3-mile seaward boundary appears to be unchanged. In rejecting claims to resources beyond the 3-mile zone asserted by Atlantic coastal states based on historical grants, the court noted:<sup>16</sup>

We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premise of prior decisions.

The view of Congress toward the high seas, however, is changing. Although Congress specifically prohibited the extension or retraction of states' boundaries, it did create recently, in the Fishery Conservation and Management Act of 1976, a 200-mile fisheries boundary off the coasts of the United States.<sup>17</sup>

### Power of the State to Set Boundaries

The power to establish state boundaries in the United States appears to be an incident of the power to admit states to the Union resting with the Congress of the United States.<sup>18</sup> The U.S. Supreme Court recently commented:<sup>19</sup>

...paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953.... In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; but this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority.

Some observers feel that it is not even essential that a recitation of state boundaries appear in a state's constitution:<sup>20</sup>

## STATE BOUNDARIES, CAPITAL, FLAG

Constitutional definition, or description, of state boundaries is common to only a slight majority of state constitutions. Most of these state constitutional boundary descriptions are briefer than the Michigan provision. Alaska and Hawaii define boundaries in their constitutions very briefly and simply by reference to what constituted their territorial boundaries.

Constitutional status for state boundary descriptions does not appear to give them any more authority than if they were not set forth as a constitutional provision. The U.S. Constitution and many state constitutions (including all of the 13 original states) do not define boundaries. No threat to their territorial integrity has developed as a result of this.

\* \* \*

...It was held judicially that the Indiana boundaries "were not fixed by the adoption of the state constitution, but by Congress and their recital in the constitution is merely a memorandum thereof". Watts v. Evansville Railroad Co., 123 N.E. 709....

The Model State Constitution does not include a provision for defining the state's boundaries.

## Chapter 2

### STATE CAPITAL SITE

A constitutional provision respecting the location of a state capital, in addition to fixing the site, may set forth means whereby the capital may be changed should the need or desire to do so arise. Heed must be paid to the forced relocation of the seat of government during emergency situations.

#### Present State Capital Site

During the 1950 Hawaii Constitutional Convention, proposals were made to situate the state capital in a place other than Honolulu. Among the reasons given were:<sup>1</sup>

- (1) Thirty-four of the 48 states have capitals located in areas other than in the largest city.
- (2) A large city has overcrowded conditions and is readily subject to pressure groups.
- (3) Thoughtful and responsible legislation would more likely be enacted in an area with lower population density.

However, Honolulu was retained as the seat of state government. Some of the factors affecting the decision were the following:<sup>2</sup>

- (1) Honolulu has been the historic site for the state capital.
- (2) Considerable expense had already been incurred for the construction of government buildings.
- (3) Relocation would require increased expenditures of public funds for new buildings on another site.

- (4) Since the bulk of the population is on Oahu, the larger part of the state's administrative apparatus must in any case remain on the island.<sup>3</sup>

The location of the state capital was not discussed in the 1968 Hawaii Constitutional Convention.

### Relocation of the State Capital

Since certain conditions such as shifts in population or the expansion of government may make it desirable to relocate the state capital, it can be argued that the site of the state capital should not be permanently fixed in the Hawaii Constitution. At least 7 states, excluding Hawaii, include provisions for removing the seat of government under such conditions.<sup>4</sup> Three states permit the capital to be relocated "as provided by law".<sup>5</sup> The remaining states require submission of the removal question at a general election for ratification. For example, the Pennsylvania Constitution provides:<sup>6</sup>

No law changing the permanent location of the Capital of the State shall be valid until the same shall have been submitted to the qualified electors of the Commonwealth at a general election and ratified and approved by them.

During the 1950 Hawaii Constitutional Convention, a proposal was made to place the seat of state government "...at the city of Honolulu on the island of Oahu, unless otherwise provided by law".<sup>7</sup> However, the proposal was defeated because the delegates were of the opinion that the state capital should be moved only for emergency reasons and relocation of the capital site should not be left to legislative discretion. The 1968 Constitutional Convention did not discuss such a provision. Thus the capital is fixed at Honolulu. The only condition under which it can be moved is:<sup>8</sup>

## STATE CAPITAL SITE

In case the capital shall be unsafe, the governor may direct that any [legislative] session shall be held at some other place.

### Continuity of Government

In an emergency it is necessary that state and local governments continue to function. To insure this, the Council of State Governments has suggested a model constitutional amendment authorizing state legislatures to provide for the continuity of government. The amendment proposes 2 duties for the legislature:<sup>9</sup>

- (1) To provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices; and
- (2) To adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations.

Together with this amendment, legislation for executive, legislative, and judicial succession and legislation for emergency location for state and local governments is suggested.<sup>10</sup> In Hawaii, however, these concerns have been addressed by existing constitutional provisions or by statute. As such, it would appear that the necessity for including such a provision in the constitution is not great.

Under provisions of the Hawaii Constitution, for instance, the lieutenant governor becomes governor when that office is vacant.<sup>11</sup> In the event that the office of lieutenant governor becomes vacant, succession is assured by officers "as provided by law". By statute, the line of succession extends to 7 persons in the following order: president of the senate, speaker of the house of representatives, attorney general, director of finance, comptroller, director of taxation, and the director of personnel services.<sup>12</sup>

## STATE BOUNDARIES, CAPITAL, FLAG

Due to the rather compact area in which the major executive officers reside, a nuclear attack could conceivably annihilate all the statutory successors to the office of governor. In recognition of this dire possibility California has provided by statute that:<sup>13</sup>

...the Governor shall appoint and designate by filing with the Secretary of State the names of at least four and not more than seven citizens qualified to become candidates for the office to succeed, in the order specified, to the office of Governor in the event of disaster....

In making appointments the Governor shall give consideration to places of residence and employment of the appointees and shall appoint from different parts of the State so that there shall be the greatest probability of survival in a disaster.

Constitutional and statutory provisions enable the governor in Hawaii, to fill state legislative vacancies by appointment.<sup>14</sup> In addition, the governor has constitutional power to appoint officers of the judicial branch and thus the governor or the governor's successor would continue to exercise such powers in case of an emergency.<sup>15</sup>

Hawaii's county legislative bodies may by law insure continuity of government during an emergency:<sup>16</sup>

...the legislative body of a county may by ordinance, unless otherwise provided by law, provide the procedure for the appointment and designation of stand-by officers for the legislative body and the elected chief executive of the county....

Although the Hawaii Constitution provides only for the relocation of the legislature in the event that the capital is unsafe, procedures have been established, by statute, for the removal of both state and county capitals.<sup>17</sup>



## STATE CAPITAL SITE

By statute Hawaii has established a department of defense which is responsible for the defense of the State and its people from mass violence, originating from either human or natural causes.<sup>18</sup> The director of the department is charged with coordinating the activities of all organizations, public and private, for civil defense within the State. In addition, the director appoints a deputy director for each political subdivision who heads all local organizations for civil defense. Finally, the governor is empowered to prescribe rules and regulations for the purpose of carrying out the civil defense provisions.

## Chapter 3

### HERALDIC SYMBOL

The use of heraldic symbols dates from antiquity. At all times, and in all parts of the world, men have used symbols to express ideas and sentiments. The states commonly make use of 10 types of heraldic symbols. They are the flag, motto, seal, song, flower, nickname, tree, bird, marine mammal, colors, and birthstone. In the 1968 Hawaii Constitutional Convention, proposals were made, but not approved, to add the state song, flower, bird, and seal to the Constitution. Additions of these symbols were believed "not necessary to clutter our Constitution".<sup>1</sup>

#### State Flag

At least two states, Alaska and Hawaii, provide for a state flag in the constitution. The remaining states designate their flags through legislation.<sup>2</sup>

The precise origin of the Hawaiian flag is unknown; however, all accounts have the following points in common.<sup>3</sup> The Hawaiian flag dates from the reign of Kamehameha I. The 8 stripes represent the 8 major islands of the Hawaiian archipelago. The designer of the flag was an Englishman, which explains, in part, the incorporation of the British Union Jack in the flag.

During the 1950 Constitutional Convention, a proposal was introduced to place the Union Jack in the upper corner of the flag with the state seal. Other suggestions called for an entirely new flag. However, a majority of the delegates favored retention of the territorial flag as the state flag because:<sup>4</sup>

## HERALDIC SYMBOL

Like most state flags, the design of the flag of Hawaii has remained unchanged over the decades. It has carried forth its historical significance, traditions and sentimental value.

Therefore, Article XIII, section 3, states:

The Hawaiian flag shall be the flag of the State.

### State Seal

All states have state seals.<sup>5</sup> The constitution generally designates the governor or the secretary of state as custodian of the seal. The language of the provisions on state seals is to the effect that:

There shall be a seal of State which shall be called the "Great Seal of the State of \_\_\_\_\_"; and shall be kept by the Governor and used by him as directed by law.

During the 1950 Hawaii Constitutional Convention, a motion to include the state seal in the Constitution was defeated. It was argued that if the seal were to be included, a description would have to be spelled out and this would unnecessarily clutter the constitution with detail. Consequently, the convention passed a resolution urging the first state legislature to provide a Great Seal for the State of Hawaii.<sup>6</sup> In 1959, the statute pertaining to the territorial seal was amended to reflect Hawaii's status as a state.<sup>7</sup>

### State Motto

According to one authority, "a motto is a word, a phrase, or a sentence, often chosen for its euphony or meaning, representing the expression of a moral or religious feeling, a war cry or heroic exclamation, a declaration of allegiance and faith, or a boast referring to

## STATE BOUNDARIES, CAPITAL, FLAG

some special occasion."<sup>8</sup> All states have state mottoes. Hawaii's motto is recognized in its statutes.<sup>9</sup>

Hawaii's motto grew out of the troubled circumstances of Kamehameha III's reign (1825-1854). In February 1843 the acting British consul, Alexander Simpson, under pretext of protecting British interests and with the help of the guns of the British frigate, Carysfort, forced King Kamehameha III to issue a provisional cession of the Islands to the British. The Hawaiian flag was lowered on February 25, 1843 to be replaced by the British flag. On July 26, 1843 the British Admiral, Richard Thomas, negated the act of cession and Hawaiian independence was restored. On July 31, 1843 the Hawaiian flag was again raised over the islands in recognition of Kamehameha III as an independent sovereign. On that day, according to one authority:<sup>10</sup>

...at a thanksgiving service at the Stone Church [Kawaiahao], the king stated that, as he had hoped, the life of the land had been restored. He is said to have then used the words which have become the motto of Hawaii: "Ua mau ke ea o ka aina i ka pono [The life of the land is preserved in righteousness]".

### State Song

Forty-six states, including Hawaii, have adopted a state song.<sup>11</sup> State songs are selected for their ability to evoke emotions and sentiments inspiring patriotism or remembrance of historically significant occasions. The fourth state legislature adopted Hawaii Pono as the official song of the State.<sup>12</sup>

### State Flower

All states have adopted a state flower.<sup>13</sup> Certain flowers are chosen for their commonly understood symbolic message such as the rose for

## HERALDIC SYMBOL

beauty and love or the white lily for purity. Other states have chosen flowers for their prevalence within the state's boundaries. Historical reasons have motivated some states; for example, Utah chose the sego lily because its root served as a source of nourishment during a period of food scarcity. Finally, a few states relate the flower to a major industry, such as the peach blossom of Delaware.

The 1950 Constitutional Convention considered the designation of a state flower but ultimately left the matter to legislative determination.<sup>14</sup> In 1923 the territorial legislature adopted the Pua Aloalo (Hibiscus) as the flower emblem of the Territory. The Hibiscus was chosen because it is indigenous to Hawaii, beautiful and representative of all the islands.<sup>15</sup> No other flower was thought to have so great a variety in form and color and so long a blooming period.

### State Nickname

All states with the exception of Alaska have chosen official nicknames.<sup>16</sup> State nicknames are selected for a variety of reasons. Some are based on historical events. For example, Alabama is known as the Yellowhammer State because the uniforms of the Alabama soldiers during the Civil War had a yellowish tinge. Other nicknames are chosen in recognition of a state's natural resources. Thus, Nevada is known as the Silver State and Kentucky is called the Blue Grass State. The 30th territorial legislature designated "The Aloha State" as the official nickname for Hawaii.<sup>17</sup>

### State Tree

All states have officially adopted state trees.<sup>18</sup> In 1959 the 30th territorial legislature designated the kukui tree, also known as the candlenut tree (Aleurites Molercana) as the official tree of the State.<sup>19</sup>

## STATE BOUNDARIES, CAPITAL, FLAG

The kukui tree was chosen because it is native to all the islands and for its distinctive beauty. In addition, the kukui tree served many needs of the ancient Hawaiians and is of continuing value to modern Hawaii.

### State Bird

All of the states have officially selected state birds.<sup>20</sup> Official designation accords recognition to the bird selected, increases the understanding of bird life and promotes feelings of pride and loyalty on the part of the inhabitants.<sup>21</sup> In 1957, the 29th territorial legislature named the Nene (Nesochen sandwicensis or Bernicata sandwicensis) as the bird emblematic of the Territory.<sup>22</sup> The Nene was chosen because it is neat, beautiful, indigenous to Hawaii and one of the rarest species of birds in the world.

### State Marine Mammal

Hawaii, in 1976, officially selected the humpback whale as its marine mammal.<sup>23</sup> The legislature in so designating the humpback whale, noted that the humpback whale is of historical significance, dating back to King Kamehameha; of scientific interest, since it migrates to Hawaiian waters annually to mate and calve; and of conservational concern, as it is an endangered species rapidly nearing extinction because of destruction by whaling industries of other countries. At least 3 other states have similarly adopted marine mammals. These include Connecticut (blue whale), California (gray whale), and Florida (manatee).

### State Color and Birthstone

During the 1950 Constitutional Convention it was suggested that the state colors be orange (from the ilima and suggestive of the soil) and deep

## HERALDIC SYMBOL

blue (for the sky and ocean); the olivene was recommended for the official birthstone because it dates back to the birth of Hawaii when it crystallized out from the hot lava.<sup>24</sup> However, no constitutional action was taken and since that time the legislature has failed to designate either official colors or a state birthstone.

## FOOTNOTES

### Chapter 1

1. *Hawaii Const.* art. XIII, sec. 1.
2. *Organic Act* of April 30, 1900, sec. 2; 31 Stat. 141.
3. Letter of Assistant U.S. Attorney General J. Lee Rankin in U.S., Congress, House, Committee on Interior and Insular Affairs, *Enabling the People of Hawaii and Alaska Each to Form a Constitution and State Government and to Be Admitted into the Union on An Equal Footing with the Original States*, 84th Cong., 1st Sess., 1955, H. Rept. 88 to accompany H.R. 2535, p. 65.
4. U.S., Congress, 55th Cong., 3rd Sess., 1898, S.Doc. 16.
5. Aaron L. Shalowitz, *Shore and Sea Boundaries*, Vol. II, U.S. Coast and Geodetic Survey Publication 10-1 (Washington: U.S. Government Printing Office, 1964), pp. 436-437. Cf. "Memorandum Re the Islands Now Included in the Territory of Hawaii," by Rhoda V. Lewis (Office of the Attorney General, Territory of Hawaii, March 16, 1953).
6. See footnote 3, *supra*.
7. The *Admission Act* of March 18, 1959, sec. 5(i), 73 Stat. 4.
8. See U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Statehood for Hawaii*, 86th Cong., 1st Sess., 1959, S. Rept. 80 to accompany S. 50, p. 4, which states: "This is because of the geographical structure of the Territory, and land areas being separated by substantial expanses of ocean which are not included in the territorial limits of Hawaii."
9. 43 U.S.C.A., sec. 1.312 (1964).
10. 235 F. Supp. 990 (D. Hawaii, 1964).
11. *Ibid.*, at p. 1007.
12. *Island Airlines v. CAB*, 352 F.2d 735 (9th Cir., 1965).
13. Shalowitz, p. 440.
14. Hawaii, Department of Planning and Economic Development, *Hawaii and the Sea - 1974* (Honolulu: 1974), p. 3-2.
15. Hawaii, University of Hawaii, Sea Grant College Program, *Hawaiian Archipelago: Defining the Boundaries of the State* (Honolulu: 1975), p. 1.
16. *U.S. v. Maine*, 420 U.S. 515, 528 (1975).
17. 16 U.S.C.A., sec. 1801 (Supp. 1977).
18. *U.S. v. Louisiana*, 363 U.S. 1, 35 (1960).
19. *U.S. v. Maine*, 420 U.S. 515, 524 (1975).
20. Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution*, Vol. I (Detroit: 1961), pp. i-3.

### Chapter 2

1. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 147.
2. *Ibid.*, p. 149. See also Standing Committee Report No. 53, p. 206.
3. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 53, pp. 206-207.
4. The seven states are: Alabama, Colorado, Idaho, Minnesota, Nebraska, Pennsylvania, and Washington.
5. The three states are: Ohio, West Virginia, and Wisconsin.
6. *Pennsylvania Const.* art. 3, sec. 28.
7. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 207.
8. *Hawaii Const.* art III, sec. 11.
9. *Suggested State Legislation, 1959* (Chicago: Council of State Governments, 1958), p. 52.
10. *Ibid.*, pp. 29-49.
11. *Hawaii Const.* art. IV, sec. 4.
12. *Hawaii Rev. Stat.*, sec. 26-2.
13. *Calif. Govt. Code*, sec. 12061.
14. *Hawaii Const.* art. III, sec. 6; *Hawaii Rev. Stat.*, secs. 17-3, 4.
15. *Hawaii Const.* art. V, sec. 3.
16. *Hawaii Rev. Stat.*, sec. 128-13(9).
17. *Hawaii Rev. Stat.*, ch. 130.
18. *Hawaii Rev. Stat.*, sec. 26-21, ch. 128.

### Chapter 3

1. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 499.
2. George Earle Shankle, *State Names, Flags, Seals, Songs, Birds, Flowers, and Other Symbols* (Rev. ed.; New York: H.W. Wilson, 1941), pp. 264-296.
3. "Origin and Meaning of Hawaiian Flag" (Legislative Reference Bureau, University of Hawaii, Request No. 1294, 1950), p. 2. (Typewritten).
4. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 54, p. 207.
5. *Book of the States, 1976-77* (Lexington, Ky.: Council of State Governments, 1976), pp. 604-653.
6. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 150.
7. *Hawaii Rev. Stat.*, sec. 5-5.



8. Shankle, p. 156.
9. *Hawaii Rev. Stat.*, sec. 5-9.
10. Ralph S. Kuykendall and A. Grove Day, *Hawaii: A History from Polynesian Kingdom to American State* (Rev. ed.; Englewood Cliffs, N.J.: Prentice-Hall, 1961), p. 68.
11. *Book of the States, 1976-77*, pp. 604-653.
12. *Hawaii Rev. Stat.*, sec. 5-10.
13. *Book of the States 1976-77*, pp. 604-653.
14. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, pp. 702-704.
15. 1923 Haw. Sess. Laws, J.R. 1.
16. *Book of the States, 1976-77*, pp. 604-653.
17. *Hawaii Rev. Stat.*, sec. 5-7.
18. *Book of the States, 1976-77*, pp. 604-653.
19. *Hawaii Rev. Stat.*, sec. 5-8.
20. *Book of the States, 1976-77*, pp. 604-653.
21. Shankle, p. 358.
22. H.C.R. 52, 29th Territorial Legislature, *Journal of the House of Representatives*, p. 1033 (1957).
23. H.C.R. 37, Eighth Legislature, 1976, State of Hawaii.
24. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 150.

## Appendix

### APPLICATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION TO INTERISLAND TRANSACTIONS IN HAWAII

Memorandum prepared by the Department of the Interior,  
March 27, 1953

This memorandum is directed to exploring certain aspects of the legal situation that would result if Hawaii were to be admitted as a State with boundaries that did not include the waters separating the various islands. It seeks to determine the extent to which the State could, consistently with the Federal Constitution, regulate and tax interisland commerce in the event the channels between the islands were to be considered outside the State.

