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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 12, Original

STATE OF HAWAII, *Plaintiff*,

v.

DAVID E. BELL, *Defendant*.

APPENDIX
EXHIBITS TO THE COMPLAINT

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CONTENTS

Page

Exhibit A: Hawaii Statehood Act, Pub. L. 86-3, March 18, 1959, 73 Stat. 4, 48 U.S.C. (Supp. II 1960), at pp. 1257-61 1

Exhibit B: Joint Resolution of July 7, 1898, 30 Stat. 750 (Hawaiian Annexation Resolution) 20

Exhibit C: Executive Order No. 10530, Dated May 10, 1954, 19 Fed. Reg. 2709 (General delegation of final authority to Director, Bureau of the Budget) 22

Exhibit D: Executive Order No. 10889, Dated October 5, 1960, 25 Fed. Reg. 9633 (Delegation of functions under § 5(e), Hawaii Statehood Act) 23

Exhibit E: Executive Order No. 10960, Dated August 21, 1961, 26 Fed. Reg. 7823 (Clarification of preceding delegation) 24

Exhibit F: Budget Circular No. A-52, November 14, 1960 (Procedures for reports on federal property in Hawaii) 25

Exhibit G: Transmittal Memorandum No. 1, to Budget Circular No. A-52, August 22, 1961 (Making final defendant's interpretation of the scope of § 5(e) of the Act) 33

Exhibit H: Opinion of the Attorney General of the United States, June 12, 1961 (Interpretation of § 5, Statehood Act) 35

Exhibit I: Letter of Assistant Secretary of the Interior, June 30, 1960, with Opinion of Associate Solicitor of the Department (Interpretation of § 5, Statehood Act) 59

Exhibit J: Legal memorandum of the Attorney General, State of Hawaii (Interpretation of § 5, Statehood Act) 71

Page

Exhibit K: Department of the Navy Reports to the Budget Bureau Regarding the 4 Public Housing Project Areas 106

Item I: John Rodgers Area Report 106

Item II: Halawa Area Report 107

Item III: Manana Area Report 109

Item IV: Red Hill Area Report 110

Exhibit L: Proceedings for Acquisition by Condemnation of the John Rodgers Housing Area 111

Item I: Chronology of Condemnation Proceedings 111

Item II: Letter of Acting Secretary of the Navy authorizing acquisition 112

Item III: Petition for Condemnation 113

Item IV: Order and Judgment on Declaration of Taking 118

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EXHIBIT A

Hawaii Statehood Act, Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, 48 U.S.C. (Supp. II 1960), at pp. 1257-61

Sec. 1. [Declaration: acceptance, ratification, and confirmation of Constitution.] That, subject to the provisions of this Act and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to pro-

vide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Sec. 2. [Territory.] The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act [March 18, 1959], except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

Sec. 3. [Constitution.] The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

Sec. 4. [Compact with United States.] As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: *Provided,* That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions

relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

Sec. 5. [Title to property; land grants; reservation of lands; public school support; submerged lands.] (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new

States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the

proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder. (As amended, Pub. L. 86-624, § 41, July 12, 1960, 74 Stat. 422.)

Sec. 6 [Certification by President; proclamation for elections.] As soon as possible after the enactment of this Act, it shall be the duty of the President of the United States to certify such fact to the Governor of the Territory of Hawaii. Thereupon the Governor of the Territory shall, within thirty days after receipt of the official notification of such approval, issue his proclamation for the elections, as hereinafter provided, for officers of all State elective offices provided for by the constitution of the proposed State of Hawaii, and for two Senators and one Representative in Congress. In the first election of Senators from said State the two senatorial offices shall be separately identified and designated, and no person may be a candidate for both offices. No identification or designation of either of the two senatorial offices, however, shall refer to or be taken to refer to the term of that office, nor shall any such identification or designation in any way impair the privilege of the Senate to determine the class to which each of the Senators elected shall be assigned.

Sec. 7. [Election of officers; date; propositions; certification of voting results; proclamation by President.] (a) The proclamation of the Governor of Hawaii required by section 6 shall provide for the holding of a primary election and a general election and at such elections the officers required to be elected as provided in section 6 shall be chosen by the people. Such elections shall be held, and the qualifications of voters thereat shall be, as prescribed by the constitution of the proposed State of Hawaii for the election

of members of the proposed State legislature. The returns thereof shall be made and certified in such manner as the constitution of the proposed State of Hawaii may prescribe. The Governor of Hawaii shall certify the results of said elections, as so ascertained, to the President of the United States.

(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

"(1) Shall Hawaii immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved ...., and all claims of this State
(Date of approval of this Act)
to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved .... reserving rights or powers
(Date of approval of this Act)
to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: Section 1 of article XIII of said proposed constitution shall

be deemed amended so as to contain the language of section 2 of this Act in lieu of any other language; article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language, and section 10 of article XVI shall be deemed amended by inserting the words "at which officers for all state elective offices provided for by this constitution and two Senators and one Representative in Congress shall be nominated and elected" in lieu of the words "at which officers for all state elective offices provided for by this constitution shall be nominated and elected; but the officers so to be elected shall in any event include two Senators and two Representatives to the Congress, and unless and until otherwise required by law, said Representatives shall be elected at large."

In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

The Governor of Hawaii is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Hawaii, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

(c) If the President shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Hawaii, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 6 of this Act, shall thereupon issue his proclamation announcing the results of said elec-

tion as so ascertained. Upon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory, and the Delegate in Congress thereof, shall continue to discharge the duties of their respective offices. Upon the issuance of said proclamation by the President of the United States and the admission of the State of Hawaii into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in, under, or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution and laws of said State. The Governor of said State shall certify the election of the Senators and Representative in the manner required by law, and the said Senators and Representative shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

Sec. 8. [House of Representatives membership.] The State of Hawaii upon its admission into the Union shall be entitled to one Representative until the taking effect of the next reapportionment, and such Representative shall be in addition to the membership of the House of Representatives as now prescribed by law: Provided, That such temporary increase in the membership shall not operate to either increase or decrease the permanent membership of the House of Representatives as prescribed in the Act of August 8, 1911 (37 Stat. 13), nor shall such temporary increase affect the basis of apportionment established by the Act of November 15, 1941 (55 Stat. 761; 2 U.S.C., sec.

2a), for the Eighty-third Congress and each Congress thereafter.

Sec. 9. [Judiciary provisions; amendment.] Effective upon the admission of the State of Hawaii into the Union—

(a) the United States District Court for the District of Hawaii established by and existing under title 28 of the United States Code shall thenceforth be a court of the United States with judicial power derived from article III, section 1, of the Constitution of the United States: *Provided, however,* That the terms of office of the district judges for the district of Hawaii then in office shall terminate upon the effective date of this section and the President, pursuant to sections 133 and 134 of title 28, United States Code, as amended by this Act, shall appoint, by and with the advice and consent of the Senate, two district judges for the said district who shall hold office during good behavior;

(b) the last paragraph of section 133 of title 28, United States Code, is repealed; and

(c) subsection (a) of section 134 of title 28, United States Code, is amended by striking out the words "Hawaii and". The second sentence of the same section is amended by striking out the words "Hawaii and", "six and", and "respectively".

Sec. 10. [Judicial provisions; amendment.] Effective upon the admission of the State of Hawaii into the Union the second paragraph of section 451 of title 28, United States Code, is amended by striking out the words "including the district courts of the United States for the Districts of Hawaii and Puerto Rico," and inserting in lieu thereof the words "including the United States District [sic] for the District of Puerto Rico,".

Sec. 11. [Judicial provisions; amendment.] Effective upon the admission of the State of Hawaii into the Union—

(a) the last paragraph of section 501 of title 28, United States Code, is repealed;

(b) the first sentence of subsection (a) of section 504 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii, where the term shall be six years";

(c) the first sentence of subsection (c) of section 541 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii where the term shall be six years"; and

(d) subsection (d) of section 541 of title 28, United States Code, is repealed.

Sec. 12. [Continuation of suits.] No writ, action, indictment, cause, or proceeding pending in any court of the Territory of Hawaii or in the United States District Court for the District of Hawaii shall abate by reason of the admission of said State into the Union, but the same shall be transferred to and proceeded with in such appropriate State courts as shall be established under the constitution of said State, or shall continue in the United States District Court for the District of Hawaii, as the nature of the case may require. And no writ, action, indictment, cause or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. And the appropriate State courts shall be the successors of the courts of the Territory as to all cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein, and all the files, records, indictments, and proceedings relating to any such

writ, action, indictment, cause or proceeding shall be transferred to such appropriate State courts and the same shall be proceeded with therein in due course of law.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no writ, action, indictment or proceeding shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said State courts had been established prior to the accrual of such causes of action or the commission of such offenses. The admission of said State shall effect no change in the substantive or criminal law governing such causes of action and criminal offenses which shall have arisen or been committed; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii.

Sec. 13. [Appeals.] Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court

of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union.

Sec. 14. [Judicial and criminal provisions; amendment.] Effective upon the admission of the State of Hawaii into the Union—

(a) title 28, United States Code, section 1252, is amended by striking out "Hawaii and" from the clause relating to courts of record;

(b) title 28, United States Code, section 1293, is amended by striking out the words "First and Ninth Circuits" and by inserting in lieu thereof "First Circuit", and by striking out the words, "supreme courts of Puerto Rico and Hawaii, respectively" and inserting in lieu thereof "supreme court of Puerto Rico";

(c) title 28, United States Code, section 1294, as amended, is further amended by striking out paragraph (4) thereof and by renumbering paragraphs (5) and (6) accordingly;

(d) the first paragraph of section 373 of title 28, United States Code, as amended, is further amended by striking out the words "United States District Courts for the districts of Hawaii or Puerto Rico," and inserting in lieu thereof the words "United States District Court for the District of Puerto Rico,"; and by striking out the words "and any justice of the Supreme Court of the Territory of Hawaii": *Provided,* That the

amendments made by this subsection shall not affect the rights of any judge or justice who may have retired before the effective date of this subsection: *And provided further,* That service as a judge of the District Court for the Territory of Hawaii or as a judge of the United States District Court for the District of Hawaii or as a justice of the Supreme Court of the Territory of Hawaii or as a judge of the circuit courts of the Territory of Hawaii shall be included in computing under section 371, 372, or 373 of title 28, United States Code, the aggregate years of judicial service of any person who is in office as a district judge for the District of Hawaii on the date of enactment of this Act;

(e) section 92 of the Act of April 30, 1900 (ch. 339, 31 Stat. 159), as amended, and the Act of May 29, 1928 (ch. 904, 45 Stat. 997), as amended, are repealed;

(f) section 86 of the Act approved April 30, 1900 (ch. 339, 31 Stat. 158), as amended, is repealed;

(g) section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(h) section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(i) section 91 of title 28, United States Code, as heretofore amended, is further amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,"; and

(j) the Act of June 15, 1950 (64 Stat. 217; 48 U.S.C., sec. 644a), is amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island."

Sec. 15. [Laws in effect.] All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii, except as provided in section 4 of this Act with respect to the Hawaiian Homes Commission Act, 1920, as amended; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States: *Provided,* That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. As used in this section, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii at the time of its admission into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provision of this Act.

Sec. 16. [Hawaii National Park; military and naval lands; civil and criminal jurisdiction.] (a) Notwithstanding the admission of the State of Hawaii into the Union, the United States shall continue to have sole and exclusive jurisdiction over the area which may then or thereafter be

included in Hawaii National Park, saving, however, to the State of Hawaii the same rights as are reserved to the Territory of Hawaii by section 1 of the Act of April 19, 1930 (46 Stat. 227), and saving, further, to persons then or thereafter residing within such area the right to vote at all elections held within the political subdivisions where they respectively reside. Upon the admission of said State all references to the Territory of Hawaii in said Act or in other laws relating to Hawaii National Park shall be deemed to refer to the State of Hawaii. Nothing contained in this Act shall be construed to affect the ownership and control by the United States of any lands or other property within Hawaii National Park which may now belong to, or which may hereafter be acquired by, the United States.

(b) Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided,* (i) That the State of Hawaii shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; (ii) that the reservation of authority in the

United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall vest and remain in the United States only so long as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes: *Provided, however,* That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense.

Sec. 17. [Federal Reserve Act; amendment.] The next to last sentence of the first paragraph of section 2 of the Federal Reserve Act (38 Stat. 251) as amended by section 19 of the Act of July 7, 1958, (72 Stat. 339, 350) is amended by inserting after the word "Alaska" the words "or Hawaii."

Sec. 18. [Maritime matters.] (a) Nothing contained in this Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Hawaii and other ports in the United States, or possessions, or as conferring on the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

(b) Effective on the admission of the State of Hawaii into the Union—

(1) the first sentence of section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1156), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or";

(2) section 605(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1175), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or"; and

(3) the second paragraph of section 714 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1204), is amended by inserting before the words "an island possession or island territory" the words "the State of Hawaii, or". (As amended Pub. L. 86-624, § 46, July 12, 1960, 74 Stat. 423.)

