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Michael O. Eshleman

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THE NEW PITCAIRN ISLANDS CONSTITUTION: STRONG, EMPTY WORDS FOR BRITAIN’S SMALLEST COLONY

Michael O. Eshleman*

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“Limitations of power, established by written constitutions, have their origin in a distrust of the infirmity of man. That distrust is fully justified by the history of the rise and fall of nations.”¹

INTRODUCTION

On March 4, 2010, the new Pitcairn Constitution came into force²—two-hundred twenty-one years to the day after the

* Member of the Ohio Bar. J.D., University of Dayton School of Law. B.A. McMicken College of Arts & Sciences, University of Cincinnati. Former law clerk to Hon. Stephen A. Wolaver, Greene County Court of Common Pleas, Xenia, Ohio.

¹ Mott v. Pennsylvania R.R., 30 Pa. 9, 28 (1858).

² Pitcairn Constitution Order, 2010, S.I. 2010/244 (U.K.), *reprinted in* THE LAWS OF PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS, at xxvii–xxix (Paul Julian Treadwell comp., 2010), available at <http://www.government.pn/Laws/index.html> [hereinafter LAWS OF PITCAIRN]; Proclamation Appointing the Day for the Coming Into Force of the Pitcairn Constitution Order 2010, *reprinted in* LAWS OF PITCAIRN, *supra*, at xxx. *See generally* Anthony H. Angelo & Ricarda Kessebohm, *The New Constitution of Pitcairn: A Primer*, 7 N.Z. Y.B. INT’L L. 285 (2009). The Foreign and Commonwealth Office’s list of jurisdictions’ names says the territory is officially styled the “Pitcairn, Henderson, Ducie and Oeno Islands” but the shorthand herein “Pitcairn” will be used; the list also sanctions “Pitcairn Islands” for unofficial use. KNOWLEDGE & INFORMATION MANAGEMENT TEAM, INFORMATION & TECHNOLOGY DIRECTORATE, FOREIGN & COMMONWEALTH OFFICE, GEOGRAPHICAL NAMES AND INFORMATION 29 (2012), available at <http://www.fco.gov.uk/>

United States Constitution took effect.³ The British government that enacted it said the Pitcairn Constitution, “enshrined human rights for the first time; provided for an attorney-general; affirmed the authority of the Island Council; updated the role of the governor; and brought the judicial system into the constitution.”⁴

The Pitcairn Constitution runs 12,164 words.⁵ It is the length of the Alaska Constitution⁶ and triple that of the U.S. Constitution.⁷ It has 66 articles, one article for every inhabitant on Pitcairn, which has the population of a small village.⁸ (The population peaked at 233 in 1937 and today is only 66.⁹ The other three islands of the group—Henderson,

resources/en/pdf/publications/geographical-names-and-information

³ Continental Congress Resolution of Sept. 13, 1788, in 34 U.S. CONSTITUTIONAL CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 5355 (Roscoe R. Hill ed., 1936) (setting effective date for U.S. Constitution as first Wednesday in March next, i.e., March 4, 1789). See also Dan T. Coenen, *Of Pitcairn's Island and American Constitutional Theory*, 38 WM. & MARY L. REV. 649 (1997) (comparing early history of Pitcairn to start of American government under the Constitution, as the *Bounty* mutiny happened on April 28, 1789, two days before General Washington took the presidential oath).

⁴ U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY: THE 2010 FOREIGN & COMMONWEALTH OFFICE REPORT, 2011, Cm. 8017, at 113 (U.K.) [hereinafter U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY].

⁵ The Author cut-and-pasted the text, minus the schedule, into a word processor and ran a word count.

⁶ See 43 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2011, at 12–13 (2011) (listing word counts of state constitutions).

⁷ Jill Lepore, *The Commandments*, 86 NEW YORKER, Jan. 17, 2011, at 70 (stating U.S. Constitution is about 4,400 words, “one of the shortest in the world”). Cf. Anthony DePalma, *Constitutions Are the New Writers' Market*, N.Y. TIMES, Nov. 30, 1997, § 4, at 3 (stating the U.S. Constitution is “ideal, but too short” and its “brevity—it is just 10 pages, with about that many more in amendments—seems to most drafters [of modern constitutions] absurdly short and maddeningly vague.”); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. (forthcoming 2012) (comparing constitutions worldwide and finding America's is no longer a model for foreign drafters, particularly when they are formulating human rights provisions).

⁸ 603 PARL. DEB., H.C. (5th ser.) (1959) 1286 (U.K.) (statement of Norman Pannell) (stating Pitcairn's population is that of a small village).

⁹ Greg Dening, *Licensed to Land*, TLS: TIMES LITERARY SUPPLEMENT, July 25, 1997, at 10 (Eng.); see also DAVID SILVERMAN, PITCAIRN ISLAND 84, 92–95 (1967). For census counts from 1790 to 2008, see *Pitcairn Islands Study Center: Census Data*, PAC. UNION COLLEGE, <http://library.puc.edu/pitcairn/pitcairn/census.shtml> (last visited Feb. 10, 2012).

Ducie and Oeno—are uninhabited).¹⁰ Many articles are filled with details of the sort generally left by the United States Constitution for statutes but which clutter many state constitutions.¹¹ This is typical of British colonial constitutions—long and detailed.¹² Reading the document shows much is based on European human rights law.¹³

The rights guaranteed by the Constitution are worded oddly to American eyes, as they are filled with lengthy exceptions that make many of them valueless. What's worse, Britain's history with its colonies shows it can and does sweep away rights when it is convenient.

¹⁰ PITCAIRN ISLAND CONST. art. 37. For the outlying islands, see generally MICHAEL DE L. BROOKE, IAN HEPBURN & ROSIE J. TREVELYAN, HENDERSON ISLAND WORLD HERITAGE SITE: MANAGEMENT PLAN (2004); F. RAYMOND FOSBERG, MARIE SACHET & DAVID R. STODDART, HENDERSON ISLAND (SOUTHEASTERN POLYNESIA): SUMMARY OF CURRENT KNOWLEDGE (1983) (Smithsonian Institution Atoll Research Bulletin No. 272); Harry Yazell, *The (No) Importance of Ducie*, 14 PITCAIRN LOG, Dec. 1986–Feb. 1987, at 12; Steve Pendleton, *Ducie Island: Isolated and Inhospitable*, 25 PAC. MAG., July–Aug. 2000, at 36; Ada M. Christian, *Pitcairners' Holiday Cruise*, 13 PAC. ISLANDS MONTHLY, July 17, 1943, at 41 (Austl.) (Oeno); Harry Yazell, *The Importance of Oeno Island*, 14 PITCAIRN LOG, Sept.–Nov. 1986, at 8; Steve Pendleton, *Party Place: The Story of Oeno Island*, 23 PAC. MAG., Mar.–Apr. 1998, at 60.

¹¹ Compare PITCAIRN ISLAND CONST. art. 57 (permitting Governor to set terms of public employees' service), *id.* art. 48 (setting rules of appellate procedure), and *id.* art. 37(6) (providing statutes to be divided into numbered sections), with ALA. CONST. *passim* (a logorrheic monstrosity of 365,000 words with miniscule details on everything), CAL. CONST. art. 19 (allocating motor vehicle revenues), N.D. CONST. art. X, § 7 (providing for tax for hail insurance for crops), and OHIO CONST. art. VI, § 6 (providing for tuition credit program). Cf. JENNIFER CORRIN & DON PATTERSON, INTRODUCTION TO SOUTH PACIFIC LAW 79–87 (2d ed. 2007) (describing form of constitutions in region).

¹² EDWARD MCWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE 58 (1981). Cf. Alexander Hamilton, Speech at the New York Ratifying Convention (June 28, 1788), in 1 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 118 (Harold C. Syrett ed., 1961) (stating constitutions should be written in generalities as they are intended to be permanent).

¹³ Cf. Satvinder Singh Juss, *Constitutionalising Rights Without a Constitution: The British Experience Under Article 6 of the Human Rights Act 1998*, 27 STATUTE L. REV. 29 (2006) (Eng.).

THE BACKGROUND OF THE 2010 CONSTITUTION

*Before the Constitution*¹⁴

Englishmen settled on the island in 1790—these were the mutineers of the *Bounty*.¹⁵ For the first century of occupation, the islanders were left on their own, occasionally visited by Royal Navy ships whose officers dispensed law and order.¹⁶ Several codes for Pitcairn were drafted by these officers.¹⁷ The

¹⁴ For Pitcairn's legal history, see Michael O. Eshleman, *A South Seas State of Nature: The Legal History of Pitcairn Island, 1790-1900*, 29 UCLA PAC. BASIN L.J. [hereinafter Eshleman, *South Seas*] (forthcoming 2011); Michael O. Eshleman, *Law in Isolation: The Legal History of Pitcairn Island, 1900-2010*, 18 ILSA J. INT'L & COMP. L. [hereinafter Eshleman, *Law in Isolation*] (forthcoming 2011). For two older accounts of Pitcairn's legal history written by Donald A. McLoughlin, the Legal Adviser to the Governor of Pitcairn, see *An Account of the Development of the System of Government and Laws on Pitcairn Island During the Nineteenth Century*, 10 TRANS. & PROC. FIJI SOC'Y 138 (1969) and *An Account of the Development of the System of Government and Laws on Pitcairn Island in the Twentieth Century*, 11 TRANS. & PROC. FIJI SOC'Y 63 (1971). McLoughlin's articles were the basis of his legal history *Law and Order on Pitcairn's Island: An Account of the Development of the System of Government and Laws of Pitcairn Island From 1791 to 1971*, in LAWS OF PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS (Donald A. McLoughlin comp., rev. ed. 1974), available at <http://library.puc.edu/pitcairn/pitcairn/govt-history.shtml>. See also U.N. Gen. Assembly, Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries & Peoples, *Pitcairn*, ¶¶ 4-9, U.N. Doc. A/AC.109/1146 (Apr. 23, 1993) (summarizing previous constitutional arrangements).

¹⁵ See generally CAROLINE ALEXANDER, *THE BOUNTY: THE TRUE STORY OF THE MUTINY ON THE BOUNTY* (2003) (the best of the scores of books on the mutiny); MANORIAL RESEARCH, WITH NATIONAL MARITIME MUSEUM, *MUTINY ON THE BOUNTY, 1789-1989: AN INTERNATIONAL EXHIBITION TO MARK THE 200TH ANNIVERSARY*, 28 APRIL 1989-1 OCT. 1989 (1989) (an excellent collection of essays).

¹⁶ For the Royal Navy as Pacific policeman, see generally JOHN MANNING WARD, *BRITISH POLICY IN THE SOUTH PACIFIC (1786-1893)*, at 58-71 (Greenwood Press 1976) (1950); John Bach, *The Royal Navy in the Pacific Islands*, 3 J. PAC. HIST. 3 (1968) (Austl.).

¹⁷ See WALTER BRODIE, *PITCAIRN'S ISLAND AND THE ISLANDERS IN 1850*, at 84-91 (London, Whitaker 3d ed. 1851) (reprinting laws drafted for islanders in 1838 by Capt. Russell Eliott of *H.M.S. Fly*), microformed on American Culture Series, Reel 80.3 (University Microfilms; Notes of Admiral Fairfax Moresby's Address to the Pitcairn Islanders (May 17, 1853) (giving islanders proposals to change their laws, all of which were adopted), original in The National Archives, London (ADM 1/5618), available at <http://evols.library.manoa.hawaii.edu/handle/10524/19431>; HARRY L. SHAPIRO, *THE HERITAGE OF THE BOUNTY: THE STORY OF PITCAIRN THROUGH SIX GENERATIONS* 289-91

first, written in 1838, is sometimes referred to as the island's first constitution—recall that in Britain the “constitution” is also just a collection of laws.¹⁸

Only in 1898 was Pitcairn formally placed under British administration when it was brought within the jurisdiction of the Western Pacific High Commissioner.¹⁹ (The High Commission was created in 1877 to combat the slave-trade in the South Pacific and lasted 101 years).²⁰ Six years later a new code was enforced and in 1940 the High Commissioner promulgated a wide-ranging code for Pitcairn that organized the government and provided for civil and criminal matters.²¹

(1936) (transcribing laws drafted in 1893 by Capt. Eustace Rooke of *H.M.S. Champion*); U.K. COLONIAL OFFICE, PITCAIRN ISLAND: REPORT RECEIVED FROM REAR-ADMIRAL DE HORSEY, COMMANDER-IN-CHIEF OF THE PACIFIC STATION 6 (1878) (reprinting transcription of code de Horsey found when he visited in 1878); Letter from Capt. F. Proby Doughty, *H.M.S. Constance*, to Rear Adm. Algernon McLennan Lyons, Commander-in-Chief, Pacific Station (Mar. 31, 1884), in U.K. COLONIAL OFFICE, CORRESPONDENCE RELATING TO THE CONDITION OF THE PITCAIRN ISLANDERS, 1899, [C. (2d series) 9148], at 7 (reprinting transcription of code Doughty found when he visited in 1884).

¹⁸ H.E. Maude, *The History of Pitcairn Island*, in ALAN STRODE CAMPBELL ROSS & ALBERT W. MOVERLEY, *THE PITCAIRNESE LANGUAGE* 72–73 (1964) (describing the 1838 document as first constitution); U.K. SEC'Y OF STATE FOR JUSTICE & LORD CHANCELLOR, *THE GOVERNANCE OF BRITAIN*, 2007, Cm. 7170, 62–63 (discussing having a written constitution for Britain).

¹⁹ Instructions to the High Commissioner, Western Pacific, from Joseph Chamberlain, Colonial Sec'y, 1898 Fiji Royal Gazette 215, *reprinted in* R. v. Seven Named Accused, [2004] PNSC 1, 127 I.L.R. 232, [109] (Pitcairn Is. Sup. Ct.).

²⁰ The Western Pacific High Commission (“W.P.H.C.”) was created by the Western Pacific Order, 1877, § 7, 68 B.F.S.P. 328, 14 H.C.T. 871, *issued pursuant to* Pacific Islanders Protection Act, 1877, 38 & 39 Vict., c. 51, § 6, *superseded by* Pacific Order, 1893, 1893 London Gazette 5119, 5 Stat. R. & O., § Foreign Jurisdiction, at 484 (2d ed. 1904), 85 B.F.S.P. 1053, 19 H.C.T. 570; W. ROSS JOHNSTON, *SOVEREIGNTY AND PROTECTION: A STUDY OF BRITISH JURISDICTIONAL IMPERIALISM IN THE LATE NINETEENTH CENTURY* 83–166 (1973) (discussing creation of W.P.H.C.); U.K. FOREIGN & COMMONWEALTH OFFICE, *WESTERN PACIFIC HIGH COMMISSION: SELECTED DOCUMENTS* vii (2002) [hereinafter U.K. FOREIGN & COMMONWEALTH OFFICE, *WESTERN PACIFIC HIGH COMMISSION*] (stating termination of W.P.H.C. was July 11, 1978). For more on the history of the High Commission, see Eshleman, *South Seas*, *supra* note 14.

²¹ U.K. COLONIAL OFFICE, *COLONIAL OFFICE MISCELLANEOUS REPORTS* No. 30, PITCAIRN ISLAND: REPORT OF MR. R.T. SIMONS, 1905, [Cd. 2397], at 4, in 53 P.P. (1905) 55, MF 111.481, PCR 4-1788; 1941 W. Pac. High Comm'n Gazette 359 (Fiji), *reprinted as* PITCAIRN ISLAND GOVERNMENT REGULATIONS 1940 (Suva, Fiji, F.W. Smith, Gov't Printer 1941), PCR 5-2237.

In 1952, Pitcairn was established as a separate colony, sharing its governor and administration with the colony of Fiji.²² After Fiji became independent in 1970, a new fundamental law was issued from London.²³ In the 1990's it was supplemented by additional provisions for courts.²⁴ These instruments governed the island until the 2010 Constitution.²⁵

During the past fifteen years a tremendous mass of legislation has been issued for Pitcairn.²⁶ This was prompted by a wide-ranging rape investigation on the island that revealed the parlous state of government on the island.²⁷ It is said "[t]he legal structure . . . changes only in response to crisis" and Pitcairn is no exception.²⁸ The prosecutions came as Britain was considering reforming territorial governance in general.

Partnership for Progress: 1999

The 2010 Constitution grew out a British project on constitutional reform for its territories that began with a

²² Pitcairn Order, 1952, S.I. 1952/459 (U.K.), *amended by* Pitcairn (Amendment) Order, 1963, S.I. 1963/368 (U.K.).

²³ Pitcairn Order, 1970, S.I. 1970/1434 (U.K.), *amended by* Pitcairn (Amendment) Order, 2000, S.I. 2000/1340 (U.K.), *and* Pitcairn (Amendment) Order, 2002, S.I. 2002/2638 (U.K.); Pitcairn Royal Instructions, 1970, [1970] 3 S.I. 6725 (U.K.).

²⁴ Pitcairn Court of Appeal Order, 2000, S.I. 2000/1341 (U.K.), *amended by* Pitcairn Court of Appeal (Amendment) Order, 2004, S.I. 2004/2669 (U.K.); Pitcairn (Appeals to Privy Council) Order, 2000, S.I. 2000/1816 (U.K.).

²⁵ Pitcairn Constitution Order, 2010, S.I. 2010/244, sched. 1 (U.K.) (revoking the Pitcairn Order, 1970; the Pitcairn (Amendment) Order, 2000; the Pitcairn (Amendment) Order, 2002; the Pitcairn Court of Appeal Order, 2000; the Pitcairn Court of Appeal (Amendment) Order, 2004; and the Pitcairn Royal Instructions, 1970).

²⁶ See LAWS OF PITCAIRN, *supra* note 2, at xiii–xix (listing all laws enacted from 1952 to 2010 and showing few laws were passed for decades and then many laws were passed in the last fifteen years).

²⁷ Cf. U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 115 (discussing changes to Pitcairn law as a result of the rape investigation). For the rape investigation, see JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS (Dawn Oliver ed., 2009); KATHY MARKS, LOST PARADISE: FROM MUTINY ON THE BOUNTY TO A MODERN-DAY LEGACY OF SEXUAL MAYHEM, THE DARK SECRETS OF PITCAIRN ISLAND REVEALED (2009); Eshleman, *Law in Isolation*, *supra* note 14.

²⁸ See MARTIN MAYER, THE LAWYERS 137 (1967).

Foreign and Commonwealth Office white paper issued in 1999.²⁹ That document is full of the usual diplomatic nebulousness; its priorities were: (1) improving the “partnership” with the territories; (2) establishing human rights; (3) regulating the financial sector; (4) proscribing the drug trade; (5) fostering economic development; and (6) protecting the environment.³⁰ A decade later, the Foreign and Commonwealth Office recommitted itself to the 1999 white paper and said its priorities were: “self-determination; mutual obligations and responsibilities; freedom for the Territories to run their own affairs to the greatest degree possible; and firm commitment from the U.K. to help the Territories develop economically and to help them in emergencies.”³¹

²⁹ U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY: BRITAIN AND THE OVERSEAS TERRITORIES, 1999, Cm. 4264 [hereinafter U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY] (the white paper); E-mail from Andrew Allen, Head of Southern Oceans Team, Overseas Territories Directorate, Foreign & Commonwealth Office, London, to Michael O. Eshleman (Mar. 11, 2011, 12:46 GMT). In Britain, “white papers” are documents laid before Parliament stating the government’s policy and indicating the course of action the government plans to take. Stephen E. Young, “*By Command of Her Majesty*”: *An Introduction to the Command Papers of the United Kingdom*, 92 LAW LIB. J. 81, ¶ 8 (2000). The House of Lords conducted an informative debate on the *Progress and Prosperity* white paper in July 1999. 604 PARL. DEB., H.L. (5th ser.) (1999) 80–96 (U.K.). For an analysis of the *Progress and Prosperity* ten years on, see Peter Clegg & Peter Gold, *The UK Overseas Territories: A Decade of Progress and Prosperity?*, 49 COMMONWEALTH & COMP. POLS. 115 (2011) (Eng.). The British Government is presently reviewing its policies on overseas territories and plans to release another white paper on the territories in 2012. 532 PARL. DEB., H.C. (6th ser.) (2011) 48WS (statement of William Hague, Foreign Secretary).

³⁰ U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 29, at 3–8. The human rights referred to were these three issues: corporal punishment, the death penalty, and “homosexual acts between consenting adults in private.” Britain has been actively working to abolish the death penalty around the world. U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 17–20. Britain is also “at the forefront of international efforts to promote the human rights of LGBT people.” *Id.* at 33.

³¹ U.K. FOREIGN & COMMONWEALTH OFFICE, SEVENTH REPORT OF THE FOREIGN AFFAIRS COMMITTEE, SESSION 2007–08, OVERSEAS TERRITORIES: RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 2008, Cm. 7473, ¶ 2 [hereinafter U.K. FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO OVERSEAS TERRITORIES REPORT]. *Cf.* U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 29, at 11 (containing same list).

While other territories were exploring constitutional reform, Pitcairn's mayor complained to the United Nations that the island had not been consulted on the 1999 white paper, nor had its goals been explained to Pitcairners.³² (The mayor went to the United Nations, as it has long been monitoring Pitcairn).³³ Likewise, a resident of Pitcairn told the House of Commons Foreign Affairs Committee in 2008 that the Foreign and Commonwealth Office had never brought up the subject of constitutional reform on Pitcairn, even though it had been doing so elsewhere for years,³⁴ and issuing many new

³² Steve Christian, *Discussion Paper*, U.N. Pacific Regional Seminar to Review the Political, Economic, and Social Conditions in the Non-Self-Governing Territories, Nadi, Fiji, 14–16 May 2002, at 2–3, U.N. Doc. PRS 2002/DP.6 (May 14, 2002); Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2002, ¶ 40, U.N. Doc. A/57/23, GAOR, 57th Sess., Supp. No. 23 (2003) (noting participation of Mayor Christian in decolonization seminar). Mayor Christian was one of the men convicted in the 2004 rape trials. *R. v. Christian*, [2005] PNSC 1, [2006] 1 L.R.C. 745 [19] (Pitcairn Is. Sup. Ct.).

³³ See Rep. of the Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2003, July 3, 2003, at 39, U.N. Doc. A/58/23; GAOR, GAOR, 58th Sess., Supp. No. 23 (2003) (reporting that a representative of Pitcairn stated the island wanted an association with French Polynesia, Australia, or New Zealand rather than Britain and that “[t]he islanders believed that the procedures being followed by the Government of the United Kingdom were impeding the development of self government, were socially divisive and could destroy the community.”). See generally Robert E. Gorelick, *Self-Determination and the Absurd: The Case of Pitcairn*, 23 INDIAN J. INT'L L. 17 (1983) (discussing United Nations' decolonization campaign for Pitcairn). Compare 880 PARL. DEB., H.C. (5th ser.) (1974) 19W–20W (U.K.) (reprinting resolution of the Pitcairn Island Council of June 16, 1968, prompted by the United Nations' work, opposing change in status), with G.A. Res. 66/89, at 14, U.N. Doc. A/RES/66/89 A-B (Jan. 12, 2012) (accepting status quo with Pitcairn).

³⁴ FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES: REPORT, 2007–8, H.C. 147–II, Ev-133 (U.K.) (submission of Kari Boye Young) [hereinafter COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES]; accord Second International Decade for the Eradication of Colonialism, Pacific Regional Seminar on the Implementation of the Second International Decade for the Eradication of Colonialism: Assessment of Decolonization Process in Today's World, U.N. Second International Decade for the Eradication of Colonialism: Pacific Regional Seminar, Nouméa, New Caledonia, *Statement of Pitcairn Islands Study Center (Dr. Herbert Ford, USA)*, 5, U.N. Doc. PRS/2010/DP.5 (May 18, 2010) (discussing Pitcairners' concerns); see also IAN D. HENDRY & SUSAN DICKSON, BRITISH OVERSEAS TERRITORIES LAW 31 (2011) (stating that most territorial constitutions were generated from internal

constitutions since the 1999 white paper.³⁵

Following these criticisms, the Foreign and Commonwealth Office reaffirmed its commitment to constitutional reform with these principles:

- (a) any modernised constitution must provide a framework for

proposals but that was not the case on Pitcairn).