It is clear that transportation necessitating passage through waters not under the jurisdiction of a State, even though both termini of the voyage lie within the borders of that State, is not intrastate commerce; where the waters traversed are a part of the high seas such transportation is foreign commerce for the purposes of the commerce clause of the Constitution. In *Lord v. Steamship Co.*, (102 U.S. 541, 26 L.Ed. 224 (1880)), it was held that a ship transporting goods from San Francisco to San Diego was engaged in foreign commerce, even though both termini were in the State of California, since the ship of necessity passed outside the 3-mile limit of California's jurisdiction. This interpretation of the meaning of "Commerce with foreign Nations, and among the several States" has been repeatedly reaffirmed, as, for example, in *Hanley v. Kansas City Southern Ry. Co.* (187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333 (1903)).

From these decisions it follows that the Congress would have full authority to regulate interisland traffic in Hawaii in the circumstances here assumed. However, it does not follow that the State would be deprived of the authority to regulate such traffic should the Congress choose to refrain from exercising its own superior authority. The principle is well established in our constitutional law that, in the silence of Congress, the States may regulate those aspects of interstate or foreign commerce that are chiefly of local significance, provided the regulation does not discriminate against such commerce in favor of intrastate commerce. Thus, in *Wilmington Transportation Co. v. California R. R. Co.* (236 U.S. 151, 35 S.Ct. 276, 59 L.Ed. 508 (1915)), it was held that sea transportation between the mainland of California and Santa Catalina Island (also in that State) was a matter over which the State could take jurisdiction, notwithstanding that such transportation necessitated passage over waters outside California's boundaries, but it was also clearly implied that the Congress had the right to impose its superior authority if it should desire to do so. Mr. Justice Hughes, in rendering the opinion of the Court in that case, pointed out that there was a well-established distinction between those matters of interstate or foreign commerce where, if any legislation should be enacted at all, it ought to be of a national or general character, and those other matters of interstate or foreign commerce which are distinctly local in character and in which it would be proper for States to act in a reasonable manner to meet the needs of suitable local protection in the absence of Federal action. In line with earlier decisions involving ferries operating across interstate or foreign boundary waters, traffic by vessels operating solely between Santa Catalina Island and the mainland was held to fall within the latter of these two categories.

The circumstances of interisland transportation in Hawaii seem sufficiently akin to those considered in the *Wilmington* case to bring such transportation within the principle of that case. If so, the State could regulate the interisland transportation, provided it did so in a nondiscriminatory manner, and provided no inconsistent action had been taken by the Congress.

With respect to the validity of State taxation of interisland commerce, somewhat different concepts are applicable. While the States may tax the property used in carrying on interstate and foreign commerce or the net profits derived from such commerce, they may not tax the commerce itself. Thus, a State may not impose a gross-receipts tax on revenues derived from the sale of interstate or foreign transportation services unless the tax is properly apportioned. In the application of these principles ferries across boundary waters are treated the same as other carriers (*Glouster Ferry Co. v. Pennsylvania*, 114 U.S. 196, 5 S.Ct. 826, 29 L.Ed. 158, (1885)).

Situations where the transportation begins and ends within the same State have the subject of a number of decisions. In *Lehigh Valley R. R. Co. v. Pennsylvania* (145 U.S. 192, 12 S.Ct. 806, (1892)), it was held that, though the commerce in question (transportation between two points in Pennsylvania through New Jersey) was interstate, it could be taxed by the State within which both ends of the journey were located. This view was more precisely stated in *Central Greyhound Lines Inc. v. Mealey* (334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948)), in which it was held that the State within which both termini of a bus journey were located could levy a tax on that part of the gross receipts from the transportation services which was proportionate to the part of the journey performed within the State, but not on the total gross receipts. A tax levied upon the total gross receipts, it was held, would unduly burden interstate commerce.

The cases cited in the foregoing paragraph indicate that Hawaii could impose a tax upon the gross receipts from interisland transportation services if the tax was an "apportioned" one, that is, measured by the portion of the receipts attributable to the portion of the services performed within the State. It is possible, however, that Hawaii might be able to tax the total gross receipts, without apportionment, for reasons indicated below.

In *Cornell Steamboat Company v. Sohmer* (235 U.S. 549, 35 S.Ct. 162, 59 L.Ed. 355, (1914)), a tax imposed by the State of New York upon the total gross receipts from water transportation between two points in that State was sustained, notwithstanding that the territorial waters of New Jersey were traversed in the course of the voyage. The court stated that "transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey, the course is over the territory of another State." This language was sharply criticized in the *Central Greyhound* case. The Court there said (pp. 661 and 662) that the tax could have been sustained on the ground that it was not a burden, in the constitutional sense, on interstate commerce, and should not have been sustained on the ground, which the court regarded as fictional, that interstate commerce was not involved. The court further stated (p. 662) that New Jersey's relation to the water transportation involved in the *Cornell* case was "very different" from the relation of that State to the highway transportation involved in the *Central Greyhound* case. As so distinguished, the *Cornell* case would appear to support the proposition that a State can tax the total gross receipts from transportation that begins and ends within the State, but goes outside of it in the course of the journey, provided the circumstances of the out-of-State part of the journey are such that interstate commerce will not be burdened if the receipts from that part of the journey are included in the measure of the tax.

In the application of this proposition, a factor of key importance would seem to be whether the out-of-State part of the journey could be taxed by another State or foreign country, thus leaving the door open to dual taxation if apportionment is not required. In the *Central Greyhound* case, the right of the States through which the bus traveled to tax the part of the journey performed on their highways was conceded, and clearly influenced the conclusion of the court that the gross receipts tax imposed by New York must be similarly apportioned. In the *Cornell* case, on the other hand, it is doubtful whether New Jersey could have taxed any part of the gross receipts, as the transportation within that State was confined to passage through the navigable waters along its boundary, and did not involve the use of any facility provided by the State. Since interisland transportation in Hawaii presents no possibility of dual taxation, it could be argued with considerable force of reason that such transportation would come within the principle of the *Cornell* case, even as distinguished in the *Central Greyhound* case.

Another line of decisions governs the extent to which the State could apply its sales or use taxes to the value or sales price of goods sold by a vendor on one island for delivery to a purchaser on another island. It is well settled that goods are not exempted from State taxation merely because they have been brought into the State through the channels of interstate or foreign commerce. Where the goods originated in a foreign country, they cannot be taxed while they remain in the hands of the importer and in their original packages. Where the goods originated in another State, they cannot be taxed until the interstate transportation has ended and they have become a part of the common mass of property within the State. Once these requirements have been fulfilled, a State sales or use tax may be imposed on subsequent transfers of the goods between parties within the taxing State, so long as the tax does not discriminate against the goods because of their out-of-State origin. *Henneford v. Silas Mason Co.* (300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, (1936)).

In *McGoldrick v. Berwind-White Co.* (309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 421, (1940)), the Court was called upon to decide the question whether New York City could impose its retail sales tax upon certain sales of coal made by a vendor in that city to a purchaser in that city. The coal in question was sold under contracts made in New York City that provided for delivery of the coal at the purchaser's facilities in the city. After the contracts were made the vendor caused the coal to be moved from its mines in Pennsylvania, through New Jersey, to the purchaser's facilities in New York City. The Court upheld the application of the tax to these sales, saying, in the words of Mr. Justice Stone:

"Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the State boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing State. Only the sales in the State of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding State taxation of merchandise transported to the State in advance of the purchase order or contract of sale.

"But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the State line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the State to the New York market, whether they are brought into competition with like goods produced within the State or not. We are unable to say that the present tax, laid generally upon all sales to consumers within

the State, subjects the commerce involved where the goods sold are brought from other States, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing State taxing power seems as salutary in the one case as in the other."

The logic of this decision would appear to impel a conclusion that interisland sales of goods in Hawaii would be subject to the taxing jurisdiction of that State, even though the goods had to move across waters outside the State in the course of their delivery from the vendor to the purchaser, provided the jurisdiction was exercised in a manner that did not discriminate against the interisland sales.

Source: U.S., Congress, S. Rept. 80, 86th Congress, First Session, 73 et seq. (1959).

## PART TWO

### **Article XIV: General and Miscellaneous Provisions**



## Chapter 1

### INTRODUCTION

Of the 50 states, 37 have a general or miscellaneous article as part of their constitution.<sup>1</sup> The diversity of subject areas covered in such an article is extensive. It is without a doubt, the rug of the constitution under which all the disparate and distinctive provisions are swept. Such an article contains all of those diverse and unrelated subjects whose arrangement in a single catch-all article is preferable to inclusion in the constitution of a number of separate articles consisting of only one or 2 relatively short sections.<sup>2</sup> The numerous miscellanies included in this type of constitutional article generally relate to specific issues of the time, some of which are now seen as quaint and out of place. By illustration, some of the subjects covered in the general or miscellaneous articles among the several state constitutions are: capital punishments by lethal gas (Arizona); inspector of hides and skins (Texas); interest rates (Tennessee); crop damage (South Dakota); exchange of black lists among corporations (North Dakota); miscegenation (Mississippi); convict labor (Kentucky); drunkenness (Nebraska); and, use of sacramental wines (New Mexico).

It is clear that a general-miscellaneous article, perhaps more than any other, reflects the individual history and uniqueness of each state in the union. Despite such wide ranging diversity, some shared subject categories do exist, although only to a minimal degree. These relate to: state seal, symbol, flag, boundaries, capitol; public offices and employment; retirement and pensions; oaths; public institutions; gambling; and transitional provisions.

Hawaii's Article XIV covers the following broad areas: civil service; retirement system; oaths and loyalty; code of ethics; intergovernmental cooperation; federal requirements; construction; and, general powers of the state. Except for section 5, code of ethics, added

## GENERAL AND MISCELLANEOUS PROVISIONS

in 1968, all of these subjects were drafted by various standing committees of the 1950 Constitutional Convention. The section on loyalty was the only one amended during the 1968 Constitutional Convention.

The option is available of placing the sections included in this Article XIV into separate articles. It is conceivable that sections 1 through 5 could come under a single article of "Public Officers and Employees". Sections 7-12, treated together in this study, could constitute another article, leaving only 4 sections to be dealt with separately.



## Chapter 2 CIVIL SERVICE

### PART I. INTRODUCTION

Section 1 of Article XIV reads:

The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle.

While only 12 other states include a provision for a civil service system governed by merit in their constitutions,<sup>1</sup> in practice, personnel policy in nearly all governments in the United States are guided by merit principles to some extent.<sup>2</sup>

Often, the terms "civil service" and "merit" are confused and used interchangeably. Civil service merely indicates the organization of public service distinguishable from military service. A civil service can be staffed either under a patronage or a merit system.<sup>3</sup>

In general, the merit principle refers to the use of objective, equitable, and consistent procedures or standards for job requirements, job performance, and the determination of individual competence. Such desired ends are generally achieved by a body of standardized rules and regulations which govern the recruitment, selection, promotion, and pay scale of employees. Typically, such rules and procedures consist of a clearly established hierarchical ordering of job categories, each in some relation to the other within the total organizational structure. Position classification is one method through which such hierarchical ordering is achieved.<sup>4</sup>

## GENERAL AND MISCELLANEOUS PROVISIONS

When positions are classified, they are placed in different categories or classes, each class having a distinctive title. The same training and experience requirements are applied to candidates for any one position in the class. Also, there is a single salary scale which applies to everyone appointed to the class.<sup>5</sup> Position classification is essentially job-oriented and focuses attention on the organization and its immediate functions. The core of this method is the "position", as an abstract entity apart from the employee. The position is viewed as a group of duties and responsibilities requiring the services of one employee. An individual employee is considered to fill a "position" and the employee achieves promotion by progressing from one "position" to a higher level "position" within the organization's structure.<sup>6</sup> Position classification bases pay on duties an individual is currently performing without regard to what the individual might be capable of doing.<sup>7</sup>

The position classification method is used extensively in the United States in the federal civil service and by many state and local public jurisdictions.<sup>8</sup> Because of the general correlation between a civil service system and the use of position classification, the need for and purposes served by such a classification should be mentioned. Felix Nigro states that:<sup>9</sup>

...pure anarchy prevails when no attempt is made to group positions together, for in such a case each individual job must be treated separately. If a vacancy develops, the appointing officer will fix the qualifications for filling the job, following his own ideas on the matter, even though they may be very different from those of another supervisor attempting to recruit for exactly the same kind of opening. In fact, both men may have only a hazy idea of what the job requires, since no detailed study has ever been made of the duties.

Similarly, defining lines of promotion is next to impossible because no one is sure what the exact relation of one job is to another. In other words, there are no clear promotional ladders. Titles are all too numerous since the same kind of position may be described by countless designations, depending even on the whim of the employee. Even more damaging, salaries will be grossly unjust because no plan

## CIVIL SERVICE

exists for covering under the same salary range all persons performing the same work or possessing equal qualifications. In such a confused situation, effective personnel administration is impossible.

Implicit in Nigro's justification for a classification plan is the idea of using equitable, objective, and consistent procedures and standards for job requirements as well as for determining individual competence. This, in effect, is the merit principle. It would appear then, because of the inextricable relationship between a government personnel system, the concomitant classification plan required in a personnel system, and the implicit use of objective standards by such a plan--the present overlap and confusion in the use of the 2 terms "civil service" and "merit" exists.

### PART II. CIVIL SERVICE PERSONNEL COVERAGE

While the Constitution mandates that the employment of persons in the civil service is to be guided by the merit principle, it is important to understand what constitutes the civil service, i.e., which employees are considered to be civil service employees.

Standing Committee Report No. 57 of the 1950 Hawaii Constitutional Convention defines the "state civil service" as "all state employees other than school teachers, members of the faculty of the University of Hawaii, elective officials, cabinet members of the governor, and those expressly excluded or who may subsequently be excluded therefrom by the legislature".<sup>10</sup>

Political appointees and publicly elected officials are usually exempted from a state civil service system. Publicly elected officials are considered policy makers and in order to effectively implement their programs and policies it is necessary to maintain maximum flexibility in the selection of certain staff members. In this sense, the spoils system or patronage has decided advantages. For example, the governor is ideally

## GENERAL AND MISCELLANEOUS PROVISIONS

elected on the basis of proposed programs and the political platforms of his party. Once elected, the governor must be allowed the discretion to fill key posts with the kind of personnel the governor feels will aid in putting his proposed programs into effect, i.e., the governor should be allowed to use "subjective" standards. These positions are generally the governor's cabinet posts--department heads, department deputies, and members of boards and commissions. However, one of the problems in this kind of patronage seems to be in deciding how far down the organizational structure of a department should such appointive positions go--or conversely, how far up the hierarchical structure of a department should civil service positions extend? Obviously, the problem is to determine by what criteria government jobs can be so separated. In addition to the possibility of categorizing policy making vs. nonpolicy making jobs, James C. Worthy has suggested several other means of identification such as: jobs whose nature are such that they can be filled without material loss of efficiency and even gain in efficiency by the selection of applicants referred by the party in office; jobs whose effective performance would not be impaired by fairly frequent turnover; jobs which are in the field and close to the grass roots since these have the most political value; and jobs which lend themselves to efficient recruitment through the channels of party organization.<sup>11</sup>

Although many authorities subscribe to the distinction of policy-making positions as being exempt from civil service, it is also pointed out that there is a danger in overexpansion of this top tier of positions. It is maintained that it is desirable to have a public personnel system which is a source of pride to all its citizens, and in order to accomplish this, one of the means is to embody a "career" system of some kind in order to recruit able and competent people into the civil service. A number of top rung positions should be made available to qualified career employees. Unless such positions are open on a competitive basis to those already in the service, it means that the top rungs of the promotional ladder are cut off, and such a situation is hardly conducive to recruiting able people into the service of government or to developing a good career service. It

## CIVIL SERVICE

is contended on this basis, that such positions filled by deputies, division heads, or unit heads should be properly included in the classified service. The incumbents of such positions in any large department play an important part in determining its tone, its pace, and its progress.<sup>12</sup> An equitable balance between politically governed appointments and appointments governed by fixed standards and regulations which will satisfy all interests concerned, if such is at all possible, will vary according to time and place.

### Single or Multiple Systems

In the State of Hawaii, there are at least 4 public personnel systems for 4 different groups of employees at the state level. In addition, to the personnel system of the executive branch, the department of education maintains its own personnel program, the University of Hawaii, under the board of regents, also maintains a separate personnel program, and recently, the state legislature established a separate and independent personnel system for the judiciary.<sup>13</sup>

The judiciary personnel system continues to be governed by the merit principle as it remains under chapter 76, the civil service law, of the Hawaii Revised Statutes. Basically, the creation of an independent personnel system for the judiciary branch of government is to reflect the constitutional intent of separate and co-equal branches of government. Although some separation of powers over the personnel function was granted through Act 159 of the 1974 Regular Session of the legislature, the final separation was completed in 1977. While the personnel systems of both the executive and judicial branches are governed by the same laws, each system may create its own rules, classification plans, examination processes, etc.

Although state civil service personnel are located at both the university and the department of education, these individuals constitute

## GENERAL AND MISCELLANEOUS PROVISIONS

the so-called nonprofessional or noncertificated body of employees. The Hawaii statutes on civil service and exemptions read:<sup>14</sup>

The civil service to which this part applies comprises all positions in the state service now existing or hereafter *established and embraces* all personnel services performed for the State, except the following:

\* \* \*

- (11) Teachers, principals, vice principals, district superintendents, chief deputy superintendents, other certificated personnel, and not more than twenty non-certificated administrative, professional and technical personnel not engaged in instructional work in the department of education, and members of the faculty of the University of Hawaii including research workers, extension agents, personnel engaged in instructional work and administrative, professional, and technical personnel of the university.

Certification and education rather than merit examinations per se, are the basis for determination of movement into or within the personnel systems of the department of education and the University of Hawaii. Paul Van Riper warns, however, that in judging qualifications on education or certification alone, "we are slighting our traditional examination task, assuming that universities are doing it for us, with the result that...public agencies [do] not know what they are getting...."<sup>15</sup> At a time when Hawaii is experiencing a surplus of certificated persons seeking employment, one may conceive of discrimination in recruitment, be it political, religious, racial, or otherwise. Personal preferences and prejudices can play a major role in such a situation. Also, in basing movement within the system and salaries on education, it may be argued again that discrimination exists in that those who are able to afford more education will be the recipients of higher pay and will have better chances for promotion.

## CIVIL SERVICE

Questions are raised as to whether merit examinations are necessary, desirable, or viable with regard to this category of certificated personnel. For example, are these occupations better served by nonobjective criteria in selection, recruitment, and promotion of personnel within the system? It then becomes a matter of public policy whether a significant portion of public employees should be guided by a different set of rules, not necessarily consonant with the merit principle.

### **State and/or Local Coverage**

Although the Hawaii state legislature prescribes the civil service law for all civil service employees, each of the 4 counties by state statute maintains separate civil service commissions which promulgate rules and regulations for government employees within its own jurisdiction. Of further interest is the fact that in Hawaii, county employees also fall under the rules, regulations, and pay scale of the state civil service laws. Although each county maintains its own civil service commission, has a personnel director, and can enact various ordinances relating to county employment, all of these must be in conformity with the state civil service laws, and the regulations of the state civil service commission. Also under the statewide centralized system of public education all educational employees in the various counties come under the jurisdiction of the state rather than the counties. The justification for this state priority in a county jurisdiction has been to provide equitable public employment conditions throughout the state. The basic argument against it has been that it restricts counties in accommodating their own peculiar employment conditions and prevents them from either moving in their own developmental directions, or even ahead of the state, in the area of public employment. For a further discussion of this problem, see the section on equal pay for equal work later in this chapter.

## Governing the Civil Service System

Traditionally, the governance of a civil service system is lodged with a group of individuals, i.e., a board or commission. Of the state constitutions which contain statements on civil service and/or merit systems, 4 of them also constitutionally establish a civil service board or commission.<sup>16</sup> In all cases, the members are appointed by the governor and the number of members range from 3 to 5. The most frequent duties enumerated are: the appointment of the executive officer or personnel director; the administering of the civil service system (determination of standards and competitive examinations); and formulation of rules and regulations.

In the State of Hawaii, a state civil service commission is established by law. The 7 members are appointed by the governor, one from each of the counties and 3 at large.<sup>17</sup>

Responsibility for governing the civil service system rests, however, with the director of the department of personnel services, who is appointed by the governor and who serves as a member of the governor's cabinet. The only duties of the civil service commission are to hear and decide appeals from any action of the personnel director covered under chapter 76, Hawaii Revised Statutes, as well as from dismissals, demotions, and suspensions.<sup>18</sup> As more employee grievances are handled through the collective bargaining process, and discrimination cases are handled in the courts, the need for a civil service commission may become obsolete.

