

# **Vote In Opposition to a Constitutional Convention: Explanation**

## **Background**

Hawai‘i has along history of writing constitutions. There were four constitutions during the constitutional monarchy, one for the republic of Hawai‘i, one while Hawai‘i was a territory, and finally, a statehood constitution. Each of the seven constitutions has been changed or amended. The constitution that was drafted and adopted in 1950 became effective when statehood was achieved in 1959. This constitution has never been replaced, only amended and revised. Since most of the amendments and revisions were the result of two constitutional conventions (1968 and 1978), they are referred to as the Statehood Constitutions, the 1968 Constitutions and the 1978 Constitution.

## **Constitutional Monarchy**

Both Kamehameha I and Kamehameha II served as absolute monarchs. Kamehameha III represented the first constitutional monarchy. The first two constitutions, both adopted during his rule (1841 and 1852), included limitations on royal power to which he voluntarily agreed. Both were influenced generally by Western ideas and by the reaction of foreigners to the exercise of absolute rule.

The first step away from absolute rule was in 1839 when Kamehameha III created the Declaration of Rights. Sounding very much like the Declaration of Independence, it stated that “God has bestowed certain rights alike on all men, and all chiefs, and on all people of the lands” and that “in making laws for the nations, it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects.”

## **Constitution of 1840**

The first written constitution partially separated the legislative, executive, and judicial powers and established a process for constitutional amendment. It codified the existing government structure and practice, providing for a House of Nobles based upon heredity and created a bicameral legislative branch by adding an elected house of representatives. It also provided for a supreme court for adjudicating legal questions.

## **The Mahele, 1848**

Kamehameha III also created another document of note. Where in the past, all land was held by the monarchy and usage only by permission of the monarch, in 1848 Kamehameha III allowed for private ownership of land, in fee, for the first time. This historic decision continues to have impact on contemporary issues of eminent domain, ceded lands, and other land tenure issues.

## **Constitution of 1852**

Hawai‘i’s second constitution also became effective under Kamehameha III. While the first was written by the king and his chiefs, the second resulted from legislative action calling for a commission to review the earlier document. The three commission members were appointed by the king, the house of nobles, and the house of representatives respectively and the changes resulted in an almost entirely new document. The legislature adopted the document after making some amendments and the king signed it on June 14, 1852.

The new Constitution expanded on the Declaration of Rights, granted universal (adult male) voting rights for the first time, and changed the house of nobles from a hereditary body to one where members were appointed for life, by the king. It allowed powerful non-native members to sit in the House of

Nobles, and institutionalized a government of three branches by separating and defining the legislative, executive, and judicial functions along the lines of the American Constitution. It also placed more limitations on the ruling monarch.

### **Constitution of 1864**

Kamehameha IV, although unhappy with the 1852 constitution because of its restrictions on royal power, took an oath to uphold the constitution when he took the throne in 1854.

Kamehameha V however, refused to take the oath to uphold the constitution and set as his goal changes to the constitution. He opposed universal suffrage, believing that property-ownership qualifications for voters and members of the House or Representatives were needed. More fundamentally, he “thought the prerogatives of the Crown ought to be more carefully protected... and that the influence of the Crown ought to be seen pervading every function of government...”

Kamehameha V called for a convention to enact a new constitution. Its members included the king, fifteen nobles, and twenty-six delegates elected by the voters, could not reach an agreement. While there was little disagreement over literacy requirements for voting, most delegates refused to agree with the property qualification. Kamehameha V disbanded the convention and announced that he was abrogating the Constitution of 1852. He and his close advisors drafted a new document and Hawai‘i’s third constitution came into effect on August 20, 1864. The document abolished universal suffrage and established literacy and property qualifications for voting. In an attempt to restore royal power, the constitution stipulated that the monarch did not have to seek advice and counsel from the nobles and made the cabinet directly responsible to the king.

### **Constitution of 1887: the “Bayonet Constitution”**

Kamehameha V’s constitution remained in effect until 1887, despite his death in 1872. However, there was dissatisfaction with the 1864 constitution, and in 1874, shortly before the end of King Lunalilo’s short reign, universal suffrage was restored.