Sec. 19. [United States Nationality.] Nothing contained in this Act shall operate to confer United States nationality, nor to terminate nationality heretofore lawfully acquired, or restored nationality heretofore lost under any law of the United States or under any treaty to which the United States is or was a party.

Sec. 20. [Immigration and Nationality Act; amendments.] (a) Section 101(a)(36) of the Immigration and Nationality Act (66 Stat. 170, 8 U.S.C., sec. 1101(a)(36)) is amended by deleting the word "Hawaii,".

(b) Section 212(d)(7) of the Immigration and Nationality Act (66 Stat. 188, 8 U.S.C. 1182(d)(7)) is amended by deleting from the first sentence thereof the word "Hawaii," and by deleting the proviso to said first sentence.

(c) The first sentence of section 310(a) of the Immigration and Nationality Act, as amended (66 Stat. 239, 8 U.S.C. 1421(a), 72 Stat. 351) is further amended by deleting the words "for the Territory of Hawaii, and".

(d) Nothing contained in this Act shall be held to repeal, amend, or modify the provisions of section 306 of the Immigration and Nationality Act (66 Stat. 237, 8 U.S.C. 1405).

Sec. 21. [Aircraft purchase loans.] Effective upon the admission of the State of Hawaii into the Union, section 3, subsection (b), of the Act of September 7, 1957 (71 Stat. 629), is amended by substituting the words "State of Hawaii" for the words "Territory of Hawaii".

Sec. 22. [Severability clause.] If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof in any circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word in other circumstances shall not be affected thereby.

Sec. 23. [Repeal of inconsistent laws.] All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed.

Approved, March 18, 1959.

EXHIBIT B

Joint Resolution of July 7, 1898, 30 Stat. 750

Whereas the government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided,* That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exer-

cised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

Sec. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

Sec. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved, July 7, 1898.

EXHIBIT C

Executive Order No. 10530, Dated May 10, 1954, 19 Fed. Reg. 2709

Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President

By virtue of the authority vested in me by Section 301 of title 3 of the United States Code (65 Stat. 713), and as President of the United States, it is hereby ordered as follows:

Part I. Director of the Bureau of the Budget

Section 1. The Director of the Bureau of the Budget is hereby designated and empowered to perform the following-described functions without the approval, ratification, or other action of the President: . . .

* * * * * *

DWIGHT D. EISENHOWER

EXHIBIT D

Executive Order No. 10889, Dated October 5, 1960, 25 Fed. Reg. 9633

Amendment of Executive Order No. 10530, Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:

Section 1. Executive Order No. 10530 of May 10, 1954, entitled "Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President", as amended, is hereby further amended by adding at the end of section 1 thereof new paragraphs (p), (q), and (r), reading as follows:

* * * * * *

"(q) The authority vested in the President by section 5(e) of the Act of March 18, 1959, providing for the admission of the state of Hawaii into the union, 73 Stat. 6, (1) to receive the reports required by the provisions of that section, and (2) to determine that certain land or property is no longer needed by the United States.

"(r) The authority vested in the President by section 40 of the Hawaii Omnibus Act, approved July 12, 1960 (74 Stat. 422), to prescribe procedures to assure that reports submitted pursuant to section 5(e) of the act of March 18, 1959, 73 Stat. 6, shall be prepared in accordance with uniform policies and coordinated within the executive branch of the government: *Provided,* that such procedures shall be published in the *Federal Register.*"

* * * * * *

DWIGHT D. EISENHOWER

EXHIBIT E

Executive Order No. 10960, Dated August 21, 1961, 26 Fed. Reg. 7823

Amendment of Executive Order No. 10530, Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:

Paragraph (q) of Section 1 of Executive Order No. 10530 of May 10, 1954, entitled "Providing for the Performance of Certain Functions Vested in or Subject to the Approval of the President," as added by Executive Order No. 10889 of October 5, 1960, is hereby amended to read as follows:

"(q) The authority vested in the President by section 5(e) of the Act of March 18, 1959, providing for the admission of the State of Hawaii into the Union, 73 Stat. 6, (1) to receive the reports required by the provisions of that section, (2) to determine that certain land or property is no longer needed by the United States, and (3) to convey to the State of Hawaii the land or property which is determined to be no longer needed by the United States."

JOHN F. KENNEDY

EXHIBIT F

Budget Circular No. A-52

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

November 14, 1960 CIRCULAR No. A-52

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Procedures for reports on Federal property in Hawaii

1. *Purpose.* Section 5(e) of the Act of March 18, 1959, providing for the admission of the State of Hawaii into the Union, Public Law 86-3 (73 Stat. 4, 5), requires that, within five years from August 21, 1959, the date Hawaii was admitted into the Union, each Federal Agency having control over any land or property retained by the United States pursuant to sections 5(c) and 5(d) of the Statehood Act shall report to the President the facts regarding its continued need for such land or property. It further provides that, if the President determines that the land or property is no longer needed by the United States, it shall be conveyed to the State of Hawaii.

This Circular prescribes procedures to assure that the reports to be submitted by Federal agencies pursuant to section 5 of the Hawaii Statehood Act shall be prepared and required actions shall be effected in accordance with uniform policies and procedures, as set forth below, and coordinated within the executive branch.

2. *Authority.* These procedures are prescribed under sections 1(q) and 1(r) of Executive Order No. 10530, as amended, and in accordance with section 40 of the Hawaii Omnibus Act, Public Law 86-624 (74 Stat. 411, 422). See Attachment A for pertinent excerpts from law and Executive orders.

3. *Definitions.* Pending further determination of the scope of section 5(e) of the Hawaii Statehood Act, the phrase "land or property" shall be defined, for purposes of all parts of this Circular except paragraphs 7, 13, and 14, to be limited to:

a. All lands or other properties, including personal properties, to which the Territory of Hawaii and its subdivisions held title and which, as of August 21, 1959, were set aside for the use of the United States by one of the methods set forth in section 5(c) of the Statehood Act, i.e., by Act of Congress, Executive order, or proclamation of the President or the Governor of Hawaii;

b. All lands or other properties, including personal properties, acquired by cession from the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898, which, as of August 21, 1959, were similarly set aside;

c. All lands or other properties, including personal properties, acquired in exchange for ceded lands or other ceded properties which, as of August 21, 1959, were similarly set aside;

d. All interests, such as easements, and other vested or contingent interests of the United States, in lands, title to which was transferred or granted to the State of Hawaii or its political subdivisions under sections 5(a) and 5(b) of the Statehood Act, if such interests were similarly set aside as of August 21, 1959; and

e. All permits, licenses, or permissions from the Territory of Hawaii or any department thereof under which, immediately prior to August 21, 1959, the United States controlled any property conveyed to the State of Hawaii by section 5(b) of the Statehood Act.

4. *Referrals to Department of Justice.* Where doubt exists as to applicability of the definitions as set forth in paragraph 3 to individual properties which are considered by an agency to be no longer needed, the question shall be referred by the agency to the Assistant Attorney General, Lands Division, Department of Justice, for advice.

5. *Policy guidelines.* In evaluating the need to retain land or property, as defined in paragraph 3 of this Circular, each agency shall be guided by the general policy that the Federal Government will retain only such land or property in Hawaii as is required for the effective performance of its program responsibilities and assigned mission. Land or property generally shall not be retained when:

a. It is not being used by the controlling agency and there are no firm plans for future use;

b. The costs of operation and maintenance are substantially higher than for other suitable properties of equal or less value which are, or can be made, available to the Federal Government without direct cost;

c. It is being leased to private individuals or enterprises and there are no firm plans for future Federal use; or

d. It is being used by the Government to produce goods or services which are available from private enterprise, except when it is demonstrated clearly in each instance that it is not in the public interest to obtain such requirements from private enterprise.

Bureau of the Budget Circular No. A-2 will not be applicable in Hawaii to land or property, as defined in paragraph 3, until August 21, 1964.

6. *Property review and reporting requirements.* Each agency having any land or property, as defined in paragraph 3 of this Circular, under its control in Hawaii on August 21, 1959, shall submit the following reports in

quadruplicate to the Bureau of the Budget. Should an agency not have any such land or property under its control, a negative report shall be submitted.

a. *Designation of responsible officer.* A report shall be submitted by December 15, 1960, designating the officer to be responsible for reviewing and reporting on such land or property.

b. *Report on land or property defined in paragraph 3 of this Circular.* A report in the form shown in Attachment B shall be submitted by June 30, 1961, except by the Department of Defense which will report by December 31, 1961, covering specified data relating to, and reviewing the need for, land or property defined in paragraph 3 of this Circular.

(1) The report shall contain a separate statement on each tract of land or property subject to review. A tract of land or property shall consist, as nearly as possible, of all the land or property at a single installation which is subject to review. Where necessary and feasible, a tract should be subdivided to indicate the portions being put to substantially different uses or to indicate that there are differing continuing needs for portions of a tract. Copies of the set-aside actions should be submitted as exhibits where a tract or part of a tract is considered to be no longer needed by the agency.

(2) The controlling agency's report shall identify and cover any land or property subject to review which is being used by another Federal agency by permit or other means. The using agency's views regarding the continued need for such land or property shall be included in the controlling agency's report.

(3) The report shall include any land or property defined in paragraph 3 which, pursuant to the Fed-

eral Property and Administrative Services Act of 1949, has already been reported to the General Services Administration as excess or determined to be surplus but which has not yet been disposed of.

(4) In the event any land or property covered by the review has been disposed of since August 21, 1959, by transfer to another Federal agency or otherwise, except to the State of Hawaii under the provisions of section 5(e) of the Statehood Act, the agency having had control on August 21, 1959, shall include such tracts in its report, together with a statement of the manner in which the land or property was disposed of.

(5) In the event that a tract of land or part of a tract of land, which is considered by an agency to be no longer needed, is interspersed with, or surrounds parcels of land which are not covered by this review because of the manner in which they were acquired, the controlling agency shall include in its report the facts regarding such parcels and a statement of its continuing need for such parcels. Easements necessary to provide access to a tract of land or part of a tract of land which is no longer needed shall also be described.

7. *Data on other land.* In order to provide an adequate basis for a determination as to the need for land or interests in land reviewed and reported on under paragraph 6 b, each agency shall submit to the Bureau of the Budget a report with respect to each tract of real property and interest in real property under its control in Hawaii which is not reported on under paragraph 6 b. Such report shall be submitted at the same time as the report to be made under paragraph 6 b. The report shall consist of a map of each tract and interest, a statement indicating acreage

and use or uses, and a statement of whether such use or uses, or any other requirement for the property, are expected to continue after August 21, 1964. A tract should consist, as nearly as possible, of all the land at a single installation which is not reported on under paragraph 6 b. This information shall be furnished with respect to all real property, and all interests therein, regardless of the method of acquisition. The Bureau of the Budget may, in specific instances, require additional information.

8. *Priority reviews.* If the Governor of Hawaii submits a request to the Bureau of the Budget that a determination be made with respect to a particular tract of land or property, as defined in paragraph 3, such land or property shall be reviewed on a priority basis and a separate report submitted to the Director of the Bureau of the Budget at the earliest practicable date. The Governor of Hawaii will be advised by the Bureau of the Budget concerning the facts disclosed by such review prior to any final determination.

9. *Screening of property.* If a tract or part of a tract of land or property reviewed under paragraph 6 b is no longer needed by the agency, a description of such tract or part thereof shall be furnished to the General Services Administration together with a request that necessary steps be taken to determine whether other Federal agencies have any need for such tract or part thereof. The General Services Administration will undertake the necessary screening and furnish the controlling agency with a statement regarding the needs of other agencies for such tract or part thereof. Such GSA statement shall be included in the controlling agency's report to the Director of the Bureau of the Budget. The furnishing of the aforesaid description to the GSA shall not constitute a report of excess under the Federal Property and Administrative Services Act of 1949 or have the effect of transferring control of the property described to GSA.

10. *Alternate sites.* The State of Hawaii may offer to make land available to the Federal Government for the purpose of relocating Federal installations, in order to make available for disposition to the State under this Circular the land on which the installations are now located. In the event that such offers are made regarding any tract of land or part of a tract of land covered by the review required in paragraph 6 b, full details regarding such offers shall be included in the pertinent report to the Director of the Bureau of the Budget. Estimates of the appraised value or cost of the properties involved shall also be included.

11. *Subsequent reviews.* In the event that a future need is sited as the reason for retaining a tract or part of a tract of land or property reviewed under paragraph 6 b, or in the event that a tract or part of a tract previously reviewed is subsequently found not to be needed, such tract or part of a tract again shall be reviewed by the controlling agency as provided in paragraph 6 b at a time appropriate, but in no event later than December 31, 1963. Reports on the results of such subsequent review shall also be made to the Director of the Bureau of the Budget. If any land or property is subsequently set aside for United States use pursuant to section 5(d) of the Statehood Act, it shall be reviewed and reported on by the controlling agency not later than December 31, 1963.