## Development of the Merit System

The association between the merit principle and civil service may also be traced historically to the time when the patronage or the "spoils system" pervaded government employment. In the very early years of



## CIVIL SERVICE

our nation's history, the work of government was generally left to competent qualified clerks who, without any formal recognition of such, nonetheless enjoyed a considerable amount of tenure in their positions. Political patronage in government employment was practiced to a limited extent, but not at all in the proportion that it was practiced in the era following "Jacksonian democracy". Andrew Jackson has been blamed for inventing the spoils system when in actuality, Jackson merely espoused the democratic ideal of equality of opportunity in the public service. Failing to find many qualified persons from less advantaged backgrounds, Jackson retained most of the corps of public servants, although they were heavily representative of the elite classes of society. It wasn't until a decade after Jackson's term that the spoils system came into flower.<sup>19</sup> With it came irresponsibility and inefficiency, and consequently, the cry for reform.

The civil service reform movement, at first, was negative in character. Its primary aim was at "keeping out the rascals" rather than finding the most competent people available.<sup>20</sup> The effects of the early reform movement, which culminated in the Civil Service Act, or the Pendleton Act of 1883, were far greater and more revolutionary than the curbing of patronage alone. It had opened up the public service to all, with no restrictions because of social class, formal education, religion, or prior political affiliation.<sup>21</sup> It was a "positive recognition of our tenet of equality of opportunity in a democracy".<sup>22</sup>

Acceptance of merit systems in state and local governments failed to immediately follow on the heels of the federal reform legislation. Since 1940, however, all governmental jurisdictions receiving federal grants for welfare, employment security, public health, vocational rehabilitation, and civil defense have had to insure that at least these branches of their civil services operated under a merit system of employment. Several states subsequently established merit systems with comprehensive coverage.<sup>23</sup>

## GENERAL AND MISCELLANEOUS PROVISIONS

Significant changes in American society have since then shifted the focus and altered the nature of the issue of civil service reforms. Factors such as increased population, urbanization and its problems, increased affluence, various social concerns, and demands for various other new and improved services have contributed to the phenomenal growth of government to a point where 13 million persons are presently involved in civilian pursuits under the federal, state, and local governments.<sup>24</sup>

The size of government, along with the increasing technology and specialization in government activities, the shortage of manpower in some professional and technical fields, and the need for skilled career-oriented persons have lessened the arena for traditional patronage operations.<sup>25</sup>

### PART III. MERIT PRINCIPLE VS. OTHER PUBLIC POLICIES

The use of political patronage in a personnel system, while not completely eradicated, is now only one of the many factors threatening the possibility of a civil service system based solely on the use of objective criteria in employment. In many instances in which personnel practices conflict with merit principles, values need to be weighed and judgments made as to whether or not a strict interpretation of merit constitutes the best public policy. At the root of this is the question of the necessity, desirability, or both, of a constitutional statement regarding merit in civil service. The following is a discussion of public policies effective in Hawaii which appear to be in conflict with the merit principle.

#### Equal Employment Opportunity

A basic premise of the merit system is equal opportunity for all to compete for appointment to public employment on consideration of job-pertinent individual differences, and not on the basis of extraneous factors such as race, sex, religion, or national origin.

## CIVIL SERVICE

During the past 25 years, the nation has come a long way in eliminating discrimination in employment whether overt or institutionalized (as in culturally biased examinations). "Equal employment opportunities" has become a rallying slogan and affirmative action programs are advanced to assure effective implementation of the equal opportunity principle. While sound merit provisions themselves would constitute a basic affirmative action program, further action was, and still is, encouraged with respect to employment of underrepresented minority groups.<sup>26</sup> Affirmative action plans often include goals and timetables for the employment of minority group persons. These have been attacked as quota systems and in violation of merit principles.<sup>27</sup> The Wall Street Journal complained that "the old American Tradition of hiring the best man for the job is dying out, a victim of women's liberation, minority militancy, and government regulation".<sup>28</sup>

On the other hand, some argued that "because of the way history has stacked the cards against certain groups, the merit system, as an institution, can constitute an obstacle to attainment of proportional representation. History, in terms of past discrimination in employment, in opportunities for education, and in the attainment of job skills and experience, has resulted in a significant lag in proportions of qualified persons in various fields".<sup>29</sup>

While the "welfare concept" of public service--government as the employer of the last resort--is inconsistent with the value of administrative excellence, other values of our democratic society need to be given consideration also. It becomes a matter of public policy to determine to what extent merit principles will be compromised to attain other social objectives.<sup>30</sup>

It can be argued that providing public employment for the unemployed and underemployed, the disadvantaged, or both, is not necessarily a diminution of merit standards. Rather, it may be viewed as providing an opportunity for those disadvantaged with the most potential

## GENERAL AND MISCELLANEOUS PROVISIONS

for development, who, although untrained, nevertheless, have the ability to perform productive work and have the capacity to acquire through job experience and training, the knowledge and skills necessary for successful career advancements.<sup>31</sup>

It is generally agreed that when there is found a realistic and sound determination of what constitutes merit to perform a job and when evaluation procedures are free of cultural bias, outmoded standards, and ill-advised testing processes, then equal employment opportunity will be assured within the framework of merit principles.<sup>32</sup> O. Glenn Stahl contends that:<sup>33</sup>

...[a]ssuming a first-rate merit operation...there is no place in the public service for special preferences or use of public jobs to serve welfare purposes. The standard of merit, and merit alone, is the only one...that can assure a quality service and at the same time avoid ridiculous competition to exploit the public payroll and to curry favor with one problem group or another in order to serve interest other than getting the government's work done effectively.

### **Veterans Preference**

A group that is consistently given preference in public service employment, thus eroding, to various extents, merit standards, are veterans. Of the 13 state constitutions which provide for merit principles in the civil service systems, 4 (California, Colorado, Missouri, and New York) include provisions that veterans be given some preference in civil service employment.

At certain times, and for limited periods, the veterans preference may be justified without risking merit principles. In times of demobilization, veterans preference in employment is a means of readjustment aid to help veterans adjust to civilian life, and to bring the scales back into balance--as a significant segment of the employable

## CIVIL SERVICE

population lacked the equal opportunity to enter civilian government pursuits.<sup>34</sup> Outside of this concept, Van Riper claims, "veterans preference is indefensible from a managerial point of view unless it can be demonstrated that veterans are a notch above the population in general in most matters".<sup>35</sup>

Again, the final determination rests on government policy-makers as to whether or not, and to what extent, demands of good administration based on employment of the most fit and best qualified will be compromised for humanitarian and political considerations of those who risked life and limb for the country.<sup>36</sup>

Hawaii does give preference to veterans in hiring for public service jobs. Section 76-103, Hawaii Revised Statutes, states that the extent to which veterans or their spouse shall be given preference in public service employment shall be provided by rules and regulations. Veterans applying for civil service employment in Hawaii are given 5 additional points on their recruitment examination; 10 additional points if they are disabled (see State of Hawaii Personnel Rules and Regulations, sec. 2). In promotional examinations, however, veterans preference does not apply.

### **Residency Requirement**

The provision guaranteeing a merit system of civil service was accepted without challenge in both the 1950 and 1968 Hawaii Constitutional Conventions. What did spark lively debate during both conventions, but both times failed to be adopted, was the issue of a residency requirement for consideration for public employment. Regardless of the arguments for and against a residency requirement, it was felt by some to be a statutory and not a constitutional matter.

## GENERAL AND MISCELLANEOUS PROVISIONS

Today, the issue is still lively and heated. This time, however, the question of the constitutionality of such a requirement is being challenged. Whether one agrees that a residency requirement would serve to promote the public good or not, it cannot be denied that it is inconsistent with the merit principle as it restricts open competition. For further discussion of this residency requirement, see Hawaii Constitutional Convention Studies 1978, Article I: Bill of Rights.

### Collective Bargaining

The ability to organize and bargain collectively is a right guaranteed to public employees in Hawaii. While experts agree that collective bargaining need not be incompatible with merit principles, and as yet has not destroyed the merit system,<sup>37</sup> union influence may encroach upon such aspects of the merit system as filling of vacancies, promotion, and discipline.<sup>38</sup> In a recent study on the relationship between the merit principle and collective bargaining in Hawaii state and local governments, Siedman and Najita concluded that:<sup>39</sup>

[T]here is little reason to fear that the merit principle will be destroyed as a result of public sector unionism.... It seems clear that the union's effort is to advance the interests of its members, not to challenge merit as such, and certainly the interest of employees deserve to be protected; yet governmental efficiency, the provision of quality service without waste of tax resources, is a prime concern of the public, and this should be a major consideration for government bargainers.

For further discussion of collective bargaining, see Hawaii Constitutional Convention Studies 1978, Article XII: Organization, Collective Bargaining.

#### PART IV. MERIT PRINCIPLE VS. CIVIL SERVICE PROCEDURES

Some of the procedures, developed in conjunction with assuring a personnel system based on merit, have been abused to where the effect is contrary to what was intended. As Shafritz views it:<sup>40</sup>

Since individuals once showed themselves incapable of being responsible for equitable personnel operations, discretion over these matters were taken out of their hands and given to unemotional, unbending, and in some circumstances, irrational classification, examination, and certification procedures. Accountability was placed in procedures rather than in individuals....

And, "somewhere along the road to civil service reform, merit got lost".<sup>41</sup>

The question which must be considered is whether a civil service system governed by the merit principle is realistic and viable in consideration of some of the problems discussed below.

#### **Job Security: Tenure and Promotion**

Being able to consider a career in civil service is an integral part of a merit system. Protection from capricious, arbitrary, political, or discriminatory personnel action is basic to merit. In conjunction with their basic interest in job security, public employees naturally tend to favor tenure, promotion on the basis of seniority, and promotion from within.

One of the values of tenure is that "it provides the continuity of experienced staff and maintenance of staff contacts necessary for effective program administration".<sup>42</sup> "If recognition is not given to the faithful", it is argued, "the morale and effectiveness of an organization may be diminished".<sup>43</sup> On the other hand, there are arguments that

## GENERAL AND MISCELLANEOUS PROVISIONS

staying power is not a virtue in itself unless it has been accompanied by progress and growth. Twenty years of experience, after all, can mean 1 year of experience 20 times over.<sup>44</sup>

Tenure, as well as promotion based on seniority, although often having little relationship to performance, has nevertheless been given substantial weight under civil service. While employee interests are vital from the standpoint of merit and good administration, unless tied to performance, tenure and seniority privileges are intolerable. Unless longer service could be demonstrated to reflect greater ability--which it often does not<sup>45</sup>--or unless it is shown that an employer's responsibility toward a worker increases as the latter's length of service increases,<sup>46</sup> the merit principles would be violated.

In attempts to assure a viable career system in the public service, merit and sound administration may again be eroded. Selection for promotion from within the system, i.e., restriction of lateral entry from outside, may be defended as maintaining the morale of the employee group. "Opportunity for advancement and the chance to make the best possible use of one's capacities form one of the well-springs of human motivation."<sup>47</sup> However, this practice ignores a basic principle of merit--that of open competition. It also precludes the infusion of new blood at middle and upper levels<sup>48</sup> and could well result in an inbred and stagnant system, unresponsive to the body politic or the public will.

Nigro and Nigro make the statement that "[n]o career system exists if employees are not protected from unfair treatment for political or other reasons. At the same time, such a system does not exist when its entire rationale is to protect employees from the competition of others and from risk-taking in general."<sup>49</sup> The U.S. Advisory Committee on Merit System Standards agrees that "[t]here is no place under merit system principles for overprotective systems which prevent normal management control and needed discipline to assure satisfactory, competent work from all government employees."<sup>50</sup>



## Removal

Procedural safeguards initially aimed at limiting the discretionary powers of the executive in personnel action have since been recognized as being hindrances to effective management practices.<sup>51</sup> A major case in point is the removability of employees. A cornerstone of the early reform movement was protection from removal for political or other discriminatory reasons. Removal, under a merit system, can occur only for cause. The procedures for removal may become far too complicated, and overly protective of the employee so that the authority of managers is undermined.<sup>52</sup>

"Reflective of the American legal tradition", Shafritz states:<sup>53</sup>

...government employees tend to be presumed innocent of incompetence until they are proven otherwise. Because this burden of proof is entirely upon management, disciplinary actions are seldom entered into unless documented evidence is overwhelming....

As more matters relating to public employment came to be treated "as if they were matters of civil rights",<sup>54</sup> from the manager's standpoint, it was frequently easier to get an increased budget allocation for an additional employee than to seek to remove an incompetent one.<sup>55</sup> So, the question is raised whether "it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed".<sup>56</sup>

Although federal authorities have observed that the quality and efficiency of personnel systems vary widely, ranging from "practical validity to procedural paralysis",<sup>57</sup> and that appeals provisions are necessary for some reasonable assurance of impartial review of actions which may be discriminatory and arbitrary,<sup>58</sup> even the National Civil

## GENERAL AND MISCELLANEOUS PROVISIONS

Service League today considers the administrative machinery and much of the procedures to be obsolete. It believes that if we are to continue to charge the chief executive with the ultimate responsibility of administering that branch of government's jurisdiction, the chief executive, with administrators, must be given greater authority over the personnel function.<sup>59</sup>

The mere act of relinquishing greater control over personnel administration back to the administrators does not indicate that the latter will take greater control. An area where administrators have held considerable rein, the probationary period, has been characterized by inertia. Because supervisors fail to utilize this process effectively, some have supported the idea of a probationer being automatically removed unless the supervisory official supports a positive certification that the former's work has been satisfactory enough to warrant continuation.<sup>60</sup>

Neither have administrators and supervisors adequately exploited performance evaluations. Subjective as they may be, they are important tools in a host of personnel functions, not the least of which are recognition of good performance and guidance in correcting shortcomings.

### Recruiting

A rule under which most merit systems operate is that once examinations are graded and a list of eligibles are prepared, 3 to 5 names will be certified, any of which may be appointed. Of those certified, the appointing officer can take into consideration any of the personal factors deemed critical to job performance. While this practice is defended on the grounds that no examining process is so perfectly valid that it insures the ranking of applicants in exact order of overall merit, or that it even encompasses all the job-pertinent aspects of merit, it is criticized as injecting subjectivity into the recruiting process. Critics fear that at this point officials may exercise some of their pet notions or prejudices about

prospective workers and suggest that only one candidate per job vacancy (the "rule of one") be certified.<sup>61</sup>

Proponents of the "rule of one" oftentimes find supporters in those interested in reducing the time lag in the recruitment process--the time between taking of an examination and the tendering of a job offer. One study showed that in many cases the lower ranking candidates were more likely to be hired in public service, the main reason being that during the inherent delay, the ablest candidates were able to find other job opportunities and did so.<sup>62</sup> While not specifying the problem to be rooted in the "rule of three", nor advocating the "rule of one", the State of Hawaii Commission on the Organization of Government recommended that the delay in the recruitment process be cut considerably in the interest of efficiency.<sup>63</sup> Although the "rule of one" is not a guaranteed solution to this problem, the evidence that it could improve the system is submitted to be sufficient to warrant serious consideration of this alternative.

Administrators argue, however, that they should be given some latitude in making the final choice of recruited employees if they are to be held responsible and accountable for operations, and thereby they continue to reject the "rule of one" as proposed by some reformers.

### **Equal Pay for Equal Work**

Another criticism of merit system procedures has been aimed at systems of position classification. Among other complaints, it is claimed that it interferes with any variation in pay on the basis of individual performance.<sup>64</sup> While the complaint is valid, the values of position classification in relation to pay need to be explored. Stahl lists 2 of them:<sup>65</sup>

- (1) It assures the citizen and taxpayer that there is some logical relationship between expenditures for public services and the services rendered; and

## GENERAL AND MISCELLANEOUS PROVISIONS

- (2) It offers as good a protection as has been found against political or personal preferment in determination of public salaries.

The hopes of reforming the chaotic pay situation among federal employees in the early half of the nineteenth century produced the roots of the cry "equal work for equal pay".<sup>66</sup> As the merit system became established in all levels of government, position classification remained a necessary tool, and the concept of equal pay for equal work was a vital cornerstone.

It is necessary in attracting the most competent persons to careers in government for public service that public pay scales be competitive with those of private enterprises. While at one time it was considered normal for public servants to make financial sacrifices,<sup>67</sup> the concept of equal pay for equal work has been gaining in all levels of government in most localities throughout the nation. In 1962, Congress passed the Salary Reform Act which stated that "[f]ederal salary rates shall be comparable with private enterprise salary rates for the same levels of work."<sup>68</sup> In state and local governments, progress in bringing the salaries of public employees to levels comparable to private sector employees has been erratic and piecemeal. The larger governments, however, have often found it necessary to provide comparable wages in order to recruit and retain in public service those employees in occupations for which there are manpower shortages.<sup>69</sup> Generally, throughout the nation, government blue-collar workers have long received wages comparable to their counterparts in the private sector. Today, even among the lower ranks of white-collar workers, especially with the strength of collective bargaining in the public sector, government employees enjoy salaries competitive with private enterprises. In the higher professional and administrative ranks of public service, however, wages have been low in comparison with similar employment outside of government service. Reasons for this phenomenon may include the fact that lower echelon workers are more numerous, thereby able to exert more

## CIVIL SERVICE

pressure on decision-making bodies; or that legislators are more apt to grant increases to the underdog. The most compelling reason, however, appears to be the fact that professional and administrative pay are more closely tied to salaries of elected and appointed officials. Elected officials are wary of granting themselves, other elected officials, or cabinet level appointed officials large salaries, or any salary increase for that matter, for fear of voter retaliation.<sup>70</sup> With top executive salaries frozen at a lower-than-comparable level, wages of civil service employees directly below the top level fail to remain competitive also. In times of manpower shortages in these high level professional, technical, and executive ranks, noncompetitive compensation would probably result in marginally skilled employees in public service, a result which is counter to the purposes and goals of merit systems.

The concept of equal pay for equal work in civil service is applicable not only in relation to the private sector, but also within a civil service system itself. In Hawaii, as in most other governmental jurisdictions, more appropriate than the term "equal pay for equal work" is the concept of equal pay for equal job title or classification.<sup>71</sup> The concept of equal pay for equal work was written into state statute<sup>72</sup> out of concern for recruiting and retaining qualified public servants on the Neighbor Islands. It was feared that higher salaries in metropolitan areas (Honolulu) would entice all of the best talent, leaving only the marginally qualified to carry out public service functions in the rural areas.<sup>73</sup> While this rationale for equal pay for equal job title may be in keeping with principles of a good merit system and in providing equitable services to all areas of the state, it is not necessarily consonant with the concept of equal pay for equal work. Presumably, the workload and responsibility is greater in metropolitan areas, but if pay remains tied to job titles regardless of workload, then equal pay for equal work is not attained. A prime example is in the problem of determining equitable pay for police officers and fire fighters among the various counties. While the workload appears greater in the higher density areas (Oahu), state statute requires that for these occupations the same salary schedules govern

## GENERAL AND MISCELLANEOUS PROVISIONS

these employees regardless of county jurisdiction or location of employment.

On the one hand, equal pay for equal work protects the employee from inequitable and arbitrary decisions on compensation. On the other hand, it may hamper initiative and motivation to produce at one's highest potential, unless other incentive awards are sufficient.<sup>74</sup> Public employee systems, in concentrating on developing position classification and protection from nonobjective decisions, left some merit principles by the wayside, one of which is adequate reward for meritorious performance. In keeping pay tied to the position with little flexibility for considering the individual in the position, there is little incentive to perform at the highest potential, if that is perceived to be more than others in the same classification, i.e., salary, are performing.

Compounding the problem of inadequate incentive awards is the practice of salary progression on the basis of length of service. Aside from increased wages to keep up with inflationary costs, public employees often receive incremental pay raises just for remaining in the system for a certain length of time. It may be argued that the employer's responsibility toward the worker increases as the length of service of the worker also increases, in which case such increases in salary are justifiable under both merit principles and the concept of equal pay for equal work. Another argument is that the employee who knows more should get more, since workload will probably increase with increased knowledge and efficiency. An assumption in this case is that knowledge automatically increases with increased length of service. If the above assumptions and premises cannot be upheld, however, then the practice of granting increments based solely on length of service is antithetical to merit and equal pay for equal work.