Kalakaua succeeded Lunalilo from 1874 to 1891. His rule was characterized by changes of widespread corruption and abuses of power. In 1887 a bloodless revolt was led by a group known as the “Hawaiian League,” composed primarily of haoles. On June 30, a huge mass meeting demanded concessions from the king. The show of popular force convinced Kalakaua, whose troops did not support him that he had better agree with the demands, including demands for changes to the Constitution of 1864. The resulting revisions, proposed by members of the Hawaiian League, created a new document.

Referred to as the “Bayonet Constitution” of 1887, it significantly reduced royal power by, 1) changing the house of nobles to an elected rather than appointive body; 2) allowed legislative override of a veto; and 3) required legislative approval for the removal of cabinet members.

### **Provisional Government**

Kalakaua died in 1891 and was succeeded by his sister, Liliuokalani. Wanting to restore the monarchy’s powers, the Queen asked the legislators to call a constitutional convention. When they refused, she attempted to promulgate her own new constitution. Opposition quickly surfaced and the queen hastily announced that she would not attempt any changes, other than by legal means.

But it was too late. Revolution was already being planned. Spearheading the overthrow of the monarchy were haoles, mostly Americans, who believed the only way to bring stability to Hawai‘i was through annexation by the United States. They organized a secret group in 1892, called the Annexation

Club, and in early January 1893, a Committee of Safety was formed, made up primarily of members of the Annexation Club. On January 17<sup>th</sup>, the Committee of Safety took possession of a government office building and issues a proclamation abrogating the monarchy. They established a Provisional Government, and quickly received recognition by the American consul.

### **Republic of Hawai'i**

The end of the monarchy came when the Queen, under protest, abdicated her throne to prevent the bloodshed of her people. When the United States did not immediately annex Hawai'i, the Provisional Government set up a constitutional convention which adopted a constitution for the Republic of Hawai'i on July 4, 1894. Put into force by decree, without popular vote, it remained in effect until 1900.

The constitution recognized the American pattern of separation of powers, though it limited presidential power by adding a cabinet and a council of state. Under the new constitution, the government was essentially elitist. It consolidated haole power by establishing voting provisions so limiting that few of any other ethnicity could qualify.

### **1898, The Organic Act: Hawai'i as a Territory**

In 1898, Hawai'i was formally annexed by the United States under the terms of the Joint Resolution of Annexation of July 7, 1898. The formal transfer of sovereignty from the republic to the United States took place on August 12. The joint resolution authorized the President of the United States to appoint a commission to prepare and recommend to Congress legislation establishing a territory and its governance.

The five commission members presented their draft act and recommendations in December 1898... however, the Act to Provide a Government for the Territory of Hawai'i, referred to the Organic Act, did not pass Congress until April 30, 1900. This "constitution," providing a government for Hawai'i was signed by President McKinley on June 14, 1900.

The Organic Act consisted of six chapters entitled General Provisions, The Legislature, the Executive, The Judiciary, United States Officers, and Miscellaneous. Though it created a structure similar to that of state governments, the Organic Act allowed territorial citizens only limited self-government.

While members of the territorial house of representatives and senate were popularly elected from among the citizenry, the governor, secretary, territorial supreme court justices, and circuit court judges were appointed by the U.S. President with advice and consent of the U.S. Senate. Ultimate power and control remained in the hands of Congress, for it could specifically legislate just for Hawai'i, it could nullify legislation passed by the territorial legislature, and it alone could amend the Organic Act. The governor was given wide powers, enhanced by the fact that, as a presidential appointee, the governor was not dependant on local support. Although the voters could elect a delegate to the U.S. Congress, that delegate had not vote.

Although the commission drafting the act sought to require property qualification for voters and office holders, Congress deleted this proposal. Instead, the act specified that citizens could vote if they were registered, male, twenty-one years or older, a resident of the territory for not less than one year, and able to speak, read, and write English or Hawaiian. It also made all persons who were citizens of the Republic as of August 12, 1898 citizens of the United States and the Territory. In 1930 it was amended to allow women to vote.