³⁵ For the constitutions issued in the last decade, see British Indian Ocean Territory Constitution Order, 2004 (U.K.), 35 Brit. Indian Ocean Territory Gazette No. 1 (2004) (Eng.), *reprinted in* HENDRY & DICKSON, *supra* note 34, at 305–10; Cayman Islands Constitution Order, 2009, S.I. 2009/1379 (U.K.), *superseding* Cayman Islands (Constitution) Order, 1972, S.I. 1972/1101 (U.K.), *both issued under* West Indies Act, 1962, c. 19, §§ 5, 7 (U.K.); Falkland Islands Constitution Order, 2008, S.I. 2008/2846 (U.K.), *superseding* Falkland Islands Constitution Order, 1985, S.I. 1985/444 (U.K.), *issued under* British Settlements Act, 1887, 50 & 51 Vict., c. 54, *and* British Settlements Act, 1945, 9 & 10 Geo. 6, c. 7 (U.K.); Gibraltar Constitution Order, 2006, [2006] 3 S.I. 11503 (U.K.), *reprinted in* Gibraltar Gazette, Dec. 28, 2006 (Gib.), *superseding* Gibraltar Constitution Order, 1969, [1969] 2 S.I. 3602 (U.K.); Montserrat Constitution Order, 2010, S.I. 2010/2474 (U.K.), *superseding* Montserrat Constitution Order, 1989, S.I. 1989/2401 (U.K.), *both issued under* West Indies Act, §§ 5, 7; St. Helena, Ascension, and Tristan da Cunha Constitution Order, 2009, S.I. 2009/1751 (U.K.), *superseding* St. Helena Constitution Order, 1989, S.I. 1989/155 (U.K.), *superseding* St. Helena (Constitution) Order, 1966, S.I. 1966/1458 (U.K.), *and* St. Helena (Constitution) (Amendment) Order, 1967, S.I. 1967/1138 (U.K.), *superseding* St. Helena Order, 1956, S.I. 1956/414 (U.K.), *superseding* St. Helena Order, 1939, Stat. R. & O. 1939/1925 (U.K.), [1939] 2 S.I. 3038, *reprinted in* 20 S.R. & O 556 (3d ed. 1949), *all issued under* St. Helena Act, 1833, 3 & 4 Will. 4, c. 85 (U.K.) (formerly known as the Government of India Act); Turks & Caicos Islands Constitution Order, 2006, S.I. 2006/1913 (U.K.), *issued under* West Indies Act, §§ 5, 7, *democratic government suspended by* Turks & Caicos Islands Constitution (Interim Amendment) Order, 2009, S.I. 2009/701 (U.K.), *and* Turks & Caicos Islands Constitution (Interim Amendment) (Amendment) Order, 2009, S.I. 2009/1755 (U.K.); Virgin Islands Constitution Order, 2007, S.I. 2007/1678 (U.K.), *superseding* Virgin Islands Constitution Order, 1976, S.I. 1976/2145, *issued under* West Indies Act, §§ 5, 7. For older constitutions of British territories still in force, see Anguilla Constitution Order, 1982, S.I. 1982/334, *issued under* Anguilla Act, 1980, c. 67, § 1(3) (U.K.), *and* West Indies Act, 1967, c. 4, §§ 6(1), 17(4) (U.K.), *amended by* Anguilla Constitution (Amendment) Order, 1990, S.I. 1990/587, *and superseding* Anguilla (Constitution) Order, 1976, S.I. 1976/50 (U.K.); Bermuda Constitution Order, 1968, S.I. 1968/182 (U.K.), *issued under* Bermuda Constitution Act, 1967, c. 63 (U.K.); British Antarctic Territory Order, 1989, S.I. 1989/842 (U.K.), *issued under* British Settlements Act, 1887, 50 & 51 Vict., c. 54, *and* British Settlements Act, 1945, 9 & 10 Geo. 6, c. 7, *superseding* British Antarctic Territory Order, 1962, S.I. 1962/400 (U.K.); Sovereign Base Areas of Akrotiri and Dhekelia Order, 1960, S.I. 1960/1369 (U.K.), *issued under* Cyprus Act, 1960, 8 & 9 Eliz. 2, c. 52 (U.K.); South Georgia and South Sandwich Islands Order, 1985, S.I. 1985/449 (U.K.), *issued under* British Settlements Acts 1887 & 1945.

enhanced good governance and human rights protection;

(b) increased Territory self-government is encouraged, but this must be consistent with the United Kingdom's continuing responsibilities for the Territories; these responsibilities include ensuring good governance, a nonpolitical civil service and police force, the independence of the judiciary, the maintenance of law and order, the fulfillment of international obligations, and the minimisation of contingent liabilities;

(c) there must be evidence that any proposed new constitution has the support of the people of the Territory concerned; that evidence should as a minimum consist of the endorsement of the Territory's legislative body, as the elected representatives of the people, but additional means of wider public consultation are encouraged.³⁶

Some Constitutional Proposals: 2004-2008

Caitlin Ryan, a New Zealand law student, wrote a new constitution for Pitcairn for her 2004 thesis. It consolidated into one document all constitutional statutes, orders-in-council, and island ordinances, making changes in their texts to promote democracy.³⁷ This document was not used in drafting the new Constitution.³⁸

In 2008 the islanders were presented with a draft charter written privately by Leslie Jacques, a New Zealander who served as the Island Commissioner.³⁹ The Pitcairn government announced to the press the charter would be in place by April

³⁶ U.K. FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO OVERSEAS TERRITORIES REPORT, *supra* note 31, ¶ 11. *See also* FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS ISLANDS: GOVERNMENT RESPONSE TO THE COMMITTEE'S SEVENTH REPORT OF SESSION, 2009-10, FIRST SPECIAL REPORT OF SESSION, 2010-11, 2010-12, H.C. 623, at 5 [hereinafter FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS RESPONSE] (reprinting government's statement that "Good Governance has been a key element in the modernisation of the Territory constitutions over the past decade.").

³⁷ Caitlin Ryan, *Towards Self-Determination: A Self-Government Document for Pitcairn*, 11 REVUE JURIDIQUE POLYNÉSIENNE-N.Z. ASS'N COMP. L. Y.B. 83 (2005) (Fr. Polynesia).

³⁸ E-mail from Andrew Allen, Head of Southern Oceans Team, Overseas Territories Directorate, Foreign & Commonwealth Office, London, to Michael O. Eshleman (Apr. 8, 2011, 12:04 GMT).

³⁹ COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at Ev-134. This proposal was not formally printed and has vanished from the web; the author has a copy, supplied by Commissioner Jacques.

2008.⁴⁰ One Pitcairner complained to Parliament that no real consultation was made with the people and claimed the charter was presented as an ultimatum.⁴¹ A prominent New Zealand legal scholar was highly critical of the proposal:

From a legal perspective, the form and content of the charter is inadequate for it to constitute a founding instrument or charter of the colony. The charter is a collection of suggestions and ideas that are often repetitive and sometimes potentially inconsistent *inter se* or with international law.⁴²

CONSTITUTION MAKING: 2009

Pitcairn was one of the few jurisdictions that lacked provisions in its laws for human rights, something which concerned the Foreign and Commonwealth Office.⁴³ In 2009 the Pitcairn administration said change was coming, but denied a new constitution was in the works, claiming only that the coming changes would bring “European standards of governance and human rights” to Pitcairn.⁴⁴ But Britain decided to issue a constitution after all, a document that

set[] out, for the first time, rights and freedoms of the individual, provide[d] for an Attorney General and establishe[d] the authority of the Island Council. It clarifie[d] the independent role of the Pitcairn courts and judicial officers, guarante[d] the

⁴⁰ Elenoa Baselala, *Getting Ready for International Dealings*, ISLANDS BUS., Oct. 2007, at 35 (Fiji).

⁴¹ COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at Ev-134. Cf. FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS RESPONSE, *supra* note 36, at 5 (reporting Foreign and Commonwealth Office’s statement that “[e]ach new Overseas Territory constitution is the result of negotiations between the UK Government and the representatives of each Territory, the circumstances, speed of development and needs of which are different.”).

⁴² Anthony H. Angelo, *Constitutional Developments for Pitcairn Islands*, 5 N.Z. Y.B. INT’L L. 2007-2008, at 267, 268 (2008).

⁴³ A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 1100 (2001); E-mail from Andrew Allen, *supra* note 29.

⁴⁴ *Big Changes in Pitcairn Government*, RADIO AUSTRALIA (June 15, 2009, 6:19 PM), <http://www.radioaustralia.net.au/asiapac/stories/200906/s2603503.htm>, also transcribed as *Britain Plans Overhaul of Pitcairn Island Governance: Tiny Territory to Become More ‘Democratic’*, PACIFIC IS. REP., <http://archives.pireport.org/archive/2009/june/06-17-16.htm> (last visited Apr. 4, 2010).

independence of the public service, institute[d] an obligation to undergo an independent audit and ma[de] provision for an Ombudsman.⁴⁵

Some “explanatory papers in plain English” were written for the islanders on what constitutions were for and explaining the proposed text.⁴⁶ When a draft was submitted to the islanders in September 2009, the Governor’s office explained the need this way:

Why do we need a change? Constitutions are being reviewed or have been reviewed in many other Overseas Territories to bring them up-to-date. The Pitcairn Order 1970 [the former fundamental law] is not very comprehensive. It does not include partnership values. Nor does it set out rights and freedoms of individuals, as most constitutions do. Also, Orders in Council and Ordinances have been passed in recent years to set up a Courts system. We want to consolidate them into the Constitution as is the case elsewhere. We believe modernising the Constitution will benefit the island. Much of this draft is based on the new Constitution of St Helena, Ascension and Tristan da Cunha. We want to work with the community to adapt it to the needs of Pitcairn. Nothing will be imposed, this will be a co-operative process.⁴⁷

The Commonwealth Foundation⁴⁸—affiliated with the Commonwealth, the London-based international organization of Britain and its former colonies—sent two advisers to Pitcairn to hold a ten-day workshop on Pitcairn to help draft

⁴⁵ U.N. Gen. Assembly, Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Pitcairn*, ¶ 4, U.N. Doc. A/AC.109/2010/4 (Feb. 12, 2010).

⁴⁶ E-mail from Andrew Allen, *supra* note 29.

⁴⁷ OFFICE OF THE GOVERNOR OF PITCAIRN, CONSULTATION DOCUMENT FOR CONSTITUTIONAL REVIEW ¶ 1 (2009), *available at* <http://www.government.pn/Consultation%20document%20for%20constitutional%20review.pdf>; *see also* Letter from Chris Bryant, M.P., Parliamentary Under-Sec’y of State, Foreign & Commonwealth Office, to Chairman, Foreign Affairs Committee, House of Commons (Sept. 15, 2009) (transmitting draft constitution to Parliament and describing need), *available at* <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmfa/ff/memo/overseas/m40102.htm>.

⁴⁸ For the establishment of the Foundation, see COMMONWEALTH PRIME MINISTERS’ MEETING 1965: AGREED MEMORANDUM ON THE COMMONWEALTH FOUNDATION, 1965, Cmnd. 2714 (U.K.).

the Constitution with the islanders.⁴⁹ Further workshops on human rights were to be held on Pitcairn.⁵⁰ The Commonwealth Foundation has been working to add human rights provisions to British territorial constitutions, though it stated this was *not* a goal for Pitcairn.⁵¹ Videoconferences were held between a steering committee of islanders and the administration in New Zealand and the Foreign and Commonwealth Office in London.⁵²

After all these discussions, the Island Council unanimously voted for the Constitution before it was enacted as an order-in-council.⁵³ (So no “miracle at Philadelphia” for the Pitcairn Constitution).⁵⁴ Orders-in-council, done either under powers granted the Queen by statute or under her royal prerogative, are the usual manner for enacting territorial constitutions.⁵⁵ The Constitution was approved by the Queen as an order-in-council at Buckingham Palace on February 10, 2010.⁵⁶ (Maybe

⁴⁹ E-mail from Andrew Allen, *supra* note 29; *Pitcairn Considers New Constitution*, RADIO N.Z. INT’L (Oct. 23, 2009), <http://archives.pireport.org/archive/2009/october/10-23-16.htm>; *Pitcairn Celebrates New Constitution*, RADIO N.Z. INT’L (Mar. 8, 2010), <http://archives.pireport.org/archive/2010/march/03-09-09.htm>.

⁵⁰ U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 113.

⁵¹ *Building Human Rights Capacity in UK Overseas Territories*, COMMONWEALTH PEOPLE, May 2008, at 16 (Eng.).

⁵² E-mail from Andrew Allen, *supra* note 29

⁵³ *Id.* Cf. McWHINNEY, *The Constitution-makers: Who Does What?*, *supra* note 12, at ch. 3 (describing methods for drafting foreign constitutions).

⁵⁴ Cf. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* (1966).

⁵⁵ T. OLAWALE ELIAS, *BRITISH COLONIAL LAW: A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH AND LOCAL LAWS IN BRITISH DEPENDENCIES* 37–47 (1962) (describing how colonial constitutions are promulgated); KENNETH O. ROBERTS-WRAY, *COMMONWEALTH AND COLONIAL LAW* 143 (1966) (stating orders-in-council “almost invariably employed to establish a constitution”); MARTIN WIGHT, *BRITISH COLONIAL CONSTITUTIONS* 1947, at 94–98 (1952) (same); Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioner at 7, *Matimak Trading Co. v. Khalily*, (No. 97–893), 1997 WL 33549577 [hereinafter *Matimak Amicus Brief*] (describing colonial constitutional arrangements); see also JOSEPH CHITTY, JR., *A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT* 25–39 (Gregg Int’l 1968) (1820) (discussing historical view of royal prerogative over colonies). See *supra* note 35 for a list of statutes under which British territorial constitutions have been issued. The statutes are also described at HENDRY & DICKSON, *supra* note 34, at 15–19.

⁵⁶ Pitcairn Constitution Order, 2010, S.I. 2010/244 (U.K.), *reprinted in*

“Miracle in SW1?”). It was one of many orders-in-council issued that day that ran the gamut from military pensions, Libyan taxes, to Welsh.⁵⁷

THE CONSTITUTIONAL LANGUAGE

Imprimis

“We the people of the United States, in order to form a more perfect union”⁵⁸ The American Constitution possesses a preamble of unequaled elegance. The St. Helena Constitution gives a legal history of the island—which is at least mildly interesting, as it invokes the cad Charles II and the merchant adventurers of the East India Company.⁵⁹ Pacific constitutions often start with a history or a statement of values.⁶⁰ A particularly vivid example is the Micronesian Constitution; its preamble speaks of how “Micronesia began in the days when man explored seas in rafts and canoes” and the “Micronesian nation is born in an age when men voyage among stars” and vowing the charter would promote “diversity,” “the promise of the future,” and “peace, friendship, cooperation, and love in our common humanity.”⁶¹

Pitcairn’s Constitution continues a British tradition of dull constitutions—which inevitably lack the “champagne touch” of the French Republic’s numerous charters.⁶² Pitcairn’s opening is a somnifacient, stating the document’s goals are to secure “good faith, the rule of law, good government, sound financial

LAWS OF PITCAIRN, *supra* note 2, at xxvii.

⁵⁷ Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order, 2010, S.I. 2010/240 (U.K.); Double Taxation Relief and International Tax Enforcement (Libya) Order, 2010, S.I. 2010/243 (U.K.); National Assembly for Wales (Legislative Competence) (Welsh Language) Order, 2010, S.I. 2010/245 (U.K.).

⁵⁸ U.S. CONST. pmbl.

⁵⁹ ST. HELENA CONST. pmbl.

⁶⁰ JENNIFER CORRIN, TESS NEWTON & DON PATTERSON, INTRODUCTION TO SOUTH PACIFIC LAW 83–84 (1st ed. 1999).

⁶¹ MICR. CONST. pmbl. This language was written by the American novelist P.F. Kluge, who was a Peace Corps volunteer in Micronesia. P.F. KLUGE, *THE EDGE OF PARADISE: AMERICA IN MICRONESIA* 77 (1991). For more on the constitutions in this region, see Norman Meller, *On Matters Constitutional in Micronesia*, 15 J. PAC. HIST. 83 (1980) (Austl.).

⁶² McWHINNEY, *supra* note 12, at 46.

management, . . . and the maintenance of international peace and security and the right of individual and collective self-defense.”⁶³

These are some of the “partnership values” between Pitcairn and Britain.⁶⁴ Partnership is a voluntary association.⁶⁵ But the Pitcairn Constitution was enacted by London—which can change it unilaterally at any time—and reading its terms shows the one-sidedness.⁶⁶ By the Constitution’s own terms, none of the “partnership values” are enforceable.⁶⁷

The Rights of Man

The first substantive part of the Constitution is a bill of rights.⁶⁸ Most American state constitutions and some foreign constitutions also begin with the rights of the individual.⁶⁹

⁶³ PITCAIRN CONST. art. 1(1).

⁶⁴ *Id.*

⁶⁵ BLACK’S LAW DICTIONARY 1230 (9th ed. 2009).

⁶⁶ *Cf. Democracy Reform for Pitcairn*, N.Z. HERALD, June 18, 2009, at A8 (quoting Herbert P. Ford, American expert on Pitcairn, saying islanders “have too little freedom to live their lives” as “everything is looked at through the eyes of a Britisher who has been appointed from London, sits [far] from them, and really doesn’t understand all the problems”). Professor Ford commented similarly in 2003: “New Pitcairn laws are being written by people whose concepts are based on the harsh streets of metropolitan cities, not on little Pitcairn Island. Downtown Londoners, or people in Wellington, Sydney or Auckland; those who have written a whole family of new and confusing Pitcairn laws, have no concept of the practicalities of life on Pitcairn Island.” Press Release, Pitcairn Is. Study Ctr., Pitcairn Island Under Martial Law and “Selective Prosecution” Academic Charges (May 27, 2003), *available at* <http://library.puc.edu/pitcairn/news/releases/news27-05-27-03.shtml>.

⁶⁷ PITCAIRN ISLAND CONST. art. 1(3). *Cf.* ST. HELENA CONST. art. 4(2) (stating preamble merely statements of principle); *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (finding preamble of U.S. Constitution to be no source of governmental power); *Grape Bay, Ltd. v. Att’y Gen’l of Berm.*, [1999] UKPC 43, [2000] 1 W.L.R. 574, [2000] 1 L.R.C. 167, [19]–[24] (appeal taken from Berm.) (discussing enforceability of preamble of Bermudan constitution).

⁶⁸ PITCAIRN ISLAND CONST. pt. 2. For the bills of rights in Pacific constitutions, see CORRIN, NEWTON & PATTERSON, *supra* note 60, at 85–88. For the impact of the Magna Carta, the English Bill of Rights, and habeas corpus on Pacific bills of rights, see *id.* at 77–83. For a discussion of modern British territorial bills of rights, see HENDRY & DICKSON, *supra* note 34, at 155–60.

⁶⁹ *Compare* ALASKA CONST. art. I, and HAWAII CONST. of 1852, art. I, LA. CONST. of 1913, arts. 1–15, OHIO CONST. art. I, PA. CONST. of 1776, ch. 1, TONGA CONST. pt. I, KIRIBATI CONST. ch. 2 (Bill of Rights; ch. 1 is

Britain, having no written constitution, has a statutory "Bill of Rights" enacted after the Glorious Revolution.⁷⁰

Britain long has included bills of rights in colonial charters.⁷¹ Those in recent constitutions are based on international conventions.⁷² The Pitcairn Bill of Rights is based particularly on the European Convention on Human Rights—a document that Britain helped draft, but is not obligated to apply to its territories.⁷³

preliminaries), SOLOMON ISLANDS CONST. ch. 2 (same), MARSHALL ISLANDS CONST. art. II (same), NAURU CONST. pt. II (same), SAMOA CONST. pt. II (same), TUVALU CONST. pt. II (same), and BERMUDA CONST. ch. 1, with OHIO CONST. of 1802, art. VIII (last article), COOK ISLANDS CONST. pt. IVA (Bill of Rights follows articles on justices of the peace and the judicial oath), MICRONESIA CONST. art. IV, PALAU CONST. art. IV, PAPUA NEW GUINEA CONST. arts. 32–64, and TOKELAU CONST. art. 16 (last article).

⁷⁰ Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2.

⁷¹ *E.g.*, U.K. COLONIAL OFFICE, CONSTITUTIONAL PROPOSALS FOR ANTIGUA, ST. KITTS/NEVIS/ANGUILLA, DOMINICA, ST. LUCIA, ST. VINCENT, GRENADA, 1965, Cmnd. 2865, ¶ 17, in 12 P.P. (1965–6) 1 (stating Caribbean territories' new constitutions must include bills of rights). See generally O.H. PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES (2007).

⁷² U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 113 ("All Territory constitutions agreed by the Government since 1999 include a Bill of Rights, including a non-discrimination clause that reflects at a minimum the European Convention on Human Rights and the International Covenant on Civil and Political Rights."). See also *id.* at 116 ("Almost all populated Overseas Territories have had the following conventions extended to them: the International Covenant on Civil and Political Rights [G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52, (Dec. 16, 1966), S. TREATY DOC. NO. 95-2, U.K.T.S. No. 6 (1977) (Cmnd. 6702), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976)]; the International Covenant on Economic, Social and Cultural Rights [G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), S. TREATY DOC. NO. 95-2, U.K.T.S. No. 44 (1992) (Cm. 1976), 993 U.N.T.S. 3 (*entered into force* Mar. 23, 1976)]; the Convention on Elimination of All Forms of Racial Discrimination [G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965), S. TREATY DOC. 95-2, U.K.T.S. No. 77 (1969) (Cmnd. 4108), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969)]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Dec. 10, 1984, S. TREATY DOC. NO. 100-20, U.K.T.S. No. 107 (1991) (Cm. 1775), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987)]; and the Convention on the Rights of the Child. [Nov. 20, 1989, U.K.T.S. No. 44 (1999) (Cm. 1976), 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990)].").

⁷³ OFFICE OF THE GOVERNOR OF PITCAIRN, *supra* note 47, ¶ 2. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953); U.N. Gen. Assembly, Special Comm. on the Situation with Regard to the

The most remarkable thing about the Bill of Rights is how different it is from its American counterparts.⁷⁴ American rights are drafted broadly and limitations have occurred in judicial interpretation.⁷⁵ The First Amendment to the U.S. Constitution, for example, is forty-five words long, but in the annotated Constitution prepared by the Congressional Research Service, the First Amendment section consumes 258 pages.⁷⁶

Implementation of the Declaration on the Granting of Independence to Colonial Countries & Peoples, *Pitcairn*, ¶ 14, U.N. Doc. A/AC.109/2011/4 (Jan. 8, 2011) [hereinafter U.N. Decolonization Committee, *2011 Pitcairn Report*] (stating new Constitution protects rights in E.C.H.R. and the International Covenant on Civil and Political Rights); Geoffrey Marston, *The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950*, 42 INT'L & COMP. L. Q. 796 (1993) (Eng.); *Quark Fishing Co. v. United Kingdom*, 2006-XIV Eur. Ct. H.R. 44 (finding Britain not obligated to extend E.C.H.R. to its possessions). *See also* U.K. FOREIGN & COMMONWEALTH OFFICE, ANNUAL REPORT ON HUMAN RIGHTS, 2009, Cm. 7805, at 55 (stating Pitcairners requested extension of the E.C.H.R. to them); U.K. HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782 (discussing enacting E.C.H.R. as law); Kevin Boyle, *The European Experience*, 40 VICTORIA U. WELLINGTON L. REV. 167 (2009) (discussing enforcement mechanism of E.C.H.R.); Michael O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697 (1980) (same); A.M. Pilling, *The European Convention on Human Rights*, 21 FAC. L. REV. 93, 114-16 (1963) (Can.) (discussing foreign impact of E.C.H.R.); Dietrich Schindler, *The European Convention on Human Rights*, 1962 WASH. U. L. Q. 152 (discussing enforcement mechanism of E.C.H.R.). *See generally* SELINA GOULBOURNE & ROSANNA MESQUITA, BUILDING HUMAN RIGHTS CAPACITY IN THE U.K. OVERSEAS TERRITORIES OF THE CARIBBEAN, PACIFIC AND SOUTH ATLANTIC (2008) (discussing laws in various relating to U.N. and E.U. human rights conventions), *available at* <http://otscapacitychri.org/Documents/Building%20Human%20Rights%20Capacity.pdf>.

⁷⁴ Cf. Sue Farran, *Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific*, 52 J. LEGAL PLURALISM & UNOFFICIAL L. 77, 86-89 (2006) (Eng.). The Universal Declaration of Human Rights also has some provisions that are unusual to American eyes, e.g. Article 24 protects the right to paid holidays from work, Article 25 protects the right to welfare, Article 27 protects rights to intellectual property and to enjoy culture, and Article 29 protects the right to develop one's personality. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GOAR, 3d Sess., U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter Universal Declaration].

⁷⁵ For a light-hearted look at American Constitutional interpretation, see Paul Horwitz, *Our Boggling Constitution: Or, Taking Text Really, Really Seriously*, 26 CONST. COMMENT. 651 (2010).

⁷⁶ CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 1013-271 (Johnny H.

In contrast, the Pitcairnese draftsmen were blunt: the Constitution limits all rights with “a few provisos, a couple of quid pro quos.”⁷⁷ There can be no penumbras and emanations of rights,⁷⁸ for Pitcairn’s Bill of Rights belongs to the “weasel words” school of drafting.⁷⁹ The St. Helena Constitution also describes rights this way, describing them in even more detail than the Pitcairn Constitution, then broadly sweeping them away with limiting language.⁸⁰ It puts one in mind of the debates in the Lunar Constitutional Convention, as reported by Robert A. Heinlein: “[I]n writing your constitution let me invite attention to the wonderful virtues of the negative. Accentuate the negative. Let your document be studded with things the government is forever forbidden to do . . . no interference however slight with freedom of press, or speech, or assembly, or of religion, or of instruction, or of communication, or occupation.”⁸¹

British-drafted constitutions reject this philosophy. Frederick A.O. Schwarz, Jr., an American attorney who served as an Assistant Attorney General of Nigeria just after its 1960 independence from Britain, observed the same approach to draftsmanship in the independence constitution bestowed by the departing British upon Nigerians, who had a Constitution “[l]acking majesty, [because] it [was] written for lawyers, not for the people.”⁸² Schwarz wrote of the Nigerian Bill of Rights:

Killian, George A. Costello & Kenneth R. Thomas eds., 2004). The most recent pocket-part to the volume adds another thirty-seven pages of annotations. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, 2010 SUPPLEMENT, S. DOC. NO. 111-39, at 71-98 (Kenneth R. Thomas ed., 2010).

⁷⁷ ALADDIN (Walt Disney Pictures 1992) (words voiced by Robin Williams’s Genie mimicking William F. Buckley, Jr.). Buckley visited Pitcairn in 1987. William F. Buckley, Jr., *Pitcairn Lives*, 36 NAT’L REV., Dec. 18, 1987, at 63.

⁷⁸ Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (Douglas, J.).

⁷⁹ *Accord* *Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta*, 256 U.S. 350 (1921) (Holmes, J.) (“Most rights are qualified.”).

⁸⁰ *E.g.*, ST. HELENA CONST. art. 15 (religion); *id.* art. 17 (expression).

⁸¹ ROBERT A. HEINLEIN, THE MOON IS A HARSH MISTRESS 305 (1966).

⁸² Nigeria (Constitution) Order 1960, S.I. 1960/1652 (U.K.); FREDERICK A.O. SCHWARZ, JR., NIGERIA: THE TRIBES, THE NATION, OR THE RACE—THE POLITICS OF INDEPENDENCE 182 (1965). Schwarz is the great-grandson of the founder of the Manhattan toy emporium. Robin Finn, *A Man of Simple Toys Tackles Campaign Finance*, N.Y. TIMES, Mar. 13, 2003, at B2. For bibliographies on the 1960 constitution, see SCHWARZ, *supra*, at 298-302;

The rights guaranteed seem to be impressively broad But though the rights guaranteed are many, the exceptions to the guarantees, concise and prolix, specific and vague, could well render them symbolic rather than real protections and at the same time deprive them of much of their effect as symbols. What is given with one breath is taken with the next as broad right is followed by broad exception Does it make any difference that those general exceptions are spelled out, in contrast to the guarantees in the United States Bill of Rights . . . ? As the United States Constitution has been construed [by American courts], those absolute and ringing pronouncements come quite close to meaning what the Nigerian Constitution says If such qualifications would in any event be read in, is it not better to come out with them straightaway? Or, if not better, is it not true that spelling them out does not make any difference?

Spelling out the exceptions in copious fashion makes the constitutional guarantees much less useful as an educative tool with which to imbue the people with the spirit of liberty. Laws can change attitudes, and none more so than constitutions. But to do so they should be simply expressed. The school child who is taught that the constitution says that free speech is guaranteed with no ifs, ands, or buts is bound to develop a different instinctive reaction toward restrictions of free speech than the school child who is told that free speech is guaranteed except in enumerated situations Spelling out the exceptions . . . also makes it easier for a legislature to justify a restriction and a little more likely that a court will uphold a restriction of liberty.⁸³

Grady H. Nunn, *Federalism in Nigeria*, in *FEDERALISM IN THE COMMONWEALTH: A BIBLIOGRAPHIC COMMENTARY* 177–90 (William S. Livingston ed., 1963).