Then again, no matter how faithfully a pay structure is kept up to date and responsive to the prevailing market rates on a general basis, there is bound to be some occupation at a given time for which the going

## CIVIL SERVICE

rates will be far above the overall market. Attempting to blend the pay of these hard-to-fill jobs into the standard salary schedules while other employers are offering much higher rates will not prove viable. Consequently, the only solution would be a deviation from equal pay for equal work principles.<sup>75</sup>

Where collective bargaining sets the salary scales, the problem of equal pay for equal work arises with regard to noncovered employees. In Hawaii, the problem is solved by "piggy-backing" the salaries of noncovered employees to those negotiated through the collective bargaining process.<sup>76</sup>

The problems involved in attempting to uphold the concept of equal pay for equal work--not the least of which is determining just what is "equal work"--provide arguments against inclusion of any constitutional provision on this matter. Others may argue, however, that despite these problems, such a basic principle warrants constitutional protection. It may be said that it is inherent in the merit principle, thus sufficiently covered under the present language. Or, it may need to be made explicitly clear that it is a basic principle guiding the civil service.

For further discussion on equal pay for equal work, see Hawaii Constitutional Convention Studies 1978, Article VII: Local Government.

## PART V. SUMMARY

The merit principle in civil service appears to be in conflict with several other public policies, such as veterans preference, affirmative action, and residency requirements. It also appears that some of the procedures developed in conjunction with assuring a personnel system based on merit have instead become self-defeating. The principle of equal pay for equal work also runs into conflict with some public policies, sometimes with the merit principle itself. Merely trying to define "equal work" constitutes a major problem.

## GENERAL AND MISCELLANEOUS PROVISIONS

While the principles of merit and equal pay for equal work are agreed upon as basic to our civil service system, due to the problems encountered in attempting to adhere to these principles, it might be better to remain silent on the issue of equal pay for equal work, and to delete the provision on merit from the constitution. As Shafritz brought out:<sup>77</sup>

Prohibition was repealed because it proved unenforceable. It does not seem unreasonable to suggest that many merit system provisions will eventually be repealed after it becomes commonly recognized that they, too are unenforceable.

The Model State Constitution, nonetheless, recommends inclusion of a merit provision in the constitution. It specifies that the language should be brief and general, not unlike Hawaii's present provision. Any "attempts to fix even the major details in the constitution are undesirable because they frequently result in rigidity and in undue restriction of the legislature".<sup>78</sup> Except for Alaska, Kansas, Nevada, and Ohio, the other states' constitutions which have merit provisions are all more detailed than what is recommended by the Model State Constitution, generally including provisions for the establishment of civil service commissions, and for veterans preference.



### Chapter 3

## PUBLIC EMPLOYEES RETIREMENT SYSTEM

Article XIV, section 2, provides that participation in a retirement system of the State or any of its political subdivisions constitutes a contractual agreement, the accrued benefits of which shall not be diminished or impaired.

This constitutional provision does not guarantee that there shall be a retirement system for public employees. However, in Hawaii, such a system has been in operation since 1926, its purpose being to increase the attractiveness of public service.<sup>1</sup>

Of 51 jurisdictions (each of the states and the District of Columbia), Hawaii ranks thirteenth highest in average monthly benefits to employee retirement system (ERS) pensioners.<sup>2</sup> Not only in the monetary amounts, but also in the general scope of benefits and coverage, Hawaii's system is generous in relation to the other 2,300 retirement systems in the United States.<sup>3</sup>

Unlike states such as Massachusetts which operate on a pay-as-you-go funding basis and whose systems are being threatened with sharp increases in costs which may have crippling effects on the general revenues of the state,<sup>4</sup> Hawaii's system accumulates and invests employer and employee contributions in pension trust funds which are currently judged to be sound.<sup>5</sup> Nevertheless, throughout the nation there are growing indications that pension fund assets may not be adequate in meeting future benefit claims. A number of jurisdictions have already experienced serious financial problems due to underfunding of pension systems.<sup>6</sup> There is nothing that exempts Hawaii from a similar fate unless careful and thoughtful planning and actions are carried out before the system and the fund reach bankrupt stages.

## GENERAL AND MISCELLANEOUS PROVISIONS

With regard to this constitutional provision, the question arises as to whether it is a boon or an obstacle in planning for an actuarially sound retirement system. The Model State Constitution is silent on this issue,<sup>7</sup> and besides Hawaii, only Alaska, Illinois, Michigan, and New York have pension benefit guarantees written into their constitutions.<sup>8</sup> The primary concerns which led to the inclusion of such provisions into the respective constitutions are that benefits might be cut, or the system might not be funded adequately due to fiscal pressures at any time.<sup>9</sup> However, counterarguments have also been raised that a constitutional provision on this matter would be too rigid. The Illinois Pension Laws Commission, in 1970, feared that such a provision would inhibit change, and would preclude corrections of errors or any adjustments that need to be made in rates of contribution, eligibility conditions, etc., in the interest of equity.<sup>10</sup> In framing Hawaii's Constitution during the 1950 Constitutional Convention, the committee on taxation and finance recommended against the inclusion of a provision of this nature. Standing Committee Report No. 44 stated:<sup>11</sup>

It is the opinion of your Committee that to include such a provision in the Constitution would be unwise and unsound, for it would be committing the State forevermore, practically speaking, to continue the present benefits, and it is conceivable that some adjustments may become necessary at some future time. Further, it appears to be unsound as class legislation. Government employees are protected by law and it is the belief of your Committee that no provision should be placed in the Constitution which would interfere with the free action of the legislature who can take necessary action as the times may warrant, after they have had an opportunity to complete a careful review and analysis of the system and of the then financial condition of the State.

Despite the recommendation of the committee on taxation and finance, the issue of a constitutional provision on the employees retirement system and its benefits was revived during the committee of the whole debates and subsequently adopted by the convention. It was not a matter of discussion during the 1968 Constitutional Convention.

## PUBLIC EMPLOYEES RETIREMENT SYSTEM

Few will argue that pensions are promises that should be fulfilled. Pension benefits are part of the compensation to the employee for his or her services, only deferred to some future time. Hence, the conclusion is drawn that retirement benefits should be treated as a contract right that may not be impaired.<sup>12</sup> An employee counting on a pension of certain dimensions should not, upon retirement, find something substantially different. This principle has been observed in public retirement systems, whether in constitutional or statutory law, judicial decisions, or by practice.<sup>13</sup>

In several states which do not have pension benefit guarantees written into their constitutions, their respective state supreme courts have nonetheless handed down rulings that participation in public retirement systems are of a contractual nature the rights and benefits of which should not be diminished.<sup>14</sup>

Whether by judicial decision or constitutional provision, Tilove, in his timely book Public Employee Pension Funds, argues that a "rule of that kind is difficult to live with, for it means that every word of the retirement statute is in effect written into the state's constitution. These [pension] laws are complex and unforeseen consequences are inevitable. Total inability to change except for new employees, means that mistakes, small or large, general or specific, are made permanent."<sup>15</sup> He goes on to say that it is even difficult to plug a loophole or correct a mistake for new members because the process would clutter the statute with a sequence of corrections, each applicable only to those persons who joined the system after the respective date of the changes.<sup>16</sup> "The thought of a statute that would gather a collection of corrective amendments each with its own generation of members to which it applied is...dismaying. Consequently, as loopholes are found and exploited, they are with rare exception permitted to exist in perpetuity."<sup>17</sup>

Although the issue of perpetuity of decisions was a topic of lively discussion during the 1950 Constitutional Convention, the resultant

## GENERAL AND MISCELLANEOUS PROVISIONS

committee of the whole report failed to paint as bleak a picture as Tilove does. Committee of the Whole Report No. 18 read:<sup>18</sup>

It should be noted that the...provision would not limit the legislature in effecting a reduction in the benefits of a retirement system provided that reduction did not apply to benefits already accrued. In other words, the legislature could reduce benefits as to (1) new entrants into a retirement system, or (2) as to persons already in the system in so far as their future services were concerned. It could not, however, reduce the benefits attributable to past services. Further, the section would not limit the legislature in making general changes in the system, applicable to past members, so long as the changes did not necessarily reduce the benefits attributable to past services.

True, Hawaii's provision appears to be not as restrictive as other state's constitutional provisions in that it specifies that accrued benefits shall not be diminished or impaired, whereas, in the cases of Illinois, Michigan, and New York the provision applies to any and all benefits. The interpretation in these cases have been that all benefits, whether already accrued, or anticipated for future services could not be diminished or impaired. However, it is still questionable of Hawaii's provision whether any amendments to the pension and retirement statute could apply to present members of the system for future services in light of the fact that participation in the system is deemed a contractual relationship. Upon becoming a member of the retirement system, the employee enters into a contractual agreement, the terms of which are embodied in the statute. It is unclear whether the contract, once agreed upon, can be changed, even as it affects only benefits for future services, without the explicit consent of both parties. In several cases in various states, the courts have declared that such changes cannot be made. The Supreme Court of Pennsylvania ruled in 1953 on the case of Baker v. Board of Allegheny County that:<sup>19</sup>

As of the time he [the employee] joined the fund, his right to continued membership therein, under the same rules and regulations existing at the time of his employment, was

## PUBLIC EMPLOYEES RETIREMENT SYSTEM

complete and vested. The legislature could not thereafter constitutionally alter the provisions of his already existing contract of membership. His rights in the fund could only be changed by mutual consent.

The Washington State Supreme Court concurred with this ruling by stating in Bakenhus v. Seattle that "[t]he promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise."<sup>20</sup>

With such a burden imposed by the guaranty provision on the drafting of provisions in the pension and retirement statutes, one would suppose that any changes would be inhibited. However, this has not been so. Various sections of chapter 88, "Pension and Retirement Systems", of the Hawaii Revised Statutes have been amended many times over. Act 110 of the 1969 legislature was a virtual rewriting of the entire chapter, and amendments have been adopted subsequently on just about an annual basis.

The experience in New York State has been that numerous temporary laws are enacted, thus avoiding the constitutional guarantee by requiring annual renewal by the legislature lest they automatically expire. The result, then, becomes the opposite of the intent of the constitutional guarantee of long-range security.<sup>21</sup>

The problem appears complex, and solutions not readily available. States not bound by constitutional guarantees for pension benefits have nevertheless been bound to the same principle by judicial rulings. One way of looking at the problem is that since several cases have ruled that participation in a retirement system is of a contractual nature and that the benefits should not be diminished or impaired, then the principle should be expressed by such a provision in the constitution. At the very least, there seems to be no reason for deleting it from the constitution.

## GENERAL AND MISCELLANEOUS PROVISIONS

On the other hand, judicial rulings have been known to be reversed. In light of the implications of such rulings, coupled with the bleak future financial status of several of the pension systems, courts may be compelled to rule otherwise in the future unless prohibited to do so due to a constitutional guarantee. In this vein, Tilove argued:<sup>22</sup>

What will happen if there is a taxpayers' revolt, a general economic depression, actual or potential bankruptcy or a serious slump or dislocation in the economy that drastically reduces revenues? What if a compelling need arises for expenditures judged to have priority over pension rights--war, widespread and acute want, domestic turmoil, or a natural catastrophe. These possibilities make it hard to be smug about the continuation of legislative policy. The question has also been raised as to whether court decisions or constitutional provisions forbidding diminution of pension rights are enforceable if the legislature refuses to appropriate the funds.

### Employees Retirement System and Social Security

Another issue of concern is public employees' dual participation in the employees retirement system and federal social security.

Prior to the 1950's, state and local government employees were barred from participation in the federal social security system as it was questionable whether that could be construed as a tax on another government.<sup>23</sup> After 1950, public employees retirement systems were given the option of electing to participate or not in social security. Hawaii opted for coverage, but at first adopted an integrated benefit formula, i.e., the benefits of the retirement system were coordinated with social security to obtain a certain goal. In 1965, however, integration was rejected for a supplementation plan, so that today employees retirement system payments are determined independently of those from social security. Alexander Grant and Company, consultants to Hawaii, report that the result of supplementation has been higher total benefits and higher total costs.<sup>24</sup>

## PUBLIC EMPLOYEES RETIREMENT SYSTEM

There is still some validity in the statement that governments are more willing to grant increased compensation in a manner more easily "hidden" from the taxpayer, such as retirement benefits, than they are in granting wage increases which are highly visible and immediately payable.<sup>25</sup> However, widespread public concern is developing over the costs of pension systems, especially as many more of these systems face future financial straits.<sup>26</sup>

On the matter of dual participation in employees retirement system and social security, increasing costs provide the major argument against continued participation in social security.<sup>27</sup> High benefits as a result of participation in both systems have come under criticism also. It was determined that an employee with 30 years of service with the state or any of the counties can receive total social security and employees retirement system retirement income exceeding pre-retirement net income. Such high benefits which necessarily mean higher costs to both taxpayers and employees may defeat the goals of pension compensation policy.<sup>28</sup>

As a solution, several public employees retirement systems in more than a dozen states and affecting one-half million employees have been withdrawing from participation in social security.<sup>29</sup> However, many factors other than retirement income are involved in deciding to remain with or withdraw from participation in social security. The recent Alexander Grant and Company study reported:<sup>30</sup>

Social Security has developed into a comprehensive social insurance system. With ongoing expansions in benefits and coverage, it has proven to be a flexible institution designed to meet the needs of a dynamic society. Social Security responds to these needs and not necessarily to special budgetary considerations. Public retirement systems, on the other hand, are primarily staff systems geared toward the employee, not the family, and can often remain static under budgetary pressures.

## GENERAL AND MISCELLANEOUS PROVISIONS

In specifically focusing on Hawaii's system, it reported further that:<sup>31</sup>

The ERS does not provide substantial protection for the family in the event of the worker's non-occupational death. Nor does the ERS provide service and disability retirement benefits for dependents, portability of coverage, tax-free benefits, or complete cost-of-living adjustments. Social Security provides all of these.

On this basis and also keeping in mind that withdrawal from social security means that the system can never again, at any future date be eligible for participation in social security, the consultants recommended against withdrawal.<sup>32</sup>

Instead, it was concluded that an integration formula would provide the best alternative. The formula recommended would provide total net retirement benefits from both social security and employees retirement system equal to pre-retirement net income. While the alluring benefits of social security would still be available, it was estimated that the required total contribution to employees retirement system and social security under this integration alternative would be about 19 per cent of payroll, as compared to more than 28 per cent of payroll required under the present supplementation plan.<sup>33</sup>

A constitutional question could possibly arise if Hawaii chose to adopt the recommendation of the consulting firm. Social security is in a constant state of flux. It changes in ways that are not controllable by the state, nor in ways that are entirely predictable.<sup>34</sup> Also, because social security is geared to all employees, public and private, it is not possible for Congress to mold social security in consideration of combination with other pension plans.<sup>35</sup> Therefore, to arrive at the goal recommended by Alexander Grant and Company, Hawaii's public employees retirement system must be dynamic and sensitive to changes in social security.



## PUBLIC EMPLOYEES RETIREMENT SYSTEM

The present constitutional provision, however, appears not to lend itself to such a dynamic system but rather implies a more static type of system. Should social security benefits become even higher than they are at present, it is unlikely, with the present constitutional language, that employees retirement system benefits can be lowered to prevent a retiree from receiving total benefits above the pre-retirement net income level. On the other hand, should social security benefits drop, it is questionable whether a retiree can receive any more than what the retiree is entitled to from contributions made during employment under the present constitutional provision.

## **Chapter 4**

### **OATHS AND LOYALTY**

#### **PART I. INTRODUCTION**

Both sections 3 and 4 of Article XIV deal with what can be considered "loyalty tests". While the worthiness of such tests has never been proven, nonetheless, throughout our nation's history, tests of loyalty have always been administered in the name of security.

The following is a discussion of the 2 tests which are included in Hawaii's Constitution. One is a provision of disqualification from public office and employment for actions to overthrow the state or national government. The other is an oath requirement for all public officers.

#### **PART II. DISQUALIFICATION FROM PUBLIC OFFICE OR EMPLOYMENT**

Article XIV, section 3, provides for the disqualification from public office and employment of those persons who act or conspire to overthrow the government.

This section was amended during the 1968 Constitutional Convention, changing "...disqualification for disloyalty on the basis of belief and/or action disqualifications for disloyalty on the basis of actions only".<sup>1</sup>

In 1950, there was little dissension in denying public office or employment to subversives or members of subversive organizations. It was the era of McCarthyism; the Red Scare was pervasive throughout the nation. Hawaii's first constitutional convention itself was tainted with the mood of McCarthyism. Delegate Kageyama resigned as a delegate to the

## OATHS AND LOYALTY

convention, his reason being that his cooperation with the House Un-American Activities Committee in helping to expose Communist activity in Hawaii and concurrent attendance at the constitutional convention might embarrass his fellow delegates and prejudice the cause of statehood for Hawaii.<sup>2</sup> Another delegate, Frank G. Silva, was forced to forfeit his seat due to his failure to cooperate with the House Un-American Activities Committee.<sup>3</sup> The major impetus that led to the inclusion of a disqualification for disloyalty provision in the constitution, however, was H.R. 49 of the Congress of the United States. Known as the Hawaii Statehood Enabling Act, this bill was being heard in congressional committees at the time of Hawaii's first constitutional convention. Although H.R. 49 failed to be enacted, it remained a major element throughout the 1950 Constitutional Convention. Standing Committee Report No. 70 of the convention stated:<sup>4</sup>

...in compliance with the mandatory provisions of H.R. 49, the Hawaii Statehood Enabling Act, Section 1 disqualifies any person who advocates, or who belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of the State of Hawaii or of the United States, from holding any public office or public employment under the State Constitution.

By 1968, however, the original language, drafted in 1950, was considered to be unconstitutional, in violation of the First Amendment rights of association and beliefs. The Harvard Law Review, in examining the U.S. Supreme Court cases of Elfbrandt v. Russell,<sup>5</sup> Keyishian v. Board of Regents,<sup>6</sup> and United States v. Robel,<sup>7</sup> reported that:<sup>8</sup>

...The Court in these cases doubted that knowing membership alone was sufficiently related to the government's goal of screening out disloyal individuals. The court pointed out that political groups may have both legal and illegal goals and that membership may reflect no more than sympathy with the organization's lawful goals.

## GENERAL AND MISCELLANEOUS PROVISIONS

While the foremost concern of the delegates to the 1968 Constitutional Convention was rewriting the section to make it constitutional, they also discussed whether such a provision should be included in the Constitution at all.

In support of retaining a provision of disqualification for disloyalty, one delegate stated that it "would express the feelings of the citizenry against the great and terrifying fear throughout the free world of the communist states".<sup>9</sup> Similarly reflective of the holdover of the Red Scare attitude, another delegate stated:<sup>10</sup>

...it was felt there was a need for such language in 1950. I cannot believe that this need is any less today. I don't believe the number of our enemies has lessened. I don't believe they are growing less powerful.

On a more temperate note, another delegate stated:<sup>11</sup>

...the word disloyal does not adequately describe the new wording proposed by the committee. This is not a section which is now being directed towards someone who has simply been disloyal to the country, this is a section which is, by its very words, applicable to those who do a specific act in an attempt to overthrow the government, who actually conspire, who do something more than simply espouse a disloyal theory.

Opponents expressed concern that the penalty of forever disqualifying one from public employment may be too harsh.<sup>12</sup> Delegate Larson queried, "What is disloyalty? . . .[C]ould [it] be classified by such as a very ultra conservative court in our state or by the Supreme Court for such a simple act as draft resisting?"<sup>13</sup> He feared that such a provision would be "constitutionalizing our fear of subversives in the State of Hawaii".<sup>14</sup>

Since 1968, the fear of subversives appears to have diminished considerably. College radicals and long-haired activists have virtually vanished from the headlines, creating an impression that these

## OATHS AND LOYALTY

subversives, once fearsome, are now defunct. Even though the United States withdrew its forces from Vietnam the domino theory of communism in Southeast Asia which our nation feared, has not yet resulted. Hyman, in his book, To Try Men's Souls, said that "[l]oyalty tests are crisis products".<sup>15</sup> Perhaps the crises that the United States face now are more of an internal nature than external and the fear of subversion and disloyalty has taken a back seat to other national concerns.