12. *Conveyances to State of Hawaii.* Pursuant to the authority vested in the President by section 5(e) of the Hawaii Statehood Act and delegated to the Director of the Bureau of the Budget by section 1(q) of Executive Order No. 10530, as amended, the Director will determine whether the land or property reported on under paragraphs 6 b and 11 is no longer needed by the United States. The controlling agency will be notified of the Director's determination and such conveyances to the State of Hawaii as may be

required of land or property found not to be needed by the United States will be effected.

13. *Property records.* Pending further determination of the scope of section 5(e) of the Statehood Act, each agency controlling land or property in the State of Hawaii should immediately review its real property records and take such steps as may be necessary to assure that complete and accurate information is available to determine:

a. What real property in Hawaii was controlled by the agency on August 21, 1959, and the precise method by which control over such property was acquired.

b. What real property in Hawaii has been acquired subsequent to August 21, 1959, in exchange for property controlled by the agency on August 21, 1959.

c. Any dispositions of real property covered by paragraphs 11 a and 11 b above, subsequent to August 21, 1959.

The information should clearly indicate whether the property was ceded, whether it was property title to which was in the Territory or its subdivisions, or whether it was property acquired by the United States by lease, purchase, exchange, condemnation or other means.

14. *Suspension of disposal actions.* Until further notice, lands and other property as defined in this paragraph shall not be disposed of by the controlling agency, by transfer to another Federal agency or otherwise, except pursuant to instructions of the Director of the Bureau of the Budget. The term "lands and other property" as used in this paragraph, shall consist only of lands and interests therein in Hawaii (excluding, however, leases to the United States by other than the Territory or State of Hawaii) owned, held or used by the United States on August 21, 1959, or exchanged thereafter for other property by the United States.

15. *Communication with State of Hawaii.* Communications from Federal agencies to the State of Hawaii regarding matters within the scope of this Circular should be addressed to the Governor of Hawaii. All correspondence should include the original letter and one copy.

Inquiries to the Bureau of the Budget about this Circular should be addressed to Harold Seidman, Assistant Chief, Office of Management and Organization (code 113, ext. 413).

MAURICE H. STANS
Director

[Attachments omitted]

EXHIBIT G

Transmittal Memorandum No. 1 to Bureau of the Budget Circular No. A-52

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

August 22, 1961 CIRCULAR No. A-52

Transmittal Memorandum No. 1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Termination of suspension of disposal actions on certain Federal property in Hawaii

Circular No. A-52, dated November 14, 1960, prescribes the procedures to be followed by Federal agencies in reporting on Federal property in Hawaii pursuant to section 5(e) of the Hawaii Statehood Act. When the Circular was issued an uncertainty existed as to the land and property within the scope of section 5(e) of the Act and therefore potentially subject to conveyance to Hawaii. As a result, paragraph 14 of Circular No. A-52 temporarily suspended

the disposal, except pursuant to instructions of the Director of the Bureau of the Budget, of all lands and interests therein in Hawaii (excluding leases to the United States by other than the Territory or State of Hawaii) owned, held or used by the United States on August 21, 1959, or exchanged thereafter for other property by the United States.

The Attorney General of the United States on June 12, 1961, issued an opinion interpreting section 5 of the Hawaii Statehood Act. The Attorney General interpreted the phrase "lands and other properties", as used in section 5(c) of the Statehood Act, to include only lands and properties which, as provided in sections 5(c) and 5(d), are excepted from transfer and conveyance to the State of Hawaii and its political subdivisions by sections 5(a) and 5(b) of the Act. The effect of that opinion is to limit the scope of section 5(e) of the Statehood Act to the land and property defined in paragraph 3 of Circular No. A-52.

Therefore, paragraph 14 of the Circular is herewith amended to read as follows:

> 14. *Suspension of disposal actions.* Until further notice, land or property as defined in paragraph 3 shall not be disposed of by the controlling agency, by transfer to another Federal agency or otherwise, except pursuant to instructions of the Director of the Bureau of the Budget. Lands and other properties which are not covered by the definitions in paragraph 3 may be disposed of as otherwise authorized by law.

This revision of paragraph 14 does not affect the requirements otherwise set forth in Circular No. A-52 for agency reports on their land and other property in Hawaii, including the data required under paragraph 7 of the Circular.

DAVID E. BELL
Director

EXHIBIT H

Opinion of the Attorney General of the United States

(42 Ops. Atty. Gen., No. 4)

JUNE 12, 1961.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to comply with a request of President Eisenhower for an opinion interpreting section 5 of the Hawaii Statehood Act, Public Law 86-3, 73 Stat. 4, 5, 48 U.S.C. (Supp. II), c. 3, Note. The pertinent parts of the section are set forth in an appendix to this opinion.

Section 5 relates to the transfer of certain publicly owned property located in the Hawaiian Islands to the new State and its political subdivisions. Subsection (e) of section 5 deals with the property retained by the United States pursuant to the other provisions of the section. It provides that, within five years after Hawaii is admitted into the Union, each Federal agency controlling such property shall report to the President regarding its continued need for such property, "and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii." Technically, the questions upon which my opinion has been requested relate only to the interpretation of the mandatory reporting requirement. However, that interpretation will, in effect, also decide what land or property the President has statutory authority to convey to the State of Hawaii upon a finding that it is surplus.

Section 5 is technical and complicated legislation, an understanding of which requires a description of the various types of Federal and territorial property rights existing in Hawaii prior to statehood. The property owned by the United States in Hawaii at the time that State was admitted into the Union in 1959, fell into two basic categories. First: The property ceded to, and acquired by, the United States pursuant to the Joint Resolution providing for the

annexation of the Hawaiian Islands, approved on July 7, 1898 (30 Stat. 750),[1] or property exchanged for lands so ceded. Section 5(g) of the Hawaii Statehood Act refers to this property as "public lands and other public property."[2] In the interest of brevity I shall refer to it as "ceded property." Second: The property acquired by the United States by means other than by the Joint Resolution of July 7, 1898. Most of that property was obtained after annexation by way of purchase or condemnation. This property is referred to herein as "afteracquired property" of the United States.

The ceded property is divided into two subgroups, *viz.*, the ceded property which has been "set aside" for the use of the United States, and that which has not been so "set aside." This distinction, and the phrase "set aside," go back to the Joint Resolution of July 7, 1898, by which the United States "accepted" the absolute fee and ownership of the ceded property (*supra,* n. 1), and provided, in substance,[3] that the existing laws of the United States govern-

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[1] Pursuant to this Joint Resolution, the United States accepted the cession by the Government of Hawaii of "the absolute fee and ownership of all public, Government or Crown lands, public buildings, or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining."

[2] Section 5(g) provides:

"As used in this Act, the term 'lands and other properties' includes public lands and other public property, and the term 'public lands and other public property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded."

[3] Joint Resolution of July 7, 1898, 30 Stat. 750, 48 U.S.C. 661:

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their

ing public lands should not apply to Hawaii; that special laws should be enacted for the management and disposition of this property; and that the income derived from it should be used only for the benefit of the inhabitants of Hawaii for educational and other public purposes, except with respect to such property "as may be used or occupied for the civil, military or naval purposes of the United States."

This portion of the Joint Resolution was implemented by section 91 of the Organic Act of Hawaii of April 30, 1900 (31 Stat. 159, 48 U.S.C. 511), pursuant to which "* * * the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, *until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii* * * *." [Italics supplied.] Pursuant to a uniform legislative,[4] judicial,[5] and executive[6] usage, ceded property "taken for the uses and purposes of the United States" under this authority has been called "set aside."

The United States has not, however, retained title to all the ceded property which has not been "set aside." Section 91 of the Organic Act, *supra,* permitted ceded prop-

management and disposition: *Provided,* That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

[4] Cf. H. Rept. 831, 77th Cong., 1st sess., pp. 1-2; S. Rept. 576, 77th Cong., 1st sess., pp. 1-2.

[5] *United States* v. *Marks,* 187 F. 2d 724, 730 (C.A. 9, 1951).

[6] See, *e.g.,* Executive Order No. 2464, of September 29, 1916.

erty which was utilized for certain enumerated public purposes to be conveyed or transferred by direction of the President to the Territory. In turn, the Territory could transfer its title to such conveyed property to "any city, county, or other political subdivision thereof, or the University of Hawaii" by direction of the Governor when authorized by the legislature.

In summary, at the time Hawaii became a State, the United States owned the following classes of property in Hawaii: Afteracquired property, ceded property which had been set aside, and that part of the ceded property which had neither been set aside nor conveyed to the Territory of Hawaii. The United States held merely the naked title to the last type of property, since, pursuant to section 91 of the Organic Act of Hawaii (*supra*), the possession, use, and control remained with the Territory of Hawaii.

The Territory of Hawaii owned two classes of property. It owned the ceded property, the title to which had been transferred to the Territory by direction of the President pursuant to section 91 of the Organic Act. It also owned nonceded property, acquired by it after annexation, presumably by purchase, condemnation, etc., which will be referred to as "territorial afteracquired property." This territorial afteracquired property could be set aside by the Governor for the uses and purposes of the United States pursuant to a 1941 amendment of section 73(q) of the Organic Act of Hawaii (48 U.S.C. 677).[7]

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[7] Cf. H. Rept. 831, 77th Cong., 1st sess. pp. 1-2, and S. Rept. 576, 77th Cong., 1st sess., pp. 1-2: "Senate Concurrent Resolution No. 11 of the Legislature of Hawaii, adopted April 19, 1941, sets forth that the Hawaii Organic Act providing for taking of lands for the uses and purposes of the United States has been held as applying only to the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, adopted July 7, 1898. The purpose of this bill is to amend section 73, subsection (q) of the Hawaii Organic Act for the purpose of authorizing the Governor of Hawaii to set aside for the uses and purposes of the United States any lands acquired by the Territory since the annexation, and in addition to those ceded by the Republic of Hawaii."

In addition to the property owned by them, the United States and the Territory of Hawaii each had the possession, use, and control of, but not the title to, certain types of property. As I have shown, the Territory of Hawaii had, pursuant to section 91 of the Organic Act of Hawaii, the possession, use, and control of the ceded property which had been neither set aside nor conveyed to the Territory, and to which the United States merely held the naked title. Conversely the United States had the use and possession under various terms and conditions of territorial property which had been set aside pursuant to either section 91 or section 73(q) of the Organic Act. Title to this territorial set aside property remained in the Territory of Hawaii.

Section 5 of the Hawaiian Statehood Act presents a statutory plan to allocate certain types of publicly-owned property to the State of Hawaii and its political subdivisions. Section 5(a) [8] is concerned with the *lands and other properties* to which the Territory of Hawaii and its subdivisions held title prior to admission. It directs that the State of Hawaii and its subdivisions, as the case may be, shall succeed to such title *except as provided in subsection* (*c*). As used in this section the key terminology "lands and other properties" includes everything to which the Territory held title.

Section 5(b) [9] grants to the State of Hawaii, *except as*

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[8] Section 5(a) reads:

"Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title."

[9] Section 5(b) reads:

"Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public

provided in subsections (*c*) and (*d*), the title to *all the public lands and other public property* (*i.e.*, "ceded property," see section 5(g)) which the United States held at the time of the admission of Hawaii into the Union.

Section 5(c) [10] directs that the United States shall retain the title to *any lands and other properties* which, at the time of the admission of Hawaii into the Union, are set aside pursuant to law for the use of the United States under any act of Congress, Executive order, proclamation of the President, or proclamation of the Governor.[11] It will be noted that while subsection (c) uses the broad term "any lands and other properties" its scope is limited to

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lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii."

[10] Section 5(c) reads:

"Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3) or (4) as the case may be."

[11] Technically, the property of the Territory of Hawaii and of its subdivisions which has been set aside, does not *remain* the property of the United States but *vests* in the United States pursuant to section 5(c). However, the express reference in section 5(a) to section 5(c) makes it evident that, in spite of its awkward phraseology, section 5(c) applies to property to which the Territory and its subdivisions had title at the time Hawaii was admitted into the Union. Were it otherwise, the exception to section 5(a) would be meaningless. For the reason underlying the anomalous use of the word "remain" see *infra*, n. 21.

those assets which have been "set aside" for the use of the United States.

Section 5(d) [12] deals with any *public lands and other public property* (*i.e.*, ceded property) which at the time of the admission of the State of Hawaii were not formally set aside by statute, Executive order, or proclamation, but which were controlled by the United States pursuant to permit, license, or permission from the Territory of Hawaii or any of its subdivisions. Such property passed to the State of Hawaii by operation of section 5(b), subject to the exception contained in section 5(d) which permits, during a period of five years following the admission of the State of Hawaii, the setting aside of such property for the use of the United States by an act of Congress or Executive order of the President. The lands and property so set aside become the property of the United States.