### **The 1950 Constitutional Convention: Hopes for Statehood**

Hawai‘i, since becoming a territory of the United States, has had three constitutional conventions. The first constitutional convention was held in 1950 in an effort to convince Congress that the people of Hawai‘i accepted American values and were ready to be part of the United States. Congressional members feared Hawai‘i’s lack of similarity with the continent because of its racial and ethnic mix and its supposed infiltration and influence of Communists.

Numerous statehood petitions had been sent to Congress previously with no action until 1947, when the U.S. House of Representatives, but not the Senate, passed a statehood act. Adoption by the House again took place in 1950 and 1953; in 1954 the Senate, but not the House, passed a joint Hawai‘i-Alaska statehood-enabling act. Only after enabling the legislation for Alaska passed, and not until 1959, did statehood come to Hawai‘i.

In 1949, the Territorial legislature passed Act 334, calling for a constitutional convention to meet in 1950 and draw up a constitution. It directed that sixty-three delegates be elected on a non-partisan basis, at a primary and general election, from a mix of single and multi-delegate districts.

Although the constitution looked very much like other state constitutions and incorporated parts of the U.S. Constitution and the Organic Act, it was unique in some ways by providing:

- No segregation in any state military organization;
- Fixing voting age at twenty, instead of at twenty-one as most states;
- Providing for periodic voter consideration of whether the constitution should be reviewed by a constitutional convention;
- Gave the governor exclusive authority to reapportion the lower chamber;
- Provided a mechanism for removing a bill from committee so that the entire chamber could consider it;
- Established a single centralized school system; a centralized responsibility for public health, public assistance, slum clearance, and low income housing and for the conservation of the land;
- Incorporated into the document the provisions of the federal Hawaiian Homes Commission Act of 1920;
- Incorporated a provision accepting a compact with the federal government to guarantee continuation of this trust obligation;
- Provided for the appointment of judges, rather than election;

### **Statehood, 1959**

When Hawai‘i became a state in 1959, it was the 1950 constitution that was accepted as Hawai‘i’s governing document. A State constitutional convention was not held until 1968.

### **1968 Constitutional Convention**

The 1968 Convention came out of the need to resolve a U.S. Supreme Court’s opinion that a state legislature must be apportioned on the one-person-one-vote principle. After that decision, Hawai‘i’s Attorney General issued opinions that both the Hawai‘i state house and senate were unconstitutionally apportioned. In November, 1966 two-thirds of the voters voted to approve a constitutional convention. The focus of this con-con was reapportionment. The convention created a bipartisan commission to carry out future districting for both the house and senate, removing the power of reapportionment from the Governor as previously provided. In addition the con-con:

- Deleted the requirement of the ability to read and write English or Hawaiian as a qualification for voting;
- Reduced the voting age to eighteen;

- Allowed the legislature to provide for a presidential primary;
- Lengthened judicial terms;
- Required adoption of a code of ethics;
- Reduced the minimum age for serving as Governor;
- Enabled collective bargaining for public employees;
- Enhanced protection against invasion of privacy; and
- Guaranteed appointment of counsel for indigent defendants.

### **The 1978 Constitutional Convention**

The 1978 Constitutional Convention was approved by 74 percent of the voters. While there was no single prevailing issue, public interest groups supported a convention because it was “a healthy and democratic device to review basic government organization and procedures.”

The convention proposed a total of 116 changes. Most noteworthy were:

- Bill of Rights: incorporated a right to privacy, requirement of a twelve-person jury in criminal trials and creation of independent counsel for grand juries;
- The period between the primary and the general was expanded, and open primaries were reinstated;
- Staggered senate terms added, requirements for open meetings, and a mandated legislative recess period added; limits to governor and lieutenant governor’s terms to two consecutive four year terms; a judicial selection commission and a new intermediate court of appeals was created.