Constitutionally, section 3 of Article XIV of Hawaii's Constitution is acceptable. Subsequent to the Elfbrandt, Keyishian, and Robel cases mentioned above, decisions have been rendered declaring that denial of federal employment on the basis of advocacy of overthrowing the government is unconstitutional.<sup>16</sup> The present language of Hawaii's Constitution does not appear to be affected by these decisions as disqualification is based on overt action rather than mere advocacy. However, there are possibilities that security programs could offend due process by establishing vague standards of determining disloyalty or by presuming disloyalty on the basis of inadequate evidence. Since Hawaii's Constitution doesn't require a conviction or even an indictment of a treasonable act as a basis of disqualification, due process offenses may occur. In disloyalty proceedings before a nonjudicial or quasi-judicial body, methods employed in obtaining information have often been found to be constitutionally questionable. Also, at times applicants for employment or employees are required to provide incriminating data about themselves.<sup>17</sup>

As Ralph S. Brown, Jr., stated:<sup>18</sup>

The central problem of employment tests then, is part of the larger problem of reconciling the needs of national security with the claims of individual freedom.

Nevertheless, the problems stated above are problems that can be handled statutorily. If the desire to maintain this provision on disqualification

## GENERAL AND MISCELLANEOUS PROVISIONS

remains, it appears that no further amendments are required to make the provision constitutionally acceptable.

Very few state constitutions include a disqualification provision similar to Hawaii's. Alaska's provision is similar to that of Hawaii's first constitutional provision, prior to the 1968 amendment. Advocacy of overthrow of the government and/or membership in a subversive organization is a disqualification for public office and employment in California and Maryland. In Michigan, a conviction for subversion is necessary before one is disqualified from public office and employment.<sup>19</sup>

### PART III. LOYALTY OATH

Section 4 of Article XIV requires that all public officers swear allegiance to the Constitution of the United States and the Constitution of the State of Hawaii, and take an oath of office. It also prescribes the form of the oath (or affirmation), and further allows the legislature to prescribe other oaths.

The U.S. Constitution, Article VI, clause 3, reads:

...the Members of the several State Legislatures, and all executive and judicial Officers, ...of the several States, shall be bound by Oath or Affirmation, to support this Constitution;...

All of the 50 states provide an oath requirement in their constitutions for some, if not all, of their public officers to support both the U.S. and their respective state constitutions. At the same time, an oath of office is administered.

In all of Hawaii's constitution-making history, the requirement for oath taking of public officers has never been questioned. At its first Constitutional Convention in 1950, it was stated in Standing Committee Report No. 63:<sup>20</sup>

## OATHS AND LOYALTY

It is the contention of your committee [on Miscellaneous Matters] that an oath or affirmation to support the Constitution of the United States and of this State is vitally necessary before any officer assumes his duties.

However, no reasons were set forth, nor does it appear that it was ever discussed as to why it was considered to be a necessity.

It has never been clearly determined what utility the oath of office serves, nor how successful it is in accomplishing its purpose or purposes. History, however, provides many evidences of the ineffectiveness of oaths of allegiance. In the 1620's, Puritans "still easily able to swear the king's oath of allegiance, cut off the royal head".<sup>21</sup> Benjamin Franklin and George Washington swore loyalty to King George the Second at one time.<sup>22</sup> And America's most notorious traitor Benedict Arnold signed his name to a loyalty oath of the rebel colonies.<sup>23</sup> Loyalty oaths have often served as covers for acts of disloyalty, even though such oaths were generally used as a means to weed out the disloyal. On the other hand, one Peter van Schaack claimed in 1778, "[i]f the propositions...in the oath are agreeable to the principles, it adds no obligation to allegiance which did not previously exist".<sup>24</sup>

Although it can be argued that oath taking does have a positive effect on most officials, perhaps of equal or greater consideration is the effect oath taking has on the general populace. Presumably, the electorate expects elected and appointed public officials to be supportive of the national and state constitutions, and to do their best in the position in which they serve. To have a public swearing to this effect probably serves as a comfort and a reassurance.

In comparing Hawaii's constitutional requirement of an oath of office to other state constitutions, 2 differences are evident. Hawaii's Constitution does not specify the consequences of refusing to take the oath as do 9 state constitutions.<sup>25</sup> Although Hawaii's provision requires that the oath be taken before assuming the duties of office, it is unclear

## GENERAL AND MISCELLANEOUS PROVISIONS

whether the official who refuses the oath actually forfeits the office to which elected or appointed, thereby leaving the respective office vacant and capable of being filled as prescribed by law. Several states also spell out penalties of perjury and violation in their constitutions.<sup>26</sup>

Another difference in Hawaii's Constitution as compared to other constitutions is that Hawaii is only one of 3 states that allows the legislature to prescribe other loyalty oaths for public offices than the one set forth in the Constitution.<sup>27</sup> States such as California, Michigan, and New York, on the other end of the pendulum, constitutionally state that no other oaths or tests shall be required.<sup>28</sup>

To understand this unique feature of Hawaii's Constitution, a look at the proceedings of the 1950 Constitutional Convention is helpful. Several delegates were interested in adding to the oath of allegiance and oath of office, an oath of nonaffiliation with any communist group or any organization aiding or advocating the overthrow of the U.S. government. Since another provision was being proposed to disqualify from public office all those associated with organizations detrimental to the government of the United States, it was agreed that a statement allowing the legislature to prescribe other oaths would be satisfactory.<sup>29</sup>

Although constrained by limiting oaths to conform to other constitutional provisions, still the potential power of the legislature to use oaths as weapons of ideology and political partisanship exists. All one needs to do is to study the history of oaths and loyalty testing through the history of the United States.

While the section dealing with disqualification for disloyalty was a heated issue in the 1968 Constitutional Convention, the oath of office was not discussed.



## Chapter 5

### ETHICS

Section 5 of the General and Miscellaneous Provisions of the Hawaii Constitution was added as a result of the 1968 Constitutional Convention. It requires codes of ethics to be adopted for all officers and employees of the state and of its political subdivisions.

Ethics legislation for government officers and employees is not a recent phenomenon. As far back as 1885, the Massachusetts senate had a rule forbidding members from voting on questions which directly affected their private affairs. Prior to that, statutory and constitutional provisions prohibited bribery and extortion, and regulated public officials' interest in various types of public contracts.<sup>1</sup> Only recently, however, has there been a widespread push for comprehensive ethics legislation.

The image of the corrupt politician reached peaks during the Boss Tweed and Tammany days, and also with the Teapot Dome Scandal in the late 1800's. Today again, with Watergate just behind us, public confidence in public officials has plummeted. However, the "developments of ethics legislation during the past few years show the capacity of state governments to respond significantly to the credibility crisis".<sup>2</sup>

Distrust of public officials, while it may be a politically motivated factor, is far from the only reason for the recent trend in ethics legislation. The growth of government, accompanied by rapid expansion of the private economy results in much intermingling of public and private affairs. A great number of important decisions made by public officers and employees directly affect interests outside of government. Conversely, the state of the private economy has a large bearing on the operations of government.<sup>3</sup> The increasing complexity of government, and the technical expertise often needed by government increases the

## GENERAL AND MISCELLANEOUS PROVISIONS

reliance on experts recruited from private life and on professionals willing to contribute their services. This naturally leads to more questions of conflict of interest and undue influence on decision making.<sup>4</sup> With the expanding gray area between the distinctions of public and private affairs, ethics in government becomes more difficult to legislate, but at the same time, more necessary. Public officials obtain guidance through ethics legislation, and citizens' confidence in the integrity of government is preserved through the right to know.

By 1968, the State of Hawaii and each of its local governments had comprehensive ethics legislation. It was questioned during the 1968 Constitutional Convention whether a constitutional provision for a code of ethics was necessary since it had already been implemented statutorily. One delegate complained that adding a code of ethics provision to the constitution was just a "selling point to the public" and a "political tool".<sup>5</sup>

The committee on revision, amendment and other provisions considered the necessity of a constitutional provision for a code of ethics. It reported in Standing Committee Report No. 44:<sup>6</sup>

Inasmuch as the state legislature and the various counties have provisions and statutes providing for code of ethics, there was some reluctance to insert a provision mandating codes of ethics for the state government and the various counties. The Committee, however, felt that having a provision mandating a code of ethics for each governmental unit would ensure the continuance of said statutes and provisions and guarantee the existence of a code of ethics for all public employees and officers.

Delegate Kato added that "it would preclude any kind of repeal of that statute".<sup>7</sup>

Although the state and all of the counties each had its own code of ethics in 1968, there had been a problem of who was covered by the codes. Delegate Kawasaki related one of the problems:<sup>8</sup>

## ETHICS

The City and County [of Honolulu] adopted its own code of ethics but very glaringly omitted the inclusion of the members of the city council and the mayor and there has been much criticism against this omission. And I believe requiring a code of ethics to cover all elected officials, appointed officials, members of boards and commissions and employees, I think would be a blanket coverage that will be very salutary in terms of restoring public confidence in the quality of employees we have throughout the State.

Within the state code of ethics, "unintentionally or otherwise, the legislators were left out in the section of conflict of interest...."<sup>9</sup>

Today, all public officers and employees in Hawaii are covered by codes of ethics of the respective governments. Each of these codes is basically similar,<sup>10</sup> however, complaints of lack of uniformity have been made concerning enforcement procedures.

Nationally, the most frequently litigated issue dealing with ethics legislation is invasion of privacy, especially in financial disclosure laws.<sup>11</sup> While some statutes have been stricken as being unconstitutional,<sup>12</sup> the courts still espouse the people's right to know against many public servants' claims of right to privacy. For example, the Supreme Court of Washington in upholding Washington's ethics law ruled that "[i]nformation which clearly and directly bears upon the qualification and fitness for public office is unquestionably in the public domain." The Court went on to say that:<sup>13</sup>

...the right to receive information is the fundamental counterpart of the right to free speech.... When the right of the people to be informed does not intrude on personal matters which are unrelated to fitness for public office, the officeholder may not complain that his own privacy is paramount to the interest of the people.

A California court similarly ruled that:<sup>14</sup>

## GENERAL AND MISCELLANEOUS PROVISIONS

...neither the right to privacy, nor the right to seek and hold public office, must inevitably prevail over the right of the public to an honest impartial government.

Since the questions on codes of ethics revolve around specific statutes, the general language of Hawaii's constitutional provision poses no problems of acceptability as far as constitutional language is concerned. Hawaii often prides itself on the brevity of her constitution. With regards to ethics provisions, only one section encompasses what in many other state constitutions take up several sections scattered throughout the documents. Only Montana and Louisiana, besides Hawaii, include in their constitutions directives for the adoption of comprehensive codes of ethics.<sup>15</sup>

It is conceivable, however, that with only this general language in the constitution, ethics legislation could become narrow and ineffective. Although it guarantees that codes of ethics will cover all public officers and employees, the breadth of the code is not defined. Generally, codes of ethics include bribery, fair and equal treatment, financial disclosure, conflict of interest and sometimes, lobbying regulations. However, just what factors constitute a code of ethics is not agreed on from state to state. An example of a possible problem is that the state legislature could repeal the financial disclosure provisions of the code without being in violation of this constitutional provision. It becomes a question of public trust in its legislative bodies, and how much input the public perceives it has in the legislative process as to whether the constitutional language should provide rigidity or flexibility.

Further, while the Hawaii Constitution mandates the adoption of ethics codes for the state and county governments, no mention is made of either ethics commissions or the manner of appointment of the members of such commissions. The state statute establishes a procedure whereby the governor appoints the state ethics commission members from a panel nominated by the judicial council, an advisory body to the chief justice of

## ETHICS

the Supreme Court of the state.<sup>16</sup> This unique procedure helps to shield the commission from potential influence and could be included in the constitution. This possibility was considered at the 1968 Constitutional Convention but was not adopted.

Consideration was also given, during the 1968 Constitutional Convention, to a unified code and commission which would cover county officials and employees along with state officials and employees. However, the home-rule approach was adopted instead with the state and counties having separate codes and commissions.<sup>17</sup>

## Chapter 6

### INTERGOVERNMENTAL COOPERATION

In a day and in a nation of highly sophisticated methods of communications and transportation, it is well-nigh impossible for any one state, or any one level of government to remain self-sufficient and independent. Moreover, with the ever broadening scope of governmental services, spheres of activity are continually created where the different governments on all levels are bound to meet. Especially indicative of the sharing or "marbeling" of responsibilities between governmental levels is the expansive interpretation of the U.S. Constitution. Areas previously considered to be state or municipal responsibilities, such as voting and employment practices, water services and sewage facilities, slum clearance and health standards, just to name a few, have become a large part of the federal government's program. Particularly commencing with the New Deal Administration at the national level during the depression of the 1930's, there has resulted a vast expansion of governmental functions, which in turn touched off far-reaching changes in governmental structure, basic to which is a close, cooperative interrelationships between the various units of American government.

Students of American government generally agree that the days of a "layer cake" approach to government--one in which the responsibilities and jurisdictions between the levels of government are clearly defined--received its death warrant with the onset of the New Deal in the 1930's. A common crisis encouraged cooperation among all units of government on all levels. The role and scope of the national government increased far beyond its traditional bounds of international relations, national defense, international and interstate commerce, and money and banking matters. On the heels of the depression followed the Second World War, another crisis that demanded close cooperation, sharing of responsibilities among the various governments, and growth of the national government. Rather than diminish, this trend of cooperation and shared responsibilities has grown enormously.

## INTERGOVERNMENTAL COOPERATION

Federal-state and federal-state-local relationships have become increasingly intertwined, moving from a "layer cake" to a "marble cake" concept, and increasingly pervasive within a very short period of time in our nation's history. Since Hawaii's statehood, fiscal relationships alone have undergone a variety of programs such as grants-in-aid, categorical grants, block grants, and revenue sharing. The federal budget has shown an ever-increasing number of federal assistance programs and correlating federal dollars since 1950.<sup>1</sup> Even today, "[d]espite the tight supply of federal assistance dollars, the economy, inflation and the energy crisis have forced state and local officials to continue to focus on Washington."<sup>2</sup>

Aside from what we might term "cooperative federalism", intergovernmental cooperation is in large part concerned with interstate relations. In fact, as Delegate Kato stated in the 1968 Hawaii Constitutional Convention:<sup>3</sup>

...this section [Intergovernmental Cooperation article XIV, section 6] was put in originally in the Constitution to facilitate the cooperation between the State of Hawaii and other states as well as the United States. Because of this particular provision, the State is able to enter into agreements with the other states such as the WICHE Conference, with the National Conference of Uniform Laws, as well as National Council on State Governments....

Interstate cooperation takes a number of forms, the most formal of which is the compact, such as the Western Interstate Commission on Higher Education (WICHE) compact of which Hawaii is a member.<sup>4</sup> Other forms are conferences or informal agreements which are less binding but could have substantial influential impacts.

Hawaii is in a unique situation of being noncontiguous with any other state or nation, and being an island state. To a large extent, these features of uniqueness reduce the need for interstate cooperation. Consideration of the interstate agreements that have been and are

## GENERAL AND MISCELLANEOUS PROVISIONS

presently in effect reveals that many of the reasons for effecting interstate agreements have been the very nature of artificial boundaries and the contiguity of states. Transportation, water rights, pollution control, and power development are examples of the kinds of issues that have fostered interstate cooperation.<sup>5</sup>

The concept of regionalism has been on the increase as a means of problem solving and growth encouragement.<sup>6</sup> However, Hawaii fails to fit neatly into any regional grouping of the states. While the more obviously compelling reasons for cooperation among states may not be evident for Hawaii, interstate cooperation has not been, and surely should not be, overlooked. As Thad L. Beyle stated in "New Directions in Inter-State Relations":<sup>7</sup>

...the potential strengths of the interstate compact or agreement are...[that] they can bring multistate political and governmental leadership together, focus it on a common problem, and with the help of the specialists, undertake the action they were chartered to do.

Hawaii's Constitution is one out of only 3 state constitutions which expressly provide for intergovernmental cooperation on the state level.<sup>8</sup> Numerous other states, however, have provisions for intergovernmental cooperation of their local governments. It appears that a formal provision on this subject is not necessary since it is unlikely that a state will allow its political subdivisions to enter into cooperative intergovernmental activities while restricting itself from such activities. Although most states do not have such a constitutional provision, all of them have entered into all types of intergovernmental agreements. Constitutional provision is encouraged, however, not only to facilitate but also to encourage cooperation.<sup>9</sup> At Hawaii's first constitutional convention, a delegate stated that:<sup>10</sup>

...There would normally be no question regarding the right of the legislature to establish agencies for inter-state cooperation...but questions have arisen as to the right of the



## INTERGOVERNMENTAL COOPERATION

legislature to appropriate for the support of agencies of an inter-state character. If the development of inter-state cooperation is to be promoted...this is one obstacle which should not be permitted to arise.

Upon such advice, Hawaii's provision for intergovernmental cooperation clearly states the legislature's authority to appropriate funds for the effectuation of such purposes.

The major problems facing the trend of increasing cooperative federalism and intergovernmental cooperation, is the lack of accountability, the weathering away of policy decision making powers, and the management morass that accompanies intergovernmental activities.<sup>11</sup> However, by Hawaii's provision of leaving it to the legislature to make the arrangements for intergovernmental cooperation, it appears that the legislature will oversee the activities and be finally accountable.

Hawaii's provision on intergovernmental cooperation compares favorably with that suggested by the Model State Constitution<sup>12</sup> and with other state constitutions in that it: (1) allows for the cooperation of the state or any of its political subdivisions with the United States, other states and territories, or their political subdivisions; (2) allows for appropriations as necessary in effecting such cooperation; and (3) limits such agreements to legislative determination. Michigan's Constitution and the Model State Constitution's suggested language are more permissive than Hawaii's, however, in that they provide for cooperation with governments outside of the United States and its territories. While the Model State Constitution's language is broad and indefinite, Michigan's Constitution specifically names one foreign nation:<sup>13</sup>

Subject to provisions of general law, this State or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing, or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution....

## GENERAL AND MISCELLANEOUS PROVISIONS

While Article I, section 10, clause 3, of the U.S. Constitution states that "no state shall, without the consent of Congress...enter into any agreement or compact with another state, or with a foreign power...", interstate compacts and agreements have very seldom met with Congressional disapproval. In the case of Virginia v. Tennessee, the Supreme Court's opinion was that the U.S. Constitution implied a prohibition only of compacts and agreements that "endangered the powers of the federal government".<sup>14</sup>

It appears, however, that cooperative agreements made by states or their political subdivisions which are international in nature, will fall under much closer scrutiny and review, and would be apt to evoke more disapproval. In the delicate area of international relations, the area of endangering the powers of the federal government looms large and gray. Nonetheless, in the enabling language of a state constitution, those forms of possible state-local-federal cooperation which cross international lines should not be ignored lest the courts be forced to find that the omissions make them unconstitutional.

Hawaii's constitutional provision on intergovernmental cooperation, by itself, appears highly permissive. However, other sections of the Constitution must be referred to in order to determine the limitations on intergovernmental cooperation.

Article VI, section 2, of Hawaii's Constitution states that the appropriations of money shall be for a public purpose. Further, Article IX, section 1, on education also specifies that no public funds may be appropriated for the support or benefit of any sectarian or private educational institution.

Some state constitutions are clearly restrictive as to the appropriations of state funds to institutions or agencies, such as Colorado's which states that "[n]o appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person,

## INTERGOVERNMENTAL COOPERATION

corporation, or community not under the absolute control of the state, nor the denominational or sectarian institutions or associations".<sup>15</sup> (Emphasis added)

Hawaii's constitutional language appears not to be as restrictive as Colorado's. However, the restriction on appropriating funds for private or sectarian institutions appears to limit Hawaii's cooperation in some types of intergovernmental activities. Where there is failure of sole control over the agencies or activities involved, there may be instances in which private and sectarian schools, for example, are participants, in which case Hawaii's participation in such an agreement may be restricted, or at least questionable, although it may clearly be for public purposes and to the benefit of the state.

Another common problem that appears in the area of intergovernmental cooperation, and of special concern in interstate cooperative agreements, is attempting to define the constituency.<sup>16</sup> Conceivably, along with the question of constituency, the question of public purpose can be raised. Are funds that are appropriated in the interest of interstate cooperation for services of benefit to other states as well as Hawaii within Hawaii's constitutional definition of public purpose? The problem becomes especially involved in the administration and management of intergovernmental agencies.