Section 5(e) [13] is the subsection which has provided the immediate occasion for this request for an opinion. It re-

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[12] Section 5(d) reads:

"Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States."

[13] Section 5(e) reads:

"Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii."

quires every Federal agency which has control over *any land or property retained by the United States pursuant to sections 5(c)* and *5(d)* [14] to report to the President within five years whether the land or property is still needed. If the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

Section 5(f) [15] directs that the *lands* granted to the State of Hawaii by section 5(b) and ceded lands retained by the United States by sections 5(c) and 5(d) and later conveyed

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[14] Section 5(d) does not appear to provide for the retention of property by the United States, but rather for its recapture. Section 5(e), however, refers to such property as "retained by the United States." None of the differing interpretations of section 5 turns upon this distinction, and, with respect to section 5(d), the word "retained" will be used herein to refer to ceded lands subject to recapture by the United States.

[15] Section 5(f) reads:

"The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

to the State pursuant to section 5(e), as well as the proceeds from their sale and the income therefrom, be held by the State as a public trust for the support of public schools, the betterment of the conditions of native Hawaiians, for the development of farm and home ownership and similar public purposes.

While regulations governing the reporting procedure under section 5(e) were being drafted by the Bureau of the Budget,[16] a difference of opinion arose concerning the scope of the reporting requirement. The Department of the Army and the General Services Administration have taken the position that reports have to be made only with respect to set aside land and property which either had belonged to the Territory of Hawaii or its subdivisions, or were ceded property. It is their view that the duty to report under section 5(e) relates to "any land or property that is *retained* by the United States pursuant to subsections (c) and (d)," and that the only types of property *retained* by the United States pursuant to those two subsections are the territorial and ceded properties, referred to in sections 5(a) and 5(b), which have been set aside.

The State of Hawaii and the Department of the Interior, on the other hand, have pointed to the fact that sections 5(c) and 5(e) refer to "any lands and other properties" and "any land or property," respectively. They therefore have taken the position that the duty to report under section 5(e) is not limited to the types of property listed in sections 5(a) and 5(b), but that it extends to all land and

[16] Section 40 of the Hawaii Omnibus Act, 74 Stat. 422, provides that the President shall prescribe procedures to assure the uniformity and coordination of the agency reports submitted to him pursuant to section 5(e) of the Hawaii Statehood Act. This authority was delegated by President Eisenhower to the Director of the Bureau of the Budget by Executive Order No. 10889 of October 5, 1960 (25 F.R. 9633). Pending the preparation of this opinion, the Director of the Bureau of the Budget issued Circular No. A-52 of November 14, 1960, governing the reporting procedure under section 5(e) (25 F.R. 12633).

property owned by the United States howsoever acquired and without limitation. The analytical difference between the two contentions is that the Department of Defense and the General Services Administration read subsection (c) [17] merely as an exception to subsections (a) and (b), while the State of Hawaii and the Department of the Interior give it an independent broader meaning.

The gist of the dispute is therefore (1) whether the duty to report and convey the property not needed by the United States five years after the admission of Hawaii is limited to set aside ceded property and set aside afteracquired property of the Territory of Hawaii, or (2) whether this duty to report and convey extends to all property owned by the United States in Hawaii, including property acquired by the United States after cession by way of purchase, or condemnation, *i.e.*, for a valuable consideration. I have been advised that the most important items of after-acquired property of the United States which may become surplus by the end of the five-year period are some portions of Fort DeRussy located between Honolulu and Waikiki Beach, and certain lands, originally acquired for the Navy, on which are now located a large portion of Hawaii's public housing units.

In addition to this controversy, there has been uncertainty concerning the scope of the words "other properties" in section 5(c). The Bureau of the Budget has asked for a construction of that term and for advice as to whether it includes interests such as leaseholds and easements, personal and mixed property, and filled lands.

The specific questions asked are the following:

1. Does the phrase "lands and other properties," as used in section 5(c) of the Statehood Act, include any lands and properties other than those which, as provided in sections

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[17] Subsection (d) is in terms limited to "public lands or other public property." Consequently, there is no dispute as to its scope and effect.

5(c) and 5(d), are excepted from transfer and conveyance to the State of Hawaii and its political subdivisions by sections 5(a) and 5(b) of the act?

2. Does the phrase "lands and other properties," as used in section 5(c) of the Statehood Act, include any interests of the United States, such as easements and leaseholds, in lands and other properties transferred and conveyed to the State of Hawaii and its political subdivisions by sections 5(a) and 5(b) of the act?

3. If the answer to the first question is affirmative, does the term "lands and other properties," as used in section 5(c) of the Statehood Act, include all real, personal and mixed property owned by the United States in Hawaii on August 21, 1959, regardless of the manner of acquisition, including filled lands created by the Federal Government, and all interests or rights of the United States in lands in Hawaii on August 21, 1959, regardless of the manner of acquisition?

For the reasons hereafter set forth in detail, it is my opinion that the first question must be answered in the negative; consequently, there is no occasion to answer the third question.

The second question assumes that property has been set aside in a manner which created a lease, an easement, or a similar interest in property. No specific examples of such transactions have been called to my attention, and, if any exist, they are presumably rare or predicated on unusual circumstances. If no such examples exist, the question would be of a purely hypothetical nature; if any such examples do exist, the solution of the problem may depend upon facts which have not been made available to me. It would therefore be inappropriate to attempt to answer the question now.[18]

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[18] If an agency should come across a set aside order of the type described in the second question, the referral provisions of Bureau of the Budget Circular No. A-52, par. 4 (*supra*, n. 16) would be applicable.

I.

The complex provisions of section 5 are indicative of a congressional purpose to convey to the State of Hawaii and its subdivisions the ceded property and territorial property which had not been set aside at the time of the admission of Hawaii into the Union, and as much of the territorial and ceded property which had been set aside as would not be required by the United States within five years after admission. The statutory plan thus is for the new State to obtain title to the property acquired by the United States from the Republic of Hawaii and from the Territory to the extent that it had not been taken for the uses and purposes of the United States, and to determine during the following five years the extent to which set aside property no longer would be needed by the United States and therefore could be returned to the State of Hawaii. Underlying this plan is the reservation contained in the Joint Resolution of Annexation (*supra,* n. 3) that the ceded lands not needed by the United States should be used for the benefit of the inhabitants of the Hawaiian Islands. It seems plain that the afteracquired property of the United States, *i.e.,* property not obtained from the Republic of Hawaii or from the Territory, does not find any place in this statutory design.

This reading of the statute is not refuted by the circumstance, stressed by the State of Hawaii and the Department of the Interior, that sections 5(c) and 5(e) do not use the words "public property" but refer to "any lands and other properties" and "any land and property," respectively. The use of this terminology is fully explained, and indeed required, by the circumstance that the territorial property which has been set aside is not limited to ceded property but includes property acquired by the Territory after annexation and subsequently set aside pursuant to section 73(q) of the Organic Act of Hawaii (cf. *supra,* n. 7).

This interpretation of the statute is supported by its legislative history, especially the origin of section 5(c), and by the traditional and technical meaning in Hawaii of the term "set aside."

II.

The legislative history of section 5 discloses that section 5(c) never was intended to relate to any property other than the categories defined in sections 5(a) and 5(b); in particular that it has no impact on the afteracquired property of the United States.

The Hawaii Statehood Act was enacted by the 86th Congress. Earlier bills, introduced in the 85th Congress, which, however, failed to pass, included equivalents to the present section 5. Those predecessors to section 5 [19] contained a

[19] Sections 5 of H.R. 49 (Jan. 3, 1957) and S. 50 (Aug. 29, 1957), sections 103 of H.R. 339 (Jan. 3, 1957) and H.R. 1243, and section 3 of H.R. 1246 (Jan. 3, 1957), 85th Cong., 1st sess., contained the following language:

"(a) The State of Hawaii and its political subdivisions, as the case may be, shall retain all the lands and other public property title to which is in the Territory of Hawaii or a political subdivision thereof, except as herein provided, and all such lands and other property shall remain and be the absolute property of the State of Hawaii and its political subdivisions, as the case may be, subject to the constitution and laws of said State: *Provided, however,* That as to any such lands or other property heretofore or hereafter set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States, whether absolute or subject to limitations, and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union, the United States shall be and become vested with absolute title thereto, or an interest therein conformable to such limitations, as the case may be.

"(b) The United States hereby grants to the State of Hawaii, effective upon the date of its admission into the Union, the absolute title to all the public lands and other public property in Hawaii title to which is in the United States immediately prior to the admission of such State into the Union, except as otherwise pro-

subsection (a) directing that the State of Hawaii and its political subdivisions should retain the *lands and other public property*[20] owned by the Territory of Hawaii or its political subdivisions, *provided* that the title to property which had been set aside was to vest in the United States; and a subsection (b) granting to the State of Hawaii all the *public* [*i.e., ceded*] *lands and other public property, provided* that the United States should retain the ceded lands and ceded property which had been set aside.

I believe that section 5(c) of the Hawaii Statehood Act constitutes nothing more than a change in the drafting technique of the earlier bills. It combines the two virtually identical provisos into a separate subsection which uses the broader term "lands and other properties" in order to cover the "lands and other property" referred to in subsection (a) (*i.e.*, the ceded and afteracquired territorial properties set aside for the use of the United States), as well as the "public lands and other public property"

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vided in this Act: *Provided, however,* That as to any such lands or other property heretofore or hereafter set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States, whether absolutely or subject to limitations, and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union, the United States shall retain absolute title thereto, or an interest therein conformable to such limitations, as the case may be. As used in this subsection, the term 'public lands and other public property' means, and is limited to, the lands and other properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or other property so ceded. The lands hereby granted shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii."

[20] Subsection (a) also uses the phrases "lands and other property" and "lands or other property."

(ceded property) of subsection (b).[21] There is nothing in the legislative history of the Hawaii Statehood Act indicating a congressional intent to change very substantially the scope of section 5(c) beyond that of the provisos contained in the bills introduced in the 85th Congress. To the contrary, the portions of the House and Senate reports which refer to section 5(c) explain it as a "qualification" of sections 5(a) and 5(b),[22] an explanation identifying it with the prior bill.

The postlegislative history of the Hawaii Statehood Act does not contain anything which would require a modification of this interpretation of section 5. While the Hawaiian Omnibus Act (P.L. 86-624, 74 Stat. 411) was pending in committee, Congress was advised of the differences which had arisen concerning the interpretation of section 5 of the Hawaii Statehood Act. The House Committee on Interior and Insular Affairs included in its report on the Omnibus Act the following statement: "* * * The committee takes this opportunity to make it clear that subsection (e)'s reference to 'land or property that is retained by the United States' includes, in some cases (namely, those covered by subsec. (c)), all land whether it falls within the definition of public land given in the act or not and, in other cases (namely, those covered by subsec. (d)), only

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[21] The circumstance that subsection (c) forms a combination of the two provisos of the earlier bill also explains why Congress used the word "remain" in spite of the fact that with respect to territorial property that subsection caused a shift in title. (Cf. *supra*, n. 11.) The proviso to subsection (a) directed that as to set aside territorial property "the United States shall be and become *vested* with absolute title thereto, etc." The proviso to subsection (b), on the other hand, directed that as to the ceded set aside property of the United States "the United States shall *retain* absolute title thereto." When Congress combined the two provisos, it used a single verb to apply to both situations.

[22] H. Rept. 32, 86th Cong., 1st sess., p. 19; S. Rept. 80, 86th Cong., 1st sess., p. 17.

public land as that term is there defined." (H. Rept. 1564, 86th Cong., 2d sess., pp. 3-4, May 2, 1960)

The corresponding Senate report stated: "The committee considered possible interpretations of section 5(e) of the Hawaii Statehood Act of 1959. No interpretation is offered at this time. The sense of the committee is that the factors involved are too complex to be considered within the time available and require independent consideration at a later date." (S. Rept. 1681, 86th Cong., 2d sess., p. 4, June 24, 1960)

The congressional interpretation of a statute is, of course, ordinarily entitled to the highest respect. *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958). This consideration is greatly enhanced where a statute is interpreted by the same Congress which enacted it; but where, as here, the interpretation never reached the legislative level its usefulness is obviously impaired. Further, the Senate Committee, reporting after the House Committee, pointedly refused to take the same "opportunity" as the House Committee to "clarify" section 5(e) and specifically postponed consideration. In these circustances [sic], the House Committee interpretation of section 5 is not persuasive.

III.

The legislative history of section 5 accordingly shows that section 5(c) was meant to constitute merely an exception to sections 5(a) and 5(b) and was not meant to require the reporting of any afteracquired property of the United States. The same result is indicated by the circumstance that the properties referred to in sections 5(a) and 5(b) are the only properties which have been "set aside" for the use of the United States.