⁸³ SCHWARZ, *supra* note 82, at 179–83. The 1960 Nigerian bill of rights is reprinted in Philip J. Kaplan, *Fundamental Rights in the Federation of Nigeria*, 13 SYRACUSE L. REV. 434, 447–52 (1961). Schwarz also discusses an analysis of the Nigerian Constitution made in a lecture by Dean Erwin N. Griswold of Harvard Law School. He says “the prolixity . . . stems from the British tradition of statutory interpretation and legislative drafting. Statutes are construed literally as if they have a ‘plain meaning’ and constitutions, since they are regarded as statutes through they are written for the ages, cannot therefore be left with broad and sweeping language.” *Id.* at 183. The British drafters grew up in a nation where there is no single instrument called a “constitution” that is a higher law, instead being governed by a series of laws that set up the system, laws which are no different than any others, thus are no harder to amend or abolish than ordinary laws. In contrast, Chief Justice Marshall felt constitutions must be treated differently than statutes: “We must never forget that it is a *constitution* that we are expounding.”

While a perfectly good bill of rights was proposed for Nigeria, Britain referred the question to its lawyers, who came up with the qualified bill of rights.⁸⁴ As a result, the Nigerian courts focused on the exceptions.⁸⁵ The president of the Nigerian Bar Association observed that the rights were written to avoid a turf-war between the courts invading the province of the legislature:

While a well-established democratic society can withstand the storms and stresses of such a conflict, it would be dangerous to expect the same result in a developing democratic society, and particularly in a young nation with the complex problems present in the Nigerian situation. Accordingly, when provisions for fundamental rights were first introduced into the Nigerian Constitution, there was a deliberate policy of defining as closely

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). *See also* D.O. Aihe, *Neo-Nigerian Human Rights in Zambia: A Comparative Study with Some Countries in Africa and West Indies*, 3 & 4 ZAMBIAN L.J. 43 (1972) (exploring how similar bills of rights have fared in newly democratic states); T.O. Elias, *The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms*, 2 J. INT'L COMM'N JURISTS 20 (1959) (Switz.); Gaius Ezejiofor, *Judicial Interpretation of Constitutions: The Nigerian Experience*, 2 NIG. L.J. 70, 80-82 (1967) (criticizing narrow construction of rights); David Lavan Grove, *The "Sentinels" of Liberty?: The Nigerian Judiciary and Fundamental Rights*, 7 J. AFR. L. 152 (1963) (Eng.); B. Obinna Okere, *Judicial Activism or Passivity in Interpreting the Nigerian Constitution*, 36 INT'L & COMP. L. Q. 788, 791-800 (1987) (Eng.) (discussing judicial interpretation of 1960 constitution); James C.N. Paul, *Some Observations on Constitutionalism, Judicial Review, and the Rule of Law in Africa*, 35 OHIO ST. L.J. 851, 859-63 (1974) (discussing how qualifying rights in a system whose lawyers and judges have little experience dealing with statutory construction tends to destroy those rights).

⁸⁴ U.K. COLONIAL OFFICE, REPORT BY THE NIGERIAN CONSTITUTIONAL CONFERENCE, HELD IN LONDON IN MAY AND JUNE, 1957, 1957, Cmnd. 207, ¶ 67 (U.K.) (stating that because rights are too complex for laymen, their drafting should be referred to the British government's lawyers); U.K. COLONIAL OFFICE, NIGERIA: REPORT OF THE COMMISSION APPOINTED TO ENQUIRE INTO THE FEARS OF MINORITIES AND THE MEANS OF ALLAYING THEM, 1958, Cmnd. 505, at 97-103 (U.K.) (offering a non-technical bill of rights); U.K. COLONIAL OFFICE, REPORT BY THE RESUMED NIGERIA CONSTITUTIONAL CONFERENCE, HELD IN LONDON IN SEPTEMBER AND OCTOBER, 1958, 1958, Cmnd. 569, at 3-9 (U.K.) (giving the lawyers' proposed bill of rights).

⁸⁵ SCHWARZ, *supra* note 82, at 185-86. *See, e.g.,* R. v. Amalgamated Press (of Nigeria), Ltd., [1961] 1 All Nig. L.R. 199 (Fed. Sup. Ct.) (upholding conviction of newspaper for printing news likely to cause fear and alarm); Dir. of Pub. Prosecutions v. Obi, [1961] 1 All Nig. L.R. 182 (Fed. Sup. Ct.) (finding conviction for sedition for criticizing government did not violate free speech protections of constitution).

as possible, in the Constitution itself, the scope of permissible restriction of those rights. It was hoped that the judiciary in Nigeria would thus be saved from the embarrassment of being accused of usurping the functions of the legislature, since its work would be confined solely to interpreting the Constitution. I am by no means certain that we succeeded in achieving our objective. In the attempt to define the scope of permissible restriction, the exceptions to the rights appeared to take up more space than the rights themselves, and a lawyer in this country, looking at the text of our Constitution, is reputed to have remarked that it was not a Bill of Rights but a Bill of Exceptions! A more serious difficulty is that we have qualified the rights in many places by reference to undefined standards of political behavior in other democratic societies. The phrase which occurs again and again is “nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defense, public safety, public order, etc., etc.”⁸⁶

Exactly the same defects exist within the Pitcairn Constitution. It is hard to see how Pitcairners’ rights will exist in practice, for “[l]ofty abstractions about individual liberty and justice do not enforce themselves. These things must be reforged in men’s heart’s every day,” and the lawyerly language hardly inspires.⁸⁷ And how in practice will rights get enforced on an island without lawyers and whose courts are 3,000 miles away in New Zealand?⁸⁸

⁸⁶ F.R.A. Williams, *Fundamental Rights and the Prospect for Democracy in Nigeria*, 115 U. PA. L. REV. 1073, 1080 (1967). Cf. Elias, *supra* note 83, at 20 (1959) (stating enforcement of rights was not going to happen without extensive provision of legal aid); Paul, *supra* note 83, at 858–61 (discussing failure to enforce bills of rights because of lack of bar association support, lawyers trained constitutional law, law books, and other factors, all of which apply to Pitcairn).

⁸⁷ ROBERT TRAVER, ANATOMY OF A MURDER 63 (1958). Robert Traver was the pen name of John Donaldson Voelker, a justice of the Michigan Supreme Court who resigned from the bench following the success of this book to write and fish full-time. Frederick M. Baker, Jr. & Rich Vander Veen, III, *John D. Voelker: Michigan’s Literary Justice*, 79 MICH. B.J. 530 (2000); Richard D. Shaul, *Backwoods Barrister*, 85 MICH. HIST., Nov.–Dec. 2001, at 82; William H. Volz, *An Anatomy of the Judicial Writing of Justice John D. Voelker*, 36 MICH. ACADEMICIAN 129 (2004).

⁸⁸ Sue Farran, *The Case of Pitcairn: A Small Island, Many Questions*, 11 J. S. PAC. L. 124, 134–37 (2007) (Vanuatu) (“the nature of the rights regime applicable to Pitcairn remains unclear” and “Pitcairn’s rights status and lack of clarity as to how such rights are to be interpreted and applied . . . leaves it vulnerable to rights abuses.”).

Life

The first right in the Pitcairn Constitution is of life,⁸⁹ also the first right Jefferson listed in the Declaration of Independence⁹⁰ and the second in the Universal Declaration of Human Rights.⁹¹ The Pitcairn Constitution codifies the right to use reasonable force for self-defense, arresting people, and quelling “riot or insurrection.”⁹²

Liberty

The second of Jefferson’s rights, liberty, appears in Article 7.⁹³ “Everyone has the right to liberty and security of person,” is the broad opening, which is then limited by provisions twenty times longer. Liberty can be limited for convicts, breach of court orders, criminal suspects, truant minors, immigration enforcement, and quarantine.⁹⁴ Slavery is outlawed—but having convicts labor, a military draft, forcible labor in time of emergency, or work as part of “normal civic obligations” is allowed.⁹⁵ The last is a reference to the public work expected of able-bodied islanders for over a century.⁹⁶

⁸⁹ PITCAIRN ISLAND CONST. art. 2(1). *Accord* BERMUDA CONST. art. 2; FALKLAND ISLANDS CONST. art. 2; MONTSERRAT CONST. art. 3.

⁹⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (resolving that “all men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness”), in 1 STAT. 1 and 5 U.S. CONTINENTAL CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 510–15 (Worthington Chauncey Ford et al. eds., 1906).

⁹¹ Universal Declaration, *supra* note 74, arts. 1, 2 (first article states all are born free and equal, second provides for non-discrimination on applying rights). For an excellent account of the drafting of the U.D.H.R., see GLEN JOHNSON & JANUSZ SYMONIDES, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION, 1948–1998 (1998).

⁹² PITCAIRN ISLAND CONST. art. 2(2). *Cf.* MODEL PENAL CODE § 3.04; David Harris, *The Right to Life Under the European Convention on Human Rights*, 1 MAASTRICHT J. EUR. & COMP. L. 122 (1994) (Belg.).

⁹³ *Accord* U.S. CONST. amend. V; *id.* amend. VI.

⁹⁴ PITCAIRN ISLAND CONST. art. 7(1); *accord* MONTSERRAT CONST. art. 5(3).

⁹⁵ PITCAIRN ISLAND CONST. art. 6. *Accord* U.S. CONST. amend. XIII (slavery); BERMUDA CONST. art. 4; FALKLAND ISLAND CONST. art. 4; MONTSERRAT CONST. art. 5; Universal Declaration, *supra* note 74, art. 4; *see* *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366 (1918) (finding military draft was not slavery under U.S. Constitution).

⁹⁶ *See* Local Government Regulations 2010, pt. 5 (Pitcairn Is.), *reprinted*

And Property

The third of Jefferson's rights is not here but the third of Locke's is: the right to property.⁹⁷ But it may be denied "in the public interest."⁹⁸ There is no mention of "just compensation" for that deprivation.⁹⁹ The article on property recognizes corporations as "persons;" no other right does so.¹⁰⁰

Criminal Procedure

Those arrested are to be informed of the charges against them in their language¹⁰¹ and be promptly arraigned.¹⁰² The writ of *habeas corpus* is protected—though that ancient phrase is not used.¹⁰³ And those falsely arrested are entitled to monetary damages.¹⁰⁴ *Ex post facto* charges may not be brought—except the Constitution permits retroactive laws to be passed to codify "the general principles of law recognised by civilised nations."¹⁰⁵ In the 2004 rape prosecutions, for

in LAWS OF PITCAIRN, *supra* note 2, at 216–18. These provisions have long existed. See SHAPIRO, *supra* note 17, at 297 (reprinting 1893 law that included the requirement); JAMES SCOTT NEILL, TEN YEARS IN TONGA 164–65 (1955) (discussing labor on public works that substituted for all taxation). The name "public work" was renamed "civic obligations" by the Local Government (Amendment) Ordinance No. 5 of 2010 (Pitcairn Is.). *Cf.* Butler v. Perry, 240 U.S. 328 (1916) (finding law requiring labor on public works constitutional).

⁹⁷ PITCAIRN ISLAND CONST., art. 21. *Accord* MONTSERRAT CONST. art. 17. *Cf.* BERMUDA CONST. art. 13 (providing no general right to property and a list of exceptions so long as to make any property right meaningless, e.g. constitution enshrines the government's ability to carry out soil conservation work on private property).

⁹⁸ PITCAIRN ISLAND CONST. art. 21.

⁹⁹ *Cf.* U.S. CONST. amend. V; ST. HELENA CONST. art. 19(1)(b).

¹⁰⁰ PITCAIRN ISLAND CONST. art. 21. *Cf.* Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394 (1886) (case first recognizing corporations as "persons" under U.S. Constitution). Lord Coke observed corporations "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls." Case of Sutton's Hospital, 10 Co. Rep. 23a, 32b, 77 Eng. Rep. 960, 973 (K.B. 1612).

¹⁰¹ PITCAIRN ISLAND CONST. art. 7(2); *accord* BERMUDA CONST. art. 5(2); MONTSERRAT CONST. art. 6(2).

¹⁰² PITCAIRN ISLAND CONST. art. 7(3); *accord* BERMUDA CONST. art. 5(3).

¹⁰³ PITCAIRN ISLAND CONST. art. 7(4). *Cf.* U.S. CONST., art. I, § 9, cl. 2.

¹⁰⁴ PITCAIRN ISLAND CONST. art. 7(5).

¹⁰⁵ *Id.* art. 10; *accord* Universal Declaration, *supra* note 74, art. 11. *Cf.* BERMUDA CONST. art. 6(4); U.S. CONST., art. I, § 9, cl. 3. The American prohibition applies only to criminal laws. *Calder v. Bull*, 3 U.S. (3 Dall.) 386

example, one of the Law Lords found the application of British law to Pitcairn was not an improper retroactive law because the British statute codified common law principles and didn't create new crimes.¹⁰⁶

Trial by jury is a right guaranteed by Magna Carta and confirmed by the Act of Settlement.¹⁰⁷ It is "an integral and indispensable part of the criminal justice system" of the United Kingdom.¹⁰⁸ Yet it is absent from the Pitcairn Constitution.¹⁰⁹ The rape cases in 2004 were tried by judges, not jurors.¹¹⁰ (Presumably because the community is so small and the entire population is related to one another).¹¹¹ Also missing are

(1798). But some state constitutions forbid all *ex post facto* laws. *E.g.*, N.H. CONST. art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."). *See also* Steve Selinger, *The Case Against Civil Ex Post Facto Laws*, 15 CATO J. 191 (1995).

¹⁰⁶ *Christian v. The Queen*, [2006] UKPC 47, [2007] 2 A.C. 400, [2007], [84]–[85] (appeal taken from Pitcairn) (Lord Hope of Craighead), *citing* Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69 (U.K.), *reenacting* Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, §§ 48, 52 (U.K.). *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *211 (William Draper Lewis ed., 1897) (discussing rape at common law).

¹⁰⁷ Magna Carta, 1297, 25 Edw. 1, c. 29; Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2. *Accord* U.S. CONST., amend. VI; MONTSERRAT CONST. art. 7(2)(g)

¹⁰⁸ *R. v. Connor*, [2004] UKHL 2, [2004] 1 A.C. 1118, [7] (Lord Steyn) (appeal taken from Eng.).

¹⁰⁹ *Cf. R. v. Seven Named Accused*, [2004] PNSC 1, 127 I.L.R. 232, [196]–[206] (Pitcairn Is. Sup. Ct.) (allowing rape trials despite lack of jury). *But see* BERMUDA CONST. art. 6(2)(g). The United States Constitution does not require jury trials in American colonies. *Dorr v. United States*, 195 U.S. 138, 149 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

¹¹⁰ *Cf. Claire Harvey, Islanders on Verge of Mutiny As Sex Trial Outsiders Flood Pitcairn*, THE AUSTRALIAN (Sydney, N.S.W.), July 2, 2004, at 6 (quoting Kari Boye Young, wife of a defendant, saying islanders were upset at the lack of a jury trial: "Britain has given these men British passports but they don't have the basic rights of every British citizen to be tried by their peers."); Sue Farran, *The Case of Pitcairn: A Small Island, Many Questions*, 11 J. S. PAC. L. 124, 134–37 (2007) (Vanuatu) (discussing lack of jury on Pitcairn in 2004 cases). *Compare* 390 PARL. DEB., H.C. (5th ser.) (1943) 1634W–1635W (U.K.) (statement of Colonel Oliver Stanley, Colonial Sec'y) (listing the twelve British colonies without trial by jury, including Pitcairn, and stating "in none of these . . . has there ever been any actual right of trial by jury."), *with* NATHAN WELBY FISKE, ALECK: THE LAST OF THE MUTINEERS, OR, THE HISTORY OF PITCAIRN'S ISLAND 154 (2d ed. 1843) (stating islanders were then conducting trial by jury), *and* NEILL, *supra* note 96, at 157 (stating Pitcairn laws he examined in 1937 provided for jury trials).

¹¹¹ Harvey, *supra* note 110 (stating in the rape cases a jury was impossible because everyone is related). *Cf. HENRY HUTCHISON MONTGOMERY*,

protections against double jeopardy¹¹² and forced self-incrimination.¹¹³

There is a right to a fair trial¹¹⁴ as well as fair administrative proceedings.¹¹⁵ Defendants are presumed innocent.¹¹⁶ They have a right to publicly-paid counsel but can represent themselves.¹¹⁷ They must be allowed to examine witnesses and call their own.¹¹⁸ Upon conviction, prisoners have the right to be treated with “humanity” and “dignity.”¹¹⁹ The press can be excluded from trials for basically any reason the court sees fit.¹²⁰

Dignity and Other Rights

The Constitution contains a number of rights unusual to American bills of rights, e.g., the right to an environment that

THE LIGHT OF MELANESIA: A RECORD OF THIRTY-FIVE YEARS MISSION WORK IN THE SOUTH SEAS 26–27 (1896) (writing of the Pitcairners’ cousins on Norfolk Island—the entire Pitcairn population in 1856 moved to Norfolk but some returned to Pitcairn and are the ancestors of today’s population—that they needed “a magistrate from outside. At present, as they are all related, the magistrate is uncle or cousin to every soul amongst them, and it must be hard indeed for the embodiment of the law to resist the pleadings of his relations.”).

¹¹² Cf. U.S. CONST. amend. V; BERMUDA CONST. art. 6(5); ST. HELENA CONST., art. 10(5).

¹¹³ Cf. U.S. CONST. amend. V; BERMUDA CONST. art. 6(7); ST. HELENA CONST., art. 10(7).

¹¹⁴ PITCAIRN ISLAND CONST. art. 8; *accord* MONTSERRAT CONST. art. 7. Cf. Universal Declaration, *supra* note 74, art. 8 (due process of law); *id.* art. 9 (arbitrary arrest).

¹¹⁵ PITCAIRN ISLAND CONST. art. 20.

¹¹⁶ PITCAIRN ISLAND CONST. art. 8(2). *Accord* BERMUDA CONST. art. 6(2)(a); MONTSERRAT CONST. art. 7(2)(a); Universal Declaration, *supra* note 74, art. 11.

¹¹⁷ PITCAIRN ISLAND CONST. art. 8(3)(c). *Accord* BERMUDA CONST. art. 6(2)(d); MONTSERRAT CONST. art. 7(2)(d); U.S. CONST., amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1962) (finding constitutional right to free counsel).

¹¹⁸ PITCAIRN ISLAND CONST. art. 8(3)(d). *Accord* BERMUDA CONST. art. 6(2)(e); MONTSERRAT CONST. art. 7(2)(e). Cf. U.S. CONST., amend. VI.

¹¹⁹ PITCAIRN ISLAND CONST. art. 9(1). *Accord* MONTSERRAT CONST. art. 8(1). Cf. MONT. CONST. art. II, § 4 (“The dignity of the human being is inviolable.”); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments).

¹²⁰ PITCAIRN ISLAND CONST. art. 8(1). *Accord* BERMUDA CONST. art. 6(10); MONTSERRAT CONST. art. 7(11). Cf. *State ex rel. Toledo Blade v. Henry Cty. Ct. of Common Pleas*, 926 N.E.2d 634 (Ohio 2010) (discussing the limited circumstances under which American courts can close their proceedings).

is “not harmful”¹²¹ and the right to human dignity.¹²² The right “to marry and have a family” is guaranteed and the resulting children are given rights.¹²³ The government is obligated to provide them a free education—but parents may send their children to private schools.¹²⁴ Both the government and businesses are forbidden to discriminate on the basis of “sex, sexual orientation, race, colour, language, religion, age, disability, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹²⁵

¹²¹ PITCAIRN ISLAND CONST., art. 19. *Accord* BRITISH VIRGIN ISLAND CONST. art. 29; MASS. CONST. art. 97. *Cf.* ALASKA CONST. art. VIII (seeking to preserve environment and natural resources).

¹²² PITCAIRN ISLAND CONST. art. 4. *See also* Govind Mishra, *The Concept of Human Dignity and the Constitution of India*, in COMPARATIVE CONSTITUTIONAL LAW: Festschrift in Honour of Professor P.K. Tripathi 353 (Mahendra P. Singh ed., 1989) (discussing Indian experience with similar language).

¹²³ PITCAIRN ISLAND CONST. arts. 15–17. *Accord* MONTSERRAT CONST. art. 10 (marry and have family); *id.* art. 12 (education); Universal Declaration, *supra* note 74, art. 12 (family); *id.* at art. 26 (education). *Cf.* GA. CONST. pmbl. (stating one of its purposes is to “promote the interest and happiness of the . . . family”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding procreation to be one of “the basic civil rights of man”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding marriage to be another of the “basic civil rights of man”). *See also* U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 32–33 (discussing British commitment to children’s rights).

¹²⁴ PITCAIRN ISLAND CONST. art. 17. *Accord* MONTSERRAT CONST. art. 12; KONSTITUSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 45 (public education to be provided); ALASKA CONST. art. VII, § 1 (public education to be provided); OHIO CONST. art. VI, § 2 (legislature to provide for “a thorough and efficient system of common schools throughout the state”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Mar. 23, 1976) (codifying the right to an education). *See also* *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (holding state cannot outlaw private schools).

¹²⁵ PITCAIRN ISLAND CONST. art. 23. *Compare* BERMUDA CONST. art. 12, and MONTSERRAT CONST. art. 16 (banning discrimination by government and private businesses open to public), and MONT. CONST. art. II, § 4 (“Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”), with CAYMAN ISLANDS CONST. art. 16 (banning discrimination only by government and not by private parties).

The Letter of the Law

An ancient bureaucrat observed the spirit giveth life but the letter killeth.¹²⁶ Here the letter of the law kills. Privacy is protected, for example, but is limited in such a way that one wonders what exactly is covered:

There shall be no interference by a public authority with the exercise of [the right to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of Pitcairn, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹²⁷

The rights of freedom of religion, expression, and assembly are likewise guaranteed with a broad opening paragraph and then severely limited with a second.¹²⁸ The expression article reads:

- (1) Everyone has the right to freedom of expression. This right

¹²⁶ *Corinthians* 3:6.

¹²⁷ PITCAIRN ISLAND CONST. art. 11(2). The St. Helena Constitution also grants privacy but has an even longer laundry list of exemptions: “(1) Every person shall have the right to respect for his or her private and family life, his or her home and his or her correspondence or other means of communication, and, except with his or her own free consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises. (2) Nothing contained in or done under the authority of any law shall be held to breach this section to the extent that the law in question is necessary in a democratic society (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning [i.e. zoning laws!], the development of mineral resources, or the development or use of any other property in such a manner as to promote the public benefit; (b) to protect the rights and freedoms of other persons; (c) to enable an officer or agent of the Government of St. Helena or any public authority to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of St. Helena or that public authority; (d) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry upon any premises by such order; or (e) for the purpose of preventing or detecting breaches of the criminal, customs or immigration law.” ST. HELENA CONST. art. 13. *Cf.* BERMUDA CONST. art. 7(2).

¹²⁸ PITCAIRN ISLAND CONST. arts. 12–14. *Cf.* U.S. CONST. amend. I; OHIO CONST. art. I, § 11 (“every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right” and explicitly allowing criminal prosecutions for libel).

shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹²⁹

And if that limitation wasn't enough, most of the rights in the Pitcairn Constitution—including freedom of expression, religion, liberty, privacy, marriage, and education—can be suspended during a “public emergency.”¹³⁰ That is where the Governor proclaims that “in or affecting Pitcairn, a war or other public emergency threatening the life of the nation” exists.¹³¹ So the Governor simply need issue a proclamation, and he can erase what rights are left.¹³² Plus, a “public emergency” means the Governor can also hold people under preventative detention.¹³³ Talk about *silent enim leges arma*.¹³⁴

THE STRUCTURE OF PITCAIRN GOVERNMENT

The Pitcairn government is *sui generis*, like the island itself. It has all the trappings of a modern Western state—a

¹²⁹ PITCAIRN ISLAND CONST. art. 13. *See also* NEILL, *supra* note 96, at 184 (stating “[g]ossip, through which reputation would suffer, was punishable and was perhaps a wise law in such a small community so cut off from the rest of the world.”); Tim Watkin, *Governor Gags Pitcairners*, N.Z. HERALD, Oct. 19, 2002, at A10 (stating Governor, during rape investigations, warned islanders gossiping was a criminal offense); BERMUDA CONST. art. 9(2) (outlining laundry list of exceptions).

¹³⁰ PITCAIRN ISLAND CONST. art. 24. *Cf.* MONTSERRAT CONST. art. 18–19 (regulations on state of emergency)

¹³¹ PITCAIRN ISLAND CONST., art. 61.

¹³² *Id.*

¹³³ *Id.* *Cf.* ST. HELENA CONST. art. 23.

¹³⁴ *See* MARCUS TULLIUS CICERO, *Pro T. Annio Milone*, ch. 11 (52 B.C.), in MARCUS TULLIUS CICERO, *PRO T. ANNIO MILONE, IN L. CALPURNIUM PISONEM, PRO M. AEMILIO SCAURO, PRO M. FONTEIO, PRO C. RABIRIO POSTUMO, PRO M. MARCELLO, PRO Q. LIGARIO, PRO REGE DEIOTARO* 16–17 (N.H. Watts trans., 1979).

constitution, an independent judiciary, auditors, a flag, postage stamps—but there is a very big omission: democracy.¹³⁵ Governments should derive their powers from those governed.¹³⁶ But that is not the case on Pitcairn.

Where's Amy Goodman When You Need Her?

America's Founding Fathers thought it repulsive that colonies should be ruled by a government they had no say in, contrasting Britain's actions with how the Greeks and Romans treated their colonies.¹³⁷ Since World War II, international law has codified democratic government as a fundamental human right.¹³⁸ Questions have been raised about whether Britain legislating for Pitcairn without any democracy on the island violates international law:

This denial of democratic involvement of those subject to such laws would appear to be a contradiction of the rights established in instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Indeed it might be thought that natural justice in a democratic society demands that those who are to be subject to the laws have a voice in their making. The high-handed use of a plethora of Ordinances issued under Orders in Council . . . resonates with “the clanking of mediaeval chains of the ghosts of the past.”¹³⁹

British Foreign Secretary Robin Cook claimed a decade ago

¹³⁵ Cf. PACIFIC WAYS: GOVERNMENT AND POLITICS IN THE PACIFIC ISLANDS (Stephen Levine ed., 1999) (providing a nice introduction to all the governments of Pacific jurisdictions from the biggest—Australia, New Zealand—to the smallest—Pitcairn, Easter Island, Palau, Tokelau—with a chapter on each).

¹³⁶ THE DECLARATION OF INDEPENDENCE, *supra* note 89.

¹³⁷ Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 215–18 (2003) (quoting John Adams, Alexander Hamilton, and others).

¹³⁸ Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992) (discussing international law and democracy). See also *R. ex parte Barclay v. Sec'y of State for Justice*, [2009] UKSC 9, [2010] 1 A.C. 464, [1]–[4] (Lord Collins) (discussing democratic government as a fundamental right in case challenging government of Sark in the Channel Islands, a dependency of the British Crown.)