### **Hawaiian Affairs**

- Created the Office of Hawaiian Affairs
- Enhanced the Hawaiian Home Lands rehabilitation program
- Required the teaching of Hawaiian culture in the public schools
- Established Hawaiian as an official language
- Protected traditional and customary rights
- Limited the use of adverse possession from acquiring title to land
- Gave a constitutional status to the state motto, written in Hawaiian
- Gave constitutional status to King Kamehameha’s “Law of the Splintered Paddle” written in Hawaiian
- Added definitions of “native Hawaiians” and “Hawaiians”

### **Voters Reject Another Convention**

In 1986, voters rejected a proposal for another periodic constitutional convention. No issues needed convention attention surfaces, and there was no visible effort to encourage a “yes” vote. In 1996, 163,869 voted “yes” for a con-con, 160,153 voted “no” and 45,335 were blank or spoiled ballots. The State interpreted this to mean that we should have a con-con, but this was challenged by the AFL-CIO in court, the Hawai‘i Supreme Court ruled in March 1997 that the blank and spoiled ballots counted as “no” and so the vote was defeated. This decision was appealed to the Federal District Court in Honolulu, and Judge Ezra ordered another vote on the question within 60 days. While awaiting an appeal decision on Judge Ezra’s decision, the Hawaii State Legislature passed a bill providing for a second vote in November 1998, the voters rejected a con-con 59.3% to 34.1%.

## **Analysis**

According to the 1994 edition of the Council of State Government's Book of the States, as of January 1, 1992, 233 con-cons, including the 1982 con-con in the District of Columbia, had been held in the U.S. No convention had been held since 1986 until the Louisiana legislature called itself into session as a convention in 1992 to resolve fiscal problems, but the amendments were turned down by the voters.

At present, Oklahoma is considering a bill calling for a con-con this November. Illinois will also be voting on this question in November.

According to many authors, one contributing fact to adding to the constitutions has been the erosion of the trust citizens have in their state governments.

It should also be noted that there has not been a Constitutional Convention to amend the U.S. Constitution since its creation in 1787. Article V of the U.S. Constitution provides two processes to amend the constitution. The first method is for a bill to pass two thirds of both House and Senate and the second method allows for a Constitutional Convention to be called by two-thirds of the legislature of the States. Both of these methods require amendments receive ratification by the Legislatures of three fourths of all the States. All the amendments to the U.S. Constitution thus far have been approved through the first method.

## **Support of a 2010 Con-Con**

In response to a survey by the Hawai'i League of Women Voters, people who support a con-con have identified the following issues needing change:

- Need to reexamine our governing structure periodically;
- Reevaluate our priorities, our values have changed;
- Need to resolve issues at the Legislature refuses to resolve such as: initiative and referendum; elected Attorney General; making legislative process more transparent;
- More home rule, amend taxing structure to benefit neighbor islands;
- Public funding for campaigns;
- Resolve the same-sex marriage issue, allow for civil unions;
- Create a Department of Aging;
- Provide for universal health care, including long-term care;
- Provide for affordable housing;
- Restructure DOE, BOE, and Board of Regents;
- Restructure OHA
- Allowing that the Akaka bill will pass, provide for negotiations for native Hawaiian rights;

## **Opposition to a 2010 con-con**

According to the 2006 State of Hawai'i Data Book, only 56.9% of the 1.2 million residents recorded in Hawai'i as of 2000 were born in Hawai'i. Since 1950, the percent of the population born in Hawai'i has consistently decreased from 71.1% to 56.9%. At the same time, the population in Hawai'i has exploded since 1950 from just under half a million to over a million residents. The changing demographic means we have a larger number of Hawai'i residents who most likely have a different set of values with superficial knowledge and understanding of Hawai'i's historic commitment to its Native peoples, and the history and protection of our privacy and union rights.

The technological advances of the Information Age with the creation of the Internet, video teleconferencing, podcasting, and satellite radio open the door to greater influence from outside Hawai'i, specifically national conservative special interest groups who intend to amend Hawai'i's

constitutional provisions relating to privacy rights, protecting access to reproductive health care (abortion, contraception, and treatment for STDs); collective bargaining, and Hawai'i's centralized system for education, health, and public assistance programs.

### **Native Hawaiian Issues**

The 1978 con-con provided for substantial changes for Hawaiian affairs. Prior to 1978, the constitution included a section entitled Hawaiian Home Lands in Article XI. This was substantially broadened in 1978 to create a new Article XII entitled Hawaii Affairs, which incorporated the section on Hawaiian Home Lands and additional provisions.