Section 5(e) refers "to any land or property that is retained by the United States pursuant to subsections (c) and (d)." The property "retained pursuant to section

5(d)'' is, according to the words of the statute, limited to ''public lands and other public property.'' Hence, no afteracquired property is ''retained by the United States pursuant to section 5(d).'' The property ''retained pursuant to section 5(c)'' is ''lands and other properties * * * set aside according to law for the use of the United States * * *.'' The only legal bases authorizing the setting aside of property for the use of the United States are sections 73(q) and 91 of the Organic Act of Hawaii which relate to ceded property and to afteracquired territorial property, *i.e.*, the types of property described in sections 5(a) and 5(b).

I am unaware of any authority to ''set aside'' any other category of property, in particular afteracquired property of the United States. Research has not disclosed a single attempt to do so, and reflection indicates that there has been no need to set aside any afteracquired property of the United States. In the situations provided for in sections 73(q) and 91 of the Organic Act of Hawaii, a set aside order was necessary in order to take property for the uses and purposes of the United States, because in the former case the Territory of Hawaii had title and possession, and in the latter, the Territory had retained the possession, use, and control of the property, and possibly even had acquired the legal title. On the other hand, the United States has legal title to, as well as the possession, use, and control of, its afteracquired property. The territorial government does not enter the picture at all. Hence, there never was any need to set it aside for the uses and purposes of the United States, a process used only where title or possession was vested in the Territory of Hawaii. It follows that no afteracquired property of the United States has been set aside pursuant to law, and that consequently, none has been ''retained by the United States pursuant to subsection (c).''

The Department of the Interior and the State of Hawaii dispute this conclusion by contending that section 5(c) does

not employ the words "set aside for the use of the United States" in the sense in which that term has always been understood with relation to Hawaii,[23] *i.e.,* to denote the taking of property for the uses and purposes of the United States, pursuant to sections 73(q) and 91 of the Organic Act of Hawaii. They argue that the term "set aside" "has various meanings and connotations,"[24] and that it refers here to the acquisition of property for the uses and purposes of the United States by any means, including purchase and the exercise of eminent domain.[25] It may be admitted that the term "set aside" may have more than one meaning though it is not generally a synonym for all forms of acquisition. Moreover, it has had a specific technical meaning with respect to Hawaii, and there is nothing in the statutory language or the legislative history of the Hawaii Statehood Act to indicate that Congress used the term "set aside" in other than that technical sense. To the contrary, section 16(b) of the Hawaii Statehood Act distinguishes between lands which were "acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii," and those which "were acquired by the United States by purchase, condemnation, donation, exchange or otherwise. * * *" The pertinent committee reports also use the term "set aside" as a term of art.[26]

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[23] Cf. *supra,* ns. 4-6.

[24] *Commissioner of Internal Revenue* v. *Strong Mfg. Co.,* 124 F. 2d 360, 363 (C.A. 6, 1941).

[25] With respect to Government property located in Hawaii, the courts have held that the setting aside under section 91 and acquisition by way of eminent domain are mutually exclusive. *United States* v. *Chun Chin,* 150 F. 2d 1016, 1017 (C.A. 9, 1945); *United States* v. *Marks, supra,* n. 5.

[26] Cf. H. Rept. 32, 86th Cong., 1st sess., pp. 5, 19; S. Rept. 80, 86th Cong., 1st sess., pp. 2-3, 17.

It also has been contended that if the term "lands and other properties that are set aside" did not include the afteracquired property of the United States, the Statehood Act would fail to make any disposition of such afteracquired property, thus leaving a gap in the statutory plan of disposition, and that Congress could not have intended such result. This argument assumes that Congress intended to provide in the Statehood Act for every type of property owned in Hawaii by the United States or the Territory of Hawaii, rather than simply for property which at some time had been property of the Republic or Territory of Hawaii. Why such intent should be presumed is not clear. All Congress had to do was to indicate which classes of property were to be transferred to the new State and its political subdivisions, and what exceptions were to be carved out of that general rule. It elected ultimately to vest title and possession in the State of Hawaii to all lands and other properties which had at one time belonged to the Republic or Territory and which at the expiration of the statutory five-year period were no longer required by the United States. The legislative history of the Hawaii Statehood Act is devoid of any indication that Congress intended to go beyond this method of disposing of the publicly owned property in Hawaii, or to include the afteracquired property of the United States among the categories of property specifically mentioned in the legislative plan.

It is therefore appropriate to conclude that Congress was concerned only with three classes of property: the property owned by the Territory and its subdivisions (section 5(a)); the ceded property (section 5(b)); and the territorial or ceded property set aside (sections 5(c) and 5(d)). There was no need for Congress to make any specific disposition with respect to any other type of property such as the afteracquired property of the United States. In the silence

of Congress the title to that property remained unaffected by Hawaii's acquisition of statehood.[27]

IV.

The State of Hawaii also makes the related contention that it was the congressional purpose to extend the reporting and conveyancing provisions of section 5(e) to after-acquired property of the United States in order to compensate the State of Hawaii for the ceded lands and after-acquired territorial property which had been set aside and consequently retained by the United States. Again, neither the Statehood Act nor its history contains any evidence of such legislative purpose.

The pertinent House and Senate reports [28] explain that through the years some of the ceded lands have been set aside for special purposes, that others have been exchanged for different lands, and that the State of Hawaii would acquire most of the remaining ceded lands, *i.e.*, those which have not been set aside which "are, for the most part, mountainous and of little value." Neither the reports nor the statutory language, however, disloses any legislative purpose to indemnify the State of Hawaii for the loss of the valuable ceded property which had been set aside. And, as already emphasized, there is no indication whatsoever of a congressional intent to effectuate this compensation by transferring to the State afteracquired property of the United States that might be surplus five years after the admission of Hawaii into the Union.

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[27] The reporting requirement of section 5(e) attaches to any land or property that has been *retained* by the United States *pursuant* to sections 5(c) and 5(d). The afteracquired property of the United States does not meet this condition since the United States has retained title to it not by operation of section 5(c), but because the Hawaii Statehood Act does not refer to it.

[28] H. Rept. 32, 86th Cong., 1st sess., p. 5; S. Rept. 80, 86th Cong., 1st sess., pp. 2-3.

Moreover, section 5(f) contradicts this contention of the State of Hawaii. I have shown that the Joint Resolution of Annexation directed that the proceeds of the ceded or public lands, except those used for civil, military, or naval purposes, "were to be used solely for the benefit of * * * the Hawaiian Islands for educational and other public purposes."[29] Sections 73 and 91 of the Organic Act of Hawaii (48 U.S.C. 663, *et seq.*, 511) provide accordingly that the ceded property, not set aside or taken for the uses and purposes of the United States, and the income derived therefrom, shall be used only for educational and other public purposes. Section 5(f) implements this reservation in favor of Hawaiian educational and other public purposes. It provides that the lands granted to the State of Hawaii by subsection (b) and *public* [*i.e., ceded*] *lands retained by the United States under subsection* (*c*) *and* (*d*) *and later conveyed to the State under subsection* (*e*) shall be held by the State as a public trust for educational and certain public purposes.

It will be noted that section 5(f) refers only to the "public [*i.e.*, ceded] lands" conveyed to the State under section 5(e). If it had been the congressional purpose to convey to the State under section 5(e) the afteracquired surplus property of the United States in order to compensate the State for the depletion caused by the setting aside of ceded property, there is no reason to believe that Congress would not have provided that such afteracquired property also would become subject to the public trust created by section 5(f). The circumstance that Congress has failed to do so establishes to my satisfaction that Congress never intended to extend the reporting and conveyance provisions of section 5(e) to any property other than that defined in sections 5(a) and 5 (b), *i.e.*, to territorial property and to ceded property set aside for the use of the United States.

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[29] *Supra*, n. 3.

The State of Hawaii finally takes the position that section 5(e) must necessarily refer to the afteracquired property because, otherwise, it would not have any meaning. This argument rests on the interpretation placed by the State on the clause in section 5(c) that the ceded property which has been set aside for the use of the United States "shall remain the property of the United States subject only to the limitations, if any, * * *" contained in the instrument which had set the property aside. The State contends that pursuant to those limitations, the United States did not acquire the absolute title to the ceded set aside property but merely a defeasible interest which shifts automatically to the State of Hawaii as soon as and whenever the property ceases to be used by the United States for the purposes specified in the instrument setting it aside. Since section 5(e) does not envisage an automatic transfer of property but requires a Presidential determination and an actual conveyance, and since its operation is limited to five years, the State of Hawaii argues that it cannot refer to the defeasible fees of the United States in ceded set aside property, and that section 5(e) must refer to the after-acquired property of the United States or be meaningless.

This contention of the State of Hawaii lacks persuasiveness for at least three reasons: First, the State's argument turns upon the assumption that the title to *all* of the ceded set aside property is unquestionably of a defeasible nature; if the United States acquired an absolute fee in only some of that property, or if the nature of its interest is doubtful, those considerations in themselves, would constitute a sufficient reason for the existence of section 5(e). It would seem more reasonable to regard the insertion in section 5(c) of the words "if any" as expressing congressional doubt as to whether the title of the United States in the

ceded set aside property, or at least in all such property, is defeasible or subject to the type of conditional limitation[30]

[30] The limitation referred to in section 5(c) clearly is the interest created by the set aside order. This interest differs substantially from the conventional defeasible fee. Ordinarily a defeasible fee is created by a conveyance which provides that the estate shall automatically expire upon the occurrence of a stated event. Such interest is usually created by the use of words such as "until," "so long as," or "during;" the mere statement of the purpose of the conveyance, however, is normally not sufficient to create a defeasible interest or "to debase the fee." American Law Institute, *Restatement of the Law of Property,* vol. I, sec. 44 and comments "l" and "m"; *American Law of Property,* vol. I, sec. 4.13; 2 Powell, *The Law of Real Property,* par 187, pp. 34, 36; Simes and Smith, *The Law of Future Interests* (Second Edition), vol. I, sec. 286, pp. 341, 343; *Abel et al.* v. *Girard Trust Co.,* 365 Pa. 34, 37, 73 A. 2d 682, 684 (1950).

Property set aside for the uses and purposes of the United States did not revert automatically to the possession, use, and control of the Territory of Hawaii as soon as it ceased to be used for the purposes for which it had been set aside, or, generally, for the purposes of the United States. Section 91 of the Organic Act of Hawaii provided that such property "may be restored to its previous status by direction of the President" and in some instances this even required an act of Congress (cf. act of July 27, 1954, 68 Stat. 567, and H. Rept. 980, 83rd Cong., 1st sess., pp. 2-4; S. Rept. 927, 83rd Cong., 2d sess., pp. 2-5). Moreover, and presumably as the result of the language of section 91, none of the set aside orders examined by me contains any clauses such as "until," "so long as," or "during," which normally are required to create a defeasible interest. At best, the orders recited the reason why the property was taken for the uses and purposes of the United States or of a particular department. Consequently, it is by no means certain that the United States acquired less than an absolute fee under section 5(c) in the ceded set aside property.

In this connection it may be pointed out that the discussions in the pertinent committee reports of the property interests retained by the United States pursuant to section 5 do not give any indication that the title of the United States constitues anything other than the conventional fee simple absolute. To the contrary, the reports state expressly that the section "also retains in effect the President's authority to restore lands to their previous status after admission." H. Rept. 32, 86th Cong., 1st sess., p. 5; S. Rept. 80,

suggested by the State of Hawaii. Section 5(e) thus would serve the definite purpose of enabling the State of Hawaii to obtain ceded set aside property which became surplus within five years after the admission of Hawaii, should it be determined that the United States holds that property, or a part of it, in fee simple absolute. Second, it is conceivable that, although a specific parcel of property is being used by an agency consistently with the purposes recited in the order pursuant to which it was set aside, it may, as a practical matter, "no longer be needed" within the meaning of section 5(e). Third, even if it should be assumed *arguendo* that the United States holds a defeasible title to all of that property, as claimed by the State of Hawaii, section 5(e) still would serve the important purpose of providing an administrative machinery in which it can be determined whether or not the contingency terminating the title of the United States has occurred.

In view of the foregoing considerations, I must answer the first question in the negative. In reaching this conclusion I am aware of the equitable argument made by the State of Hawaii, *viz.*, that it ought to receive the surplus afteracquired property in compensation for the many sacrifices it has made for the United States, in particular for the ceded properties which have been set aside. However, neither the language nor the legislative history of the Hawaii Statehood Act discloses to my satisfaction a congressional purpose to adjust in that statute Hawaii's equitable claims of this nature, however meritorious. It is, of course, still open to the State of Hawaii to seek appropriate

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86th Cong., 1st sess., pp. 2-3, see also id. at 19 and 17, respectively. In other words, section 5(e) is the equivalent of the President's authority under section 91 of the Organic Act of Hawaii to restore ceded set aside property to its previous status. The committee reports accordingly would seem to refute the State's theory that section 5(e) has no bearing on ceded set aside property, and that the title acquired in the latter by the United States is defeasible and shifts automatically to the State of Hawaii without Presidential action.

legislative action from the Congress which has the special constitutional function under Article IV, section 3, clause 2 of the Constitution of disposing of the property of the United States. *Alabama* v. *Texas,* 347 U.S. 272, 273 (1954); *United States* v. *San Francisco,* 310 U.S. 16, 29-30 (1940).