¹³⁹ Farran, *Case of Pitcairn*, *supra* note 110, at 147–48, *quoting* United Australia, Ltd. v. Barclays Bank, Ltd., [1941] A.C. 1, 29 (H.L. 1940) (appeal taken from Eng.) (Lord Aiken).

that Britain's "Overseas Territories are beacons of democracy."¹⁴⁰ Long ago his government declared its policy was for all colonies to become self-governing.¹⁴¹ And the Foreign and Commonwealth Office recently stated in its annual human rights report that the rule of law is "more than a set of legal rules that govern society. It encompasses representative government"¹⁴²

Traditionally there had been an evolution towards an elected responsible government in British colonies.¹⁴³ Pitcairners operated democratically for over a century on their own; a visiting colonial officer (and attorney) observed in 1937: "[t]hey wanted Pitcairners to rule Pitcairn under the guidance of the Crown."¹⁴⁴ Instead of continuing that tradition and strengthening responsible government—which most of Britain's populated overseas territories today have—Britain has seen to it that there is ultimately no democratic control of Pitcairn.¹⁴⁵

The 2009 suspension of democracy in the Turks and Caicos Islands has shown Britain can simply sweep away local control whenever the Foreign and Commonwealth Office chooses to do so.¹⁴⁶ Even though democracy is a part of the

¹⁴⁰ Robin Cook, *Introduction to U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY*, *supra* note 29, at 4.

¹⁴¹ 391 PARL. DEB., H.C. (5th ser.) (1943) 38 (U.K.) (statement of Colonel Oliver Stanley, Colonial Sec'y).

¹⁴² U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 8.

¹⁴³ Compare WIGHT, *supra* note 55, at 17–34 (discussing typical progression towards democratic control), with HUMPHREY HUME WRONG, GOVERNMENT OF THE WEST INDIES 73–81 (Negro Universities Press 1969) (1923) (discussing how responsible government was eliminated in Britain's Caribbean colonies in the mid-Nineteenth Century). The Caribbean regression was caused by a series of riots on Jamaica. See generally REPORT OF THE ROYAL COMMISSION ON THE ORIGIN, NATURE, AND CIRCUMSTANCES OF DISTURBANCES IN THE ISLAND OF JAMAICA, 1866, [C. (2d series) 3683], [C. (2d series) 3683-I] (U.K.). The riots were barbarically put down by the royal governor. Ronald V. Sires, *Government in the British West Indies: An Historical Outline*, 6 SOC. & ECON. STUD. 109, 119–120 (1957) (Jam.).

¹⁴⁴ NEILL, *supra* note 96, at 179.

¹⁴⁵ See COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at 16.

¹⁴⁶ U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 114–15; Turks & Caicos Islands Constitution (Interim Amendment) Order, 2009, S.I. 2009/701 (U.K.).

international human rights conventions Britain is so fond of—such as the Universal Declaration of Human Rights—Britain can simply withdraw its adherence to those conventions when it chooses to suspend democracy.¹⁴⁷ There is no check on the government, as British “courts will not inquire into whether [colonial] legislation . . . [is] in fact for the ‘peace, order[,] and good government’ or otherwise for the benefit of the inhabitants of” a territory.¹⁴⁸ So long government of, by, and for the people!¹⁴⁹

The Executive

Executive power is vested in the Queen.¹⁵⁰ The Governor is nominally appointed by her—who reigns because Parliament three centuries ago placed her great-great-great-great-great-great-great-grandmother in the line of succession.¹⁵¹ (This action also arose out of the Glorious Revolution that gave Britain its Bill of Rights). Gubernatorial appointments are in reality made by the mandarins of the Foreign and Commonwealth Office.¹⁵² They are as unaccountable as Her

¹⁴⁷ Universal Declaration, *supra* note 74, art. 1; U.K. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY, *supra* note 4, at 114–15 (stating Britain withdrew from Protocol 1 to the E.C.H.R. because its actions otherwise would violate that Protocol); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.

¹⁴⁸ R. ex. rel. Bancoult v. Sec’y of State for Foreign & Commonwealth Affairs, [2008] UKHL 61, [2009] 1 A.C. 453, [50] (appeal taken from Eng.) (Lord Hoffmann).

¹⁴⁹ Cf. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 17–23 (Roy P. Basler ed., 1953).

¹⁵⁰ PITCAIRN ISLAND CONST., art. 33(1); *accord* BERMUDA CONST. art. 56(1). Cf. TUVALU CONST. art. 51(1) (stating Queen has no powers except those expressly given her).

¹⁵¹ Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, § 1 (settling crown on Sophia, Electress of Hanover, over other members of the House of Stuart); DAVID WILLIAMSON, BREWER’S BRITISH ROYALTY 373–75 (1996) (showing by genealogical charts the descent of Elizabeth II from Sophia, the granddaughter of James I and mother of George I). See also Paul Sonne, *Last in Line of Succession, Ms. Vogel Is Glad She Isn’t Queen: Descendant of Sophia of Hanover, She Would Rule Britain if 4,972 Die*, WALL ST. J., Apr. 27, 2011, at A1 (reporting on the woman at the other end of the Act of Settlement).

¹⁵² Memorandum of the Foreign & Commonwealth Office, in FOREIGN

Majesty, for the Foreign and Commonwealth Office is headed by a Member of Parliament, theoretically accountable to his fellow M.P.'s—but not to Pitcairners, since they have no representation at Westminster.¹⁵³

In contrast, France's overseas possessions are all represented in Paris in Parliament.¹⁵⁴ The Greenlanders and Faroese are represented in the Danish parliament.¹⁵⁵ In the Nineteenth Century, when still a Spanish colony, Puerto Rico was represented in Madrid.¹⁵⁶ In the Twentieth, the Portuguese colonies were represented in Lisbon.¹⁵⁷ All the American possessions have representatives in Congress—albeit with no vote—in continuance of a practice that began with the First Congress.¹⁵⁸

AFFAIRS COMMITTEE, OVERSEAS TERRITORIES: EVIDENCE, 2007–8, H.C. 147-II, Ev-144, ¶ 32 (stating appointments made on advice of Foreign & Commonwealth Office); *see also* HENRY L. HALL, THE COLONIAL OFFICE: A HISTORY 87–96 (1937) (discussing backgrounds of colonial governors).

¹⁵³ 375 PARL. DEB., H.C. (6th ser.) (2001) 543 (U.K.) (statement of Andrew Rosindell). The Foreign Secretary, upon questions by Mr. Rosindell at a Foreign Affairs Committee hearing, agreed to look at the possibility of giving the overseas territories a larger role in the Commonwealth organization. HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, DEVELOPMENTS IN UK FOREIGN POLICY: ORAL AND WRITTEN EVIDENCE, 2010–12, H.C. 1471-I, at Ev-19, Ev-21 (U.K.). That would not affect their lack of representation at Westminster, however.

¹⁵⁴ CODE ÉLECTORAL [C. ÉLECTORAL], art. L394 (Fr.) (New Caledonia and French Polynesia each have two deputies and Wallis and Futuna has one); *id.* art. L438-1 (New Caledonia has two senators, French Polynesia has two senators, and Wallis and Futuna has one senator); *id.* L555 (St. Pierre and Miquelon has one senator); *id.* art. L527 (St. Martin has one senator); *id.* art. L500 (St. Barts has one senator); *id.* art. L473 (Mayotte has two senators); *id.* Annex No. 1 (Guadalupe has four deputies, Guyana has two, Martinique has four, Mayotte has two, Réunion has seven); *id.* Annex No. 6 (Guadalupe has three senators, Guyana has two, Martinique has two, Réunion has four). The French electoral code is online at www.legisfrance.gouv.fr.

¹⁵⁵ DENMARK CONST. art. 28; *see also* Isi Foighel, *Home Rule in Greenland*, 1 MEDDELESER OM GRØNLAND [MAN IN SOCIETY] 18 (1980) (Den.).

¹⁵⁶ Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L. J. 1, 16–17 (2003).

¹⁵⁷ RONALD H. CHILCOTE, PORTUGUESE AFRICA 22 (1967).

¹⁵⁸ 48 U.S.C. § 891 (2006) (Puerto Rico); 48 U.S.C. § 1711 (2006) (Guam and the Virgin Islands); 48 U.S.C. § 1731 (2006) (American Samoa); 48 U.S.C. § 1751 (LexisNexis Supp. 2011) (Northern Mariana Islands); An Act to Provide for the Government of the Territory Northwest of the River Ohio, Act of Aug. 7, 1789, 1 Stat. 50 (U.S.) (affirming the Northwest Ordinance of the Continental Congress—appended in the *Statutes at Large* as a footnote to this Act—which provided for a delegate from the Northwest Territory); *see*

Residents of the Dutch possessions in the Caribbean have no representation at The Hague, but the legislature there does not make laws for them as they have local autonomy.¹⁵⁹ This is similar to the relationship between New Zealand and the Cook Islands and Niue, where New Zealand lacks legislative power over either.¹⁶⁰ The Australian external territories—those with a permanent population are Norfolk Island, the Cocos (Keeling) Islands, and Christmas Island—at least have a parliamentary committee dedicated to them and thus some limited voice in the Australian Parliament even if they do not elect their own M.P.’s.¹⁶¹

also BETSY PALMER, CONGRESSIONAL RESEARCH SERV., R40555, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS (2011). For a table showing all statutory provisions authorizing American territorial delegates over the past two centuries, see *id.* at 11–12.

¹⁵⁹ Case C-300/04, *Eman v. College van burgemeester en wethouders van Den Haag*, 2006 E.C.R. I-8055; STEVEN HILLEBRINK, THE RIGHT TO SELF-DETERMINATION AND POST-COLONIAL GOVERNANCE: THE CASE OF THE NETHERLANDS ANTILLES AND ARUBA 155 (2008); see also Jonkheer H.F. van Panhuys, *The International Aspects of the Reconstruction of the Kingdom of the Netherlands in 1954*, 5 NETH. Y.B. INT’L L. 1 (1974) (discussing relationship between the Netherlands and its overseas territories).

¹⁶⁰ Cook Islands Constitution Act 1964 (N.Z.); Niue Constitution Act 1974 (N.Z.); C.C. Aikman, *Recent Constitutional Changes in the South-West Pacific*, 72 N.Z. OFFICIAL Y.B. 1104 (1968) (discussing relationship of New Zealand with Cooks and Niue); Roger S. Clark, *Self-Determination and Free Association: Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. J. INT’L L. 1, 54–60 (1980) (same). A similar relationship exists between New Zealand and Tokelau. See U.N. Gen. Assembly, Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Tokelau*, 3–5, 9–11, U.N. Doc. A/AC.109/2011/3 (Feb. 2, 2011).

¹⁶¹ 491 PARL. DEB., H.C. (2009) 161WH (U.K.) (statement of Andrew Rosindell) (discussing the position of the Australian external territories); AUSTL. PARL. JOINT STANDING COMMITTEE ON THE NATIONAL CAPITAL & EXTERNAL TERRITORIES, *QUIS CUSTODIET IPSOS CUSTODES: INQUIRY INTO GOVERNANCE ON NORFOLK ISLAND* ¶¶ 4.102–4.109 (2003) (discussing proposals to give Norfolk Island representation in Parliament); AUSTL. ROYAL COMM’N INTO MATTERS RELATING TO NORFOLK ISLAND, REPORT OF THE ROYAL COMMISSION INTO MATTERS RELATING TO NORFOLK ISLAND 349 (1976) (Australia Parliamentary Paper No. 305 of 1976) (calling on Norfolk Islanders to be given representation in Parliament); AUSTL. PARL. JOINT STANDING COMMITTEE ON THE NAT’L CAPITAL & EXTERNAL TERRITORIES, CURRENT AND FUTURE GOVERNANCE ARRANGEMENTS FOR THE INDIAN OCEAN TERRITORIES ¶¶ 1.17–1.19 (2006) (discussing purpose of committee and listing reports it has produced on territorial issues). For good examples of these reports, see AUSTL. PARL. JOINT STANDING COMMITTEE ON THE NAT’L CAPITAL & EXTERNAL TERRITORIES, ADVISORY REPORT ON THE TERRITORIES LAW REFORM

But in Britain “ultimate legislative authority over the Dependent Territories is vested in the United Kingdom Parliament,” which has none to speak for Pitcairners.¹⁶² (Parliament once tried to remind its wayward American colonies that it and not the colonies called the shots—a move which worked out so very well for king and country).¹⁶³ Thus, there is no proper oversight of governors by Parliament—or anyone else.¹⁶⁴ The House of Commons Foreign Affairs Committee has repeatedly pointed out that the Foreign and Commonwealth Office does not take oversight of the overseas territories seriously.¹⁶⁵ One reason is the heavy turnover among the leaders of the F.C.O. and its overseas territories division.¹⁶⁶

Because of their day jobs as ambassador to New Zealand, the unaccountable governors appointed by the unaccountable Foreign and Commonwealth Office bureaucrats in the name of an unaccountable monarch actually delegate the work of administering Pitcairn to a series of New Zealanders hired as Island Commissioners—yet another layer of unaccoun-

BILL 2010 (2010); AUSTL. PARL. JOINT STANDING COMMITTEE ON THE NAT'L CAPITAL & EXTERNAL TERRITORIES, ISLAND TO ISLANDS: COMMUNICATIONS WITH AUSTRALIA'S EXTERNAL TERRITORIES (1999).

¹⁶² Matimak Amicus Brief, *supra* note 55, at 9. *See also* Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645, 722 (P.C. 1968) (appeal taken from S. Rhodesia) (U.K.) (finding Parliament's authority to legislate for colonies is unlimited); Liyange v. The Queen, [1967] 1 A.C. 259, 284 (P.C. 1965) (appeal taken from Ceylon) (U.K.) (finding that Parliament's ability to legislate for colonies is not constrained by any principles of natural justice). *Cf.* Christopher Horan, *Section 122 of the Constitution: A "Disparate and Non-Federal" Power*, 25 FED. L. REV. 97 (1997) (Austl.) (discussing how the Australian Constitution gives Parliament unlimited power over territories).

¹⁶³ *See* American Colonies Act, 1766, 6 Geo. 3, c. 12.

¹⁶⁴ 491 PARL. DEB., H.C. (6th ser.) (2009) 157 WH (U.K.) (statement of Andrew Mackinlay) (“It has become clear that Governors have been incompetent, because there was no reporting back or flagging up of anxieties and there was poor governance. There was acquiescence through silence to a thoroughly unacceptable situation. We have no way of knowing whether those people are good, bad, or indifferent.”).

¹⁶⁵ FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, ¶ 437; FOREIGN AFFAIRS COMMITTEE, FOREIGN AND COMMONWEALTH OFFICE ANNUAL REPORT, 2008–09: FIFTH REPORT OF SESSION, 2009–10, H.C. 145, ¶ 326; FOREIGN AFFAIRS COMMITTEE, THE ROLE OF THE FCO IN UK GOVERNMENT: SEVENTH REPORT OF SESSION, 2010–12, H.C. 665, ¶¶ 12, 72–76. The F.C.O.'s bungling of the response to the volcanic eruptions on Montserrat in the mid-1990's is typical of its work. *See* INT'L DEVELOPMENT COMMITTEE, MONTSERRAT: FIRST REPORT OF SESSION, 1997–8, H.C. 267.

¹⁶⁶ *See* Clegg & Gold, *supra* note 29, at 123.

tability.¹⁶⁷

Making the Laws

The law—and not the Pitcairn Constitution—provides for an Island Council of seven members. It consists of the Mayor, elected to a three-year term; a Deputy Mayor, elected to a two-year term; four councilors, also elected for two-year terms; and another councilor appointed by the Governor.¹⁶⁸ The Governor or a designee is an *ex officio* member.¹⁶⁹

Pitcairn laws are styled “ordinances.”¹⁷⁰ The enacting clause is “Enacted by the Governor of the Islands of Pitcairn, Henderson, Ducie and Oeno.”¹⁷¹ There is a single-subject rule for laws,¹⁷² whose titles must accurately describe the contents.¹⁷³ The Governor cannot legislate on certain subjects, such as enriching himself or the changing the currency.¹⁷⁴ The Governor must publish laws, but only as he directs,¹⁷⁵ and send

¹⁶⁷ *Salt v Fell*, [2008] NZCA 128, [2008] 3 NZLR 193 (CA) (discussing the role of the commissioner in litigation between a fired Island Commissioner and the Governor); *Salt v Fell*, [2006] ERNZ 475, ¶ 5 (N.Z. Emp. Relations Auth.) (earlier incarnation of the dispute); MARKS, *supra* note 27, at 75–77 (discussing the allegiances of Commissioner Salt to the islanders versus his allegiance to Governor Fell).

¹⁶⁸ Local Government Ordinance No. 1 of 1964, §§ 3, 6 (Pitcairn Is.) (codified as amended in LAWS OF PITCAIRN, *supra* note 2, at ch. 11).

¹⁶⁹ *Id.* § 6.

¹⁷⁰ PITCAIRN ISLAND CONST. art. 37(2).

¹⁷¹ *Id.* Laws enacted by Congress begin: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.” Laws enacted by the British Parliament begin: “Be it Enacted, by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows . . .” An ornate form is from the Isle of Man: “We, your Majesty’s most dutiful and loyal subjects, the Council and Keys of the said Isle, do humbly beseech your Majesty that it may be enacted, and be it enacted, by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows (that is to say):—”

¹⁷² PITCAIRN ISLAND CONST. art. 37(3). *Cf.* ALASKA CONST. art. II, § 13; N.D. CONST., art. IV, § 13.

¹⁷³ PITCAIRN ISLAND CONST. art. 37(4).

¹⁷⁴ *Id.* art. 38.

¹⁷⁵ *Id.* art. 39. Congress initially required laws to be published in newspapers. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68. In 1845, it commissioned the familiar *Statutes at Large* from Little, Brown & Company. Res. No. 10 of Mar. 3, 1845, 5 Stat. 798. For publication of Pitcairn laws, see Eshleman,

copies to London.¹⁷⁶

The Western Pacific High Commissioner was historically empowered to issue regulations as he saw fit and, once published, these regulations were law unless disapproved by London—but this power was lightly exercised.¹⁷⁷ Pitcairners met in mass meetings to make laws, a practice one Commissioner approvingly compared to Swiss popular democracy.¹⁷⁸

Under the Pitcairn Orders the “Governor of Pitcairn ha[d] a law-making role and [was] the only active legislator.”¹⁷⁹ This is still true since everything adopted by the democratically-elected Island Council can be vetoed by an unelected, unseen, unaccountable Governor thousands of miles away.¹⁸⁰ (Lord Chancellor Halsbury said a legislature in its law-making acts as “an ideal person that does not make mistakes,” but are governors likewise infallible?).¹⁸¹ And the Governor, in turn, can be vetoed by the Foreign and Commonwealth Office, another world away in Whitehall, which can “instruct the Governor in the exercise of his functions; . . . disallow . . . legislation; and [has] the power to legislate by . . . Order in

Law in Isolation, *supra* note 14.

¹⁷⁶ PITCAIRN ISLAND CONST. art. 40.

¹⁷⁷ *British Islands in Western Pacific*, 2 J. SOC'Y COMP. LEGIS., N.S. 113, 113–14 (1900) (Eng.). The High Commissioner from 1914 to 1967 had his own gazette, the *Western Pacific High Commissioner Gazette*, in which laws were published. JERRY DUPONT, *THE COMMON LAW ABROAD* 1186 (2001); Letter from the W. Pacific High Comm'n Secretariat, Note on the Western Pacific High Commission in Relation to the Gilbert & Ellice Islands Colony ¶ 23 (Feb. 25, 1970), *reprinted in* U.K. FOREIGN & COMMONWEALTH OFFICE, *WESTERN PACIFIC HIGH COMMISSION*, *supra* note 20, at 240.

¹⁷⁸ Harry C. Luke, *Legislatures of the British Pacific Islands*, 1 PARLIAMENTARY AFF., Winter 1947, at 38, 49–50. (Eng.) (Luke was High Commissioner 1938–1942).

¹⁷⁹ Anthony H. Angelo & Fran Wright, *The Pitcairn Trials Act 2003 (NZ), Ordinance 6 of 2004 (Pit) and the Bounty of the Mutiny*, 21 N.Z. U. L. REV. 486, 488 (2004) (discussing ordinance removing mayor from office following his conviction and arguing it was a bill of attainder).

¹⁸⁰ PITCAIRN ISLAND CONST. art. 36(3) (Governor may legislate without consulting Island Council); *id.* art. 34 (mandating elected Island Council).

¹⁸¹ *See* Comm'rs for the Special Purpose of the Income Tax v. Pemsel, [1891] A.C. 531, 549 (H.L.) (appeal taken from Eng.) (Lord Halsbury, L.C.). *Cf.* *Missouri, Kansas & Texas Ry. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) (“legislatures are the ultimate guardians of the liberties and welfare of the people”).

Council.”¹⁸²

One example of such law-making by fiat was the Foreign and Commonwealth Office deciding without any consultation with local governments—or anyone else—to abolish the death penalty in its Caribbean colonies.¹⁸³ In stark contrast to the situation for Pitcairners, the St. Helenians have a real legislature that makes laws.¹⁸⁴

Received Wisdom

English “common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in Pitcairn.”¹⁸⁵ Early American constitutions contained similar “reception clauses.”¹⁸⁶ Even though English law is in practice impossible to know in the South Pacific,¹⁸⁷ it is common in former British colonies in the

¹⁸² COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at 16 (speaking generally of colonies); Matimak Amicus Brief, *supra* note 55, at 8–9 (same). *See also* PITCAIRN ISLAND CONST. art. 41 (specific power for Pitcairn); U.N. Decolonization Committee, *2011 Pitcairn Report*, *supra* note 73, ¶ 5 (describing retained power); ROBERTS-WRAY, *supra* note 55, at 227–33 (discussing disallowance of laws). For a discussion of legislating through orders-in-council, see COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 451–60 (6th ed. 2007).

¹⁸³ *See* Caribbean Territories (Abolition of Death Penalty for Murder) Order, 1991, S.I. 1991/988 (U.K.).

¹⁸⁴ ST. HELENA CONST. art. 47 (creating legislature); *id.* art. 60 (legislature makes laws).

¹⁸⁵ *Id.* art. 42(1). *Cf.* Judicature Ordinance No. 1 of 1961, §§ 7–8 (Pitcairn Is.) (applying laws of England to Pitcairn); Judicature Ordinance No. 2 of 1970, § 14 (Pitcairn Is.) (applying laws of 1970); Judicature Amendment Ordinance, 1983 (Pitcairn Is.) (applying laws of 1983), *all quoted in* R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745 [93] (Pitcairn Is. Sup. Ct.). No copy of the English statutes was available on the island until 1997. *Id.* ¶ 95. The courts are to take judicial notice of English statutes published by Her Majesty’s Stationery Office or in *Halsbury’s Statutes* as well as the *Statutory Instruments*, also published by H.M.S.O. Evidence (Proof of Written Laws) Ordinance No. 11 of 2000, § 2 (Pitcairn Is.) (*codified in* LAWS OF PITCAIRN, *supra* note 2, at c. 6).

¹⁸⁶ *E.g.*, N.Y. CONST. of 1777, art. 35. *See also* 15A C.J.S. *Common Law* §§ 14, 18–21 (2002) (discussing adoption of common law in the United States); Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 607–11 (2002) (listing all American reception statutes).

¹⁸⁷ Anthony H. Angelo, *Rule of Law—Role of Law in the South Pacific*, in *GOVERNANCE AND SELF-RELIANCE IN PACIFIC ISLAND SOCIETIES* 65–68 (Anthony H. Angelo & Yves-Louis Sage eds., 2010).

Pacific for English law to apply after independence.¹⁸⁸ The Cook Islands received it as it stood on January 14, 1840, the date New Zealand was established as a colony.¹⁸⁹ And the United States in its administration of the Trust Territory of the Pacific Islands initially imposed English common law and statutes as they stood on July 3, 1776.¹⁹⁰

But English law historically only applied as it fit local circumstances; e.g., in 1769, the Kings Bench found “[a]n act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom . . . let alone to a remote overseas colony or possession.”¹⁹¹ A century and a half ago, the Governor of Norfolk Island opposed a move to apply outside law on that island for reasons that are true of Pitcairn today:

The habits and modes of thought of the islanders are so different from those of Englishman, the circumstances of the colony are so unique, that I confess I should be sorry to see the laws of England or of New South Wales, either civil or criminal, adopted in the aggregate as the laws of Norfolk Island. Were this done . . . the islanders would be subjected to a legal system, which having been framed to suit a state of society altogether different from that which it is proposed to apply it, would probably be found to be a variance with their feelings and habits, and of the bearing of which upon all their relations with each other they would be utterly ignorant.¹⁹²

¹⁸⁸ See generally Jennifer Corrin, *Discarding Relics of the Past: Patriation of Laws in the South Pacific*, 39 VICTORIA U. WELLINGTON L. REV. 635 (2008) (N.Z.); Jennifer Corrin, *Colonial Legacies?: A Study of Received and Adopted Legislation Applying in the University of the South Pacific Region*, 21 J. PACIFIC STUD. 33 (1997) (Fiji); Anita Jowitt, *The Nature and Functioning of Pacific Legal Systems*, 13 J. S. PAC. L. 1, 1 (2009) (Vanuatu) (giving example of the difficulties this lack of local law creates). See also J.E. Cote, *The Reception of English Law*, 15 ALTA. L. REV. 29 (1977) (discussing reception throughout the English common law world); Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K. L.J. 183 (1988) (discussing reception with a focus on Hong Kong).

¹⁸⁹ COOK ISLANDS CONST. art. 77; Cook Islands Act 1915 § 615 (N.Z.).

¹⁹⁰ TRUST TERR. CODE § 22 (1952).

¹⁹¹ R. v. Vaughan, 4 Burr. 2494, 2500, 98 Eng. Rep. 308, 311 (K.B. 1769).

¹⁹² Letter from William T. Denison, Governor of Norfolk Island & New South Wales, Sydney, to Edward George Earle Bulwer-Lytton, Colonial Sec’y, London (Jan. 22, 1859), in U.K. COLONIAL OFFICE, PITCAIRN ISLANDS: COPY OF CORRESPONDENCE WITH THE GOVERNMENT OF NEW SOUTH WALES IN REFERENCE TO PITCAIRN ISLANDERS SETTLED IN NORFOLK ISLAND, H.C. 297, at 23 (U.K.).

The Courts

The Constitution mandates a Supreme Court—the trial court—and a Court of Appeals, while additional lower courts may be created by law—and one has been, a Lands Court.¹⁹³ Appeals can be made from the Court of Appeals to the Privy Council in London.¹⁹⁴ Such appeals to outside courts are not unusual in the region, e.g., the Cook Islands, Kiribati, Niue, and Tuvalu still allow appeals to the Privy Council, while Tokelau appeals go to New Zealand and Nauru appeals go to Australia.¹⁹⁵

The Pitcairn courts are not obligated to sit on Pitcairn.¹⁹⁶ In 2000 they were allowed to sit in Pitcairn, Britain, or elsewhere in “Her Majesty’s dominions.”¹⁹⁷ And in 2002 Britain and New Zealand concluded a treaty to allow Pitcairn trials on Kiwi soil.¹⁹⁸ This is comparable to the British Indian Ocean

Cf. Brian Z. Tamahana, *A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia*, 13 HASTINGS INT’L & COMP. L. REV. 71, 94–99, 112–14 (1989) (discussing consequences of imposing outside law on Pacific islands).