The prohibition against dual office holding may also limit Hawaii's participation in cooperative intergovernmental activities. Again, other states have far more restrictive provisions than Hawaii in prohibiting dual office holding. Hawaii's Constitution contains prohibitions against dual office holding in 3 articles which prohibit legislators from holding any other public office under the state;<sup>17</sup> and which prohibits the governor<sup>18</sup> and any justice or judge,<sup>19</sup> respectively, from holding any other offices or positions of profit under the state or the United States. Several other states extend the prohibition of dual office holding to all officers and employees.<sup>20</sup>

## GENERAL AND MISCELLANEOUS PROVISIONS

While the restriction on all public officers and employees from holding more than one office under the state or United States is more readily recognizable as a barrier to intergovernmental cooperation, Hawaii's provision also could mean nonparticipation in some intergovernmental activities. An example of how Hawaii's constitutional prohibitions against dual office holding could foreseeably limit intergovernmental cooperation can be found in what is called "judicial federalism". John L. Winkle III contends that "[j]urisdictional overlap between state and federal courts have long generated administrative and political tension that strike at the heart of intergovernmental viability".<sup>21</sup> In 1970, Chief Justice Warren E. Burger urged the creation of State-Federal Judicial Councils to stimulate intersystem communication and thereby reduce friction.<sup>22</sup> In light of Article V, section 3, of the Hawaii Constitution, such federal-state agreements involving state judicial officers on both levels of government may be questionable depending on how such offices are established.

The prohibition of appropriating funds for anything other than for public purposes and dual office holding limits the extent of intergovernmental cooperation, whether it be a clearly definable limitation or merely a gray area which causes hesitation in entering into cooperative agreements with other governments.

## Chapter 7 FEDERAL REQUIREMENTS

Sections 7 through 12 of Article XIV can all be grouped under the general heading of federal requirements. All, except section 12, which is concerned with the consent of the state to the judicial powers and rights of the United States government, refer to public lands. These include provisions that the United States shall retain title to property it held immediately prior to the admission of Hawaii as a state; assures compliance with the trust provisions imposed by Congress with respect to lands granted to the state by the United States; reserves the right to administration of undisposed lands to the United States; exempts federal lands from taxation; and cedes jurisdiction and lands of the Hawaii national park to the United States.

According to the various committee reports of the 1950 Hawaii Constitutional Convention, these sections were all, in some way or other, intended to comply with the provisions of the Admission Act under which Hawaii would enter the union.<sup>1</sup>

A pervading consideration during the 1950 Constitutional Convention was that Hawaii was in the process of attaining statehood. From the commencement of the convention, House Resolution No. 49 of the Congress of the United States, known as the Statehood Enabling Act, received the unfailing attention of the delegates. Indeed, several of the delegates absented themselves from the convention for several days to attend senate committee hearings in Washington, D.C., on the admission of Hawaii as a state of the Union.<sup>2</sup>

With regards to sections 7, 8, and 9, the committee on agriculture, conservation and lands of the 1950 Constitutional Convention reported:<sup>3</sup>

## GENERAL AND MISCELLANEOUS PROVISIONS

The purpose...is to incorporate in the constitution provisions as to the public lands and other public property required in order to conform with the Statehood Enabling Act, H.R. 49....

Likewise for sections 11 and 12, the committee of the whole report states:<sup>4</sup>

Your committee feels that the proper method of complying with the requirements...of H.R. 49...is to specifically agree to each matter covered by said H.R. 49 as to which agreement is required of this State....

The majority of the delegates to Hawaii's first constitutional convention felt that in 1950 it was necessary, if for nothing else but to enhance Hawaii's achievement of statehood, to express Hawaii's earnest intent and willingness to comply with the conditions imposed by Congress.

It should be remembered that House Resolution No. 49, at that time, was far from enactment. Although it had passed the house, the senate had already proposed amendments to the bill. Several minority opinions were expressed against inclusion of these sections into the Constitution for the very reason of the temporary nature of House Resolution No. 49.<sup>5</sup>

As it turned out, all of the provisions dealing with the federal requirements as set forth in House Resolution No. 49 were adopted at the 1950 Constitutional Convention. However, nearly a decade was to pass before Hawaii was finally admitted as a state. The sections drafted in 1950, nonetheless, were in accord with the Admissions Act of 1959, except that the provision granting tax exempt status to federal lands was not contained in the 1959 Admission Act.

The question before the 1968 Constitutional Convention with regards to these federal requirements was whether constitutional compliance with the terms of the Admission Act was necessary, or if it could be accommodated by a general statement of agreement, thereby refining and reducing verbiage.<sup>6</sup> The issue was only mildly discussed, probably

## FEDERAL REQUIREMENTS

because these provisions had not created any major problems in the history of Hawaii, and it appeared better to maintain them without any change.

The same situation confronts us 10 years later. The number of available alternatives in terms of amending these sections remain limited, since terms of admission to the Union are irrevocable without the consent of the United States and the people of Hawaii.

Although section 11, which relates to the tax exempt status of federal lands, is not a provision of the Admission Act, several U.S. Supreme Court cases appear to rule out the question of taxing federal property. Since the 1886 Van Brocklin v. Tennessee<sup>7</sup> case, it has been established law that "no state can tax the property of the United States without their consent".<sup>8</sup> A commentary on another Supreme Court case, Graves v. New York,<sup>9</sup> states:<sup>10</sup>

Tax immunity evolves from the premise that there is an implied immunity between the state and federal taxing powers as a limitation to prevent interference each by the other in the exercise of that power where the other government's activities are concerned.

In much stronger language, "The power to destroy can be exercised... by a tax against the real property of a federal agency...."<sup>11</sup>

Several other states include terms of the enabling acts as a separate "Ordinance" or "Compact with the United States" article such as contained in the Arizona, Nevada, and North Dakota Constitutions. Montana and Wisconsin merely have a statement of general compliance with the terms of their respective enabling acts. Still other states incorporate provisions of the enabling acts, or provisions relating to federal property and jurisdictions into the respective articles of their constitutions.<sup>12</sup> Most common is the expression of the tax exempt status of federal property within the taxation article of the Constitution.

## GENERAL AND MISCELLANEOUS PROVISIONS

In summary, the compelling reasons for including these 6 sections into the Constitution do not exist today as they did in 1950. The possibility of any substantive amendment to any of these provisions, however, appears severely limited in light of the language of the Admission Act. The deletion, refinement, and reduction of verbiage, dispersement into different articles of the Constitution, or maintenance of these sections would likely have very little or no impact.

However, at the Montana Constitutional Convention of 1973, it was noted that the statement of compact with the United States was included in its constitution to make it clear that the new constitution does not affect any agreement with the United States government when Montana first became a state.<sup>13</sup> Perhaps the words of Delegate Kato are as applicable today as they were in 1968 during Hawaii's second constitutional convention:<sup>14</sup>

These sections...were put in the Constitution originally to show compliance or an agreement on the part of the State to comply with all the federal requirements as set out in the Statehood Enabling Act.... I think we should retain these to show the evidence of our agreement with the United States government.



## Chapter 8

### CONSTRUCTION

Construction of the Constitution is dealt with in section 13 of the General and Miscellaneous Article of the Hawaii Constitution. It reads:

Titles and subtitles shall not be used for purposes of construing this constitution.

Whenever any personal pronoun appears in this constitution, it shall be construed to mean either sex.

The latter half of this section must be considered in light of the women's rights movement and the Equal Rights Amendment in Article I, section 21, of the Hawaii Constitution, since masculine personal pronouns are generally used in the Hawaii Constitution. An examination of the present constitution reveals the use of such masculine pronouns presents no interpretative or substantive problem as long as this provision remains in force, i.e., there appears to be no implied or overt sex discrimination. There is required no change in statute or practice, no difference in income or disbursement of funds, or anything else if the "he" that is referred to in this Constitution is a "she" in application.

Although the language of section 13 of Article XIV does not cause substantive sex discrimination, the delegates of the constitutional convention may wish to consider rewriting the Constitution to replace as much as possible all masculine and feminine pronouns as the State of California did in 1974.<sup>1</sup>

## Chapter 9 GENERAL POWERS

Section 14 of Article XIV restricts any interpretation of the powers of the state from being limited to only those which are constitutionally enumerated or specified. The prime reason for such a provision is to avoid a strict construction of the Constitution.

The major concern which led to the inclusion of this section in the Hawaii Constitution in 1950 was the areas of public health and welfare. Standing Committee Report No. 16 of Hawaii's first constitutional convention states that it should be made clear that the powers of the State in the areas of public health and welfare are not to be interpreted to be limited to those that are enumerated in Article VIII on "Public Health and Welfare".<sup>1</sup> Eventually, it was decided that such a provision should not apply only to health and welfare, but to "labor, industry, education and everything else"<sup>2</sup> and the reference was changed to the general welfare of the people.

Aside from this issue of strict versus broad construction of the Constitution is the question of whether this section is merely repetitive of other provisions in the Constitution. It is generally accepted that where the U.S. Constitution is one of grant, the state constitutions, by contrast, are constitutions of constraint. It follows that whatever powers are not delegated or ceded to the central government are reserved to the states.<sup>3</sup>

The Tenth Amendment of the U.S. Constitution bears this out:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## GENERAL POWERS

The Supreme Court concurred that "the governments of the States are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with the powers delegated to the national government, or with Congressional legislation enacted in exercise of those powers".<sup>4</sup>

These understandings, confirmed by the Tenth Amendment, are such that "rarely is the allegedly broad authority of the state spelled out."<sup>5</sup> This statement proves true upon examination of the other states' constitutions. Only 3 other states--Alaska, Illinois, and Virginia--include a provision of this nature in their constitutions.<sup>6</sup>

Upon such foundations as the U.S. Constitution, Supreme Court opinion, and basic beliefs, it may be argued that this section constitutes unnecessary verbiage. Although this section was not discussed during the 1968 Constitutional Convention, there was some vocal opposition to the inclusion of the section during the Hawaii Constitutional Convention of 1950. Opponents called this provision a "catch-all, apologetic grab bag of power", and stated that they were "fearful of it because of its indefiniteness".<sup>7</sup>

Proponents of this section in the 1950 Constitutional Convention were concerned with the judicial rule of construction expressio unius est exclusio alterius--that a specific grant of power implies a limitation on the exercise of all powers not expressly granted--especially, as mentioned above, in the areas of public health and welfare. The National Municipal League's Model State Constitution recommends the inclusion of such a section to "...avoid judicial findings of implied limitations which were wholly unintended".<sup>8</sup>

Upon examination of the purpose for adopting the Tenth Amendment of the U.S. Constitution, it "was not to add a substantive provision to the terms of the basic document...[but] was intended to confirm the understanding of the people...that powers not granted to the United

## GENERAL AND MISCELLANEOUS PROVISIONS

States were reserved to the States or to the people".<sup>9</sup> The same theory can be applied to the provision in question.

The pervasiveness of government on all levels has grown since the framing of the U.S. Constitution and the adoption of the Tenth Amendment. It may be argued that history will bear out the general acceptance of the idea that state constitutions are documents of constraint, and therefore, the language found in section 14 is merely repetitive. On the other hand, precisely because of the pervasiveness of government and the fact that it touches just about every aspect of our lives, it should be made clear that it is in the power of the state to conduct the activities and enact laws as it sees fit for the general welfare of the state, except as expressly prohibited.

It should be noted that one of the reasons cited by the National Municipal League for the inclusion of a provision of this nature is that it discourages unnecessary and frivolous amendment. Several states have experienced frequent proposals and adoptions of amendments because of fear that a certain action may be interpreted to run afoul of some implied limitation of powers. A commentary to the Model State Constitution states:<sup>10</sup>

It is the purpose of Article II [Powers of the State] to encourage state government to use its powers to the fullest and not seek constitutional amendment in every instance where no express authorization for a particular function is to be found. In applying a state constitution the emphasis should be a search for express limitations rather than a search for express authority.

## Chapter 10

### SELF-EXECUTION

The last section of Article XIV states that the provisions of the Constitution shall be self-executing to the fullest extent that their respective natures permit.

A self-executing provision is intended to be complete in itself and operative without the aid of supplemental or enabling legislation. The overriding consideration for a self-executing clause is that nonself-executing provisions are "dependent upon further action by the legislature [and] put the effectiveness of the basic charter at the mercy of that body".<sup>1</sup>

Standing Committee Report No. 68 of the 1950 Constitutional Convention states:<sup>2</sup>

This section is intended, wherever possible, to make the various provisions of the Constitution operative without the aid of supplemental or enabling legislation. It is a definite declaration showing the express intent of the framers of the Constitution that its provisions are self-executing and this must be effected.

Alaska is the only other state whose constitution includes a self-executing provision. However, the courts generally have said that in interpreting constitutions, the "provisions are self-executing unless a contrary intention appears".<sup>3</sup>

Although Hawaii's present Constitution includes several provisions which are technically not self-executing in that they rely on enabling legislation for implementation, the language of section 15 clearly states that the provisions are self-executing "to the fullest extent that their natures permit". In effect, this section indicates that the Hawaii

## GENERAL AND MISCELLANEOUS PROVISIONS

Constitution, as a whole, requires no further legislative action for effectuation.

## FOOTNOTES

### Chapter 1

1. Those state constitutions without a General or Miscellaneous Article are: Georgia, Idaho, Illinois, Massachusetts, Michigan, New York, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.
2. Maryland Constitutional Convention Commission, *Interim Report* (Baltimore: 1967), p. 195.

### Chapter 2

1. *Alabama Const.* amend LXXXVIII; *Alaska Const.* art. XII, sec. 6; *California Const.* art. XXIV; *Colorado Const.* art. XII, secs. 13, 14, and 15; *Georgia Const.* art. XIV; *Kansas Const.* art. 15, sec. 2; *Missouri Const.* art. IV, sec. 19; *Louisiana Const.* art. X; *Michigan Const.* art. XI, secs. 5 and 6; *New York Const.* art. V, sec. 6; *Ohio Const.* art. 15, sec. 10; and *Nevada Const.* art. 15, sec. 15.
2. U.S. Advisory Committee on Merit System Standards, *Progress in Intergovernmental Personnel Relations* (Washington: 1968), p. 17.
3. O. Glenn Stahl, *Public Personnel Administration* (New York: Harper & Row, 1971), p. 30.
4. Daniel F. Halloran, "Why Position Classification?", *Public Personnel Review*, 28(2) (April, 1967), p. 89.
5. Felix A. Nigro, *Public Personnel Administration* (New York: Henry Holt, 1959), p. 83.
6. Halloran, p. 89.
7. *Ibid.*, p. 91.
8. *Ibid.*, p. 89.
9. Nigro, pp. 83-84.
10. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 209.
11. James C. Worthy, "The Problem of Patronage," *Good Government*, 72(2) (March-April, 1955), pp. 15-16.
12. Rhode Island, Civil Service Advisory Committee, *Report on the State Merit System to Governor Christopher Del Sesto* (Providence: 1959), ch. II.
13. 1977 Haw. Sess. Laws, Act 159.
14. *Hawaii Rev. Stat.*, sec. 76-16(11).
15. Paul Van Riper, "Public Management Objectives: Role of a Merit System," *The Merit System: Foundation for Responsible Public Management* (Chicago: Public Personnel Association, 1963), p. 6.
16. The 4 states which constitutionally establish a civil service board or commission are California, Colorado, Georgia, and Michigan.

17. *Hawaii Rev. Stat.*, sec. 26-5.
18. *Hawaii Rev. Stat.*, sec. 76-14.
19. Jay M. Shafritz, *Public Personnel Management: The Heritage of Civil Service Reform* (New York: Praeger Publishers, 1975), pp. 11-15.
20. Felix A. Nigro and Lloyd G. Nigro, *The New Public Personnel Administration* (Illinois: F.E. Peacock Publishers, Inc., 1976), p. 5.
21. Van Riper, p. 2.
22. U.S. Advisory Committee on Merit System Standards, p. 14.
23. Stahl, p. 22.
24. *Ibid.*, p. 27.
25. U.S. Advisory Committee on Merit System Standards, p. 46.
26. *Ibid.*, p. 3.
27. Nigro and Nigro, p. 20.
28. Ralph E. Winter, "All Applying Are Equal But Some Are More So at Many Companies," *Wall Street Journal*, June 6, 1973, p. 1.
29. U.S. Advisory Committee on Merit System Standards, p. 33.
30. *Ibid.*, p. 14.
31. *Ibid.*, p. 29.
32. *Ibid.*, p. 70.
33. Stahl, p. 20.
34. Nigro and Nigro, p. 137.
35. Van Riper, p. 10.
36. Nigro and Nigro, pp. 141-142.
37. *Ibid.*, p. 16.
38. Joel Siedman and Joyce Najita, *The Merit Principle and Collective Bargaining in Hawaii* (Honolulu: 1976), pp. 70-71.
39. *Ibid.*, p. 71.
40. Shafritz, p. 4.
41. *Ibid.*, p. 45.
42. U.S. Advisory Committee on Merit System Standards, p. 59.
43. *Ibid.*, p. 74.
44. Nigro and Nigro, p. 146.
45. *Ibid.*, p. 15.
46. Stahl, p. 90.

47. Nigro and Nigro, p. 145.

48. Stahl, p. 50.

49. Nigro and Nigro, p. 91.

50. U.S. Advisory Committee on Merit System Standards, p. 60.

51. Shafritz, p. 3.

52. Van Riper, p. 10.

53. Shafritz, p. 50.

54. Van Riper, p. 10.

55. Shafritz, p. 53.

56. *Ibid.*, p. 47.

57. U.S. Advisory Committee on Merit System Standards, p. 1.

58. *Ibid.*, p. 60.

59. Nigro and Nigro, pp. 79-80.

60. *Ibid.*, pp. 143-144.

61. *Ibid.*, p. 136.

62. Shafritz, p. 65.

63. Hawaii, Commission on the Organization of Government, *Report to the Ninth State Legislature, State of Hawaii* (Honolulu: 1976), p. 70.

64. Stahl, p. 53.

65. *Ibid.*, p. 66.

66. *Ibid.*, p. 62.

67. Nigro and Nigro, p. 126.

68. Federal Salary Reform Act of 1962, Pub. L. 87-973, 87th Cong.

69. U.S. Advisory Committee on Merit System Standards, p. 62.

70. Nigro and Nigro, pp. 126-127.

71. Siedman and Najita, pp. 73-74.

72. *Hawaii Rev. Stat.*, sec. 89-9(d).

73. Siedman and Najita, p. 73.

74. Van Riper, p. 9.

75. Stahl, p. 91.

76. Hawaii, Commission on the Organization of Government, p. 69.

77. Shafritz, p. 111.

78. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 102.

### Chapter 3

1. Hawaii (Territory), Auditor, *Report of the Auditor on Social Security Coverage for Members of the Employees' Retirement System of the Territory of Hawaii* (Honolulu: 1956), p. 5.

2. Fred W. Bennion, "State Public Employee Pensions and How They Grew," *Honolulu* (1977), Vol. IX, No. 9, p. 34.

3. Alexander Grant and Company, *State of Hawaii Study on Continued Participation in Social Security by Members of the Employees' Retirement System: Report Digest* (Honolulu: 1976), p. K-1.

4. Massachusetts Taxpayers Foundation, Inc., *Paying for Public Pensions: Will a Day Come When the Money Runs Out?* (Boston: 1976).

5. Tax Foundation, Inc., *Employee Pension Systems in State and Local Government* (New York: 1976), p. 31.

6. Bennion, p. 34.

7. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968).

8. *Alaska Const.* art. XII, sec. 7; *Illinois Const.* art. XIII, sec. 5; *New York Const.* art. V, sec. 7; and *Michigan Const.* art. IX, sec. 24.

9. Robert Tilove, *Public Employee Pension Funds* (New York: Columbia University Press, 1976), pp. 304, 307.

10. *Ibid.*, p. 337.

11. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 180.

12. Tilove, p. 256.

13. *Ibid.*, p. 354.

14. Two examples of such decisions are the California Supreme Court ruling in *Abbot v. City of Los Angeles*, 50 C.2d 438, 326 P.2d 484 (1958); and the Washington Supreme Court ruling in *Weaver v. Evans*, 80 Wash. 2d 461, 495 P.2d 639 (1971).