Respectfully,

ROBERT F. KENNEDY

[Appendix Omitted]

EXHIBIT I

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

JUN. 30, 1960

Dear Mr. Stans:

This will reply to Deputy Director Staats' letter of May 2, relating to certain questions which have arisen respecting section 5 of the Hawaii Statehood Act.

I enclose a copy of the opinion of the Associate Solicitor of this Department for Territories, Wildlife and Parks concerning the two legal questions presented by your letter, *i.e.,* whether section 5(e) applies to ceded land only, and whether the term "property" as used in that section means real property only. The Associate Solicitor has concluded that both questions must be answered in the negative.

Mr. Staats also requested information concerning Federal lands in Hawaii which are administered or controlled by this Department, with particular reference to the method of acquiring such lands. As of June 30, 1959 (the date of our most recent intra-Departmental report on this matter), the United States held title to and the Department of the Interior administered approximately 200,000 acres of land in Hawaii. Of these, 196,040.61 acres comprised the Hawaii National Park, and of this acreage, less than 8,000 acres

constituted land other than ceded land or lands in exchange for ceded land. The Fish and Wildlife Service administers the Hawaiian National Wildlife Refuge of 623 acres, of which all were ceded lands made available for the purpose of the refuge by Executive order. Finally, 2.2 acres are held by the Service for the purpose of a fish investigations laboratory. These acres were acquired from the Territory and were not ceded lands.

Pursuant to the last paragraph of Mr. Staats' letter, we shall refrain from disposing of any of the foregoing lands, or of any other property, real or personal, held by this Department in Hawaii, pending the resolution of the questions which have arisen.

Sincerely yours,

/s/ Roger C. Ernst
Ass't Secretary of the Interior

Hon. Maurice H. Stans
Director, Bureau of the Budget
Washington 25, D. C.
Enclosure

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Memorandum

To: Secretary of the Interior
From: The Solicitor

Subject: Construction of section 5 of the Hawaii Statehood Act

You have requested my opinion concerning two questions which have arisen under section 5 of the Hawaii Statehood Act (Public Law 86-3, 73 Stat. 4):

(1) Does the phrase "land . . . that is retained by the United States pursuant to subsections (c) and (d)" of

section 5, as that phrase is used in section 5(e), mean only land ceded to the United States by the Republic of Hawaii under the Annexation Resolution, and land acquired in exchange therefor?

(2) Does the term "property", as used in subsection (e), apply to real property only?

In my opinion, both questions must be answered in the negative, for the reasons set forth below.

(1) Does the phrase "land . . . that is retained by the United States pursuant to subsections (c) and (d)" of section 5, as that phrase is used in section 5(e), mean only land ceded to the United States by the Republic of Hawaii under the Annexation Resolution, and land acquired in exchange therefor?

In considering the question whether section 5(e) applies only to ceded lands or lands exchanged therefor, subsections (c), (e), and (g) of section 5 are pertinent:

> "(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.
>
> * * * * * * * * *
>
> "(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

* * * * * * * * *

> "(g) As used in this Act, the term 'lands and other properties' includes public lands and other public property, and the term 'public lands and other public property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded."

Subsection (d) of section 5 relates to "public lands or other public property" which is conveyed to the State of Hawaii under the Statehood Act, but which, immediately prior to Hawaii's admission, is controlled by the United States pursuant to a permit, license, or permission, written or verbal. Such "public lands or other property" may, during the five years following Hawaii's admission, be set aside by Act of Congress or Executive order for the use of the United States. No question is currently raised concerning subsection (d) and I shall therefore not refer to it further.

I construe sections (c), (e), and (g), when read together, to mean the following: Any lands in Hawaii, ceded or otherwise, which were acquired by the United States pursuant to an Act of Congress, an Executive order, or a proclamation by either the President or the Governor, shall remain the property of the United States; but if within five years following Hawaii's admission the President determines that such land is no longer needed by the United States, such land shall be conveyed to the State. I base this construction upon a reading of the definitions provided in subsection (g).

The definition of the term "public lands and other public property" is clearly limited to ceded lands and lands acquired in exchange therefor. Section 5(g) so states. The definition of the term "lands and other properties" is equally clearly not so limited. If it were, two definitions would be pointless. Additionally, the latter term is defined

to "include" public lands and other public property, and the word "include" is regarded as a word of enlargement, not of limitation (*People* v. *Western Airlines,* 268 P. 2d 723, 733 (Calif., 1954)). It is synonymous with "as well as" or "also" (*In re Links Estate,* 47 N.Y.S., 2d 40, 44 (1943)). "Lands and other properties" must thus include more than ceded lands.

What then, other than ceded lands, are included in the phrase "lands and other properties"? The lands other than ceded lands which are included are in my opinion "[a]ny lands . . . set aside [*i.e.,* acquired] pursuant to law for the use of the United States" under Act of Congress, Executive order, or proclamation. Those are the lands retained by the United States under section 5(c), and they are thus among the lands which are the subject of the report (and possible later conveyance to the State) under section 5(e).

If ceded lands alone were meant to be included, sections 5(c) and 5(e) would refer to "public lands and other public property". They refer instead to "lands and other properties" and "land or property". The land referred to is thus more than land acquired by the United States under the Annexation Resolution. It is also land acquired by the United States by purchase, condemnation, donation, or by any other means, so long as the means of acquisition was pursuant to an Act of Congress, Executive order, or proclamation. To conclude that only ceded lands are dealt with in sections 5(c) and (e) is to ignore the definitions which the Congress provided. "When a statute defines the meaning of a word it is clearly improper to seek to give such word a different meaning" (*Cothran & Connally* v. *U.S.,* 276 F. 48, 50 (Va., 1921)). But this is precisely the consequence of construing sections 5(c) and (e) as including ceded lands only.

By the construction I have adopted, I am of course required to read the term "set aside" in subsection (c) as

synonymous with the term "acquired". To do so may be unusual, but I find nothing to suggest that, as a matter of law, it is incorrect. The words "set aside" are not words of art. The courts have recognized that these words may have various meanings, depending upon their context (*Commissioner of Internal Revenue* v. *Strong Mfg. Co.,* 124 F. 2d 360, 363 (CCA-6, 1941)). And although the term "set aside" is used in its more traditional sense in section 16(b) (wherein the Act provides for exclusive Federal jurisdiction over certain lands which "were acquired by cession . . . by the Republic of Hawaii and set aside by Act or Congress or by Executive order or proclamation of the President or the Governor"), the Congress is not required to ascribe to particular terms the same meaning, even when those particular terms appear within the same statute (*Atlantic Cleaners & Dyers* v. *U.S.,* 286 U.S. 427, 433 (1932)).

Quite apart from the definitions it provided, there is clear evidence that the 86th Congress understood the difference between ceded land and land otherwise acquired. The legislative history of the Statehood Act makes clear that for many years the status of certain lands in Hawaii as ceded lands was recognized by the Congress. For example, in 1953 in its comments to the Senate upon S. 49 of the 83rd Congress (a bill which provided only for the conveyance of ceded land to the new State), this Department urged a specific definition of a term "public lands and other public property" in order "to eliminate any possibility of these [land grant] provisions being construed as providing for a grant to the new State of lands or other properties acquired by the United States, subsequent to the annexation of Hawaii, through such means as purchase, condemnation, or donation . . ." (S. Rept. 886, 83d Cong. 2d Sess. pp. 24, 30). The Senate Committee adopted the amendment, and language similar to it was generally contained in Statehood legislation thereafter. In the circumstances, there is no reason to suppose that Congress did not mean precisely

what it said in the subsections of the Statehood Act quoted above: that lands, including but not limited to ceded lands, are subject to reporting by Federal agencies and possible subsequent conveyance to the State.

I will not here undertake to summarize the extensive legislative history of land grant provisions in Hawaii Statehood legislation. This has been done thoroughly by the Bureau of the Budget in a document dated April 18, 1960, entitled "Legislative History of section 5 of the Hawaii Statehood Act". Our own review of the legislative history, and particularly our careful scrutiny of Departmental files, reveals nothing of significance not contained in the Bureau of the Budget's study. The Budget study, in turn, provides no comfort to those attempting to construe the present section 5. It is true that legislation prior to the 86th Congress was rather clearly designed to limit the land grant provisions to ceded land only. More particularly, the predecessors of subsection (c) (generally in the form of provisos to subsections (a) and (b)), were limited to ceded lands. But the 86th Congress changed the pattern of the land grant provisions, and in so doing, it used the phrase "lands and other properties" for the first time. Since the legislative history of earlier Statehood bills was directed toward significantly different language, I believe it cannot be given any weight.

In the 86th Congress, the legislative history is silent on the point now before us, save for the following exchange on the House floor:

> "Mr. Gross. On page 5 of the bill there is a provision which says that the President may dispose of land within a 5-year period after Hawaii becomes a state. I am referring to paragraph (e) on page 5. Will the gentleman please tell us the meaning of that provision?
>
> "Mr. Aspinall. That provision provides that the areas now held by the United States, for one purpose or another, may be held by the Federal Government for an additional period of not over 5 years for a deter-

mination as to how much of that area is to be needed permanently by the Federal Government, is for defense purposes primarily.

"Mr. Gross. And such land could be disposed of at the discretion of the President of the United States?

"Mr. Aspinall. No; the lands automatically go to the new state of Hawaii.

"Mr. Gross. That is not what the provision says.

"Mr. Saylor. Mr. Chairman, will the gentleman yield?

"Mr. Aspinall. I yield to the gentleman from Pennsylvania.

"Mr. Saylor. I should like to call attention of the Members of the House to the fact that the Federal lands in Hawaii come in two classes; first, those to which the Federal Government has title in fee. Those are not affected at all by this bill. The other lands affected by this bill are those which the United States Government holds under license. These lands are owned by the Territory of Hawaii. Upon the admission of Hawaii into the sisterhood of States, if there is no provision in the bill, all of the rights of the Federal Government in those lands will cease at once. The military, which occupy a large portion of these lands, have appeared before our committee and asked that for a period of 5 years the President be given the discretion to determine which of those lands are needed and which are not needed.

"Those which will be needed will be kept by the United States without any payment to the State of Hawaii of any sort or description, and those that are not needed will automatically then go back to the State of Hawaii.

"Mr. Gross. Mr. Chairman, will the gentleman yield?

"Mr. Aspinall. I yield to the gentleman from Iowa.

"Mr. Gross. Why should they not come to the Congress for the disposal of this land, rather than leaving

it to the discretion of a President? That is the way we dispose of other U.S. property, is it not?

"Mr. ASPINALL. These properties are in reality properties of the Territory of Hawaii.

"Mr. GROSS. Then why does a President have any discretion in the matter at all?

"Mr. ASPINALL. Because we presently hold possession over these particular areas.

"Mr. GROSS. So that we do control the land?

"Mr. ASPINALL. Just for certain purposes, that is all.

"Mr. GROSS. I think that under any circumstances the authority should be vested in Congress to dispose of any federally owned or controlled land." (*Cong. Rec.*, Mar. 11, 1959, p. 3494, daily ed.).

Inasmuch as the Congressmen contradicted one another respecting the status of the lands affected, the exchange as a practical matter must be disregarded.

I am also aware of the recent comments of the House Interior Committee in reporting H. R. 11602, the Hawaii Omnibus bill. Report Number 1564 (86th Cong., 2d Sess., pp. 3-4), states:

> "* * * The committee takes this opportunity to make clear that subsection (e)'s reference to land or property that is retained by the United States includes, in some cases (namely, those covered by subsec. (c)), all land whether it falls within the definition of public land given in the act or not and, in other cases (namely, those covered by subsec. (d)), only public land as that term is there defined. * * *"

Apart from the question whether such subsequent legislative history is entitled to weight, the effect of the foregoing language is largely offset by the comments later made during the Senate Interior Committee's consideration of the Hawaii Omnibus bill, S. 3054. I am informed that several members of the Senate Committee indicated their

disagreement with the House Committee's view, quoted above, and their consequent unwillingness to include in the Senate Report a similar paragraph. Thus, I cannot pay much deference to either Committee's comments during the session of Congress following enactment of the bill.

It will doubtless be argued that the construction I have urged results, under subsection (f) of the Statehood Act, in impressing a trust upon lands conveyed to the State under subsection (e) which were formally ceded lands, but does not impress a trust upon lands or other property conveyed to the State under that subsection if they were acquired by the United States by any other means. Inasmuch as the State of Hawaii was widely regarded as having an historical claim to lands ceded to the United States by the Republic, this result initially appears incongruous. However, I conclude below that the term "property" includes personal as well as real property, and thus that personal property too is subject to transfer under section 5(e). Since the holding by the State of personal property in trust would be impracticable in the extreme, I believe that the Congress' impressing a trust upon ceded lands alone and not upon *all* "lands and other properties", is entirely reasonable.