¹⁹³ PITCAIRN ISLAND CONST. art. 43(1); Lands Court Ordinance No. 8 of 2000 (Pitcairn Is.) (*codified in* LAWS OF PITCAIRN, *supra* note 2, at ch. 15). *Cf.* CORRIN & PATTERSON, *supra* note 11, at 337–94 (detailing formation and jurisdiction of South Pacific courts).

¹⁹⁴ PITCAIRN ISLAND CONST. art. 43(2).

¹⁹⁵ MAXWELL BARRETT, *THE LAW LORDS* ch. 5 (2001); Tokelau Amendment Act 1986, cl 4 (N.Z.); Agreement Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru, Austl.-Nauru, Sept. 6, 1976, 1276 U.N.T.S. 151; *Nauru (High Court Appeals) Act 1976* (Austl.), *upheld by Ruhani v Dir. of Police*, 222 C.L.R. 489 (2005) (Austl.). This relationship is because Nauru was formerly administered by Australia as a trusteeship under the United Nations. *See also* DAVID B. SWINFEN, *IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833–1986* (1987) (discussing whether appeals to the Judicial Committee of the Privy Council from abroad should be permitted). *Cf.* West Indies Associated States Supreme Court Order, 1967, S.I. 1967/223 (U.K.); Anguilla, Montserrat, and Virgin Islands (Supreme Court) Order, 1983, S.I. 1983/1108 (U.K.) (providing for nine former and present British possessions in the Caribbean—Anguilla, Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Vincent and the Grenadines, and the Virgin Islands—to share a tribunal, the Eastern Caribbean Supreme Court).

¹⁹⁶ PITCAIRN ISLAND CONST. arts. 43(4), 46(1), 50(3).

¹⁹⁷ Pitcairn (Amendment) Order, 2000, S.I. 2000/1340 (U.K.).

¹⁹⁸ Agreement Concerning Trials Under Pitcairn Law in New Zealand and Related Matters, N.Z.–U.K., Oct. 11, 2002, 2219 U.N.T.S. 57; Pitcairn Trials Act 2002 (N.Z.); Pitcairn Trials Act Commencement Order, 2003, SR 2003/11 (N.Z.); *see also* N.Z. HOUSE OF REPRESENTATIVES, FOREIGN AFFAIRS,

Territory Supreme Court, which can sit in the United Kingdom; the Supreme Courts of the Australian territories of the Cocos (Keeling) Islands and the Coral Sea Islands, both of which can sit in their respective territories or elsewhere in Australia; and America's Wake Island Court of Appeals, which can sit on Wake, in Hawaii, or in the vicinity of Washington, D.C.¹⁹⁹ In 2002 Pitcairn law was changed to permit its courts to sit anywhere in the world.²⁰⁰ Yet seven hundred years ago the Magna Carta outlawed the abuse that forced litigants to attend wandering courts.²⁰¹ This is unusual today: the only other recent instance of a civilian court sitting in a foreign nation is the Pan Am 103 trial.²⁰² While American courts-martial can sit anywhere,²⁰³ the only American civil tribunals beside a few

DEF. & TRADE COMMITTEE, PITCAIRN TRIALS BILL (2002) (explaining Pitcairn Trials Act); N.Z. PARLIAMENTARY LIBRARY, BILLS DIGEST NO. 918: PITCAIRN TRIALS ACT 2002 (2002) (same).

¹⁹⁹ See BRITISH INDIAN OCEAN TERRITORY CONST. § 13(4); *Cocos (Keeling) Islands Act 1955* s 15 (Austl.); Supreme Court Ordinance, 1955, § 4 (Cocos (Keeling) Is.); *Coral Sea Islands Act 1969* s 8(2) (Austl.); 32 C.F.R. § 935.66(c) (2011) (U.S.) (Wake). See also Andrew Wilson & David Kennedy, *Laws in Australia's Territories*, 13 AUSTL. L. LIBR. 29, 31 (2005) (speaking of the Coral Sea Islands Territory, which consists of a series of miniscule islands: "why a court would sit or where a court would sit in what is basically an uninhabited territory is a mystery. Perhaps a judge may wish for a warm winters court case."). Cf. Falkland Islands Courts (Overseas Jurisdiction) Order, 1989, S.I. 1989/2399, § 2 (U.K.) (permitting Falkland Islands Magistrate's Court to hear cases arising in the British Antarctic Territory and South Georgia and the South Sandwich Islands).

²⁰⁰ Judicature (Courts) Ordinance No. 14 of 2002, § 2 (Pitcairn Is.) (amending Judicature (Courts) Ordinance No. 2 of 1999 (Pitcairn Is.), *codified in* LAWS OF PITCAIRN, *supra* note 2, at ch. 1). The courts have sat in New Zealand. E.g., Tim Watkin, *Pitcairn Court Asked to Rule Out Its Own Existence*, N.Z. HERALD (Auckland), May 9, 2003, at A4 (reporting on hearing in Auckland); Tim Watkin, *Defender Calls for 'Pitcairn Law'*, N.Z. HERALD, Nov. 17, 2003, at A4 (reporting on hearing in Auckland suburb of Papakura); Tim Watkin, *Ambitious Pitcairn Challenge*, N.Z. HERALD, Nov. 18, 2003, at A4 (same).

²⁰¹ Magna Carta, 1297, 25 Edw. 1, c. 29, art. 17 ("The common pleas shall not follow [the King], but shall be held in some certain place.").

²⁰² Agreement Concerning a Scottish Trial in the Netherlands, Neth.-U.K., Sept. 18, 1998, 2062 U.N.T.S. 82; High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order, 1998, S.I. 1998/2251 (U.K.); Exchange of Notes, Neth.-U.K., Dec. 16, 1999, 2117 U.N.T.S. 474. The decision in that Scottish court was Her Majesty's Advocate v. Al Megrahi, [1999] ScotHC 248, 2000 J.C. 555 (H.C.J.), *aff'd* [2002] ScotHC 30, 2002 J.C. 99.

²⁰³ 10 U.S.C. § 805 (2006).

consular courts to sit outside American territory were the United States Court for China²⁰⁴ and the United States Court for Berlin,²⁰⁵ both of which went out of business decades ago.

²⁰⁴ Act to Create a United States Court for China and Prescribing the Jurisdiction Thereof, Act of June 30, 1906, ch. 3934, 34 Stat. 814, *formerly codified at* 22 U.S.C. §§ 191-9 (1940), *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992, *pursuant to* Treaty for the Relinquishment of Extraterritorial Rights in China and for the Regulation of Related Matters, U.S.-Ch., Jan. 11, 1943, 57 Stat. 767 (*entered into force* May 20, 1943). Congress based its power to establish the court on the Treaty of Peace, Amity, and Commerce (Treaty of Wang Hiya), U.S.-Ch., July 3, 1844, 8 Stat. 592; Treaty of Peace, Amity, and Commerce (Treaty of Tientsin), U.S.-Ch., June 18, 1858, 12 Stat. 1023; Treaty on Commercial Relations and Judicial Procedure (Treaty of Peking), U.S.-Ch., Nov. 17, 1880, 22 Stat. 826. *See also* FRANK E. HINCKLEY, AMERICAN CONSULAR JURISDICTION IN THE ORIENT (1906) (author was clerk of the United States Court for China); Thomas F. Millard, *A United States Court on Foreign Soil: Excellent Results Follow Judge Wilfley's Work in the Establishment of American Law and Jurisdiction in Foreign Concession, Shanghai*, N.Y. TIMES, Mar. 22, 1908, § 4 at 8 (full page article on the court); Frank E. Hinckley, *Extraterritoriality in China*, 39 ANNALS AM. ACAD. POL. SCI. 97 (1912) (author was by then district attorney for the court); *United States Court for China: Hearings Before the H. Comm. on Foreign Affairs on H.R. 4281*, 65th Cong. (1917) (giving extensive account of court through questioning of Charles Sumner Lobinger, judge of the court, 1914-1924); Charles Sumner Lobinger, *China: Rule Making Function of the United States Court*, 4 A.B.A. J. 215 (1918) (offering his proposed evidence rules for the Court); Charles M. Loring, *American Extraterritoriality in China*, 10 MINN. L. REV. 407 (1926) (author was member of the bar of the court); Crawford Morrison Bishop, *American Extraterritorial Jurisdiction in China*, 20 AM. J. INT'L L. 281 (1926) (same); Charles Sumner Lobinger, *A Quarter-Century of Our Extraterritorial Court*, 20 GEO. L.J. 427 (1932); Note, *The United States Court for China*, 49 HARV. L. REV. 793 (1936); Milton J. Helmick, *The United States Court for China*, 27 A.B.A. J. 544 (1941) (author was judge of the court); David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451 (1988) (comparing court to United States Court for Berlin); Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923 (2004); Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217 (2008). Two volumes of the Court's decisions, both edited by Judge Lobinger, were issued in 1921 and 1928 under the title *Extraterritorial Cases*; both were reviewed by Crawford Morrison Bishop. Crawford Morrison Bishop, *Extraterritorial Cases*, 16 AM. J. INT'L L. 349 (1922); Crawford Morrison Bishop, *Extraterritorial Cases*, 24 AM. J. INT'L L. 646 (1930).

²⁰⁵ The Court was created by the U.S. High Commissioner for Germany by High Commissioner Law No. 46 of April 28, 1955, Allied Kommandatura Gazette 1056, *reprinted in* United States, as the U.S. Element, Allied Kommandatura v. Tiede (U.S. Ct. Berlin 1979), 86 F.R.D. 227, 261-65. The Court declared it was "established pursuant to the powers granted to the President by Article II of the United States Constitution." *Tiede*, 86 F.R.D. at 237; *see* U.S. CONST., art. II, § 2, cl. 1 ("The President shall be Commander in

The Governor has sole power to appoint judges and judicial officers.²⁰⁶ There is no residency requirement for judges.²⁰⁷

Chief of the Army and Navy"). The High Commissioner's authority—see Establishing the Position of United States High Commissioner for Germany, Exec. Order 10,062, 14 Fed. Reg. 2965 (June 7, 1949), 3 C.F.R. 116 (1949 supp.), *reprinted in* 22 U.S.C. § 901 (1952)—transferred to the American ambassador to West Germany when the post of High Commissioner was abolished in 1955—see United States Authority and Functions in Germany, Exec. Order 10,608, 20 Fed. Reg. 3093 (May 7, 1955), 3 C.F.R. 65 (1955 supp.), *reprinted in* 22 U.S.C. § 3942 (1988) and 1955 U.S.C.C.A.N. 1070—was additionally derived from the Protocol on the Zones of Occupation in Germany and Administration of "Greater Berlin" Area, Sept. 12, 1944, 5 U.S.T. 2078, 227 U.N.T.S. 279; Agreement on Control Machinery in Germany, Nov. 14, 1944, 5 U.S.T. 2062, 236 U.N.T.S. 359; Agreements Relating to Basic Principles for Merger of the Three Western German Zones of Occupation in Germany and Other Matters, Apr. 8, 1949, 63 Stat. 2817, 140 U.N.T.S. 196; Convention on Relations Between the Three Powers and the Federal Republic of Germany and on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327; Convention on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219; Tripartite Agreement on the Exercise of Retained Rights in Germany, Oct. 23, 1954, 6 U.S.T. 5703. The court heard one case: *Tiede*, 86 F.R.D. 227. Efforts by Berliners to sue in the Court were rejected when the American Ambassador fired the judge and failed to appoint a new one, a decision the Federal courts declined to reverse. *Dostal v. Haig*, 652 F.2d 173 (D.C. Cir. 1981). *Cf.* *United States v. Adams*, 13 M.J. 728, 731 (A.C.M.R. 1982) (finding U.S. Court for Berlin would not be available to try American serviceman). American rights in Berlin were terminated by the Treaty on the Final Settlement with Respect to Germany art. 7, Sept. 12, 1990, 1696 U.N.T.S. 115, and the Agreement on the Settlement of Certain Matters Relating to Berlin, Sept. 25, 1990, 30 I.L.M. 445, thus ensuring the United States Court for Berlin will never sit again. *See also* HERBERT J. STERN, JUDGMENT IN BERLIN (1984) (Stern was third and final judge and wrote a spellbinding account of presiding over *Tiede*); JUDGMENT IN BERLIN (Hobo 1988) (film of Judge Stern's book with Martin Sheen playing Stern); Andreas F. Lowenfeld, *Hijacking, Freedom, and the "American Way"*, 83 MICH. L. REV. 1000 (1985) (reviewing STERN, *supra*); David Biedler, Case Comment, 7 BROOK. J. INT'L L. 1 (1981) (analysis of *Tiede*); Lynn D. Healy, Case Note, 11 SETON HALL L. REV. 809 (1981) (same); David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 474-94 (1988) (same); David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993) (same); C.M.A. McCauliff, *The Reach of the Constitution: American Peace-Time Court in West Berlin*, 55 NOTRE DAME LAW. 682 (1980) (examination of the Court's application of the U.S. Constitution to West Berlin); *Introduction*, in U.K. FOREIGN OFF., SELECTED DOCUMENTS ON GERMANY AND THE QUESTION OF BERLIN, 1944-1961, 1961, Cmnd. 1552 (U.K.), in 37 P.P. (1961-2) 1 (short account of legal status of Berlin); IAN D. HENDRY & M.C. WOOD, THE LEGAL STATUS OF BERLIN (1987) (detailed account).

²⁰⁶ PITCAIRN ISLAND CONST. art. 52. "Judicial officers" are magistrates and the court registrars, i.e., clerks. *Id.* art. 61.

This is typical both in the Pacific²⁰⁸ and for British colonies.²⁰⁹

The independence of colonial judges from the government has long been a consideration for Britain.²¹⁰ Pitcairn too protects its judges. Their salaries may not be decreased.²¹¹ Judges hold office until age seventy-five, but they may be removed for incapacity or misbehavior if the removal has been sanctioned by the Privy Council.²¹² A judge's office may not be

²⁰⁷ Cf. 28 U.S.C. § 44(c) (2006) (federal circuit judges, except for those on the District of Columbia Circuit, must live in their circuit); 28 U.S.C. § 134 (2006) (federal district court judges must live in their district, except for those of the District of the District of Columbia and the Southern and Eastern Districts of New York).

²⁰⁸ COOK ISLANDS CONST. art. 53(2); SAMOA CONST. art. 68(2); SOLOMON ISLANDS CONST. art. 80(2); TUVALU CONST. art. 124. CORRIN, NEWTON & PATTERSON, *supra* note 60, at 99 (stating most judges of higher courts in Pacific come from abroad).

²⁰⁹ See ARTHUR BERRIEDALE KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS 273-79 (1909).

²¹⁰ ELIAS, *supra* note 55, at 64-69.

²¹¹ PITCAIRN ISLAND CONST. art. 53; *accord* U.S. CONST. art. III, § 1.

²¹² PITCAIRN ISLAND CONST. art. 54; *see also* ELIAS, *supra* note 55, at 70 (discussing removal of colonial judges). The Privy Council's power of removing judges comes from the Judicial Committee Act, 1833, 6 & 7 Vic. 4, c. 38, § 4 (U.K.). For an early example of a request for removal for misconduct, see *Representatives of the Island of Grenada v. Sanderson*, 3 Moo. P.C.C. 38, 13 Eng. Rep. 596 (P.C.) (U.K.). For a recent example of a successful petition for removal, see *In re Chief Justice of Gibraltar*, [2009] UKPC 43, [2010] 2 L.R.C. 450. For examples codifying this removal power, see WEST INDIAN FEDERATION CONST. of 1957, art. 75(3), *enacted by* West Indies (Federation) Order, 1957, S.I. 1957/1364 (U.K.); Nigeria (Constitution) (Amendment) Order, 1958, S.I. 1958/429, § 142C(2) (U.K.); Singapore (Constitution) Order, 1958, S.I. 1958/1956, § 91(4) (U.K.). America's federal judges hold office on "good behavior." U.S. CONST., art. III, § 1. Federal judges may be removed upon impeachment and conviction for "treason, bribery, and high crimes and misdemeanors." *Id.* art. II, § 4. This was most recently done in 2010. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF G. THOMAS PORTEOUS, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, H. REP. 111-427 (2010); 156 CONG. REC. H1327-337 (daily ed. Mar. 11, 2010) (impeachment); 156 CONG. REC. S8608-611 (daily ed. Dec. 8, 2010) (conviction and removal). Judge John Pickering of New Hampshire was removed for incapacity in 1804. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 284-96 (1907) (providing material on the Pickering impeachment from Congressional records). *See generally* U.S. NAT'L COMM'N ON JUDICIAL REMOVAL & DISCIPLINE, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL REMOVAL AND DISCIPLINE (1993) (discussing American judicial discipline), *reprinted in* 19 IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON, THE EVIDENTIARY RECORD PURSUANT TO S. RES. 16, S. DOC. NO. 106-63, at 689 (1999) [hereinafter CLINTON IMPEACHMENT]; H. COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED

abolished without his consent.²¹³

The Attorney General

The Attorney General, an office newly created with the Constitution, is also appointed by the Governor for either a fixed term or until a mandatory retirement age.²¹⁴ His salary may not be diminished.²¹⁵ He can be removed only for incapacity or misbehavior, and then only after an investigation by a tribunal of three judges of Commonwealth countries.²¹⁶ Previously, the Governor had a "legal adviser," but this position was for decades an informal one, there being no statutory provision for it.²¹⁷ In 2000 an ordinance gave the Legal Adviser the same powers as the Attorney-General would have in England.²¹⁸

Donald A. McLoughlin, an Australian lawyer in the British colonial service in Fiji, was appointed a Judicial Commissioner to try a divorce on Pitcairn in 1958 and thereafter served as Legal Adviser to the Governor of Pitcairn, even after he retired home to Perth, thousands of miles from the Pitcairn administration in Auckland.²¹⁹ His successor, Paul Treadwell,

MATERIALS, H. DOC. NO. 93-97 (1973) (reprinting primary source materials for all impeachments to that date, most of which are judges); H. COMM. ON THE JUDICIARY, 105TH CONG., IMPEACHMENT: SELECTED MATERIALS (Comm. Print. 1998) (reprinting documents on subsequent impeachments, President Nixon plus three judges), *reprinted in* CLINTON IMPEACHMENT, *supra*, at 1; H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE SAMUEL B. KENT, H. REP. NO. 111-159 (2009) (penultimate American impeachment); Judicial Conduct and Disability Act, 28 U.S.C. § 351 et seq. (2006).

²¹³ PITCAIRN ISLAND CONST. art. 54; *accord* Western Pacific (Courts) Order, 1961, S.I. 1961/1506, § 6(4) (U.K.).

²¹⁴ PITCAIRN ISLAND CONST. art. 35(2)-(3).

²¹⁵ *Id.* art. 35(10).

²¹⁶ *Id.* art. 35(11)-(15).

²¹⁷ Notes of Evidence Taken Before Supreme Court on Apr. 20, 2005 at 45, R. v. Seven Names Accused, Sup. Ct. Nos. 1-55/2003, PCR. 2-619 (testimony of Paul Julian Treadwell, Legal Adviser to the Governor of Pitcairn); *see also* R. v. Seven Named Accused, [2004] PNSC 1, 127 I.L.R. 232, [38] (Pitcairn Is.).

²¹⁸ Judicature (Courts) Ordinance No. 2 of 1999, § 19(1) (Pitcairn Is.) ("The functions and powers conferred upon the Attorney-General of England in respect of civil or criminal causes or matters arising in England may be exercised by the Legal Adviser in respect of civil or criminal causes or matters occurring or arising in the Islands.").

²¹⁹ Memorandum for the File by Arthur Galsworthy, Governor of

took over in 1979 but did not visit the island in his quarter century of service.²²⁰ The Attorney General today is Paul Rishworth, a law professor at the University of Auckland.²²¹

Bureaucracy

Constitutional provisions for public employees are common in the Pacific.²²² The Governor can make appointments to the public service.²²³ Public officials serve at the pleasure of Her Majesty.²²⁴ The Governor determines the conditions of their employment.²²⁵ The Governor is to hire independent auditors to review the public accounts.²²⁶ (Britain's government has expressed concern about auditing government finances, but does not seem to have been particularly active in actually performing these audits in the overseas territories).²²⁷ The U.S. Constitution requires accounts be published—but this language is unenforceable.²²⁸ The Governor may also appoint

Pitcairn, on Meeting with Donald A. McLoughlin, Pitcairn Legal Adviser (Nov. 4, 1970), PCR 7–3355. This is why the colophon of the 1974 edition of Pitcairn laws, compiled by McLoughlin, states it was issued from Wembley, Western Australia.

²²⁰ Notes on Evidence Taken Before Supreme Court on Apr. 20, 2005 at 46, R. v. Seven Named Accused, Pit. Sup. Ct. Nos. 1-55/2003; *see also Seven Named Accused*, [2004] PNSC 1, [38].

²²¹ *Paul Rishworth*, UNIV. OF AUCKLAND, <http://www.law.auckland.ac.nz/uoa/os-paul-rishworth> (last visited Jan. 29, 2012).

²²² *E.g.*, KIRIBATI CONST. arts. 98–105; NAURU CONST. arts. 68–70; NIUE CONST. arts. 68–69; VANUATU CONST. arts. 57–60.

²²³ PITCAIRN ISLAND CONST. art. 56(1).

²²⁴ *Id.*

²²⁵ *Id.* art. 57.

²²⁶ *Id.* art. 58. *See also* Michael Wood, *Field Trip to Pitcairn*, 89 CHARTERED ACCT. J., Apr. 2010, at 12 (N.Z.) (reporting on Pitcairn's auditors).

²²⁷ *Compare* U.K. COMPTROLLER & AUDITOR GEN'L, FOREIGN AND COMMONWEALTH OFFICE: CONTINGENT LIABILITIES IN THE OVERSEAS TERRITORIES, 1997–8, H.C. 13 ¶¶ 4.4–4.12, *and* U.K. COMPTROLLER & AUDITOR GEN'L, FOREIGN AND COMMONWEALTH OFFICE: MANAGING RISK IN THE OVERSEAS TERRITORIES, 2007–8, H.C. 4 (discussing financial risks in Britain's overseas territories), *with* Clegg & Gold, *supra* note 29, at 131 (discussing how these audits are years behind and no improvements had occurred in a decade).

²²⁸ U.S. CONST. art. I, § 9, cl. (“a regular statement and account of the receipt and expenditures of all public money shall be published from time to time”); *United States v. Richardson*, 418 U.S. 166 (1974) (holding citizens have no standing to enforce this clause).

an ombudsman to conduct independent investigations.²²⁹

The Governor is to have a seal.²³⁰ Officials can resign by writing the appointing authority.²³¹ The Pitcairn Constitution provides for the oaths of office.²³² One oath is provided in the American Constitution—that of the President—while the others are set by statute.²³³ The first law enacted under the United States Constitution was on oaths.²³⁴ (Naturally, the second levied taxes).²³⁵ Some state constitutions provide for oaths, notably Kentucky's requirement that public officials swear they haven't been dueling.²³⁶ And like the United States Constitution, Pitcairn's protects those opposed to swearing.²³⁷

BRITAIN'S TRACK RECORD

Over the last fifty years, Britain has an accumulated an appalling record as to the rights of its colonies' citizens. The articles in the Pitcairn Constitution guaranteeing freedom of travel and British citizenship in particular are remarkable in

²²⁹ PITCAIRN ISLAND CONST. art. 59. *Cf.* Commissions of Inquiry Ordinance No. 6 of 1999 (Pitcairn Is.) (codified in LAWS OF PITCAIRN, *supra* note 2, at ch. 8).

²³⁰ PITCAIRN ISLAND CONST. art. 31 ("official stamp"). *Cf.* OHIO CONST. art. III, § 12 (providing for great seal); RICHARD SHARPE PATTERSON & RICHARDSON DOUGALL, *THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SEAL OF THE UNITED STATES* (1976); *Fact Sheet: The Great Seal of the United States*, 7 DEPT. OF STATE DISPATCH 456 (1996); R.W. Perceval, *The Great Seal*, 1 PARLIAMENTARY AFF., Autumn 1948, at 40 (discussing British great seal).

²³¹ PITCAIRN ISLAND CONST. art. 66. *Cf.* 3 U.S.C. § 20 (2006) (President and Vice-President resign by writing Secretary of State); 17 LEWIS DESCHLER, WILLIAM HOLMES BROWN & CHARLES W. JOHNSON III, *DESCHLER-BROWN-JOHNSON PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES* 354 (2011) (giving examples of how members of House resign); 2 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* §§ 1167–253 (1907) (same).

²³² PITCAIRN ISLAND CONST. sched.

²³³ U.S. CONST. art. II, § 1, cl. 8; 5 U.S.C. § 3331 (2006).

²³⁴ An Act to Regulate the Time and Manner of Administering Certain Oaths, Act of June 1, 1789, ch. 1, 1 Stat. 23.

²³⁵ Act for Laying a Duty on Goods, Wares, and Merchandises Imported Into the United States, Act of July 4, 1789, ch. 2, 1 Stat. 24.

²³⁶ KY. CONST. § 228 (all officeholders—including lawyers—must swear this).

²³⁷ PITCAIRN ISLAND CONST. sched.; U.S. CONST. art. VII, cl. 3 ("oath or affirmation").

light of that record.²³⁸ A major problem for colonial citizens is that in 1968 the Commonwealth Office—the former Colonial Office—was subsumed into the Foreign and Commonwealth Office, thus subordinating the interests of Britain’s colonies and their residents to diplomats’ desire for good relations with foreigners.²³⁹ An astute summary was submitted to the Foreign Affairs Committee of the House of Commons:

The tiny communities of the [fourteen] Overseas Territories have very limited representation in the apparatus of the UK Government. Unlike France, they have neither a ‘Ministry of the Overseas Territories’ to advocate their interests, nor any representation or official observers within the Houses of Parliament. Although they have very specific needs, communities such as Pitcairn . . . do not have the capacity to staff permanent UK delegations to represent their interests. Consequently, the Overseas Territories have very little voice in Westminster and have been frequently overlooked. The FCO thus has a crucial role to play in representing their interests to other Departments across the entire breadth of Government activity.²⁴⁰

The British Indian Ocean Territory

In 1965 the British created a new colony, the British Indian Ocean Territory, to lease the Territory’s islands to the

²³⁸ See PITCAIRN ISLAND CONST. arts. 18, 22. *Accord Magna Carta*, 1297, 25 Edw. 1, c. 29, art. 29 (regulating exiling citizens); *id.* art. 39 (guaranteeing right to travel abroad and return); Universal Declaration, *supra* note 74, art. 9 (forbidding exile); *id.* at 15 (citizenship). Cf. Guy S. Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law*, 47 BRIT. Y.B. INT’L L. 1975-76, at 55 (1977) (discussing limits on a government’s power to expel its people).