15. Tilove, p. 354.

16. *Ibid.*, p. 256.

17. *Ibid.*, p. 306.

18. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 330.

19. *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 169, 97 A.2d 231, 233 (1953).

20. *Bakenhus v. Seattle*, 48 Wash. 2d 695, 700, 296 P.2d 536, 539 (1956). This case was also cited in the ruling on *Weaver v. Evans* (1971), see footnote 14 above.

21. Tilove, p. 256.

22. *Ibid.*, pp. 137-138.



23. Alexander Grant and Company, p. B-1.
24. *Ibid.*, p. C-1.
25. Roy W. Bahl and Bernard Jump, "The Budgetary Implications of Rising Employee Retirement System Costs," *National Tax Journal* (1974), Vol. 27, No. 3, p. 485.
26. Bennion, p. 34.
27. Alexander Grant and Company, p. F-3.
28. *Ibid.*, p. R-4.
29. U.S., Congress, Senate Special Committee on Aging, *Termination of Social Security Coverage: The Impact on State and Local Government Employees; A Working Paper* (Washington: 1976), pp. 4-8.
30. Alexander Grant and Company, p. F-1.
31. *Ibid.*, p. E-1.
32. *Ibid.*, p. S-1.
33. *Ibid.*, p. R-5.
34. Tilove, pp. 123-124.
35. *Ibid.*, p. 94.
- 1969) and *Haskett v. Washington*, 294 F. Supp. 912 (D.D.C. 1968) were decided by a 3-judge district court and the decision was not appealed by the government.
17. *Ibid.*, p. 1169.
18. Ralph S. Brown, Jr., *Loyalty and Security: Employment Tests in the United States* (New Haven: Yale University Press, 1958), p. vii.
19. *Alaska Const.* art. XII, sec. 4; *California Const.* art. XX, secs. 3 and 19; *Maryland Const.* art. XV, sec. 11; and *Michigan Const.* art. IV, sec. 7.
20. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. 1, p. 211.
21. Hyman, p. 14.
22. *Ibid.*, p. 60.
23. *Ibid.*, p. 83.
24. *Ibid.*, p. 93.
25. *Colorado Const.* art. XII, sec. 10; *Maryland Const.* art. I, sec. 7; *Missouri Const.* art. III, sec. 15; *Nebraska Const.* art. XV, sec. 1; *Oklahoma Const.* art. XV, sec. 1; *Pennsylvania Const.* art. VI, sec. 3; *South Dakota Const.* art. III, sec. 8; *West Virginia Const.* art. VI, sec. 16; and *Wyoming Const.* art. 6, sec. 20, all state that failure to take the oath equals forfeiture of office.

#### Chapter 4

1. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 509.
2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 16.
3. *Ibid.*, p. 28.
4. *Ibid.*, p. 225.
5. 384 U.S. 11 (1966).
6. 385 U.S. 589 (1967).
7. 389 U.S. 258 (1967).
8. "Developments in the Law--The National Security Interest and Civil Liberties," 85 *Harv. L. Rev.* 1130, 1172-1173 (1972).
9. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 508.
10. *Ibid.*, p. 510.
11. *Ibid.*, p. 511.
12. *Ibid.*, p. 509.
13. *Ibid.*
14. *Ibid.*
15. Harold M. Hyman, *To Try Men's Souls: Loyalty Tests in American History* (Berkeley: University of California Press, 1959), p. vii.
16. "Developments in the Law--The National Security Interest and Civil Liberties, 1168. The cases of *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969) and *Haskett v. Washington*, 294 F. Supp. 912 (D.D.C. 1968) were decided by a 3-judge district court and the decision was not appealed by the government.
26. *Maryland Const.* art. I, sec. 7; *Missouri Const.* art. III, sec. 15; *Nebraska Const.* art. XV, sec. 8; *West Virginia Const.* art. VI, sec. 16; and *Wyoming Const.* art. 6, sec. 20, state that perjury or violation of the oath of office results in disqualification from any office of the state thereafter.
27. *Alaska Const.* art. XII, sec. 5; and *Oklahoma Const.* art. XV, sec. 1, also allow their respective legislatures to prescribe further oaths.
28. *California Const.* art. XX, sec. 1; *Delaware Const.* art. XIV; *Maryland Const.* art. 37 of the Bill of Rights; *Massachusetts Const.* 7th Amendment; *Michigan Const.* art. XI, sec. 1; *Montana Const.* art. III, sec. 3; *New York Const.* art. XIII, sec. 1; *North Dakota Const.* art. XVII, sec. 211; and *West Virginia Const.* art. VI, sec. 16, prohibit other tests or oaths from being required as a condition of holding public office.
29. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, pp. 692-695, 718-720.

#### Chapter 5

1. Council of State Governments, *Ethics: State of Conflict of Interest/Financial Disclosure Legislation 1972-75* (Lexington, Ky.: 1975), p. 1.
2. Virginia G. Cook, "Ethics," *The Book of the States 1976-77* (Lexington, Ky: Council of State Governments, 1976), p. 241.
3. Council of State Governments, p. 8.

4. Marver H. Bernstein, "Ethics in Government: The Problems in Perspective," *National Civic Review*, July 1972, Vol. 61, No. 7, p. 344.
5. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 515.
6. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 210.
7. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 516.
8. *Ibid.*, p. 515.
9. *Ibid.*, p. 516.
10. *Hawaii Rev. Stat.*, ch. 84; *Honolulu Charter*, art. X; *Hawaii Charter*, art. XIV; *Kauai Charter*, art. XX; and *Maui Charter*, art. X.
11. Council of State Governments, p. 28.
12. The case most frequently mentioned is the *City of Carmel-by-the-Sea v. Young*, 85 Cal. Rptr. 1, 466 P.2d 225, in which the court overturned the California conflict of interest law as it felt that the financial disclosure requirements were overly broad and not relevant to the duties of office.
13. *Fritz v. Gorton*, 83 Wash. 2d 275, 295-298, 517 P.2d 911, 923-925 (1974).
14. *County of Nevada v. MacMillen*, 114 Cal. Rptr. 345, 672, 522 P.2d 1345, 1351 (1974).
15. *Montana Const.* art. XIII, sec. 4; *Louisiana Const.* art. X, sec. 21.
16. *Hawaii Rev. Stat.*, sec. 84-21.
17. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 513-516.
9. W. Brooke Graves, *American Intergovernmental Relations* (New York: Charles Scribner's Sons, 1964), p. 89.
10. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, Delegate Kanemura reading from a letter from the Legislative Reference Bureau, pp. 720-721.
11. Walker, pp. 18-31.
12. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 19.
13. *Michigan Const.* art. III, sec. 5.
14. Paul Charles Bartholomew, *Summaries of Leading Cases on the Constitution* (N.J. Littlefield, Adams, N.J.: 1973), quoting from the U.S. Supreme Court decision on *Virginia v. Tennessee* (1893), pp. 325-326.
15. *Colorado Const.* art. V, sec. 34.
16. Beyle, p. 116.
17. *Hawaii Const.* art. III, sec. 9.
18. *Hawaii Const.* art. IV, sec. 1.
19. *Hawaii Const.* art. V, sec. 3.
20. *Alabama Const.* art. XVII, sec. 280; *Florida Const.* art. II, sec. 5; *Mississippi Const.* art. 14, sec. 226; *Missouri Const.* art. VII, sec. 9; *Rhode Island Const.* art. IX, sec. 6; and *South Carolina Const.* art. VI, sec. 3.
21. John L. Winkle III, "Dimensions of Judicial Federalism," *The Annals of the American Academy of Political and Social Science*, Nov. 1974, p. 67.
22. *Ibid.*, p. 75.

## Chapter 6

1. Elmer B. Staats, "Intergovernmental Relations: A Fiscal Perspective," *The Annals of the American Academy of Political and Social Science*, Nov. 1974, p. 33.
2. David B. Walter, "How Fares Federalism in the Mid-Seventies," *The Annals of the American Academy of Political and Social Science*, Nov. 1974, p. 25.
3. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 507.
4. *Hawaii Rev. Stat.*, ch. 310.
5. Council of State Governments, *Interstate Compacts, 1783-1970: A Compilation* (Lexington, Ky.: 1971).
6. Thad L. Beyle, "New Directions in Interstate Relations," *The Annals of the American Academy of Political and Social Science*, Nov. 1974, pp. 110-111.
7. *Ibid.*, p. 113.
8. *Michigan Const.* art. III, sec. 5; *Alaska Const.* art. XII, sec. 2.

## Chapter 7

1. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, see Standing Committee Report Nos. 70 and 78; also Committee of the Whole Report No. 26.
2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 37.
3. *Ibid.*, p. 234.
4. *Ibid.*, p. 356.
5. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 648.
6. Millicent Y.H. Kim, *Article XIV: General and Miscellaneous Provisions*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), p. 76.
7. 117 U.S. 151 (1886).
8. Bernard Schwartz, *The Powers of Government: A Commentary on the Constitution of the United States, Volume I: Federal and State Powers* (New York: Macmillan Co., 1963), p. 49.

9. 306 U.S. 466 (1939).
10. Paul Charles Bartholomew, *Summaries of Leading Cases on the Constitution* (Adams, N.J.: N.J. Littlefield, 1973), p. 112.
11. Schwartz, p. 50.
12. See: *Missouri Const.* art. III, "Legislative Department - Limit on Legislative Power," sec. 43; *Montana Const.* art. VIII, "Revenue and Finance," sec. 5, and art. X, "Education and Public Lands," sec. 11; *New Mexico Const.* art. XII, "Education," sec. 12; *North Dakota Const.* art. XI, "Revenue and Taxation," sec. 176; *Oklahoma Const.* art. X, "Revenue and Taxation," sec. 6; *South Dakota Const.* art. XI, "Revenue and Finance," sec. 5; *Washington Const.* art. VII, "Revenue and Taxation," sec. 1, art. XVI, "Schools and Granted Lands," various sections, and art. XXV, "Jurisdiction," sec. 1; and *Wyoming Const.* art. 15, "Taxation and Revenue," sec. 12.
13. *Montana Const.* art. I, notes.
14. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 507.

### Chapter 8

1. Statutes of California and Digests of Measures 1974, Vol. II, pp. 3753-3763; also, *California Const.*, various sections. The California Legislature submitted to the electorate amendments to the state constitution which would purge all traces of sexism from that document. The amendments were ratified on November 5, 1975.

For an example, see Senate Bill No. 157, Regular Session of 1975, State of Hawaii, which deletes all sexist pronouns from the Hawaii Constitution. This bill, however, did not pass.

### Chapter 9

1. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 16, p. 159.
2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 575.
3. William H. Young, *Ogg's and Ray's Essentials of American State and Local Government* (New York: Appleton-Century-Crofts, 1969), p. 12.
4. Bernard Schwartz, *A Commentary of the Constitution of the United States, Volume I: Federal and State Powers* (New York: Macmillan Company, 1963), p. 32.
5. Young, p. 12.
6. *Alaska Const.* art. XII, sec. 8; *Illinois Const.* art. II, sec. 2; *Virginia Const.* art. IV, sec. 14.
7. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 574.
8. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 37; herein-after cited as *Model State Constitution*.

9. Schwartz, p. 40.
10. *Model State Constitution*, p. 38.

### Chapter 10

1. National Municipal League, *The Drafting of State Constitutions: Working Papers for a Manual*, by Frank P. Grad (New York: 1967), p. II-15.
2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 68 from the Committee on Ordinances and Continuity of Laws, p. 223.
3. National Municipal League, p. 15.



## PART THREE

### **Article XVI: Schedule**



## Chapter 1

### INTRODUCTION

The last article of a constitution is called the Schedule. It provides for a smooth transition from the provisions in an old constitution to the provisions in a new constitution in such matters as the continuity of government operations, the election of officers and the establishment of governmental machinery.<sup>1</sup>

In Hawaii's Constitution, the Schedule includes a description of legislative districts, provisions to carry over government structure and function from the territory to the state and various other miscellaneous matters.

Since the provisions of this article were only intended to be temporary, the article probably contains more sections than in any other article that may be obsolete and dropped from the Constitution. Although these transitional and temporary sections might be preserved in the Constitution for historic and illustrative purposes, some sections are unnecessary to the document. The 1978 Constitutional Convention would therefore be a good place to review the necessity for these provisions.

One constitutional observer has made this point:<sup>2</sup>

The most conspicuous deadwood is the transitional provisions that have outlived their temporary, but once useful, purpose.... Much more noticeable are the provisions facilitating an orderly transition from territorial status to statehood or from one constitution to the next. Typically, these schedules, so-called, provide that the laws previously enacted, the court judgments and decrees previously handed down and the territory's (or state's) obligations shall remain in force until such time, if any, that they might be lawfully superseded. In most constitutions the schedule also provides that the officials holding office under the old system shall continue to hold office until their successors have been duly appointed or elected in the manner prescribed therein.

## SCHEDULE

Another has said:<sup>3</sup>

Certainly, the first requisite of a good constitution is brevity. It is a very great mistake for the authors of a constitution to attempt to say too much. A constitution is no place for legal codes or the appeasement of temporary interests. It should do no more than set down fundamental and enduring first principles. It must describe the basic framework of government, assign the institutions their powers, spell out the fundamental rights of man, and make provision for peaceful change.

Because there are many sections in the Schedule which were necessary only for a particular period of time, the 1978 Convention delegates may want to eliminate those sections. The effect would be a reduction of the overall length and the increased readability of the Hawaii Constitution.



## Chapter 2 DISCUSSION OF THE ARTICLE

### PART I. DISTRICTING AND LEGISLATIVE PROVISIONS

#### Section 1

Section 1 of Article XVI includes a description of the legislative districts for the state senate and state house of representatives. This section supplements sections 2 and 3 of Article III which declare:

##### Senate; Composition

...Until the next reapportionment the senatorial districts and the number of senators to be elected from each shall be as set forth in the Schedule.

##### House of Representatives; Composition

...Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

Section 1 of Article XVI was not intended to be a permanent part of the Constitution, however.<sup>1</sup> The legislative districts delineated in 1968 were valid only until the next reapportionment set for 1973. Reapportionments thereafter were scheduled to occur every 8 years.<sup>2</sup> The 1973 redistricting plan is contained in a note at the end of chapter 25, Hawaii Revised Statutes.

The machinery currently in the Constitution for periodic reapportionment and redistricting is in the form of a reapportionment commission. The commission is vested with the full power to redistrict the seats of the state legislature according to guidelines set by the state constitution. Those guidelines are:<sup>3</sup>

## SCHEDULE

- (1) The commission shall allocate the total number of members of each house being reapportioned among the 4 basic island units, namely (A) the island of Hawaii; (B) the islands of Maui, Lanai, Molokai, and Kahoolawe; (C) the island of Oahu and all other islands not specifically enumerated; and (D) the islands of Kauai and Niihau, on the basis of the number of voters registered in the last preceding general election in each of the basic island units and computed by the method known as the method of equal proportions, except that no basic island unit shall receive less than one member in each house.
- (2) No district shall extend beyond the boundaries of any basic island unit.
- (3) No district shall be so drawn as to unduly favor a person or political faction.
- (4) Except in the case of districts encompassing more than one island, districts shall be contiguous.
- (5) Insofar as practicable, districts shall be compact.
- (6) Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams, and clear geographical features, and when practicable shall coincide with census tract boundaries.
- (7) Where practicable, representative districts shall be wholly included within senatorial districts.
- (8) Not more than 4 members shall be elected from any district.
- (9) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

The 1968 Constitutional Convention was faced with the "one man, one vote" problem. The procedure for legislative apportionment and districting in 1968 was as follows:<sup>4</sup>

In order to assure incumbents and the public of a rational and objective districting plan which meets the legal requirements, your Committee utilized elaborate precautions to insure fairness and nonpartisanship. Your Committee first

## DISCUSSION OF THE ARTICLE

heard testimony from political scientists, attorneys and others, reviewed judicial decisions, analyzed the apportionment and districting provisions in the constitutions of other states and reviewed numerous publications on the subject. From all these sources, your Committee formulated and adopted districting criteria. It then engaged an independent team consisting of computer programmers, a statistician, a statistical assistant, statistical typists and a draftsman. This team programmed into the computer appropriate data gleaned from the 1960 registered voter figures for election precincts and extrapolated all data to correspond to census tracts. The team was then instructed to prepare and present to your Committee various districting plans according to your Committee's criteria. The maps were prepared in a downtown office and no member of your Committee or any other delegate was involved in the preparation of the various plans.

Given that the apportionment process vitally affects the political power structure, however, it must be remembered when considering the problem of apportionment that:<sup>5</sup>

...A criterion of apportionment always contains a value. Representation may be defined as a relationship between an official and a citizen in which the actions of the official accord with the desires of the citizen. The relationship is a particular one, varying among individuals, and no device of representation extends to all persons equally. Every step in the process of granting representation to a citizen or group of citizens is a controversial one. From the determination of who shall vote to the provisions for control of the representative after he has been elected, the process of representation is subjected to a struggle over values, so that ultimately the system of representation favors in each detail some citizens over others, or extracts for favorable attention in policymaking certain attributes of individuals rather than other attributes. No system of apportionment and no system of suffrage, balloting, or counting is neutral. The process of apportionment, like the other stages in the process of representation, is a point of entry for preferred social values. Any existing system of apportionment, whether legal, illegal, or extra-legal, institutionalizes the values of some groups in the jurisdiction.

These "value" influences were not absent from the 1968 Constitutional Convention. Despite the efforts aimed at objectivity by the

## SCHEDULE

committee on legislative apportionment and districting and the convention itself, there is evidence that political considerations were strong factors.

One delegate remarked, "I want to say, as I have stated earlier that the criteria are only criteria and they should not be followed to the T in every district."<sup>6</sup>

Another from the Big Island of Hawaii stated "...the apportionment committee chairman and its members did extend many extra courtesies to the delegation from Hawaii and to the People of the County of Hawaii. And for this we are truly grateful."<sup>7</sup>

The 1978 Convention delegates may want to delete this section on legislative districting from the Constitution since its provisions are dated and since the Constitution already provides mechanisms for periodic reapportionment. In so eliminating the description of legislative districts, the Hawaii Constitutional Convention delegates would be following a rule expressed in the Model State Constitution of not permanently fixing the geographical boundaries of legislative districts in the Constitution.<sup>8</sup>

For a detailed discussion and analysis of apportionment and districting, see Hawaii Constitutional Convention Studies 1978, Reapportionment in Hawaii.

## Section 2

Section 2 of Article XVI relating to the terms of senators elected in the 1968 general elections was inserted into the Constitution to accommodate the intent of the committee on legislative apportionment to have all senate terms commence after the 1970 general election.<sup>9</sup> The effect of this provision has been an elimination of staggered terms for the senate.

## DISCUSSION OF THE ARTICLE

Originally, senators elected to 4-year terms in the 1968 general election would have been allowed to serve the full 4 years for which they had been elected. The apportionment committee reasoned that it would be unfair to require a person who is elected to a 4-year term to run again for office at the expiration of half of his term merely because of a reapportionment.<sup>10</sup>

This proposal, however, allowing senators elected in 1968 to serve 4 years was amended by the committee of the whole to allow those senators elected in 1968 only 2-year terms. The committee of the whole felt that senators could only hold their senate seats subject to constitutional amendments.<sup>11</sup>

Together with the approval of concurrent 4-year terms for all senators, an 8-year legislative apportionment and districting cycle was approved by the committee of the whole instead of a 6-year cycle that was proposed by the apportionment committee. It was felt more reasonable that reapportionments occur at the end of two 4-year senate terms than in the middle of a 4-year term.<sup>12</sup>

Since this section has served its function it should be dropped from the Constitution. For a further discussion of staggered terms and the 6-versus 8-year apportionment cycles, see Hawaii Constitutional Convention Studies 1978, Reapportionment in Hawaii.

### Section 3

Section 3, relating to a twenty-sixth senator assigned to Kauai, was suggested by the 1968 Constitutional Convention to implement the minimum representation paragraph of section 4, Article III.<sup>13</sup> That paragraph provided that any basic island unit allocated less than a minimum of 2 senators and 3 representatives would be augmented by the number of senators or representatives necessary to attain such minimum. That

## SCHEDULE

paragraph also provided that the senators or representatives of any unit so augmented would share among themselves their county's total allocated vote such that each would exercise a fractional vote. In all nonvoting respects, the county's representatives and senators would be entitled to all the rights and privileges of their office.