I would observe in passing that the mere fact that my construction of section 5 results in a particularly liberal property grant to the State of Hawaii is not inconsistent with the pattern recently established by Congress in connection with the admission of new States. The Alaska Statehood Act (Public Law 85-508), enacted merely eight months prior to the Hawaii Act, contains land grant provisions which are unprecedented in their liberality. Similarly, the Alaska Omnibus Act (Public Law 86-70), enacted soon after the Hawaii Statehood Act, contains additional provisions to assist the new State of Alaska, in the form of property grants as well as others. It is not inconsistent, therefore, to suppose that Congress meant to accord to Hawaii comparably generous treatment.

I have heard propounded a variety of ingenious theories to achieve the result of including ceded lands only within the terms of subsections (c) and (e). I think these theories must be rejected, because when definitions have been provided, they cannot be ignored. We must suppose that Congress meant what it said. I am impressed by this ingenuity, but not persuaded by it. "It is generally safe [in construing statutes] to reject an interpretation that does not naturally suggest itself to the mind of a casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey" (*Shulthis* v. *McDougal,* 162 F. 331, 341 (Okla., 1901)). The meaning conveyed by sections 5(c) and (e) to both the casual and the careful reader, can only be that ceded lands and other lands are included within their terms.

(2) Does the term "property", as used in subsection (e), apply to real property only?

I believe that the term "other properties" as used in subsection (c), and thus the term "property" as used in subsection (e), must be construed to include personal property. I find nothing in section 5, or elsewhere in the Statehood Act or its legislative history, to indicate that these terms mean real property only. There is, on the contrary, evidence that they do not, inasmuch as the reference is to "lands and other properties". Property other than land must mean either interests in real property, or personal property, or both. Since the term "property" is used unadorned, I believe it must be given its usual definition, and thus that it must be read to include personal property.

It is well known that the term "property" is extremely broad. Without limiting adjectives or other qualifications, the term includes property which is real, personal, and mixed, choate and inchoate, corporeal or incorporeal (*Hunt* v. *Authier,* 169 P. 2d 913, 917 (Calif., 1946)). It includes easements, franchises, and other incorporeal hereditaments, choses in action and everything which has an exchangeable value. (*In re Brown,* 21 F. Supp. 935, 937

(Iowa, 1938)). The foregoing construction is the usual definition of the term. We must presume that Congress intended to ascribe to the term its usual meaning. (*U.S.* v. *Wurts,* 303 U. S. 414, 417 (1938)). I therefore conclude that the terms "property" and "other properties", as used in subsections (c), (e), and (g), include personal property.

If it is urged that such a broad construction is unsound, inasmuch as the United States could not possibly, for example, wish to convey to the State of Hawaii its choses in action, I would reply that it need not do so. The President has sufficient discretion under section 5(e) to prevent such a result. If it is urged that only real property is intended to be included, because section 5(e) permits the President to "convey" property only, I would argue that the term "convey" need not be limited to real property. Although the term is properly used in a real property context only, its meaning need not be so restricted. "Popularly, it may apply . . . to personal property, and may be read in the sense of 'assign', 'sell', or 'transfer.' " (*Woodbine* v. *Van Horn,* 163 P. 2d 895, 897 (Calif., 1946)). Such use of the term is permissable, if such a construction is consistent with the "whole scheme" of the document being construed (*Thompson* v. *Thompson,* 69 N. Y. S. 223, 229 (1901)). Such a construction is in my opinion consistent in this case. One must either conclude that the term "property", unqualified, means real property only, or that the term "convey" is intended to mean "transfer" as well as convey. I find the former far more difficult than the latter, and I consequently conclude that sections 5(c) and (e) relate to personal as well as real property.

George W. Abbott
The Solicitor

By: (Signed)
A. M. Edwards
Associate Solicitor
Territories, Wildlife and Parks

EXHIBIT J

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

Memorandum

INTERPRETATION OF SECTION 5 OF THE HAWAII STATEHOOD ACT (PUBLIC LAW 86-3), APPROVED MARCH 18, 1959

I

INTRODUCTION

Regarding the questions raised in our opinion dated March 25, 1960, and supplement dated June 17, 1960, as to the types of lands and other properties which fall within the scope of the words "land or property" used in section 5 of the Hawaii Statehood Act (Public Law 86-3), approved March 18, 1959, Elmer B. Staats, Deputy Director, Bureau of the Budget, has requested opinions from General Services Administration, Department of Interior and Department of Defense. On June 30, 1960, Roger C. Ernst, Assistant Secretary of the Interior, submitted to Mr. Staats the memorandum of George W. Abbott, the Solicitor, by A. M. Edwards, Associate Solicitor, Territories, Wildlife and Parks; on July 26, 1960, Franklin Floete, Administrator of General Services Administration, submitted the memorandum, dated July 25, 1960, of J. H. Macomber, Jr., General Counsel of G. S. A.; on June 30, 1960, J. Vincent Burke, Jr., General Counsel of the Department of Defense, submitted his opinion to Mr. Staats.

Counsel for G. S. A., the Department of Interior and the Department of Defense have all recognized in their opinions that an ambiguity exists in the use of the words "land or property" in section 5(e) of the Hawaii Statehood Act and since section 5(e) pertains to "any land or property re-

tained by the United States pursuant to subsections (c) and (d)'', the answer to the problem is dependent on the interpretation of the words ''lands and other properties'' in section 5(c) and the definition of these words in section 5(g).

Section 5(e) of the Hawaii Statehood Act provides:

> ''(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.''

Section 5(c) of the Hawaii Statehood Act provides:

> ''(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.''

Section 5(g) of the Hawaii Statehood Act provides:

> ''(g) As used in this Act, the term 'lands and other properties' includes public lands and other public property, and the term 'public lands and other public property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.''

The term ''lands and other properties'' is defined in section 5(g) as including ''public lands and other public

property'' and ''public lands and other public property'' is in turn defined as being limited to lands and properties ceded to the United States by the Republic of Hawaii or lands that have been acquired in exchange for lands or properties so ceded. Counsel for G.S.A., the Department of Interior and the Department of Defense are agreed in their opinions that the words ''lands and other properties'' were evidently not intended to be limited to lands and properties ceded to the United States or land acquired in exchange for lands or properties so ceded, but to encompass therein more than the ''public lands and other public property.'' All three opinions are agreed that an interpretation that the term ''lands and other properties'' in section 5(c) is not limited to ''public lands and other public property'' as such an interpretation would be contrary to the distinction in the meaning of the two terms specifically set forth in section 5(g) and would render at least a part of section 5(g) meaningless.

The basic problem has now been refined to the scope of the words ''land or property'' referred to in section 5(e) whether it was intended substantially to apply to (1) all Federal land and property in Hawaii or (2) land and property ceded to the United States by the Republic of Hawaii and land acquired in exchange for lands so ceded and lands purchased by the Territory and subsequently taken by the United States.

It should be noted that, in his memorandum to the Secretary of the Interior, the Solicitor of the Department of Interior is of the same opinion as the State of Hawaii that the words ''land or property'' used in section 5 of the Hawaii Statehood Act refers to all Federal lands. He stated:

> ''I construe sections (c), (e) and (g), when read together, to mean the following: Any lands in Hawaii, ceded or otherwise, which were acquired by the United States pursuant to an Act of Congress, an Executive order or a proclamation by either the President or the

> Governor, shall remain the property of the United States; but if within five years following Hawaii's admission the President determines that such land is no longer needed by the United States, such land shall be conveyed to the State.
>
> * * * * * * * * *
>
> "The land referred to is thus more than land acquired by the United States under the Annexation Resolution. It is also land acquired by the United States by purchase, condemnation, donation, or by any other means, so long as the means of acquisition was pursuant to an Act of Congress, Executive order, or proclamation."

The State of Hawaii is in accord with the views expressed in the memorandum of the Department of Interior regarding the scope of the lands covered by section 5. This memorandum is submitted to restate the view of the State of Hawaii that section 5 encompasses all Federal lands in the State of Hawaii, including land and property ceded to the United States by the Republic of Hawaii, lands acquired in exchange for ceded lands, lands acquired by the Territory and subsequently set aside for use by the United States and lands acquired by the United States by purchase or condemnation, and to further elaborate the views of the State of Hawaii.

II

Status of the Lands Ceded by the Republic of Hawaii to the United States Upon Annexation

In order that the true perspective may be had of the provisions in section 5, it is absolutely essential that one must have a background of the history and status of ceded lands. Therefore, as a beginning section of this brief, we shall attempt to review the history and status of ceded lands.

A review of the history and status of ceded lands reveals that Congress has consistently in all legislation affecting public lands of the Territory of Hawaii recognized the

special trust imposed upon the lands ceded to the United States by the Republic of Hawaii. By the Treaty of Annexation of 1897 ratified by the Senate of the Republic of Hawaii on September 9, 1897, the Republic of Hawaii ceded to, and by the Newlands Resolution, approved July 7, 1898, numbered 55 (30 Stat. 750), the United States accepted the title to the public lands and other public property of the Republic of Hawaii upon the terms and provisions retaining for the people of Hawaii the beneficial ownership thereof but providing for the free use and occupancy of such property by the United States for its civil, military or naval purposes.

The Treaty of Annexation of 1897 ratified by the Senate of the Republic of Hawaii, September 9, 1897, provides in part:

> "Article II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.
>
> "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The Newlands Resolution, after accepting the cession, annexing the Hawaiian Islands and vesting title to property in the United States repeats the above proviso contained in the Treaty of Annexation.

As stated in an opinion of the Attorney General of the United States, September 9, 1899, 22 Ops. 574, the effect of the terms of the cession made by the Republic of Hawaii was:

> ". . . to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands."

See also 22 Ops. 627.

The special nature of these lands having been recognized by Congress in the Newlands Resolution when it provided that the existing laws of the United States relative to public lands were not applicable to these ceded lands but that Congress should enact special laws for their management and disposition, it was logical that when it passed the Hawaiian Organic Act, approved April 30, 1900 (31 Stat. 141), it gave the possession, use, and control of these lands to the government of the Territory of Hawaii. Section 91, as amended by Act of 1910 (36 Stat. 44), Act of 1930 (46 Stat. 789) and Act of 1958 (72 Stat. 709) provides in part:

> "That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; Provided, That when any such public property so taken for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii . . ."

Clearly, Congress recognized in section 91 of the Organic Act and all legislation involving public lands in Hawaii the terms of the cession accepted by it. In section 91 when land withdrawn by the United States for particular purposes had served those purposes the land was to be returned to the Territory for its benefit, the control of the land being vested in the Commissioner of public lands, appointed by the Governor of Hawaii with the advice and consent of the Senate of the Territory of Hawaii. For example, such a return took place when the Kahului custom house site was turned over to the Territory on January 19, 1929, and January 8, 1932, by Presidential proclamations.

It should be noted that by reason of the provision for retention of the beneficial ownership of the ceded lands by the Territory, all income from the ceded lands held by the Federal government had been turned over to the Territory of Hawaii. Therefore, it has been consistently recognized that ceded lands taken for the use of the United States but becoming excess to its needs cannot be sold for the benefit of the treasury of the United States but only returned to the Territory which may sell the lands so returned and place the proceeds into its own treasury. Similarly, if ceded land taken for the use of the United States is rented, these revenues were required to be remitted to the Territory.

Lest this acceptance by the United States of a trust relationship be thought strange in light of the United States' supposedly having purchased the public domain of the Republic of Hawaii by having "assumed" the public debt of the Republic (30 Stat. 751), it should be remembered the United States has always been fair in dealings with peoples and areas joining the Union. It would appear the public debt, of about $3,330,000 of the Republic was guaranteed by the United States rather than assumed because Act 2 of the Provisional Territorial Government, dated April 20, 1901, provided for the payment of a small

portion of said public debt as did also Act 5 of the 1901 Session Laws of the Territory of Hawaii and Act 108 of the 1909 Session Laws of Hawaii. Most important of all, of course, is the fact of the special treatment of Hawaii's public lands being accepted in the resolution of annexation and the almost contemporaneous opinion of the Attorney General recognizing the existence of the trust before the adoption of the Organic Act, which provided for the details of the relationship between the United States and its new Territory of Hawaii.

It should also be noted that the Territory of Hawaii has conformed to the terms of the Joint Resolution of 1897. Section 99-20 of the Revised Laws of Hawaii 1955 provides that the proceeds of disposal of public lands shall be applied consistently with the Joint Resolution of Annexation.

The role of the United States as trustee is not new. In the case of *United States* v. *Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U.S. 498, where lands of the Mille Lac Indians were disposed of under the general land laws of the United States in disregard of their rights, the court held that the United States held certain lands in trust for the Mille Lac Chippewas who are entitled to damages for their wrong disposal. The court stated that the cession was not to the United States absolutely but in trust and the trust by its terms was to be executed by the sale of the ceded lands and a deposit of the proceeds in the treasury of the United States to the credit of the Indians.