²³⁹ 761 PARL. DEB., H.C. (5th ser.) (1968) 1866 (statement of John Biggs-Davison). Cf. 491 PARL. DEB., H.C. (6th ser.) (2009) 160WH (U.K.) (statement of Andrew Rosindell) (“This issue should not be under foreign affairs. The [overseas territories] are not foreign; they are British. Why [are they] under foreign affairs? Why are British overseas territories—territories of Her Majesty the Queen—under the Foreign Office? They are neither foreign nor Commonwealth. They are not members of the Commonwealth in their own right. They are British overseas territories in the Commonwealth only via Britain, so they should not really be under the Foreign Office at all.”).

²⁴⁰ Statement of the Royal Soc’y for the Protection of Birds ¶ 8, in FOREIGN AFFAIRS COMMITTEE, THE ROLE OF THE FCO IN UK GOVERNMENT: SEVENTH REPORT OF SESSION, 2010-12: WRITTEN EVIDENCE, H.C. 665-II, at EV-W36.

United States for a military base.²⁴¹ In exchange, Britain was able to buy American-made submarine-launched ballistic missiles at a discount.²⁴² The islands are used for American espionage and the “extraordinary rendition” torture program.²⁴³

²⁴¹ British Indian Ocean Territory Order, 1965, S.I. 1965/1920 (U.K.); Exchange of Notes on Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28, 603 U.N.T.S. 273; Agreement on Naval Communications Facility on Diego Garcia, U.S.-U.K., Oct. 24, 1972, 23 U.S.T. 3087, 866 U.N.T.S. 302; Agreement on Naval Support Facility on Diego Garcia, U.S.-U.K., Feb. 25, 1976, 27 U.S.T. 315, 1018 U.N.T.S. 372; Exchange of Notes on Availability of Certain Indian Ocean Islands for Defense Purposes, U.S.-U.K., June 22 & 26, 1976, 27 U.S.T. 3448, 1032 U.N.T.S. 323; Supplemental Arrangement to Exchange of Notes Constitution An Agreement Concerning the Availability for Defence Purposes of the British Indian Ocean Territory, U.S.-U.K., Dec. 13, 1982, 34 U.S.T. 4553, 2001 U.N.T.S. 397; Exchange of Notes Constituting an Agreement Concerning the British Indian Ocean Territory and Operations and Construction Contracts on Diego Garcia, U.S.-U.K., Nov. 16, 1987, 1576 U.N.T.S. 179; Exchange Keesing's Contemporary Archives of Notes, U.S.-U.K., June 18 & July 21, 1999, 2106 U.N.T.S. 294. See also *British Indian Ocean Territory*, 15 KEESING'S CONTEMPORARY ARCHIVES 21102 (1965) (Eng.) (discussing creation of territory and protest by Mauritius); *British Indian Ocean Territory*, 20 KEESING'S CONTEMPORARY ARCHIVES 26570 (1974) (Eng.) (reporting objections by many governments to American base there); *Threat of Legal Action Against U.K. by Mauritius*, 50 KESSING'S RECORD WORLD EVENTS 46123 (2004) (discussing Mauritian claims).

²⁴² Memorandum from Robert S. McNamara, Sec'y of Defense, to Eugene M. Zuckert, Sec'y of the Air Force (June 14, 1965), reprinted in 21 OFFICE OF THE HISTORIAN, BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968: NEAR EAST REGION, ARABIAN PENINSULA 96-97 (Nina Davis Howland ed., 2000) [hereinafter U.S. DEP'T OF STATE, F.R.U.S. NEAR EAST] (stating McNamara approved discount in exchange for base); *The Islanders That Britain Sold*, SUNDAY TIMES (London), Sept. 21, 1975, at 10 (discussing transaction), reprinted in *Diego Garcia, 1975, The Debate Over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcomm. on Investigations of the H. Comm. on Int'l Relations*, 94th Cong., 93-101 (1975) [hereinafter U.S. House Int'l Relations Committee, *Diego Garcia 1975*]. See also U.S. DEP'T OF STATE, F.R.U.S. NEAR EAST, *supra*, at 83-117 (reprinting papers on B.I.O.T. lease); 24 OFFICE OF THE HISTORIAN, BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976: MIDDLE EAST REGION AND ARABIAN PENINSULA, 1969-1972; JORDAN, SEPTEMBER 1970, at 123-225 (Linda Wills Qaimmagami & Adam M. Howard eds., 2008) (further papers on B.I.O.T. lease and base).

²⁴³ JAMES BAMFORD, BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY FROM THE COLD WAR THROUGH THE DAWN OF A NEW CENTURY 163-65 (2001); Don Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, § 1, at 1; Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends*

The British forcibly expelled the entire population of the islands and has since forbidden them to return.²⁴⁴ When the

Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, WASH. POST, Dec. 26, 2002, at A1. The British Government long denied B.I.O.T. was used for rendition before it finally admitted the truth. 694 PARL. DEB., H.L. (5th ser.) (2007) 25W (U.K.) (denial); 440 PARL. DEB., H.C. (6th ser.) (2005) 1652W (U.K.) (same); 426 PARL. DEB., H.C. (6th ser.) (2004) 225W (U.K.) (same); 642 PARL. DEB., H.L. (5th ser.) (2003) 1019 (U.K.) (same); 472 PARL. DEB., H.C. (6th ser.) (2008) 547-8 (U.K.) (truth). This was not the first time the British Government has concealed from Parliament what was happening on Diego Garcia. Joel Larus, *Diego Garcia: Political Clouds Over a Vital U.S. Base*, 10 STRATEGIC REV. 44, 50-53 (1982). See also Briefings on Diego Garcia and Patrol Frigate: Hearings Before the S. Comm. on Foreign Relations, 93d Cong. (1974) (Chief of Naval Operations explaining need for the base was an expansion of Soviet influence in the Indian ocean); Kirby Harrison, *Diego Garcia: The Seabees at Work*, 105 PROC. U.S. NAVAL INST., Aug. 1979, at 53 (describing construction of base); Daniel W. Urish, *To Build a Link: The Seabees at Diego Garcia*, 99 PROC. U.S. NAVAL INST., Apr. 1973, at 101 (same); Massimo Calabresi, *Postcard: Diego Garcia*, 170 TIME, Sept. 24, 2007, at 8 (report from journalist accompanying President Bush when Air Force One landed to refuel en route from Iraq to Australia).

²⁴⁴ See generally COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at 25-28; U.S. House, Int'l Relations Committee, *Diego Garcia 1975*, *supra* note 242, at 40-81 (1975); DAVID VINE, ISLANDS OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA (2009); ROBERT SCOTT, LIMURIA: THE LESSER DEPENDENCIES OF MAURITIUS (1961) (former governor of Mauritius describing the islands that became B.I.O.T.); SIMON WINCHESTER, THE SUN NEVER SETS: TRAVELS TO THE REMAINING OUTPOSTS OF THE BRITISH EMPIRE 38-39 (1985); JOHN MADELEY, DIEGO GARCIA: A CONTRAST TO THE FALKLANDS (rev. ed. 1985) (Minority Rights Group Rep. No. 54); J. Khan, *Diego Garcia: The Militarization of an Indian Ocean Island*, in AFRICAN ISLANDS AND ENCLAVES 174 (Robin Cohen ed., 1983); H. Ly-Tio-Fane & S. Rajabalee, *An Account of Diego Garcia and Its People*, 1 J. MAURITIAN STUDIES 90 (1986) (India); Richard Gifford, *The Chagos Islands: The Land Where Human Rights Hardly Ever Happened*, [2004 (1)] LAW, SOC. JUST. & GLOBAL DEV. J., 2004, at 1, 6 (Eng.), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_1/gifford/; Laura Jeffrey, *Historical Narrative and Legal Evidence: Judging Chagossians High Court Testimonies*, 29 POLAR: POL. & LEG. ANTHROPOLOGY REV. 228 (2006); Laura Jeffrey, *How a Plantation Became Paradise: Changing Representations of the Homeland Among Displaced Chagos Islanders*, 13 J. ROYAL ANTHROPOLOGICAL INST., n.s. 951 (2007) (Eng.); Timothy P. Lynch, *Diego Garcia: Competing Claims to a Strategic Isle*, 16 CASE W. RES. J. INT'L L. 101 (1984); David Snoxell, *Anglo/American Complicity in the Removal of the Inhabitants of the Chagos Islands, 1969-73*, 37 J. IMP. & COMMONWEALTH HIST. 127 (2009) (Eng.) (Snoxell was British High Commissioner to Mauritius); David Snoxell, *Expulsion From Chagos: Regaining Paradise*, 36 J. IMP. & COMMONWEALTH HIST. 119 (2008); David Vine, *War and Forced Migration in the Indian Ocean: The U.S. Military Base at Diego Garcia*, 42 INT'L MIGRATION 111 (2004) (Switz.); Simon Winchester, *Diego Garcia*, 73 GRANTA 207 (2001) (Eng.).

exiles in recent years won judicial decisions finding their expulsion unlawful and giving them a right to return, the Foreign and Commonwealth Office simply had the Queen overturn the courts by fiat.²⁴⁵ (As Yakov Naumovich might say: “What a country!”).²⁴⁶ The B.I.O.T. Constitution decreed by Her Majesty in 2004 states nobody has the right to live or be in the Territory—especially not the native-born population.²⁴⁷

The people of Tristan da Cunha were forced by nature to leave their island and Britain did what it could to stop them from returning.

²⁴⁵ R. *ex rel.* Bancoult v. Sec’y of State for the Foreign & Commonwealth Office, [2000] EWHC (Admin) 413, [2001] Q.B. 1067 (finding banishment illegal); Chagos Islanders v. Att’y Gen’l, [2003] EWHC 2222 (Q.B.) (finding right of return for islanders), *aff’d*, [2004] EWCA (Civ) 997, 76 BRIT. Y.B. INT’L L. 2005, at 486 (2006), *annulled by* British Indian Ocean Territory (Constitution) Order, 2004, 35 Brit. Indian Ocean Territory Gazette No. 1 (2004) (U.K.), and British Indian Ocean Territory (Immigration) Order, 2004, 35 Brit. Indian Ocean Territory Gazette No. 1 (2004), *both declared ultra vires by* R. *ex rel.* Bancoult v. Sec’y of State for the Foreign & Commonwealth Office, [2006] EWHC (Admin) 1038, [2006] A.H.D. 81, *aff’d* [2007] EWCA Civ 498, [2008] Q.B. 365, *rev’d* [2008] UKHL 61, [2009] A.C. 453. The exiles also unsuccessfully sued the American officials complicit in the arrangement. *Bancoult v. McNamara*, 227 F. Supp. 144 (D.D.C. 2002); *Bancoult v. McNamara*, 370 F. Supp. 1 (D.D.C. 2004), *aff’d* 445 F.3d 427 (D.C. Cir. 2006). For a discussion of the cases, see Stephen Allen, *Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands*, 7 HUM. RTS. REV. 441 (2007); Stephen Allen, *International Law and the Resettlement of the (Outer) Chagos Islands*, 8 HUM. RTS. REV. 683 (2008) (Eng.); Christian J. Nauvel, *A Return from Exile?: The Chagossians and Their Struggle*, 5 NW. J. INT’L HUM. RTS. 96 (2006); Recent Case, *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), 120 HARV. L. REV. 860 (2007); Peter H. Sand, Case Note, *The Queen ex rel. Bancoult v. Sec’y of State for Foreign & Commonwealth Off.*, [2008] UKHL 61, [2009] A.C. 453, 103 AM. J. INT’L L. 317 (2009).

²⁴⁶ For another good example of how the British government can simply negate adverse court decisions, see War Damage Act, 1965, 1965 Eliz. 2, c. 18. The Act was retroactive legislation that nullified the ruling of the House of Lords affirming the award of large damages against the government. See *Burmah Oil Company (Burmah Trading), Ltd. v. Lord Advocate*, [1965] A.C. 75 (H.L. 1964) (appeal taken from Scot.). For a discussion of the War Damage Act and *Burmah Oil*, see J.W. Bridge, *Retrospective Legislation and the Rule of Law in Britain*, 35 U. MO. KAN. CITY L. REV. 132, 140-47 (1967); A.L. Goodhart, *The Burmah Oil Case and the War Damage Act 1965*, 82 LAW Q. REV. 97 (1966) (Eng.); Note, *The Burmah Oil Affair*, 79 HARV. L. REV. 614 (1966).

²⁴⁷ BRITISH INDIAN OCEAN TERRITORY CONST. art. 9; 424 PARL. DEB., H.C. (2004) 61W (U.K.). Yet the United States has brought whoever it wants there. 427 PARL. DEB., H.C. (6th ser.) (2003) 547 (U.K.).

Tristan da Cunha

In 1961 the entire population of Tristan da Cunha was evacuated to England after the island's volcano erupted.²⁴⁸ The Colonial Office had plans decades before to shut the island down and the eruption provided them with a way to do so.²⁴⁹ Once in England, the Colonial Office tried to break up the community, refused to consider the islander's requests to return, and actively worked to keep them in Britain, paternalism run amok.²⁵⁰ Upon their return, the Colonial Office forcibly established an socialist economy reminiscent of coal mines' company stores that kept the people at the mercy of the government—and then tried to prevent anyone from leaving!²⁵¹

The Falkland Islands

Across the South Atlantic, the Foreign and Commonwealth Office had similar misguided ideas about the Falklands.²⁵² The

²⁴⁸ P.J.F. Wheeler, *Tristan da Cunha: Death of an Island*, 121 NAT'L GEOGRAPHIC MAG. 678 (1962) (author was island's administrator); Thomas Whiteside, *Annals of Migration: Something Wrong With the Island*, 39 NEW YORKER, Nov. 9, 1963, at 154, reprinted in THOMAS WHITESIDE, *ALONE THROUGH A DARK SEA* 67-126 (1964).

²⁴⁹ PETER ANDREAS MUNCH, *CRISIS IN UTOPIA: THE ORDEAL OF TRISTAN DA CUNHA* 209 (1971).

²⁵⁰ *Id.* at 218 (Colonial Office tried to disperse the community throughout England); *id.* at 231-44 (Colonial Office efforts to thwart the islanders' return). See also Peter Andreas Munch, *Culture and Superculture in a Displaced Community: Tristan da Cunha*, 3 ETHNOLOGY 369, 374-75 (1964).

²⁵¹ MUNCH, *supra* note 249, at 269-70 (economic situation); *id.* at 285 (keeping islanders from leaving). See also Peter Andreas Munch, *Development and Conflicting Values: A Social Experiment in Tristan da Cunha*, 72 AMER. ANTHROPOLOGIST, n.s. 1300, 1313-17 (1972).

²⁵² Many law review authors, afraid to take a stand on anything, have mealy-mouthed politically-correct footnotes about how the Argentines call them the "Malvinas," the United Nations uses "Falklands/Malvinas," the English claim is open to debate, etc., etc., etc., so they will use both names so as not to cause offense to the legions of militantly nationalistic Argentine readers of American law reviews. *E.g.*, Miguel Antonio Sánchez, *Self-Determination and the Falkland Islands Dispute*, 21 COLUM. J. TRANSNAT'L L. 557, 557 n.1 (1983) (citing 1964 report of U.N. decolonization committee, a body which is a forum for dictatorships to attack Britain and the United States); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L. J. 621, 621 n.1 (1986); Roberto Laver, *The Falkland/Malvinas: A New Framework for*

Foreign and Commonwealth Office for years negotiated to give the Falkland Islands to Argentina.²⁵³ Never mind the British population in sole possession there since 1833 adamantly opposed the move and the fact that the Argentine claim to title is fantasy.²⁵⁴

In the 1960s the Foreign Office's spokesmen evaded giving straight answers to Parliament when questions were raised about the negotiations and the refusal to hold a referendum in the Falklands to record the islanders' views.²⁵⁵ The islanders

Dealing with the Anglo-Argentine Sovereignty Dispute, 25 FLETCHER F. WORLD AFF. 147, 147 n.1 (2001). This author calls the Falklands because that is their name.

²⁵³ FALKLAND ISLANDS REVIEW: REPORT OF A COMMITTEE OF PRIVY COUNCILLORS, 1983, Cmnd. 8787, ¶ 23 [hereinafter FALKLAND ISLANDS REVIEW] (stating Foreign & Commonwealth Office in 1968 proposed giving islands to Argentina). For the history of the negotiations, see *id.* ¶¶ 15-107. See also LOWELL S. GUSTAFSON, THE SOVEREIGNTY DISPUTE OVER THE FALKLAND (MALVINAS) ISLANDS 43-48 (1988) (discussing accusations of treachery committed by Foreign & Commonwealth Office); George Clark, *Appeal on Fate of Falklands*, THE TIMES (London), Mar. 12, 1968, at 1 (reporting protest of islanders to Parliament and press that diplomats were trying to give them away).

²⁵⁴ PETER CALVERT, THE FALKLANDS CRISIS: THE RIGHTS AND WRONGS 5-10 (1982) (giving concise account of British and Argentinian claims to islands); C.J. Metford, *Falklands or Malvinas? The Background to the Dispute*, 44 INT'L AFFAIRS 463, 480 (1968) (Eng.) (stating "Argentina's claim is founded on emotion and recurrent irredentist fever"); John M. Lindsey, *Conquest: A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands*, 18 TEX. INT'L L.J. 11 (1983) (giving British claim). *Contra* Adrián F.J. Hope, *Sovereignty and Decolonization of the Malvinas (Falkland) Islanders*, 6 B.C. INT'L & COMP. L. REV. 391 (1983) (arguing Argentine title is valid); Mónica Pinto, *Argentina's Rights to the Falkland/Malvinas Islands*, 18 TEX. INT'L L. J. 1 (1983) (same); Alfredo Bruno Bologna, *Argentinian Claims to the Malvinas Under International Law*, 12 MILLENNIUM: J. INT'L STUD. 39 (1983) (Eng.) (same). See also Application Instituting Proceedings Against the Argentine Republic, Antarctica Cases (U.K. v. Arg., U.K. v. Chile), 1956 I.C.J. Pleadings 7 (May 1955) (giving British position on its claim to the former Falkland Islands Dependencies); GUSTAFSON, *supra* note 253, at 3-36 (giving full history of both sides' claims); Christopher C. Joyner, *Anglo-Argentine Rivalry After the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection*, 15 LAW. AM. 467 (1984) (focusing on Antarctic claims of parties); D.W. Greig, *Sovereignty and the Falkland Islands Crisis*, 8 AUSTL. Y.B. INT'L L. 1978-80, at 20 (1981) (giving full history of both sides' claims); Sonia A.M. Viejobueno, *Self-Determination v. Territorial Integrity: The Falkland/Malvinas Dispute with Reference to Recent Cases in the United Nations*, 16 S. AFR. Y.B. INT'L L. 1990-91, at 1 (1991) (same).

²⁵⁵ 290 PARL. DEB., H.L. (5th ser.) (1968) 990-95 (U.K.); 761 PARL. DEB., H.C. (5th ser.) (1968) 1866-75 (U.K.); *Falkland Islands*, 16 KEESING'S

issued a public appeal at the time: “Is our tiny community to be used as a pawn in power politics?”²⁵⁶ The Foreign Office in 1980 admitted in Parliament that it was working to hand the islanders to Argentina.²⁵⁷ Even though the defense budget was increasing, the government at the same time withdrew the sole naval presence in the region, *H.M.S. Endurance* to save money.²⁵⁸

Argentina took the hint Britain was not interested in the Falklands and invaded in 1982, generating a debate in the Commons full of visceral fury at the Foreign and Commonwealth Office.²⁵⁹ One M.P. correctly stated the very idea the striped-pants brigade was negotiating with the “criminal” regime in Buenos Aires—a ruthless military dictatorship that had “disappeared” thousands of its citizens—“make[s] any normal Englishman’s blood . . . boil.”²⁶⁰ The

CONTEMPORARY ARCHIVES 22730 (1968) (Eng.) (summarizing debates in Parliament); *Commons Storm on Falklands: Argentina Talks Deplored*, THE TIMES (London), Mar. 19, 1968, at 5 (reporting on Parliamentary debates). See also Editorial, *Betrayal or Barter?*, THE TIMES, Mar. 15, 1968, at 11 (condemning negotiations); Editorial, *More Grounds for Suspicion*, THE TIMES, Nov. 30, 1968, at 11 (criticizing British government’s position); David Wood, *Suspensions of MPs Over Falklands Are Unallayed*, THE TIMES, Dec. 4, 1968, at 1 (reporting on Parliamentary criticism); Richard Wigg, *Minister Fails to Allay Fears on Falklands*, THE TIMES, Nov. 29, 1968, at 1 (stating that after islanders met with Lord Chalfont of the Foreign Office they were resigned to being “sold out” to Argentina).

²⁵⁶ *Falkland Islands*, 16 KEESING’S CONTEMPORARY ARCHIVES 22730 (1968) (Eng.).

²⁵⁷ 995 PARL. DEB., H.C. (5th ser.) (1980) 129 (U.K.). See also Michael Frenchman, *Transfer of Falklands Sovereignty Proposed*, THE TIMES (London), Nov. 26, 1980, at 1; Hugh Noyes, *Commons Is United by Suspicion of Ridley Intentions on Falklands*, THE TIMES, Dec. 3, 1980, at 8.

²⁵⁸ 422 PARL. DEB., H.L. (5th ser.) (1981) 185; 17 PARL. DEB., H.C. (6th ser.) (1982) 856–57 (statement of Prime Minister Thatcher).

²⁵⁹ 21 PARL. DEB., H.C. (6th ser.) (1982) 633–67 (U.K.) (debate during the Saturday session, April 2, the day after invasion). See also Michael P. Socarras, *The Argentine Invasion of the Falklands and International Norms of Signalling*, 10 YALE J. INT’L L. 356 (1985) (examining the signals sent by British actions); Philip Windsor, *Diplomatic Dimensions of the Falklands Crisis*, 12 MILLENNIUM: J. INT’L STUD. 88 (1983) (Eng.) (arguing both sides wanted to avoid war but ignored each others’ signals).

²⁶⁰ 21 PARL. DEB., H.C. (6th ser.) (1982) 659 (statement of Bernard Braine); Editorial, *A Dangerous Negotiation*, THE TIMES (London), Feb. 23, 1977, at 15 (making same point as Braine). See also GUSTAFSON, *supra* note 253, at 44 (summarizing widespread beliefs: “Many Britons and most islanders feared that [the Foreign and Commonwealth Office] harbored a sly group of potential traitors who were scheming to hand over fellow Britishers

Foreign Secretary was forced by an angry House of Commons to immediately collect his cards.²⁶¹ A few years later, in his memoirs, he was unrepentant, continuing to insist that saving money for London and getting along with foreigners trumped the islanders' fervent desire to remain British.²⁶²

Anguilla

Another place with similarly loyal British citizens was Anguilla. "Anguilla is the only former colony to ever revolt *against* independence [and its people] are possibly the only rebels in history ever to have carried off a successful rebellion without killing anybody."²⁶³ It is a prime example of how, when it comes to its colonies that anything Britain says is temporary and can be revoked at any time when it suits Britain.²⁶⁴

to foreigners who would impoverish and harass them."); Bernard Levin, *A Nation for All That, Even If Is Just a Dot on the Map*, THE TIMES, Feb. 23, 1977, at 14 (stating of the Falklands that "When the Government tells a group of people dependent on it that there is going to be no 'sell-out' of their interests, we may be reasonably confident that a sell-out has been decided in principle, and when they are in addition promised that nothing will be done 'behind their back', it can be taken as certain that the method by which the sell-out will be effected has already been devised"); Ronald Butt, *No Surprise How the FO Hates MPs*, THE TIMES, Apr. 8, 1982, at 10 (discussing how diplomats are interested in talking to foreigners above all else and ignore morality). Cf. LA HISTORIA OFFICIAL [The Official Story] (Virgin/Almi/Historias Cinematograficas/Progress 1985) (film that won the Best Foreign Film Oscar about the countless children whose parents were murdered by the Argentine government and then placed with families of government loyalists); Alexei Barrionuevo, *A Child of War Discovers 'Dad' Is Parents' Killer*, N.Y. TIMES, Oct. 9, 2011, at 1 (giving real life example of the brutality depicted in *The Official Story*).

²⁶¹ *United Kingdom*, 28 KESSING'S CONTEMPORARY ARCHIVES 31537, 31538 (1982) (Eng.) (reprinting Carrington's resignation letter).

²⁶² PETER CARRINGTON, REFLECTING ON THINGS PAST: THE MEMOIRS OF PETER LORD CARRINGTON 366 (1989) (resignation); *id.* at 349-50, 355 (position on the Falklands). Carrington's time as a diplomat reversed his stance on the Falklands. Compare 298 PARL. DEB., H.L. (5th ser.) (1968) 26 (statement of Lord Carrington) (calling for protecting national sovereignty and the islanders), with FALKLAND ISLANDS REVIEW, *supra* note 253, ¶ 73 (stating Carrington as Foreign Secretary advocated transfer to Argentina).

²⁶³ Donald E. Westlake, *In Anguilla It's the Spirit of '71*, N.Y. TIMES MAG., May 23, 1971, at 24, 25.

²⁶⁴ For the Anguillan Revolution, see generally REPORT OF THE COMMISSION OF INQUIRY APPOINTED BY THE GOVERNMENTS OF THE UNITED KINGDOM AND ST. CHRISTOPHER-NEVIS-ANGUILLA TO EXAMINE THE ANGUILLA PROBLEM, 1970, Cmnd. 4510 [hereinafter REPORT OF THE COMMISSION ON

Britain in the 1950s set out to join its colonies in the Caribbean into a vast West Indian Federation, notwithstanding the lack of a common geography, history, politics, laws, or institutions.²⁶⁵ This was to save Britain money while it looked to get rid of the islands, the Federation being a prelude to independence.²⁶⁶

Such plans had been afoot since the Nineteenth Century.²⁶⁷

INQUIRY] (giving the official story); COLVILLE L. PETTY, *ANGUILLA: WHERE THERE'S A WILL, THERE'S A WAY* (1984) (giving solid history of Revolution by an Anguillan); FRED PHILLIPS, *FREEDOM IN THE CARIBBEAN: A STUDY OF CONSTITUTIONAL CHANGE* 98-106 (1977) (giving account of the Revolution by the lawyer who was governor of St. Kitts-Nevis-Anguilla at the time); DONALD E. WESTLAKE, *UNDER AN ENGLISH HEAVEN* (1972) (giving blackly humorous account of Anguillan Revolution).