First, the language in Section 1, the Hawaiian Home Lands section, was expanded by requiring that the legislature "make sufficient sums available" for four specific purposes; and added into the constitution the requirement that 30% of state receipts derived from the least (or sale, etc.) of cultivated sugar cane lands and from the sale of water licenses are to be transferred to a Native Hawaiian Rehabilitation Fund.

Section 4 provided that ceded lands, excluding the available lands covered in Sections 1, 2, and 3 (HHL) are held as a public trust for native Hawaiians and the general public. Approximately 1.5 million acres, referred to as the public lands, fall under this section's coverage. Prior to this change, the constitutional provisions relating to public lands were very general. Because there were no statutory provision, the state used the funds from public lands for only one of the five purposes specified in section 5(f) of the Admission Act—public education. The new section intended to rectify this issue.

Section 5 created the Office of Hawaiian Affairs and established the board of trustees. Section 6 outlined the powers of the Board of Trustees of OHA. Section 7 was added to reaffirm, for descendants of native Hawaiians, rights customarily and traditionally exercised for subsistence, cultural and religious purposes.

Several of these constitutional provisions and its related statutory language have been under legal attack for the past decade. In 1996, a Hawai'i resident challenged his exclusion from voting in elections for OHA trustees and from voting in a special election relating to Hawaiian sovereignty. The U.S. Supreme Court in *Rice v. Cayetano* ultimately concluded that allowing only Hawaiians to vote for OHA trustees violated the 15<sup>th</sup> amendment of the U.S. Constitution. A subsequent legal challenge resulted in a decision by the 9<sup>th</sup> Circuit Court of Appeals invalidating Hawai'i's limitation of eligibility to be a candidate for OHA trustee to Hawaiians. Thus, all Hawai'i residents are allowed to vote in OHA elections and serve as an OHA trustee.

Legal attacks to these constitutional provisions and related statutory language continue today, but most challenges have not yet withstood procedural requirements, thereby precluding a decision on the substance of the legal challenges. The individuals and groups who have supported these legal challenges would clearly take the opportunity to amend the Hawaiian Affairs section of the Hawai'i Constitution if a Constitutional Convention were approved. Thus, opposition to a 2010 con-con would be the best course to preserve the provisions for Hawaiian Affairs in the State Constitution.

### **Conclusion**

"Ahahui Siwila Hawai'i o Kapolei came to the conclusion that given the current climate among certain persons and groups now living in Hawai'i to reduce, limit or totally destroy benefits and entitlements to native Hawaiians, the "Ahahui cannot support a constitutional convention.

In just the past few years we have seen ample evidence of malicious attacks on the Office of Hawaiian Affairs, the Kamehameha Schools, the Queen Liliuokalani Trust and other agencies important to Hawaiians, and there is no reason to believe that such actions will diminish.

The 1978 con-con provided unprecedented opportunities to Native Hawaiian and we have made some gains, but there is a real fear that the same method can be used to remove them. Rather, we can expect that they would exacerbate using a constitutional convention as a vehicle.

There is a mechanism to amend the State Constitution more often and more readily within the processes of the Hawai'i State Legislature, instead than having to go through the artificial contrivances of a con-con. Further, Hawai'i's legislators are known and readily available to the citizenry for issue discussions.

Amazingly, the year 1787 was the one and only time that the United States of America held a constitutional convention. However, the constitution has been amended twenty-seven times through the U.S. Congress by approval of two-thirds of the House and Senate followed by ratification by the legislatures of three fourths of the States. A similar procedure is also provided for in Article XVII of the State Constitution. The state legislature may propose constitutional amendments by a two-thirds vote of the House and Senate followed by ratification by the voters. A con-con is not the only mechanism available, in Hawai'i or nationally.

In a practical, common sense way we should ask ourselves: Is a con-con really necessary? What are the issues that absolutely must be settled that cannot be settled at and through the legislative process? Can Hawai'i afford the luxury of renting a meeting place, electing, seating and paying for one hundred or more delegates and staff given the current economic situation?

Some of the major issues being talked about are environment, land and water, and education – these issues have huge impact on Native Hawaiians and we should be prepared. Just as our kupuna did, we continue to fight for our existence in a different arena that uses high tech rules, but will do what must be done.