

IN THE SUPREME COURT  
OF THE KINGDOM OF HAWAII

IN THE MATTER OF  
*THE SIERRA CLUB V.*  
*THE HAWAII DEPARTMENT OF TRANSPORTATION*

PROTOCOL

*All matters currently addressed by this Court are addressed with the full understanding that this Court has yet to be completed as part of the restoration process. In its incomplete status, the Court cannot issue binding opinions. Nor can the Court issue enforceable opinions.*

*The only capacity of the Court at this time is to issue advisory opinions.*

*Given the limitations of time and resources, the Court currently provides advisory opinions only at the request of the Ali'i Nui Mō'ī.*

ISSUE BEFORE THE COURT

In the interest of public health and safety and of domestic peace and tranquility, the Ali'i Nui Mō'ī ordered this Court to provide an advisory opinion on an expedited basis regarding the following question:

Under Hawai'i Revised Statutes § 343-5 and in light of the decision in *The Sierra Club v. The Hawai'i Department of Transportation*, can the Hawai'i Department of Transportation permit the Hawai'i Superferry to use the harbor improvements, funded by the State and necessary for Superferry's operation, prior to the State of Hawai'i completing and the Governor or Department of Transportation accepting a final environmental assessment addressing the potential environmental impacts of Superferry's operations?

This court responded to His Majesty's order by preparing an advisory opinion dated October 7, 2007. That opinion accompanied the King's Order of Performance delivered to the Hawai'i Supreme Court on October 9, 2007.

As a follow up to that opinion, this Court herein provides a legal analysis of the continuing turmoil and the root of that turmoil to be found in the deliberate and willful disobedience of public officials rejecting the final ruling of the Hawai'i Supreme Court in the *Sierra Club* case.

On August 26 and 27, 2007, when people entered the waters of Nawiliwili Harbor to enforce the law by blocking the entrance of Superferry, the response from Federal and State law enforcement included arrests. See Exhibits 1 and 2 hereto. Law enforcement actions also included the use of mace and physical force, causing injury to those seeking to enforce the law. See Exhibits 3-4 attached hereto.

The official actions taken to continue operations of the Hawai'i Superferry, after the Supreme Court ruling, constituted actions outside the authority of the public officials involved and constituted both illegal actions and actions taken in furtherance of a conspiracy to violate the law.

The events of August 26 and 27 in Nawiliwili Harbor, Island of Kaua'i, include the following civil torts and/or criminal offenses:

Encouraging and facilitating the illegal operation of the Hawai'i Superferry, after the Supreme Court ruled that an environmental assessment was required, constituted malfeasance in office or official misconduct on the part of the Governor and the Director of the Department of Transportation.

The agreement between the Governor, the Director of the Department of Transportation, and the management/directors of Hawai'i Superferry, Inc. to continue operations of the Superferry illegally, after the Supreme Court ruled that an environmental assessment is required, constituted a conspiracy.

Even though State and Federal officials in the highest positions of responsibility were not present on August 26 and 27, to the extent those officials acted to create and/or facilitate the situation, those officials are accessories to the events on those dates.

On August 26 and 27, law enforcement officials arrested numerous people trying to prevent the implementation of the illegal conspiracy to continue Superferry operations. Exhibits 1 and 2 hereto. All those arrests were false arrests.

The people arrested on August 26 and 27 were falsely imprisoned.

Anyone participating in the Superferry enterprise who took from another person their boat, surfboard, boogie board, or other possession without their consent is guilty of theft. [www.YouTube.com](http://www.YouTube.com) (search "Kaua'i police arresting surfers !" – 3 ½ minute video showing arrests and seizure of boogie and surf boards).

The actions of law enforcement in seizing the property of people in the Nawiliwili Harbor area on August 26 and 27 took place with the implicit use of deadly force. Such actions constituted robbery.

In the course of aiding and abetting Superferry in violating the law, law enforcement personnel arrested, and detained against their will, citizens trying to enforce the law. Such actions constituted kidnapping.

To the extent the County Prosecutor pursued or continues to pursue prosecution of those arrested, rather than those participating in the illegal conspiracy, the County Prosecutor is engaged in, or is engaging in, obstruction of justice.

The Coast Guard boat that de-tarped and manned its large caliber machine gun in Nawiliwili Harbor committed an assault on those within range.

When the Governor then created the Unified Command to continue the illegal operation, all participants in the Unified Command joined the conspiracy.

**HRS §707-716 Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

- (a) By threatening another person on more than one occasion for the same or a similar purpose;
- (b) By threats made in a common scheme against different persons;

(c) Against a public servant arising out of the performance of the public servant's official duties. For the purposes of this paragraph, "public servant" includes but is not limited to an educational worker. "Educational worker" has the same meaning as defined in section 707-711; or

(d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony. [L 1979, c 184, pt of §1(2); am L 1989, c 131, §1; gen ch 1992; am L 2006, c 230, §31]

The press conference held by the Governor, the Coast Guard, and Superferry announcing the plan to return to Nawiliwili Harbor constituted an act of official terroristic threatening. Exhibit 5 hereto.