²⁶⁵ David Lowenthal, *The West Indies Chooses a Capital*, 48 *GEOG. REV.* 336, 337-41 (1958). See also *THE WEST INDIES FEDERATION: PERSPECTIVES ON A NEW NATION* (David Lowenthal ed., 1961); Bernard Marshall, *Attempts at Windward/Leeward Federation*, 18 *CARIBBEAN Q.* 9 (1972) (Trin. & Tobago); Gordon K. Lewis, *West Indian Federation: The Constitutional Aspects*, 6 *SOCIAL & ECON. STUD.* 215 (1957) (Jam.). For the sources of law enacting the Federation Constitution, see West Indies (Federation) Order, 1957, S.I. 1957/1364 (U.K.), issued under British Caribbean Federation Act, 1956, 4 & 5 Eliz. 2, c. 63 (U.K.), both reprinted in 1 *W. Indies Gazette*, Jan. 3, 1958, at 3, 68 (Trin. & Tobago). For the official preparatory documents on the Federation, see ELISABETH WALLACE, *THE BRITISH CARIBBEAN: FROM THE DECLINE OF COLONIALISM TO THE END OF FEDERATION* 254-56 (1977) (giving an excellent history of the rise and fall of the Federation), and DUPONT, *supra* note 177, at 160. For the most comprehensive annotated biography of these documents and all other aspects of the Federation, see Jesse Harris Proctor, Jr., *Federalism in the West Indies*, in *FEDERALISM IN THE COMMONWEALTH*, *supra* note 82, at 59-85. For a survey of the colonies during the gestation of the Federation, see U.K. COLONIAL OFFICE, *BRITISH DEPENDENCIES IN THE CARIBBEAN AND NORTH ATLANTIC, 1939-1952, 1952*, Cmd. 8575, in 25 P.P. (1951-2) 151.

²⁶⁶ Jesse Harris Proctor, Jr., *Britain's Pro Federation Policy in the Caribbean: An Inquiry Into Motivation*, 22 *CAN. J. ECON. & POLI. SCI.* 319, 319 (1956); Elisabeth Wallace, *The West Indies: Improbable Federation?*, 27 *CAN. J. ECON. & POLI. SCI.* 444, 452 (1961). See also *West Indies*, 11 *KEESING'S CONTEMPORARY ARCHIVES* 15995, 15995-57 (1958) (describing at length the provisions of the Federation Constitution); J.C. McPetrie, *The Constitution of the West Indies*, [1959] *PUB. L.* 293 (Eng.) (same); PHILLIPS, *supra* note 264, at 34-52; Jesse Harris Proctor, Jr., *Constitutional Defects and the Collapse of the West Indian Federation*, [1964] *PUB. L.* 150. Britain in the 1950's planned several federations linking similarly heterogeneous populations; for an able discussion of these federations, see *WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERATION* (Thomas M. Franck ed., 1968).

²⁶⁷ See generally *WRONG*, *supra* note 143, at 145-70; PHILLIPS, *supra* note 264, at 1-16; Lloyd Braithwaite, *Progress Toward Federation, 1938-1956*, 6 *SOCIAL & ECON. STUD.* 133 (1957); Paul Knaplund, *Federation of the West*

But Jamaica—the largest part of the Federation in terms of area, population, and financial resources—realized that it would be picking up most of the costs of new government, be subservient to a capital a thousand miles away in the Lesser Antilles, and get few benefits from federation.²⁶⁸ So Jamaica quit the Federation months before it was to become independent in 1962.²⁶⁹ The Federation immediately collapsed and Britain had to plan a different future for the small islands.²⁷⁰

Anguilla had been connected to St. Kitts and Nevis for decades because all three were British and in the general vicinity of one another, notwithstanding the fact that (1) Anguilla was separated from the other two by seventy miles of ocean and several French and Dutch islands and (2) had nothing in common with St. Kitts and Nevis.²⁷¹ When Britain spun the three off in February 1967, Anguilla found itself yoked to the distant islands as part of an “associated state.”²⁷²

Indies: Introduction, 6 SOCIAL & ECON. STUD. 99 (1957); Jesse Harris Proctor, Jr., *The Development of the Idea of Federation of the British Caribbean Territories*, 39 REVISTA DE HISTORIA DE AMERICA [J. OF AM. HIST.] 61 (1955) (Mex.); Shridath S. Ramphal, *Federalism in the West Indies*, 6 CARIBBEAN Q. 210 (1960) (Trin. & Tobago). See, e.g., PAPERS RELATING TO THE PROPOSED UNION OF THE ISLANDS OF GRENADA, ST. LUCIA, ST. VINCENT, AND TOBAGO, 1884, [C. 4482 (2d series)] (U.K.).

²⁶⁸ Charles H. Archibald, *The Failure of the West Indies Federation*, 18 WORLD TODAY 233 (1962) (Eng.). See also HUGH W. SPRINGER, REFLECTIONS ON THE FAILURE OF THE WEST INDIAN FEDERATION (1962) (Harvard University Center for International Affairs Occasional Papers No. 4); JOHN MORDECAI, FEDERATION OF THE WEST INDIES (1968).

²⁶⁹ See generally Wallace, *supra* note 266. For background, see *West Indies*, 13 KEESING'S CONTEMPORARY ARCHIVES 18358 (1961) (Eng.); *West Indies*, 13 KEESING'S CONTEMPORARY ARCHIVES 18578 (1961) (Eng.); *West Indies*, 13 KEESING'S CONTEMPORARY ARCHIVES 18813 (1961) (Eng.).

²⁷⁰ See generally U.K. COLONIAL OFFICE, REPORT OF THE EAST CARIBBEAN FEDERATION CONFERENCE, 1962, 1962, Cmnd. 1746, in 11 P.P. (1961–2) 747; U.K. COLONIAL OFFICE, CONSTITUTIONAL PROPOSALS FOR ANTIGUA, ST. KITTS/NEVIS/ANGUILLA, DOMINICA, ST. LUCIA, ST. VINCENT, GRENADA, 1965, Cmnd. 2865; U.K. COLONIAL OFFICE, REPORT OF THE ST. KITTS/NEVIS/ANGUILLA CONSTITUTIONAL CONFERENCE, 1966, 1966, Cmnd. 3031; *West Indies*, 13 KEESING'S CONTEMPORARY ARCHIVES 18578 (1961) (Eng.); *West Indies*, 13 KEESING'S CONTEMPORARY ARCHIVES 18813 (1961) (Eng.).

²⁷¹ PETTY, *supra* note 264, 9–12; Colin G. Clarke, *Political Fragmentation in the Caribbean: The Case of Anguilla*, 15 CAN. GEOGRAPHER 13, 19–20 (1971).

²⁷² West Indies Act, 1967, c. 4 (U.K.); St. Christopher, Nevis, and

Anguilla wanted nothing to do with St. Kitts.²⁷³ Anguilla for decades had been completely neglected by the Colonial Office and the government on St. Kitts, a situation that left Anguilla longing for roads, electricity, water, telephones, schools, and the Twentieth Century.²⁷⁴ Because conditions had been so awful there for so long, a mass exodus abroad had taken place; at the time of the revolt there were more Anguillans living in Greater New York City than on Anguilla.²⁷⁵

Anguillans were at the mercy of St. Kitts Prime Minister Robert Llewellyn Bradshaw—a militant trade unionist partial to uniforms, Rolls Royces, flogging, and being called “Colonel”—who regularly made remarks about Anguillans as warm and fuzzy as those Cato the Censor made about the Punii.²⁷⁶ And it wasn’t just talk. To name just one indignity:

Anguilla Constitution Order, 1967, S.I. 1967/228 (U.K.); REPORT OF THE COMMONWEALTH CONFERENCE ON ANGUILLA, 1967, Cmnd. 3433, in 25 P.P. (1966–7) (U.K.). *See generally* REPORT OF THE COMMISSION OF INQUIRY, *supra* note 264, ¶¶ 28–52; S.A. de Smith, L.H. Leigh & R.A. Hasson, *Constitutional Law*, [1966] ANN. SURV. COMMONWEALTH L. 1, 8 (1967) (Eng.) (explaining concept of “associated state”); A.M. Honoré, J.M. Finnish & P.K. Irani, *Constitutional Law*, [1968] ANN. SURV. COMMONWEALTH L. 1, 9–11 (1969) (Eng.) (same); PHILLIPS, *supra* note 264, at 78–94; Margaret Broderick, *Associated Statehood—A New Form of Decolonisation*, 17 INT’L & COMP. L. Q. 368 (1968) (Eng.); Urias Forbes, *The West Indies Associated States: Some Aspects of the Constitutional Arrangements*, 19 SOCIAL & ECON. STUD. 57 (1970) (Jam.); William C. Gilmore, *The Associated States of the Commonwealth Caribbean: The Constitutions and the Individual*, 11 LAW. AM. 1 (1979); William C. Gilmore, *Legal Perspectives on Associated Statehood in the Eastern Caribbean*, 19 VA. J. INT’L L. 489 (1979); William C. Gilmore, *Requiem for Associated-Statehood?*, 8 REV. INT’L STUD. 9 (1982) (Eng.). *Cf.* George C. Abbott, *Integration and Viability in the Caribbean*, 29 J. COMMONWEALTH & COMP. POL. 327 (1991) (Eng.) (arguing for islands to be associated states with the United States).

²⁷³ Roy Lewis, *Anguilla’s Rebellion Is Over But Antipathies Remain*, THE TIMES (London), Aug. 2, 1967, at 6.

²⁷⁴ BRYAN DYDE, OUT OF THE CROWDED VAGUENESS: A HISTORY OF THE ISLANDS OF ST. KITTS, NEVIS, AND ANGUILLA 267 (2005); David Smithers, *Anguilla’s UDI*, 19 VENTURE: J. FABIAN COLONIAL BUREAU, Oct. 1967, at 15 (Eng.).

²⁷⁵ 6,700 Anguillans Live in the New York Area, 700 More Than on the Island of Anguilla, N.Y. TIMES, Mar. 21, 1969, at 13.

²⁷⁶ *Brute Farce and Ignorance*, SUNDAY TIMES (London), Mar. 23, 1969, at 13 (discussing flogging and the Rolls and quoting Bradshaw’s statements on destroying Anguilla); 7780 PARL. DEB., H.C. (5th ser.) (1969) 1150–1 (U.K.) (statement of Viscount Lambton) (recounting Bradshaw’s antics); *id.* at 1542–44 (statement of Bernard Braine) (recounting thuggish use of power by

Anguilla had a telephone system, but Bradshaw had it dismantled.²⁷⁷ In the legislature, Anguilla got only one vote in the ten-member legislature, while St. Kitts, with seven votes, totally dominated it and Nevis.²⁷⁸ (The people of Nevis were also unhappy about the shotgun marriage to St. Kitts).²⁷⁹

Britain ignored repeated warnings that Bradshaw and Anguilla were in a toxic relationship.²⁸⁰ Four months after Britain spun St. Kitts-Nevis-Anguilla off, Anguillans voted 1,813 to 5 to secede from it.²⁸¹ This was Bradshaw's excuse to declare a state of emergency throughout the nation and have his political opponents jailed.²⁸² The Anguillans wrote two constitutions and proceeded to elect their own government, all

Bradshaw); 751 PARL. DEB., H.C. (5th ser.) (1967) 1205–8 (U.K.) (statement of R.H. Turton) (recounting jailing without trial of Bradshaw's political opponents); Diana Prior-Palmer, *The Prisoners of St. Kitts*, 219 THE SPECTATOR 452 (1967) (Eng.) (same, the author having been one of the usual suspects rounded up); 285 PARL. DEB., H.L. (5th ser.) (1967) 168–72 (U.K.) (statement of Earl of Bessborough) (discussing rule by decree of Bradshaw); 287 PARL. DEB., H.L. (5th ser.) (1967) 1268–70 (U.K.) (discussing efforts by Bradshaw to intimidate the courts and pervert justice); *contra* WHITMAN T. BROWNE, FROM COMMONER TO KING: ROBERT L. BRADSHAW—CRUSADER FOR JUSTICE AND DECENCY IN THE CARIBBEAN (1992) (giving staunch defense of Bradshaw and denying the foregoing complaints). *See also* John Updike, *Letter from Anguilla*, 41 NEW YORKER, June 22, 1968, at 70 (discussing the "walrus-mustachioed dictatorial premier"); V.S. Naipaul, *St. Kitts: Papa and the Power Set*, 12 N.Y. REV. BOOKS, May 8, 1969, at 23.

²⁷⁷ WESTLAKE, *supra* note 264, at 27.

²⁷⁸ ST. CHRISTOPHER-NEVIS-ANGUILLA CONST. of 1967, § 24.

²⁷⁹ *E.g.*, FRED PHILLIPS, WEST INDIAN CONSTITUTIONS: POST-INDEPENDENCE REFORM 131 (1985) (Phillips was Governor of St. Kitts-Nevis-Anguilla during the Anguilla crisis).

²⁸⁰ *See* 751 PARL. DEB., H.C. (5th ser.) (1967) 1199–1205 (U.K.) (statement of John Rodgers). *See also* 780 PARL. DEB., H.C. (5th ser.) (1969) 1061–65 (U.K.) (statement of Edward Heath, Leader of the Opposition); *id.* at 1116 (statement of Sir Dingle Foot); *id.* at 1122–29 (statement of James Davidson); *id.* at 1522–37 (statement of Neil Marten).

²⁸¹ United Press Int'l, *Voters of Anguilla Confirm Independence Action*, N.Y. TIMES, July 13, 1967, at 10. *See generally* *St. Kitts*, 16 KEESING'S CONTEMPORARY ARCHIVES 22262, 22262–63 (1967).

²⁸² For cases finding the government's political arrests to be illegal, *see* *Charles v. Phillips*, 10 W. Indian Rep. 423 (W. Indies Assoc'd States Ct. App. 1967); *Herbert v. Phillips*, 10 W. Indian Rep. 435 (W. Indies Assoc'd States Ct. App. 1967) (Herbert was leader of opposition in parliament); *Att'y Gen'l of St. Christopher, Nevis & Anguilla v. Reynolds*, [1980] A.C. 687 (P.C. 1979) (U.K.) (appeal taken from W. Indian Assoc'd States Ct. App.) *aff'g* 24 W. Indian Rep. 552 (W. Indian Assoc'd States Ct. App. 1977).

of which was ignored by Britain.²⁸³

After months of fruitless (and not-so-serious) negotiations, the Foreign and Commonwealth Office had the Queen issue a decree in London in March 1969 and to enforce it—and to keep the Anguillans under Bradshaw's thumb—landed the Royal Marines to impose a British dictator.²⁸⁴ This despite British law that said Britain was not responsible for the internal security of the “associated state.”²⁸⁵ “If the British government's interpretation of the scope of its responsibility in foreign affairs were analogously applied to the division of departmental responsibilities among Cabinet Ministers, the theft of a Frenchman's car in London would *ipso facto* be a Foreign Office rather than a Home Office matter!” wrote legal scholars.²⁸⁶ The fact that Britain had done nothing to stop the similar unilateral declaration of independence in Southern Rhodesia in 1965 led to much criticism.²⁸⁷ The invaders

²⁸³ United Press Int'l, *Anguilla Vote to Break the Old Ties*, THE TIMES (London), Feb. 8, 1969, at 6 (noting constitution adopted). For reprintings of the two constitutions Anguilla adopted during the interregnum, see REPORT OF THE COMMISSION OF INQUIRY, *supra* note 264, at 88–89, 98–111.

²⁸⁴ Anguilla (Temporary Provisions) Order, 1969, S.I. 1969/371 (U.K.) (sanctioning British invasion). See also WESTLAKE, *supra* note 264, at 201–21 (describing invasion); Editorial, “Rights and Freedoms,” THE TIMES, Mar. 22, 1969, at 9 (criticizing the Temporary Provisions Order).

²⁸⁵ See West Indies Act, 1967, § 2(1) (U.K.); 780 PARL. DEB., H.C. (5th ser.) (1969) 1135–36 (U.K.) (statement of John Hynd) (questioning legality of 1969 order and invasion); 755 PARL. DEB., H.C. (5th ser.) (1967) 1114–16 (U.K.) (statement of George Thompson, Foreign Sec'y) (“Responsibility for the internal government of this associated state [St. Kitts-Nevis-Anguilla], including the arrangements for the administration of its constituent parts, lies with the State authorities and not with Her Majesty's Government”); Alan Watkins, *Mr. Stewart's Caribbean Jaunt*, 77 NEW STATESMAN 430 (1969) (questioning legality of 1969 order and invasion). See also Basil A. Ince, *The Diplomacy of New States: The Commonwealth Caribbean and the Case of Anguilla*, 69 S. ATL. Q. 382 (1969) (discussing efforts by Britain to get support in Caribbean for its actions); Basil A. Ince, *The Limits of Caribbean Diplomacy: The Invasion of Anguilla*, 5 NEW WORLD 48 (1970) (Jam.).

²⁸⁶ J.M. Finnis & A.R. Carnegie, *Constitutional Law*, [1969] ANN. SURV. COMMONWEALTH L. 1, 86 (1970) (Eng.).

²⁸⁷ Roy Lewis, *Reasons for the Anguilla Crisis*, THE TIMES (London), Mar. 18, 1969, at 10 (noting charges against Britain that it “will always use force against black rebels but not against white Rhodesian rebels”); *Troops Sail for Anguilla As Island Offers Talks*, THE TIMES, Mar. 19, 1969, at 1 (noting the embarking troops were met at docks by protestors, one with a sign reading “Go attack Ian Smith [the premier of Southern Rhodesia] and Rhodesia”). See also 780 PARL. DEB., H.C. (5th ser.) (1969) 501–06 (U.K.) (discussing

distributed leaflets written in the best newspeak stating the new dictator was their "friend" and insisting, "[i]t is not our purpose to force you to return to an administration you do not want."²⁸⁸

Britain was rightly ridiculed for this absurdity.²⁸⁹ After a lengthy impasse, the island got its own constitution in 1971, even though it was still part of the St. Kitts-Nevis-Anguilla "associated state."²⁹⁰ Britain finally allowed Anguilla to

comparisons of Anguilla to Rhodesia), *excerpted as Why Anguilla Operation Cannot Be Repeated in Rhodesia*, THE TIMES, Mar. 20, 1969, at 8. For background on the Rhodesia question, see SOUTHERN RHODESIA: DOCUMENTS RELATING TO THE NEGOTIATIONS BETWEEN THE UNITED KINGDOM AND SOUTHERN RHODESIA GOVERNMENTS, NOVEMBER, 1963–NOVEMBER, 1965, 1965, Cmnd. 2807; *Rhodesia*, 16 KEESING'S CONTEMPORARY ARCHIVES 20747 (1965) (Eng.); *Rhodesia*, 16 KEESING'S CONTEMPORARY ARCHIVES 21023 (1965); *Rhodesia*, 15 KEESING'S CONTEMPORARY ARCHIVES 21087 (1965) (at 21094–95 is the Rhodesian declaration of independence, which uses verbatim swaths of the one written by Jefferson); *Rhodesia*, 16 KEESING'S CONTEMPORARY ARCHIVES 21247 (1966); *Rhodesia*, 16 KEESING'S CONTEMPORARY ARCHIVES 21755 (1966).

²⁸⁸ 780 PARL. DEB., H.C. (1969) 208 (U.K.) (statement of Michael Stewart, Foreign Sec'y) ("It is no part of our purpose that the Anguillans should live under an administration which they do not want."); 780 PARL. DEB., H.C. (1969) 493–506 (U.K.) (announcing invasion). *See also* REPORT OF THE COMMISSION OF INQUIRY, *supra* note 264, at 112 (reprinting leaflet); Henry Giniger, *Nary a Shot Fired As British Seize Anguilla*, N.Y. TIMES, Mar. 20, 1969, at 1, 28 (same); Henry Giniger, *Nonchalant British Commissioner: Anthony C.W. Lee*, N.Y. TIMES, Mar. 27, 1969, at 16 (profiling dictator); Roy Lewis, Dictator Role for Lee, THE TIMES (London), Mar. 20, 1969, at 1.

²⁸⁹ *E.g.*, Anthony Lejeune, *The Anguilla Caper*, 21 NAT'L REV. 386 (1969); *Britain's Bay of Piglets*, 93 TIME, Mar. 28, 1969, at 28; *The Lion That Meowed*, 73 NEWSWEEK, Mar. 31, 1969, at 40; *Diplomacy—or Comic Opera?*, Editorial, 222 THE SPECTATOR 397 (1969) (Eng.); A.P. Ryan, Letter, *Offended Majesty*, THE TIMES (London), Mar. 19, 1969, at 11 (stating "Passport to Pimlico" [Ealing Studios 1949] had nothing richer in the way of comic parts than that of [Prime Minister Harold] Wilson as a pint-sized Palmerston."); Alvin Shuster, *Anguilla: A Slap for the Mouse That Roared*, N.Y. TIMES, Mar. 23, 1969, at E2; Auberon Waugh, *The War of Whitlock's Ear*, 222 THE SPECTATOR 399 (1969) (Eng.).

²⁹⁰ Anguilla Act, 1971, c. 63 (U.K.); Anguilla (Administration) Order, 1971, S.I. 1971/1235 (U.K.); Anguilla (Constitution) Order, 1976, S.I. 1976/50 (U.K.). *See also* 821 PARL. DEB., H.C. (5th ser.) (1971) 891–921 (U.K.) (debate on Anguilla Act, 1971); 322 PARL. DEB., H.L. (5th ser.) (1971) 1314–27 (U.K.) (same); 323 PARL. DEB., H.L. (5th ser.) (1971) 193–95 (U.K.) (same); *West Indies*, 18 KEESING'S CONTEMPORARY ARCHIVES 24763 (1971) (Eng.) (reporting on debate over Anguilla Act); K.R. Simmonds, *Anguilla—An Interim Settlement*, 21 INT'L & COMP. L. Q. 151, 153 (1972) (Eng.).

completely separate in 1980.²⁹¹ (This was possible only because Bradshaw had died).²⁹²

The legality of that action was contested because the 1967 law that created St. Kitts-Nevis-Anguilla required the approval of its legislature for any division of the associated state and Britain had ignored this requirement.²⁹³ Court action challenging the separation failed because of the doctrine of Parliamentary sovereignty—the 1980 law trumped the 1967 one because Parliament can do anything it likes.²⁹⁴ This is keeping with Bagehot's famous claim that the Queen would have to sign her own death warrant if Parliament approved

²⁹¹ Anguilla Act, 1980, c. 67 (U.K.), *brought into force by* Anguilla (Appointed Day) Order, 1980, S.I. 1980/1953 (U.K.) (setting Dec. 19, 1980 as effective date of Anguilla Act). *See also* 415 PARL. DEB., H.L. (5th ser.) (1980) 329–42 (U.K.) (debating act). For Anguilla after the separation, see U.N. G.A., Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Anguilla*, ¶ 4, U.N. Doc. A/AC.109/2011/2 (Feb. 1, 2011). For St. Kitts after the separation, see 42 PARL. DEB., H.C. (6th ser.) (1983) 514–31 (U.K.) (discussing independence); 42 PARL. DEB., H.C. (6th ser.) (1983) 29W–30W (U.K.) (same); 442 PARL. DEB., H.L. (5th ser.) (1983) 357–72 (U.K.) (same); DYDE, *supra* note 274, at 289–302; *An Independent St. Christopher and Nevis Becomes the Forty-eighth Member*, 9 COMMONWEALTH L. BULL. 1491 (1983) (Eng.).

²⁹² 996 PARL. DEB., H.C. (5th ser.) (1980) 89 (U.K.) (statement of Nigel Fisher); Associated Press, *Robert Bradshaw, Premier in St. Kitts for 11 Years, Dies*, N.Y. TIMES, May 25, 1978, at D22.

²⁹³ West Indies Act, 1967, §§ 9(2)(a), 19(5) (giving requirements for division); 983 PARL. DEB., H.C. (5th ser.) (1980) 179W (U.K.) (statement of William Whitlock) (stating newly elected government of St. Kitts-Nevis-Anguilla informed London that consent would not be given); 996 PARL. DEB., H.C. (5th ser.) (1980) 83 (U.K.) (statement of Nicholas Ridley, Foreign & Commonwealth Office minister) (stating during debate over Anguilla Act that consent would not be given); *St. Kitts Nevis Anguilla*, 26 KEESING'S CONTEMPORARY ARCHIVES 30548 (1980) (Eng.) (quoting new St. Kitts government statement that it wouldn't oppose separation); 976 PARL. DEB., H.C. (5th ser.) (1979) 321 (U.K.) (statement of William Whitlock) (stating consent of St. Kitts-Nevis-Anguilla legislature would be given); *see also* Lindel Smith, *End of an Era in St. Kitts: A Comment on the 1980 General Elections*, 5 BULL. E. CARIBBEAN AFFAIRS 8 (1980) (Barb.) (discussing elections that brought new government to power).

²⁹⁴ Att'y Gen'l of St. Christopher & Nevis v. Payne, 30 W. Indian Rep. 88 (E. Caribbean States Ct. App. 1982) (appeal taken from E. Caribbean Sup. Ct. at St. Christopher and Nevis). *See also* Francis Alexis, *British Intervention in St. Kitts*, 16 N.Y.U. J. INT'L L. & POL. 581 (1984) (discussing legality of separation); William C. Gillmore, *The Anguilla Act, 1980: A Question of Constitutional Propriety*, 5 W. INDIAN L.J. 10 (1981) (Jam.) (same).

it.²⁹⁵

The Turks and Caicos Islands

The example of the Turks and Caicos further shows how all promises made to colonies are meaningless. The 1976 Turks and Caicos Islands Constitution provided for a parliamentary government.²⁹⁶ In 1986 the Governor (appointed from London) named a commissioner to investigate allegations of corruption.²⁹⁷ The previous year the premier and a cabinet minister had been charged by the United States with drug trafficking.²⁹⁸ While the corruption inquiry was ongoing, democracy was suspended.²⁹⁹ (Some democracy: only 7,000

²⁹⁵ WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 98 (Collins Fontana Library 1963) (1867).

²⁹⁶ *Turks & Caicos Islands (Constitution) Order, 1976, S.I. 1976/1156 (U.K.)*. See also LOUIS BLOM-COOPER, *TURKS AND CAICOS ISLANDS COMMISSION OF INQUIRY 1986: REPORT OF THE COMMISSIONER MR. LOUIS BLOM-COOPER, Q.C., INTO ALLEGATIONS OF ARSON OF A PUBLIC BUILDING, CORRUPTION, AND RELATED MATTERS WITH APPENDICES, 1986, Cm. 12, at 8–20 (U.K.)*.

²⁹⁷ BLOM-COOPER, *supra* note 294, at vii, 113–18; *Turks and Caicos Islands*, 32 KESING'S CONTEMP. ARCHIVES 34553 (1987) (Eng.). See also 94 PARL. DEB., H.C. (6th ser.) (1986) 538W (U.K.) (giving notice of Blom-Cooper's appointment); 102 PARL. DEB., H.C. (6th ser.) (1986) 863–70 (U.K.) (discussions in Parliament about his report). For another report on the corruption, see LOUIS BLOM-COOPER, *REPORT OF THE COMMISSION OF INQUIRY INTO THE NORTH CREEK DEVELOPMENT PROJECT, 1986-87, SUBMITTED TO THE GOVERNOR, TURKS AND CAICOS ISLANDS, BY THE COMMISSIONER MR. LOUIS BLOM-COOPER, Q.C., 1987, Cm. 195 (U.K.)*. For an excellent piece discussing how tiny governments breed corruption, see K.W. Patchett, *Legal Problems of the Mini-State: The Caribbean Experience*, 6 CAMBRIAN L. REV. 57 (1975) (Wales). For an examination of those same issues in small Pacific states, see Barrie Macdonald, *Decolonization and Beyond: The Framework for Post-Colonial Relationships in Oceania*, 21 J. PAC. HIST. 115 (1986) (Austl.).