Since the voter population of Kauai permitted only one senator, the minimum representation scheme provided an additional senator to the constitutionally apportioned 25 and allocated it to Kauai. The scheme permitted Kauai to receive 2 senators with one-half vote each.

This plan, however, was struck down as constitutionally impermissible<sup>14</sup> and the provision should be deleted from the Constitution. For a further discussion of fractional voting, see Hawaii Constitutional Convention Studies 1978, Reapportionment in Hawaii.

### Section 4

Section 4 was added to the Constitution in 1968 to make the legislative districting plan proposed by the 1968 Constitutional Convention effective for the first general election following ratification of the plan. That plan, sections IA and IB of the Schedule, was ratified by the voters and thus made effective for the 1970 elections. Since this provision has already served its purpose, it should be removed from the Constitution.

### Section 5

Section 5 was added by the 1968 Constitutional Convention to provide for the convening of the reapportionment commission by March 1, 1969 in the event that the temporary reapportionment and redistricting plan set forth in section 1 of the Schedule was not ratified. The convention was concerned that the U.S. District Court having jurisdiction over Hawaii's reapportionment would not act promptly should the voters not ratify the reapportionment and redistricting plan.<sup>15</sup>

## DISCUSSION OF THE ARTICLE

This problem, however, became moot when the voters did in fact ratify the reapportionment and redistricting plan set forth in section 1 of the Schedule and the section should be taken out of the Constitution.

### Section 6

Section 6 was added to the Constitution in 1968 to resolve the potential conflict between the reapportionment plan proposed by the Hawaii legislature and one proposed by the 1968 Constitutional Convention. The reapportionment plan proposed by the legislature was passed in 1967 as Senate Bill 1102 and provided for the reapportionment of the state senate. This amendment was presented on the 1968 ballot for ratification. The reapportionment plan proposed by the constitutional convention itself, provided for the reapportionment of both the state senate and house of representatives. It too was placed on the 1968 ballot. The possibility that the electorate might simultaneously approve 2 conflicting apportionment plans, was therefore presented.

To resolve this conflict, section 6 provided that in the event that both proposals were approved, the constitutional convention's proposal would prevail.

The results of the 1968 elections proved this section useful as both proposals were ratified by the voters. Since this section is no longer applicable, however, it should be deleted.

### Section 7

Section 7 sets the salaries of legislators at \$12,000 a year "until otherwise provided by law".

## SCHEDULE

The 1950 Constitutional Convention after debating on whether the convention should set legislative salaries at all, decided to set the first legislature's salaries, then allow subsequent legislatures to increase or decrease that amount. The power of the legislature to alter salaries, however, was limited by section 10 of Article III which required that any change in salary "not apply to the legislature which enacted the same", a provision which was carried over by the 1968 Convention.

Although many of the delegates at the 1950 Constitutional Convention were reluctant to raise the salaries, they were finally fixed at \$2,500 for general sessions, \$1,500 for budget sessions and \$750 for special sessions. These salaries were specified in the schedule apart from the main body of the Constitution. Delegates to the 1968 Constitutional Convention established an annual salary of \$12,000. The committee on legislative powers and functions noted that not only had the cost of living increased since 1950, but that legislative responsibilities had become more complex and demanding.<sup>16</sup>

In connection with the increase in legislative salaries, the 1968 Constitutional Convention created a commission on legislative salaries to be appointed by the governor which would meet every 4 years.<sup>17</sup> The commission's function was to recommend a salary plan for members of the legislature. It still left to the legislature, however, the burden to prescribe its own salary by the enactment of a law.

Since 1968, there have been 2 commissions on legislative salaries and both have recommended an increase in salaries. The latest commission in 1975 recommended that the legislative salary be increased to \$17,000.<sup>18</sup> To date, the Hawaii legislature has not acted on this recommendation, nor on any recommendation of either of the commissions. The 1975 salary commission indicated that it felt it unlikely that any future recommendation would be implemented. The 1975 commission believed that:<sup>19</sup>



## DISCUSSION OF THE ARTICLE

- (1) Since the recommendations are timed to be received by a legislature immediately before a general election, legislators, particularly those considering running for re-election, are going to be reluctant to vote for a salary increase, whatever the merits of the increase. Political realities mean that the burden of a final decision may unfairly rest with the legislator.
- (2) The constraints of a constitutionally imposed narrow jurisdiction precluding the commission from considering the entire legislative compensation plan [salaries, per diem, retirement, and other benefits], prevents a logical, systematic, comprehensive approach to setting the salary plan.
- (3) Consideration should be given to paying expenses on a vouchered expense-incurred basis.

In light of the experiences of the commissions on legislative salaries, the 1978 Constitutional Convention may want to review the entire legislative compensation mechanisms. Further discussion of legislative salaries can be found in Hawaii Constitutional Convention Studies 1978, Article III: The Legislature.

## PART II. MISCELLANEOUS PROVISIONS

### Section 8

Section 8 was added to the Constitution in 1968 to insure that the biennial budgeting cycle take effect for the 1971-72 biennium. Since this section is no longer applicable, it should be deleted. For further discussion of the state budgeting process, see the Hawaii Constitutional Convention Studies 1978, Article VI: Taxation and Finance.

## SCHEDULE

### Section 9

Section 9 provides that the amendments to Article VII, section 2, take effect on the first day of January, 3 calendar years after its ratification.

Article VII, section 2, specifies:

Section 2. Each political subdivision shall have power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by general law. The prescribed procedures shall not include approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be of superior authority to statute, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

A law may qualify as a general law even though it is inapplicable to one or more counties by reasons of the provisions of this section. (Material added in 1968 is underscored)

Previously, it was held that a county charter, even if adopted under the Constitution was no more than a statutory charter subject to continuing legislative control. The intent of the 1968 amendment was to give the county charter a higher status. Charter provisions with respect to "executive, legislative and administrative structure and organization" were therefore placed above amendment or repeal by the legislature and were subject only to general law allocating and reallocating powers and functions.<sup>20</sup>

Before the county charters passed partially beyond the legislature's control, however, the Constitutional Convention intended that the legislature be able to review the charters. Section 9 of the Schedule gave the legislature until January 1, 1972 for this review.<sup>21</sup>

## DISCUSSION OF THE ARTICLE

Since the intent of this section has been implemented, it should be deleted. For further discussion of county charters, see the Hawaii Constitutional Convention Studies 1978, Article VII: Local Government.

### Section 10

Section 10, relating to the continuity of laws from the territory to state, was retained by the 1968 Hawaii Constitutional Convention with minimal change. One of the changes, reflecting the fact that the 1968 Constitutional Convention was only proposing amendments to an existing constitution, included adding the words "amendments to the constitution". The intent of this section was that all laws in force before the amendments take effect, remain in force unless contrary to the amendments. This included all acts of Congress related to the lands in possession, use, and control of the State.<sup>22</sup>

The 1950 Constitutional Convention, in enacting this section, intended that:<sup>23</sup>

This section continues in effect (a) not only the land laws of Hawaii (territorial and federal) except as otherwise provided in the constitution, but also (b) the provisions of other federal laws (not inconsistent with the state constitution or incongruous with the state system or scheme of government or laws) such as the Hawaiian Organic Act, insofar as the same constitute part of the system of laws that are local in their nature and, if not continued in effect, would cause a hiatus in our local or state government or system of laws. On the other hand, section 2 would, of course, not continue in effect laws of purely federal nature, such as the Mann Act, or the Interstate Commerce laws having both an interstate commerce application and an express intra-territorial application, which, as applied to a state would be incongruous with the state system.

\* \* \*

...Examples of provisions of the federal laws continued in effect would be those creating territorial executive departments not otherwise covered by statute.

## SCHEDULE

The Hawaii Admission Act, subsequently provided that laws in force in the Territory of Hawaii, and any action pending in the courts would continue unabated in the new state.<sup>24</sup> It would appear then that sections in the Hawaii Constitution which refer to the same ideas, could have been abolished, since the federal act is controlling.

This section, however, broadly covers the idea of the continuation of laws from one governmental status to another. It therefore was retained by the 1968 Convention and probably should be retained by the 1978 Convention. The Model State Constitution explains:<sup>25</sup>

The principle of this section is that a new constitution ought to bring with it no greater changes than are necessary to effectuate its terms. All laws on the statute books and decisional law not inconsistent with the new constitution continue in force. Furthermore, all private and public rights, duties and proceedings continue unaffected except in so far as they may be modified in accordance with the provisions of the new constitution. It should be noted that the precise impact of a new constitution on particular private or public rights may be a difficult legal issue which can be resolved only by litigation in a particular case. All that can be done here is to state a principle. Normally, a new constitution has no effect on private litigation already terminated and private rights already adjudicated. Its main impact is on the future.

### Section 11

Since section 10, relating to the continuity of laws, covers adequately the entire subject of transition, it may be possible to abolish section 11. Section 11, relating to debts, was retained by the 1968 Constitutional Convention because the convention was uncertain whether any debts were still owed to the territory. The convention did not want to preclude the state from collecting on any such debts or liabilities.<sup>26</sup>

For a discussion of the state debt, see Hawaii Constitutional Convention Studies 1978, Article VI: Taxation and Finance.

## Section 12

Section 12, relating to residence and other qualifications, carries over prior status in the Territory of Hawaii to the state and allows the residence, citizenship, and other status of persons in the territory to satisfy any requirements of residence, citizenship, or other status prescribed by the Constitution. For instance, where a certain period of residence in the state is required for the qualifications of legislators, governor, lieutenant governor, judges, and heads of executive departments and other executive appointments, previous residence in the territory would be regarded as compliance with the requirement for residence in the state.

The 1950 committee of the whole explained:<sup>27</sup>

This section relates to all requirements, not only of residence, citizenship or other status or qualifications, but also of duration of the same. For instance, under its provisions, the period of residence in or under the Territory prior to statehood can be added to that in or under the State thereafter to fulfill requirements of residence in the "State" or any part thereof under the constitution. Likewise where the constitution requires that an attorney shall have been admitted to the bar of the "State" for ten years before he is eligible for appointment as a justice or judge, this section will constitute admission to the bar of the Territory a compliance with the requirement of admission to the bar of the State, as well as permit the addition of the period of membership in the Territorial bar to the period of membership in the State bar after statehood.

The 1968 Hawaii Constitutional Convention retained this provision because the Constitution required a justice or a judge to have been admitted to practice law before the Supreme Court of the State for at least 10 years.<sup>28</sup> No one would have been technically eligible to become a justice or a judge in 1968 unless some provision was made to carry over territorial status to statehood, statehood having occurred in 1959.

## SCHEDULE

There being no durational requirements currently in the Constitution longer than the existence of the State of Hawaii, the 1978 Convention delegates may wish to delete this provision from the Constitution.

### Section 13

Section 13, condemnation of fisheries, relates to what is commonly called konohiki fishing rights. These rights, referred to in section 3 of Article X, and section 13 of Article XVI, are rooted in a practice carried over from the Hawaiian monarchy involving the private right of konohikis to fish in certain areas of the sea.

The konohiki, which originally referred to a land agent appointed by a superior chief, but in time included the chief,<sup>29</sup> had rights which "entitled [the konohiki] to either taboo (tabu) one species of fish for himself, or to declare open and closed seasons and to take one-third of the tenants' catch during the open season for himself. The tenants [were] entitled to all other fish and no one other than the konohiki and his tenants [were] permitted to fish in the private fishing ground.<sup>30</sup> In addition:<sup>31</sup>

- (1) The private fisheries of the konohikis were limited to the reefs, and where there were no reefs, were limited to one geographical mile seaward of the beach at the low water mark; and
- (2) The hoainas, or tenants of the ahupuaas, as well as the konohikis had privileges to the fisheries.

In 1900, the Organic Act, although recognizing the existence of the konohiki fishing rights, required that those rights be registered with the government within 2 years.<sup>32</sup> Subject to such registered rights, public ownership was proclaimed and a program of condemnation begun. The Organic Act specified that the attorney general of the territory:<sup>33</sup>

## DISCUSSION OF THE ARTICLE

...may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

The intent of these provisions of the Organic Act was:<sup>34</sup>

...to make all fisheries in the sea waters of the Territory free to the citizens of the U.S. The purpose of the requirement of establishment of private fishing rights was to separate them from the public fisheries for the double purposes of doing justice to the claimants of vested rights therein and protecting the public fisheries from encroachment by adverse claimants and from other acts prejudicial to their free use and enjoyments.

The general rule of law that the public has the right to fish in all public waters, such as the sea or the navigable or tidal waters, except where a private individual could claim exclusive rights to fish in a designated area by right of custom, grant or prescription,<sup>35</sup> therefore, was limited in Hawaii by the laws concerning konohiki fishing rights. The rules developed in Hawaii courts have included:<sup>36</sup>

- (1) One acquiring title to a portion of ahupuaa has right of piscary in the sea adjoining, subject to rights of konohiki in fishery.
- (2) Under Hawaiian law, the fishery lying between low-water mark and the outer edge of a coral reef awarded to the owner of the ahupuaa is the private property of the landlord or konohiki, subject only to certain rights of the tenants of hoainas.
- (3) Fishing rights granted by 1846 statutes to tenants were granted also to those who might thereafter become tenants, and each succeeding tenant derived fishing rights from statute, not grantor or lessor.
- (4) Explicit and implicit in the Hawaiian Organic Act, sections 95 and 96, is the purpose of Congress of the United States to make all fisheries in the sea waters of

## SCHEDULE

the territory, not included in any fish pond or artificial enclosure, free to all citizens of the United States. To that end, it repealed all of the pre-existing laws of the Republic of Hawaii which conferred exclusive fishing rights and provided a method by which, in conjunction with the local statutes pertaining to eminent domain, private fishing rights, which in law constituted vested rights, might be segregated and acquired for the use of the citizens of the United States on making just compensation.

- (5) Section 96 of the Organic Act, requiring any person who has a private right to any fishery within 2 years after the effective date of the Organic Act to file a petition in the circuit court of the territory to establish such right, does not give such circuit court any jurisdiction to modify the rights of the owners of the fishery as defined by the statutes of the Territory of Hawaii; it can only recognize and confirm the title to fisheries. The extent of the rights of the owner are fixed by statute.
- (6) Within the meaning of the Organic Act, fishing rights granted by 1846 statutes to tenants were exclusive, and fishing rights were not "vested" in case of persons who did not become tenants until after April 30, 1900.
- (7) The Organic Act repealing laws conferring exclusive fishing rights is not unconstitutional insofar as it affected persons becoming tenants after April 30, 1900.

Under the Organic Act, 101 private fisheries were registered, although it is estimated that 300 to 400 existed. The ownership of these fisheries in the Territory of Hawaii is profiled below.



# DISCUSSION OF THE ARTICLE

## PRIVATE FISHERIES IN THE TERRITORY OF HAWAII (1939)<sup>37</sup>

Island	Registered under Sec. 96 of the Organic Act		Unregistered Fisheries	
	Number	Number of Owners	Number	Number of Owners
Hawaii	1	3	140	62
Maui	27	3	54	21
Molokai	3	2	25	15
Lanai	2	1	2	1
Oahu	53	20	11	9
Kauai	<u>8</u>	<u>6</u>	<u>16</u>	<u>11</u>
	101	35	248	119

Through the condemnation powers granted in the Organic Act, several konohiki fisheries were acquired by the U.S. government and the Territory of Hawaii. The fisheries acquired by the United States included those in the Pearl Harbor naval base. The fisheries acquired by the Territory included the Wailuku Fishery of 20 adjoining fisheries and the Heeia-Kahaluu fisheries at Kaneohe, Oahu.<sup>38</sup>

Fisheries acquired by the State of Hawaii have included Anukoli, Maui; Kahana Bay, Oahu; Maunalua, Oahu; Honouliuli, Oahu; Lawai, Kauai; and Waipa, Kauai.

At present, all of the major konohiki fishery rights have been condemned and acquired by the state. The remaining fisheries are assumed to be abandoned, since the owners have not attempted to bar the public from fishing in their areas.<sup>39</sup>

There appears, however, to be no method of ascertaining the intention of an owner to exercise his claim. No up-to-date list of who presently owns these konohiki fishing rights or where they are located has been compiled.<sup>40</sup> The possibility, therefore, though slim, still exists that a konohiki fishing right will be asserted. In that event the attorney general is mandated to purchase that fishing right.<sup>41</sup>

## SCHEDULE

The delegates to the 1950 Constitutional Convention were aware of these special konohiki rights, and felt that the state should continue to move to eliminate them. The chairman of the committee on agriculture, conservation and land remarked:

...the point is that there has been established by Hawaiian law the konohiki rights of fisheries, and those are vested rights according to law. If you will note later in the report...we are including or suggest including in the Constitution the mandate already in the Organic Act that all private fishing rights be condemned, so that eventually there will be no private fishing rights.<sup>42</sup>

The feeling of the committee was that all fisheries should be open to the public subject to reasonable regulation by the legislature.... The point is that...the committee was interested in seeing that the public eventually secured all fishing rights so that they could fish<sup>43</sup> from shore as well as out away from the present vested rights.

Informed that there were vested konohiki fisheries yet to be condemned and that if they deleted this section the State would no longer be required to condemn the vested rights to these fisheries, the 1968 Constitutional Convention delegates voted to retain this section.<sup>44</sup>

## FOOTNOTES

### Chapter 1

1. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 112.
2. Robert B. Dishman, *State Constitutions: The Shape of the Document*, State Constitutional Studies Project, Series II, No. 1 (New York: National Municipal League, 1960), p. 26.
3. David Fellman, "What Should a State Constitution Contain," *Major Problems in State Constitutional Revision*, ed. W. Brooke Graves (Chicago: Public Administration Service, 1960), p. 156.

### Chapter 2

1. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 240.
2. *Hawaii Const.* art. III, sec. 4.
3. *Ibid.*
4. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 245.
5. Alfred de Grazia, *Essay on Apportionment and Representative Government* (Washington: American Enterprise Institute for Public Policy Research, 1963), p. 20.
6. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 232.
7. *Ibid.*, p. 222.
8. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), p. 47; herein-after cited as *Model State Constitution*.
9. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 362.
10. *Ibid.*, pp. 265-266.
11. *Ibid.*, p. 362.
12. *Ibid.*, p. 360.
13. *Ibid.*, p. 264.
14. *Burns v. Gill*, 316 F. Supp. 1285 (1970).
15. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 363.
16. *Ibid.* p. 217.
17. *Hawaii Const.* art. III, sec. 10.
18. Hawaii, *Report of the 1975 Commission on Legislative Salary* (Honolulu: 1975), p. 7.
19. *Ibid.*, p. 3.
20. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 229.
21. *Ibid.*, p. 232.

22. *Ibid.*, p. 278.
23. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 351.
24. The Admission Act, secs. 12, 13, 15, 73 Stat. 4, Pub. L. No. 86-3, March 18, 1959.
25. *Model State Constitution*, pp. 113, 114.
26. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 279.
27. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 352.
28. *Hawaii Const.* art. V, sec. 3.
29. Jon J. Chinen, *The Great Mahele* (Honolulu: University of Hawaii Press, 1958), p. 24, footnote.
30. *State v. Hawaiian Dredging Co.*, 48 Haw. 152, 397 P.2d 593 (1964).
31. Richard H. Kosaki, *Konohiki Fishing Rights*, University of Hawaii, Legislative Reference Bureau, Report No. 1 (Honolulu: 1954), p. 3.
32. Organic Act, secs. 95 and 96, 31 Stat. 141, April 30, 1900.
33. *Ibid.*, sec. 96.
34. *Bishop v. Mahiko*, 35 Haw. 608, 673 (1940).
35. 36A C.J.S. *Fish*, sec. 6 (1961).
36. *Ibid.*, note 28.
37. Kosaki, p. 10.
38. *Ibid.*, p. 14.
39. Interview with Andrew Lee, Deputy Attorney General, July 21, 1977.
40. Hawaii, Department of Planning and Economic Development, and Western Interstate Commission on Higher Education, Gordon Trimble, *Legal and Administrative Aspects of an Aquaculture Policy for Hawaii* (Honolulu: 1972), p. 34.
41. Interview with Andrew Lee, Deputy Attorney General, July 21, 1977.
42. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 628.
43. *Ibid.*, p. 630.
44. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 279.