To the extent that the Attorney General cooperated with the Superferry illegal enterprise and/or failed to prosecute the government officials cooperating in that enterprise, the Attorney General is guilty of obstruction of justice. Exhibit 5 (Attorney General participated in press conference threatening arrest and prosecution of citizen law enforcers)

The release of the statement of offenses and punishments aimed at those intending to enforce the law in Nawiliwili Harbor was the second act of official terroristic threatening. Exhibit 6 hereto. That second act triggers Section (a) of the State statute.

The Governor going to Kaua'i to again threaten people with arrest and prosecution is a third act of official terroristic threatening, reinforcing the application of Section (a) of the State statute. Exhibit 7 hereto.

The official threats made against hundreds of people to further the Superferry enterprise triggered Section (b) of the State statute.

The people trying to enforce the law in the face of official lawlessness assumed a position as “public servants.” The threats directed at these public servants triggers Section (c) of the State statute.

To threaten to arrest, prosecute, imprison and fine people acting in harmony with the law in order to further violations of law constitutes official terroristic threatening.

The inclusion of law enforcement personnel in the Unified Command added use of deadly weapons to enforce the threats, triggering section (d) of the statute.

The conspiracy to intimidate, arrest, prosecute, imprison, and fine the people trying to enforce the law against the illegal operation of Superferry constitutes a civil rights conspiracy with both state and private actors.

Upon remand, the trial court in the *Sierra Club* case at issue, issued a ruling granting a permanent injunction preventing any further operation of the Hawai'i Superferry until such time as the environmental assessment ordered by the Hawai'i Supreme Court is “legally concluded.” Order Granting Plaintiffs' Motion to Enforce Judgment Requiring Environmental

Assessment by Prohibiting Implementation of Hawai'i Superferry Project, for Temporary, Preliminary, and Permanent Injunction, Civil No. 05-1-0114(3), (2<sup>nd</sup> Cir Haw.), October 9, 2007 at 7. The Order also invalidated the Harbors Operating Agreement as it relates to Mau'i between the State of Hawai'i and Hawai'i Superferry, Inc. Id.

This order confirmed again that HRS § 343-5 requires completion and acceptance of a required EA prior to any implementation of the action proposed.

In response to this order, the Governor and other supporters of the Hawai'i Superferry have mounted an extensive campaign to have the Legislature hold a special session for purposes of amending the law to permit the Hawai'i Superferry to continue operating.

Opponents of Superferry operating prior to completion of an EA or an environmental impact statement (EIS) are mounting a campaign to prevent passage of such legislation.

The turmoil is extraordinary.

Email systems at the Capitol are breaking down or becoming useless to the legislators as automatically generated emails and genuine citizen expression pour into the legislative offices.

Print media outlets are swamped with letters to the editor and opinion editorials.

The General Manager of a broadcast company with seven radio stations in Hawai'i began broadcasting his message criticizing the State Senate and calling upon the people to demand a special session of the Legislature to pass legislation allowing Superferry to operate. The message ran multiple times each hour.

One Senator is already calling for hearings on the outer islands prior to the passage of any legislation. Such hearings are certain to be highly contentious, given the expressions of opposition to Superferry to date from the outer islands.

Legislators are struggling with proposed legislation that can protect the environment while allowing Superferry to be operated profitably.

These and other manifestations of the controversy continue to heat the political atmosphere. The community is definitely in the midst of an interbranch conflict between the courts and the Governor allied with some legislators.

This conflict emanates from a profound misunderstanding of the United States and Hawaiian Constitutions. In both Constitutions, the separation of powers between the Executive, Legislative, and Judicial

Branches is a fundamental principle that defines the proper and legal operations of the government.

The Supreme Court ruling in the *Sierra Club* case constituted a final judgment with respect to the bar on continued operation of Superferry. The trial court, on remand, simply enforced the Supreme Court's order by entering a permanent injunction preventing Superferry from using the harbor improvements in the Mau'i harbor and invalidated the harbor use agreement as that agreement applies to Maui harbor.<sup>1</sup>

The Legislature cannot constitutionally pass legislation that alters that final judgment.

The key issue here is the constitutional separation of powers. This issue is discussed in depth regarding the ability of a legislative body to overturn a judicial decision in *Plaut v. Spendthrift Farm, Inc.* (93-1121), 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995). The essential holding in this United States Supreme Court case is that a legislature cannot pass a law altering a final judgment of a court because to do so would violate the separation of powers between the legislative and judicial branches.

This holding turns on whether the judgment is final.