²⁹⁸ Jon Nordheimer, *Head of Isles Near Bahamas Accused of Drug Plot*, N.Y. TIMES, Mar. 6, 1985, at A1 (reporting arrests the previous day). See also *United States v. Saunders*, 611 F. Supp. 45 (S.D. Fla. 1985) (discussing charges); *Turks and Caicos Islands*, 31 KESING'S CONTEMPORARY ARCHIVES 33771 (1986) (Eng.) (discussing charges and political aspects); Mark Andrew Sherman, *An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 395–56 n.18 (1989) (discussing charges).

²⁹⁹ *Turks & Caicos Islands (Constitution) (Interim Amendment) Order, 1986, S.I. 1986/1157 (U.K.)*; *Turks & Caicos Islands (Laws) (Interim Amendment) Order, 1986, S.I. 1986/1158 (U.K.)*. See also 102 PARL. DEB., H.C. (6th ser.) (1986) 863 (U.K.) (statement of Tim Eggar, Foreign & Commonwealth Office minister) (discussing suspension of democracy); Ursula Smartt, *Constitutionalism in the British Dependent Territories of the*

“belongers” out of a population of 36,000 residents were even eligible to vote).³⁰⁰ The corrupt attorney general was deported.³⁰¹ A new constitution was issued and representative government was restored in 1988.³⁰²

The 2006 Constitution, issued as part of the general review of colonial charters, provides for a democratically elected parliamentary government as well as trial by jury.³⁰³ Soon after the new charter came into force renewed allegations of pervasive corruption were made, a state of affairs common in the Caribbean.³⁰⁴ The Foreign and Commonwealth Office fought any investigation.³⁰⁵ But a judge retired from the English Court of Appeal was appointed; he confirmed the accusations.³⁰⁶ The judge blamed the Foreign and

Caribbean, 7 EUR. J. CRIME CRIM. L. & CRIM. JUST. 300, 306–13 (1999) (Neth.) (discussing state of law and order in Turks and Caicos).

³⁰⁰ Clegg & Gold, *supra* note 29, at 124.

³⁰¹ 140 PARL. DEB., H.C. (6th ser.) (1986) 204W (U.K.).

³⁰² Turks and Caicos Constitution Order, 1988, S.I. 1988/247 (U.K.); 113 PARL. DEB., H.C. (6th ser.) (1987) 897-902 (U.K.) (discussing new constitutional provisions); 486 PARL. DEB., H.L. (5th ser.) (1987) 474-82 (U.K.) (same).

³⁰³ Turks & Caicos Islands Constitution Order, 2006, S.I. 2006/1913 (U.K.).

³⁰⁴ 491 PARL. DEB., H.C. (6th ser.) (2009) 141WH–143WH (U.K.) (statement of Mike Gapes, Foreign Affairs Committee chairman) (giving committee’s findings on the Turks and Caicos Islands); 491 PARL. DEB., H.C. (6th ser.) (2009) 155WH (U.K.) (statement of Sir John Stanley) (alleging Foreign & Commonwealth Office was either deliberately trying to mislead Parliament about the situation in the Turks and Caicos or was “asleep on the job”); COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, ¶ 147–97; Irwin Carmon, *The Hangover: Turks and Caicos Was Poised to Become the Monte Carlo of the Caribbean. So How Did It End Up a Tropical Hell?*, BLOOMBERG BUSINESSWEEK, Feb. 21, 2011, at 68 (discussing corruption). See also Ivelaw W. Griffin, *Illicit Arms Trafficking, Corruption, and Governance in the Caribbean*, 15 DICK. J. INT’L L. 487 (1997) (surveying corruption in the region); Ivelaw L. Griffith & Trevor Munroe, *Drugs and Democracy in the Caribbean*, 33 J. COMMONWEALTH & COMP. POL. 357 (1995) (Eng.) (same).

³⁰⁵ COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, *supra* note 34, at 67.

³⁰⁶ TURKS & CAICOS ISLANDS COMMISSION OF INQUIRY, 2008–2009, INTO POSSIBLE CORRUPTION OR OTHER SERIOUS DISHONESTY IN RELATION TO PAST AND PRESENT ELECTED MEMBERS OF THE LEGISLATURE IN RECENT YEARS, INTERIM REPORT OF THE COMMISSIONER THE RIGHT HONOURABLE SIR ROBIN AULD (2009), available at http://tci-inquiry.org/interim_report.html; TURKS & CAICOS ISLANDS COMMISSION OF INQUIRY, 2008–2009, INTO POSSIBLE CORRUPTION OR OTHER SERIOUS DISHONESTY IN RELATION TO PAST AND

Commonwealth Office:

This state of affairs follows decades of the FCO's stewardship, or lack of it, in the exercise of its ultimate constitutional responsibility for the probity and efficiency of the Territory's governance. The FCO now has direct control, yet seemingly considers that that does not carry with it financial responsibility to lift its charge out of the administrative and financial mire into which it has allowed it to fall.³⁰⁷

While there were serious problems with corruption, the British exercised an extraordinary remedy.³⁰⁸ Britain suspended democracy in 2009 and has never restored it.³⁰⁹ It declared an intention to hold elections in July 2011, but these elections have been postponed indefinitely.³¹⁰ At the 2011 meeting of the U.N. Decolonization Committee, representatives of the islands spoke of the "interim dictatorship" imposed by Britain and the complete lack of accountability of their

PRESENT ELECTED MEMBERS OF THE LEGISLATURE IN RECENT YEARS, REPORT OF THE COMMISSIONER THE RIGHT HONOURABLE SIR ROBIN AULD (2009), *available at* <http://www.fco.gov.uk/en/newsroom/latest-news/?view=News&id=2070072>.

³⁰⁷ Letter from Sir Robin Auld, Comm'r, to David Milliband, Foreign & Commonwealth Sec'y (Mar. 23, 2010), *in* FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS RESPONSE, *supra* note 11, at Ev-11.

³⁰⁸ See 519 PARL. DEB., H.C. (6th ser.) (2010) 1164-72 (U.K.) (statement of Andrew Rosindell, member of the Foreign Affairs Committee) (discussing corruption and bureaucracy in Turks and Caicos).

³⁰⁹ Turks & Caicos Islands Constitution (Interim Amendment) Order, 2009, 2009/701 (U.K.); Turks & Caicos Islands Constitution (Interim Amendment) (Amendment) Order, 2009, 2009/1755 (U.K.).

³¹⁰ 498 PARL. DEB., H.C. (6th ser.) (2009) 70W (U.K.) (stating elections to be held in July 2011); 502 PARL. DEB., H.C. (6th ser.) (2009) 1039W (U.K.) (same); 715 PARL. DEB., H.L. (5th ser.) (2010) 57WS (U.K.) (announcing indefinite postponement of elections); FOREIGN AFFAIRS COMMITTEE, TURKS AND CAICOS ISLANDS: SEVENTH REPORT OF SESSION, 2009-10, H.C. 469, ¶ 46 (calling plan for July 2011 elections "unrealistic" and stating that "there is a real danger of a return to the *status quo ante*" if they were held on that timetable); U.N. Gen. Assembly, Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Turks and Caicos Islands*, ¶ 18, U.N. Doc. A/AC109/2011/10 (Feb. 28, 2011) (reporting negative reaction in Turks and Caicos to further delay of elections). The F.C.O. in the summer of 2011 pledged to "to put the [Turks and Caicos Islands] on the path to a sustainable future under a democratically elected government." FOREIGN & COMMONWEALTH OFFICE, SEVENTH REPORT FROM THE FOREIGN AFFAIRS COMMITTEE, SESSION, 2010-12: THE ROLE OF THE FCO IN UK GOVERNMENT: RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 2011, Cm. 8125, at § 12 (U.K.).

government.³¹¹ One speaker noted the number of corrupt members of the British Parliament recently sent to prison in the parliamentary expenses scandal, yet democracy was not suspended in the United Kingdom because of those crooked legislators.³¹²

³¹¹ Press Release, General Assembly, Omnibus Draft Resolution on Non-Self-Governing Territories Approved by Consensus in Special Committee on Decolonization, Amid Proposals to Treat Cases Separately, U.N. Press Release GA/COL/3226 (June 23, 2011); U.N. Third International Decade for the Eradication of Colonialism: Caribbean Regional Seminar, Kingstown, St. Vincent and the Grenadines, *Statement of Turks and Caicos All-Party Commission of the Constitution and Electoral Reform (Mr. Conrad Howell)*, at 5–6, U.N. Doc. PRS/2011/DP.4 at 2 (May 18, 2010). See also Anita Snow, *UN Seeks to Sweep Away Last Traces of the Age of Empires*, CINCINNATI ENQUIRER, July 31, 2011, at A17 (discussing 2011 meeting of decolonization committee).

³¹² London's *Daily Telegraph* exposed the corruption after it sued under Britain's Freedom of Information Act, 2000, ch. 26, to obtain files of legislators' expense claims. *Corporate Officer of the House of Commons v. Info. Comm'r*, [2008] EWHC 1084 (Admin), [2009] All E.R. 403. The paper used the documents as the basis of scores of stories from May 8, 2009 to date; its editions in May and June 2009 have several articles in nearly every single issue. E.g., *The Extraordinary Week in Politics That Changed Parliament Forever: Expenses Disclosures in the Telegraph Have Already Claimed Six MPs, Including the Speaker, But It Is Merely the Beginning*, DAILY TELEGRAPH, May 23, 2009, at 8; *The System Exposed: Tricks of the Trade, From Shifting 'Second Homes' to Profiting After Taxpayer-Funded Renovations*, DAILY TELEGRAPH, May 8, 2009, at 2. The paper has continued its coverage, e.g., Mark Hughes, *Moran Charged with 21 Fraud and Forgery Offences*, DAILY TELEGRAPH, Sept. 7, 2011, at 7 (stating four members of the Commons and two members of the Lords went to prison for their embezzlement and Margaret Moran was latest M.P. charged); Martin Evans, *You're a Benefits Cheat, Judge Tells Peer As He Jails Him over Expenses*, DAILY TELEGRAPH, July 2, 2011, at 6 (reporting on the fraud committed by Lord Hanningfield); John Bingham, *Morley Goes to Prison Blaming Downfall on 'Powerful No. 10 Enemy'*, DAILY TELEGRAPH, May 21, 2011, at 1 (reporting minister in Tony Blair's government stole £31,000 from public by false claims); Robert Winnett, *This Rotten Parliament: Half of MPs Guilty of Over-Claiming Expenses, More Than £1m Must Be Paid Back*, DAILY TELEGRAPH, Feb. 5, 2010, at 1. For summaries of the issues, see ANDREW RAWNSLEY, *THE END OF THE PARTY* 645–52 (2010); MEMBERS ESTIMATE COMMITTEE, *REVIEW OF PAST ACA PAYMENTS: FIRST REPORT OF SESSION, 2009–10*, H.C. 348 (reporting hundreds of members of the Commons had been overpaid on their official expenses); MEMBERS ESTIMATE COMMITTEE, *REVIEW OF PAST ACA PAYMENTS: SUPPLEMENTARY REPORT, SECOND REPORT OF SESSION, 2009–10*, H.C. 450 (further report on same). For a typical example of the recent corruption, see STANDARDS & PRIVILEGES COMMITTEE, *CONDUCT OF MR. DEREK CONWAY: FOURTH REPORT OF SESSION, 2007–8*, H.C. 280 (reporting on M.P. who put his son, a full-time college student, on his office payroll in a do-nothing job). For suggestions on reform, see U.K. COMMITTEE ON STANDARDS IN PUBLIC LIFE,

Citizenship

In 1981, Parliament stripped British citizenship from the people of its colonies.³¹³ One motivation was the government did not want the millions of people in Hong Kong, who it “perceiv[ed] as a liability rather than an asset,” to be able to use their British citizenship to move to Britain instead of being forced to become subjects of the People’s Republic of China when the British lease on the territory expired in 1997.³¹⁴ Thus the law was seen as racist in many quarters,³¹⁵ just as the 1961

MP’S EXPENSES AND ALLOWANCES: SUPPORTING PARLIAMENT, SAFEGUARDING THE TAXPAYER, TWELFTH REPORT OF THE COMMITTEE, 2009, Cm. 7724.

³¹³ British Nationality Act, 1981, c. 61 (U.K.), *effective Jan. 1, 1983 pursuant to British Nationality Act, 1981 (Commencement Order)*, 1982, S.I. 1982/933 (U.K.); 434 PARL. DEB., H.L. (5th ser.) (1982) 1021 (U.K.). *See also* 997 PARL. DEB., H.C. (5th ser.) (1981) 935–1047 (U.K.) (debates on 1981 Act); U.K. HOME OFFICE, *BRITISH NATIONALITY LAW: DISCUSSION OF POSSIBLE CHANGES*, 1977, Cmnd. 6795 (green paper for discussion on what became 1981 law); U.K. HOME OFFICE, *BRITISH NATIONALITY LAW: OUTLINE OF PROPOSED LEGISLATION*, 1980, Cmnd. 7987 (white paper on what became 1981 law); Charles Blake, *Citizenship, Law, and the State: The British Nationality Act 1981*, 45 MOD. L. REV. 179 (1982) (Eng.) (criticizing strongly the act); Ann Dummett, *The New British Nationality Act*, 8 BRIT. J. L. & SOC’Y 233 (1981) (Eng.) (same). Pitcairners were formerly British citizens under the British Nationality Act 1948, 11 & 12 Geo. 6, c. 56 (U.K.), *discussed in* J. Mervyn Jones, *British Nationality Act, 1948*, 25 BRIT. Y.B. INT’L L. 1948, at 310 (1949).

³¹⁴ Roda Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient Legal International Issues*, 14 DENV. J. INT’L L. & POL’Y 171, 205 (1986) (discussing people as liability); Kerrin Tso, *The Legal Implications of the Sino-British Treaties Regarding Hong Kong*, 4 LOY. L.A. INT’L & COMP. L.J. 111, 131 (1980) (discussing sizable Hong Kong population that would leave rather than submit). *See also* David Dixon, *Thatcher’s People: The British Nationality Act 1981*, 10 J. L. & SOC’Y 161, 163 (1983) (Eng.) (discussing fears of mass Hong Kong immigration); Christine Chua, *The Sino-British Agreement and Nationality: Hong Kong’s Future in the Hands of the People’s Republic of China*, 8 UCLA PAC. BASIN L.J. 163, 167–69 (1990); Timothy Parlin, *The Nationality Crisis of Hong Kong’s Non-Chinese Residents: Scholarly Myth or Harsh Reality?*, 12 BROOK. J. INT’L L. 369 (1986); Robin M. White, *Nationality Aspects of the Hong Kong Settlement*, 20 CASE W. RES. J. INT’L L. 225 (1988). Following the Tiananmen Square Massacre in 1989, a mass exodus of Hong Kongers began, mainly to Australia, the United States, and Canada—countries that gave a far warmer welcome than Britain did. Daniel C. Turack, *Identifying a Future Refugee Problem: Hong Kong, 1997*, 14 DALHOUSIE L.J. 544, 552–55 (1992) (P.E.I.); Note, *Hong Kong: China’s June 4 Massacre, Emigration, and Capital Flight*, 3 GEO. IMMIG. L.J. 293 (1989); Note, *Great Britain’s New Hong Kong Immigration Policy: The Solution to Hong Kong’s Immigration Crisis*, 4 GEO. IMMIG. L.J. 145 (1990).

³¹⁵ *E.g.*, 421 PARL. DEB., H.L. (5th ser.) (1980) 875–88 (U.K.) (statement of the Archbishop of Canterbury) (discussing these charges); W.S.C.,

immigration act that limited colonial citizens' ability to move to Britain was also viewed as racist because it chiefly worked to keep black West Indians from migrating.³¹⁶

The newly minted "British overseas citizens."³¹⁷ Especially since not all colonials were treated equally. The Falkland Islanders, whose government had been trying to get rid of them, got their citizenship back after the Argentinians were expelled.³¹⁸ And the Gibraltarians had a special status all along.³¹⁹ But only in 2002 did all the 200,000 stateless colonials regain their British citizenship.³²⁰

Grain of Salt

On top of all this, recent House of Lords decisions further erode what protections citizens have. One decision held the British government cannot be held liable for the actions it has its colonial governments carry out under the fiction that the colonial governments have an independent existence and will, the judges refusing to pierce the corporate veil, as it were.³²¹

Editorial, *Hong Kong and the Law of British Nationality*, 13 H.K. L.J. 1, 4-5 (1983) (same).

³¹⁶ *Immigration Bill*, 21 FACTS ON FILE Y.B. 1961, at 471 (1962) (stating immigration bill "aimed . . . particularly at West Indian negroes"). See also 649 PARL. DEB., H.C. (5th ser.) (1961) 706, 713, 715, 777, 780 (U.K.) (stating new immigration bill was racist); 236 PARL. DEB., H.L. (5th ser.) (1961) 32 (U.K.) (same); *United Kingdom*, 13 KEESING'S CONTEMPORARY ARCHIVES 18897-900 (1962) (Eng.) (reporting on Parliamentary debates); Dennis Dean, *The Conservative Government and the 1961 Commonwealth Immigration Act: The Inside Story*, 35 RACE & CLASS 57 (1993) (Eng.) (giving history of the law). The bill became the Commonwealth Immigrants Act, 1962, 10 & 11 Eliz. 2, c. 21. It was found to be racist in violation of Britain's treaty commitments in *East African Asians v. United Kingdom*, 3 Eur. H.R. Rep. 76 (1973).

³¹⁷ E.g., U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 29, at 17 (discussing concerns of St. Helenians).

³¹⁸ British Nationality (Falkland Islands) Act, 1983, c. 6 (U.K.).

³¹⁹ U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 29, at 16; Philip Baker, *A Note on the British Nationality Act 1981*, 8 COMMONWEALTH L. BULL. 780, 790 (1982) (Eng.).

³²⁰ British Overseas Territories Act, 2002, ch. 8 (U.K.); U.K. FOREIGN & COMMONWEALTH OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 29, at 19 (giving population). See also *id.* at 16-19 (discussing citizenship for territories' inhabitants); HENDRY & DICKSON, *supra* note 34, at 197-209 (same).

³²¹ *R. ex rel. Quark Fishing, Ltd. v. Sec'y of State for Foreign &*

Others held that the British government is neither obligated to legislate for the benefit of the colony nor to preserve democracy.³²² With this dismal record—combined with the judges' refusal to stand up to the government—all guarantees Britain makes to its colonial citizens should be viewed with the utmost skepticism. Time and again, expediency has trumped principle.³²³

CONCLUSION

The circumstances of Pitcairn's founding have fascinated the world since its settlement became known. Its two centuries of legal and social history are one and the same.³²⁴ Supposedly, "[f]rom [Pitcairn's] petty history the philosopher of another planet could reconstruct the whole of human society."³²⁵ Any why not, for Pitcairn "presents so many fascinating and fundamental questions about the existence and nature of legal systems, justice, and the law."³²⁶

For years, colonial officers gave little attention to the island. Their handling of Pitcairn and the other colonies was "a national disgrace," taking actions to push them away from the sceptered isle and treating colonials as second-class

Commonwealth Affairs, [2005] UKHL 57, [2006] 1 A.C. 529 (appeal taken from Eng.).

³²² R. ex. rel. Bancoult v. Sec'y of State for Foreign & Commonwealth Affairs, [2008] UKHL 61, [2009] 1 A.C. 453 [50] (appeal taken from Eng.) (benefit); R. ex rel. Misick v. Sec'y of State for Foreign & Commonwealth Affairs, [2009] EWHC (Admin) 1039, [2009] A.C.D. 62 (denying attempt by deposed premier of the Turks & Caicos to challenge the order-in-council suspending democracy), *aff'd* [2009] EWCA Civ 1549.

³²³ Cf. Margaret Thatcher, Speech to the 52d Annual Conservative Women's Conference, London (May 26, 1982), in MARGARET THATCHER, IN DEFENCE OF FREEDOM: SPEECHES ON BRITAIN'S RELATIONSHIP WITH THE WORLD, 1976–1986, at 74–75 (Prometheus Books 1987) (1986) ("To those—not many—who speak lightly of a few islanders beyond the sea [i.e. the Falklanders] and who ask the question, 'Are they worth fighting for?' let me say this: right and wrong are not measured by a head-count of those to whom the wrong has been done. That would not be principle but expediency.").

³²⁴ Andrew Lewis, *Pitcairn's Tortured Past: A Legal History*, in JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS 61 (Dawn Oliver ed., 2009).

³²⁵ 5 A. WYATT TILBY, THE ENGLISH PEOPLE OVERSEAS: AUSTRALASIA, 1688–1911, at 268 (1912).

³²⁶ Dawn Oliver, *Problems on Pitcairn*, in JUSTICE, LEGALITY, AND THE RULE OF LAW, *supra* note 27, at 2.

citizens.³²⁷ There was for decades an obsession by British officials with minutia—the form of good government, rather than the practice, e.g., visiting officials were perturbed that the government files were not in perfect bureaucratic order.³²⁸

Now Pitcairn has an elaborate constitution, a type of document “framed for ages to come and . . . designed to approach the immortality as nearly as humanity can approach it.”³²⁹ The Pitcairn Constitution will soon undergo its first test. In a pending case against the island’s former mayor, his counsel is making challenges to the entire system of Pitcairn government.³³⁰ One issue is the claim that the current regime violates the English Bill of Rights, adopted in 1688.³³¹ “A one-person legislature [i.e. the Governor] is anathema to self-determination” and “[m]aking the Governor . . . the legislature creates something worse than a one-party state: it creates a no-party state,” says the challenge.³³² Another recent attempt to challenge the government a small island whose administration included undemocratic elements—the Crown Dependency of Sark in the Channel Islands—went all the way to the U.K. Supreme Court without success this new challenge is an uphill battle even though Pitcairn’s situation is far more egregious than Sark’s.³³³

³²⁷ 382 PARL. DEB., H.C. (6th ser.) (2002) 769 (U.K.) (statement of Andrew Rosindell).

³²⁸ E.g., H.E. Maude, *Pitcairn Island: A General Report Based on Eight Months Residence in the Island During 1940–41; With Suggestions for the Future Welfare of the Community*, June 6, 1941, ¶ 16 (Maude was colonial officer who visited to rewrite the laws), *original in* Western Pacific Archive, Auckland, PCR 5–2198.

³²⁹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821) (Marshall, C.J.).

³³⁰ See *Mayor of Pitcairn Island Charged With Child Porn Offenses*, THE INDEPENDENT (London), Dec. 6, 2010, at 26. As of February 2012, the case is pending in the Pitcairn Supreme Court as *R. v. Warren*, Pitcairn Sup. Ct. Nos. 2/2010 to 26/2010.

³³¹ The challenges are contained in filings in *R. v. Warren*, Pitcairn Sup. Ct. Nos. 2/2010 to 26/2010.

³³² [Defendant’s] Submissions on Constitutional Challenges (Nov. 30, 2011), at 64, *R. v. Warren*, Pitcairn Sup. Ct. Nos. 2/2010 to 26/2010 (“anathema”); [Defendant’s] Additional Constitutional Challenges and Submissions (Jan. 8, 2012), at 16, in *id.*

³³³ See *R. ex rel. Barclay v. Sec’y of State for Justice*, [2009] UKSC 9, [2010] 1 A.C. 464, *aff’g* [2008] EWCA Civ 1319, [2009] 2 W.L.R. 1205, *aff’g in part and rev’g in part* [2008] EWHC 1354 (Admin), [2008] 3 W.L.R. 867; see

While the Pitcairn Constitution can be swept away by London at any time,

the theory that [a c]onstitution is a written document is a legal fiction. The idea that it can be understood by a study of its language and the history of its past development is equally mythical. It is what the Government and the people who count in public affairs recognize and respect as such, and what they think it is. More than this it is not merely what it has been, or what it is today. It is always becoming something else, and those who criticize it and the acts done under it, as well as those who praise, help to make it what it will be tomorrow.³³⁴

Words on paper do not enforce themselves and when those words are enforced by Britain, one thinks of Justice Scalia's observation that every banana republic has a bill of rights.³³⁵

NOTE ON SOURCES

"P.P." indicates the British Parliamentary Papers, some of which have been filmed by Chadwyck-Healey in its House of Commons Parliamentary Papers Series. The cite "61 P.P. (1897) 161, MF 103.499-500" means the document was at page 161 of volume 61 of the *Sessional Papers*—akin to the U.S. *Congressional Serial Set*—for the 1897 session of the House of Commons, and the document is on microfiche numbers 103.499 and 103.500 of the Chadwyck-Healey edition.³³⁶

also Stuart Lakin, *Human Rights and the Royal Assent (on Sark): A Case Comment on R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor*, 2 UCL HUM. RTS. REV. 24 (2009) (Eng.) (discussing the Barclay case); Gordon Dawes, *Sark Bites*, 22 THE LAWYER, July 28, 2008, at 30 (Eng.) (discussing High Court ruling in article written by the Barclays' lawyer); Gordon Dawes, *Sark Attack*, 22 THE LAWYER, May 5, 2008, at 30 (discussing High Court case before ruling); JUSTICE COMMITTEE, CROWN DEPENDENCIES: EIGHTH REPORT OF SESSION 2009-10, 2009-10, H.C. 56-I, ¶¶ 42-49 (U.K.) (discussing Sark government); JUSTICE COMMITTEE, CROWN DEPENDENCIES: EIGHTH REPORT OF SESSION 2009-10: ORAL AND WRITTEN EVIDENCE, 2009-10, H.C. 56-II, at Ev-37 to Ev-42, Ev-102 to Ev-107 (U.K.) (same in documents submitted by the Barclays and Sark officials).

³³⁴ CHARLES A. BEARD & WILLIAM BEARD, *THE AMERICAN LEVIATHAN* 39 (1931).

³³⁵ *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong., S. Hrg. 112-37, at 6-7 (2011) (statement of Justice Scalia).

³³⁶ See also FRANK RODGERS, *A GUIDE TO BRITISH GOVERNMENT PUBLICATIONS* ch. 8 (1980) (discussing *Sessional Papers*); PERCY FORD &

The author has deposited with the Thomas Hale Hamilton Library at University of Hawaii in Honolulu copies of a file submitted in the 2006 Privy Council appeal from Pitcairn. It has thousands of pages of historical documents on Pitcairn. The documents are cited as “PCR” (Privy Council Record) with the page numbers in the record. The file is online at: <http://evols.library.manoa.hawaii.edu/handel/10524/19431>.

GRACE FORD, A GUIDE TO PARLIAMENTARY PAPERS: WHAT THEY ARE, HOW TO FIND THEM, HOW TO USE THEM 71–73 (3d ed. 1980) (discussing how to cite *Sessional Papers*).