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<sup>1</sup> While the court in Mau'i acted within the court's limited jurisdiction, the Supreme Court decision is of statewide applicability.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in *United States v. Klein*, 13 Wall. 128 (1872), where we refused to give effect to a statute that was said "[t]o prescribe rules of decision to the Judicial Department of the government in **cases pending** before it." *Id.*, at 146. Whatever the precise scope of *Klein*, however, later decisions have made clear that **its prohibition does not take hold when Congress "amend[s] applicable law."** *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992).

*Plaut*, *supra* at 218 (emphasis added).

Thus Congress can amend a law and affect a case in which the legal issue addressed by the law is still pending. The case cited above and being discussed publicly, *Robertson v. Seattle Audubon Soc'y* (90-1596), 503 U.S. 429 (1992), is just such a case of the law changing while a case is pending.

After a final decision, however,

[i]t is, of course, retroactive legislation, that is, legislation that prescribes **what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred--**in this case, the filing of the initial Rule 10b-5 action in the District Court. When retroactive legislation requires its own application in a case **already finally adjudicated**, it does no more and no less than **"reverse a determination once made, in a particular case."**

*Ibid.* at 226 (emphasis added) *citing* The Federalist No. 81 at 545.

Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and **Congress may not declare by retroactive**

**legislation that the law applicable to that very case was something other than what the courts said it was.** Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation of powers analysis than it deprives the latter of its significance for due process purposes. See, e.g., *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985); *Meachum v. Fano*, 427 U.S. 215 (1976).

Ibid at 227(emphasis added).

The separation of powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner--viz., with particular rather than general effect--that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. **Not favoritism, nor even corruption, but power is the object of the separation of powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.**

Ibid. at 228-229.

[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Ibid. at 239.

Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.

Ibid at 218-219

The Hawai'i Supreme Court's *Sierra Club* decision, in light of the clear mandate and plain wording of the statutory "condition precedent" requirement, decided the matter and left the trial court to enforce that decision.

The trial court granted the plaintiffs' motion to "enforce" the final judgment of the Supreme Court and entered an injunction.

Whatever the Hawai'i Superferry lawyers may think that they are appealing in the Maui case, they are not appealing the original Supreme Court ruling. They are only appealing the specific enforcement of that ruling imposed by the trial court, which is not an appeal on the merits. As far as the merits, the case is closed and the judgment is final.

If legislation is passed to allow operations of Superferry while an EA or EIS is being prepared, that legislation must somehow lift the injunction. That would require reopening the judicial decision. The Legislature would then be exercising judicial power. *Plaut* is directly on point that such a reopening of a final decision is an impermissible violation of the separation of powers.

The necessary assertion of the separation of powers would begin the process of restoring the public peace and stopping the interbranch conflict.

Separation of powers, a distinctively American political doctrine,  
profits from the advice authored by a distinctively American poet:  
Good fences make good neighbors.

Ibid. at 240.

The provisions of the Hawai'i Constitution create the same separation of powers as the United States Constitution. See Addendum below.

The legislative power of the Hawai'i Legislature extends to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Article VI, Section 1, Hawai'i Constitution.

For the Hawai'i Legislature, overturning a final judicial ruling is not a rightful subject of legislation consistent with the Hawaiian or United States Constitutions.

## CONCLUSION

The political leadership of the State violated the public trust, abused their power, and violated the law by attempting to continue the operation of the Hawai'i Superferry after the Supreme Court's Sierra Club decision.

Now that same leadership is asking legislators to act outside their constitutional power to reopen a final judicial judgment and reach a different result.

The Legislature can legitimately refuse to include in any special session legislative proposals that are clearly unconstitutional.

A handwritten signature in cursive script, reading "Lanny Alan Sinkin", written in dark ink.

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LANNY ALAN SINKIN  
CHIEF JUSTICE

DATED: October 16, 2007

For publication<sup>2</sup>

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<sup>2</sup> Upon completion of this Court and establishment of a reporting system, the advisory opinions issued during the interim period between initial restoration (September 25, 2007) and full restoration will be published.

Addendum  
Constitution of the United States  
compared to  
Constitution of Hawai'i  
re: Separation of Powers

LEGISLATIVE POWER

**United States Constitution**

Article I.

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**Hawai'i Constitution**

Article III

THE LEGISLATURE

LEGISLATIVE POWER

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

EXECUTIVE POWER

**United States Constitution**

Article II.

Section 1

The executive Power shall be vested in a President of the United States of America.

**Hawai'i Constitution**

ARTICLE V

THE EXECUTIVE

ESTABLISHMENT OF THE EXECUTIVE

Section 1. The executive power of the State shall be vested in a governor.

## JUDICIAL POWER

### **United States Constitution**

Article 3.

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

### **Hawai'i Constitution**

ARTICLE VI

THE JUDICIARY

JUDICIAL POWER

Section 1. The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish.

The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules. [Ren and am Const Con 1978 and election Nov 7, 1978]