The court stated further that the disposal of these Indian lands by the United States was wrongful and the fact that it was pursuant to and in obedience to directions in two resolutions of Congress does not make it any less a violation of the trust.

The court, in *Minnesota* v. *Hitchcock,* 185 U. S. 373, stated:

> "The cession was not to the United States absolutely but in trust . . . The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the treasury of the United States to the credit of the Indians, such sums to draw interest at five percent and one-fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit."

In an action to recover penalty for driving sheep to range and feed on land belonging to the Ute Indians, the court, in *Hanson* v. *United States,* 153 F. (2nd) 162, stated:

> "We think it clear that while the legal title passed to the United States and the lands were subject to entry and sale, the beneficial title remained in the Indians and the United States held the lands as trustee for the Indians." Citing *Ash Sheep Co.* v. *United States,* 252 U.S. 159.

In *Ash Sheep Co.* v. *United States* (*supra*), the court in its opinion stated:

> "Whether or not the government became trustee for the Indians or acquired an unrestricted title by the cession of their lands depends on each case upon the terms of the agreement or treaty by which the cession was made . . . It is obvious that the relation thus established by the act between the government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust."

In this case the Act of Congress specifically stated that the moneys from proceeds of sale of the Indian lands are to be paid over and expended for the benefit of the Indians. The court further stated in this case that the Indian lands did not become public lands in the sense of being subject

to sale or other disposition under the general land laws. These Indian cases and the Treaty of Annexation of 1897 by the Republic of Hawaii accepted by the Newlands Resolution are therefore similar in that lands were ceded to the United States by treaty, Act of Congress or agreement. The treaties or agreements contained language imposing a trust or contained language that the proceeds of disposition of the land are to be deposited to the credit of the beneficiaries.

It should be noted that the United States, in section 5(f) of the Hawaii Statehood Act, may bring an action against the State of Hawaii for breach of trust. There is a serious question whether the United States, designated to act on behalf of the beneficiaries in section 5(f) could take these lands under trust for its own use.

For a period of sixty years, the United States has been making free withdrawals from the Hawaiian public domain for Federal uses and purposes. It should be noted that in the case of Puerto Rico, the United States with some exceptions, returned to the people the title of the public domain shortly after its acquisition and did not retain a right of free use as shown by the Acts of April 12, 1900 (31 Stat. 77) and July 1, 1902 (32 Stat. 77). Texas, the only other area which has come under the American flag by the voluntary action of its people did not cede to the United States its public lands or any right of free use of lands, except the existing public works (5 Stat. 797).

Throughout this brief it must therefore be kept in mind that the lands were held in special trust for Hawaii and that *the real grant to the new State of Hawaii in section 5(b) is the freedom from continued taking for Federal purposes together with freedom from supervision of Congress over the provisions of the state land laws.*

Certain portions of section 5 purport to make grants to the State of Hawaii of ceded lands but a careful analysis based on the "trust" background above mentioned shows

that it merely returns to the people of Hawaii what they beneficially own.

The Justice Department in its letter of January 28, 1954, to the Senate Interior and Insular Affairs Committee commenting on the provisions of Hawaii's Statehood Bill S. 49, as to the passing of title to the ceded lands granted to Hawaii, stated:

> "Section 3 deals with the passing of title of land in the manner aforementioned . . . In practical effect the transfer of title to public land may well be merely a paper transaction in that Hawaii will not be receiving much more than it has had in the past. This is due to the fact that by consent of the United States, Hawaii has been given the use of public lands not expressly set aside for Federal purposes. The public lands laws of the United States (e.g., the Homestead Act, the Mineral Leasing Act, and such) have not applied to Hawaii. Thus the situation is different from that involved in the admission of States to the Union in the continental United States."

III

Legislative History of Section 5

Although all the above-mentioned opinions submitted feel that the legislative history cannot be given any weight and there is nothing in the record or any legislative report specifically stating the reasons for the changes in the language of section 5 of the Hawaii Statehood Act in the 86th Congress, it can be presumed that Congress intended to give to the State of Hawaii within the five years after its admission into the Union all Federal lands in the State which are not needed in return for the free use of vast areas given to the United States out of ceded lands and lands acquired by the Territory of Hawaii as well as the free use of lands now under permit, license or permission which they could withdraw from the ceded lands in the next five years under section 5(d). The United States may withdraw possession and use of the ceded lands re-

turned to the State of Hawaii by section 5(b) and which were controlled by the United States pursuant to permit, license or permission, written or verbal. By its terms it includes verbal licenses, the terms of which or even its existence could be disputable.

It should be noted that H. R. 50 and S. 50 introduced in the 86th Congress contained the provisions of section 5 which had been introduced in other sessions of Congress. H. R. 888 was introduced in the House of Representatives on January 7, 1959, by Representative O'Brien of New York and for the first time the language of section 5 in substantially the form as it presently appears in the Hawaii Statehood Act was used with the exception of subsection (d).

Sections 5(a) and 5(b) of H. R. 50 and S. 50 provided:

> "(a) The State of Hawaii and its political subdivisions, as the case may be, shall have and retain all the lands and other public property title to which is in the Territory of Hawaii or a political subdivision thereof, except as herein provided, and all such lands and other property shall remain and be the absolute property of the State of Hawaii and its political subdivisions, as the case may be, subject to the constitution and laws of said State: Provided, however, That as to any such lands or other property heretofore or hereafter set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States, whether absolutely or subject to limitations, and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union, the United States shall be and become vested with absolute title thereto, or an interest therein conformable to such limitations, as the case may be.
>
> "(b) The United States hereby grants to the State of Hawaii, effective upon the date of its admission into the Union, the absolute title to all the public lands and other public property within the boundaries of the

State of Hawaii as described herein, title to which is in the United States immediately prior to the admission of such State into the Union, except as otherwise provided in this Act: Provided, however, That as to any such lands or other property heretofore or hereafter set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States, whether absolutely or subject to limitations, and remaining so set aside immediately prior to the admission of the State of Hawaii into the Union, the United States shall retain absolute title thereto, or an interest therein conformable to such limitations, as the case may be: Provided further, That the provisions of section 91 of the Hawaiian Organic Act, as amended (48 U.S.C. 511), which authorize the President to restore to their previous status lands set aside for the use of the United States, shall not terminate upon the admission of the State of Hawaii into the Union but shall continue in effect for a period of five years thereafter. As used in this subsection, the term 'public lands and other public property' means, and is limited to, the lands and other properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or other properties so ceded. The lands hereby granted shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii."

Subsection (d) of H. R. 888 with the additional language now existing in subsection (d) noted in parentheses provided:

"(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section (but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof) may, at any time during the five years following the admission of Hawaii

> into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.''

S. 50 was amended to incorporate the language used in H. R. 888 with the addition of the words noted above to subsection (d). As amended S. 50 became the Hawaii Statehood Act (Public Law 86-3).

It should be noted that subsection (d), as introduced in H. R. 888, virtually nullified the effect of subsection (b) in that it permitted during the five years following admission of Hawaii into the Union the taking of free use of additional lands previously returned to the State of Hawaii in subsection (b). The additional language inserted into subsection (d) mentioned above limited to some extent the additional withdrawals of possession and use by the United States to ceded lands controlled by the United States under permit, license or permission, written or verbal. In effect, subsection (d), as presently existing, nevertheless, permits during a period of five years additional withdrawals for possession and use of ceded lands which immediately prior to admission of Hawaii into the Union were controlled by the United States pursuant to permit, license or permission, written or verbal, from the Territory of Hawaii. The intention of Congress to compensate the State of Hawaii for these additional areas the free use of which would be given to the United States by subsection (d) is clear.

In a report submitted by Fred A. Seaton, U. S. Department of the Interior, Office of the Secretary, dated January 23, 1959, to the Chairman of the Committee on Interior and Insular Affairs, House of Representatives, which report is noted in Report No. 32 of the 86th Congress to H. R. 4221, he stated:

"We understand that these provisions (sections 5(d), (h) and section 16(b) were drafted after consultation with the Department of Defense, and we shall therefore not comment on their details. In general, however, we feel that the title to the land conveyed to the State should not be subject to the right of the Federal Government to take back the title, or an indefinite right of free use. The State is entitled to know at some reasonable time what it is authorized to do with the land. Moreover, there should be a limit on the right of the United States to take title to or free use of lands which it only holds in trust for the people of the present Territory."

The special nature of the ceded lands is again brought out in this report submitted to the Chairman of the Committee on Interior and Insular Affairs that the United States only holds the ceded lands in trust for the people of the Territory. As the Solicitor of the Department of Interior stated:

"Quite apart from the definitions it provided, there is clear evidence that the 86th Congress understood the difference between ceded land and land otherwise acquired. The legislative history of the Statehood Act makes clear that for many years the status of certain lands in Hawaii as ceded lands was recognized by the Congress."

On January 27, 1959, Rear Admiral Kenmore M. McManes, Deputy Chief of Naval Operations for Administration, made the following statement contained in page 69 of the Hearings before the Committee on Interior and Insular Affairs, House of Representatives, 86th Congress, 1st Session on H. R. 888 and H. R. 50 (Serial No. 1):

"The particular matter in point is a section which appears in H. R. 888, section 5d, which does not appear in H. R. 50.

"Admiral McManes. Yes, sir.

"Mr. BURNS. Can that be left out of the bill, or is that desired? I do not have any reference to critical areas or anything else.

"Admiral McMANES. Yes, sir. If we do not leave in that provision, sir, regarding the extension for 5 more years of section 91 of the Hawaiian Organic Act, H. R. 50 and similar bills would result in the following:

"They would confirm title, possession, and management of the United States in lands withdrawn for Federal use. Now we have no objection to that.

"They would also transfer complete fee title in the rest of the ceded lands, which have not been withdrawn for Federal use, to the State of Hawaii. Now that we do not like because at the present time we hold those lands under license. It would require, when Hawaii becomes a State, that we renegotiate with the State of Hawaii, and undoubtedly there would be rentals charged for that land.

"We would be deprived of the continued use without cost of about 114,000 acres of ceded land now occupied under Territorial license. We would be obliged to pay the market value for the lands which may be needed in the near future.

"This period of 5 years gives us an opportunity to negotiate with the State of Hawaii for the purpose of, shall we say, determining the conditions under which we can continue to occupy the land, and what the cost of it will be.

"Mr. BURNS. Your concern then, Admiral, is with lands which you presently have custody of or usage of, regardless of the method in which you use them?

"Admiral McMANES. That is correct, sir.

"Mr. BURNS. And not over the possibility of the potentiality of taking any further lands?

"Admiral McMANES. No, sir.

"Mr. BURNS. I think that answers the question, sir.

"Mr. O'BRIEN. Mr. Berry?

"Mr. BERRY. No questions.

"Mr. O'BRIEN. Mr. Edmondson?
"Mr. EDMONDSON. Mr. Chairman, I was also concerned about that provision of subsection d and about the take-back provision that applies. I am glad to get the assurance that nothing is contemplated other than lands now presently in use for military purposes.
"Admiral MCMANES. Yes, sir.
"Mr. BURNS. Will the gentleman yield?
"Mr. EDMONDSON. Yes, I yield.
"Mr. BURNS. As I understand the admiral's statement, we can so amend the bill to secure that which he wants to bring about without objection from the Department.
"Mr. EDMONDSON. I think that might be desirable.
"I have no further questions."

It is interesting to note the comment of Admiral McManes that the period of five years will give the military "an opportunity to negotiate with the State of Hawaii for the purpose of, shall we say, determining the conditions under which we can continue to occupy the land, and what the cost of it will be." Obviously, any "negotiation" under the provisions of section 5(d) and all the terms thereto will be in the military's favor.

On page 91 of the Hearings before the Subcommittee on Territories and Insular Affairs of the Committee on Interior and Insular Affairs, United States Senate, 86th Congress, 1st Session, on S. 50, February 25, 1959, appears a letter, dated February 25, 1959, of R. L. Kibbe, Capt., U. S. N., Deputy Chief of Legislative Liaison to Chairman, Committee on Interior and Insular Affairs, U. S. Senate, which states in part:

"With regard to the military aspects of Statehood for Hawaii, this bill provides for retention of ownership by the United States in all lands held for military purposes. The bill further provides that concurrent jurisdiction over such lands is to be vested in the State of Hawaii and the United States with the reservation to

the Congress of the authority, by legislative process, to take exclusive jurisdiction on behalf of the United States. These provisions are satisfactory to this Department.

"At the present time the military departments are occupying about 114,000 acres of ceded land under Territorial license. As there is no provision in S. 50 for the continued use of this land without cost, this Department could be deprived of the free use of such land. Following the hearings before the House Committee on Interior and Insular Affairs, H. R. 4221 was introduced. Section 5(d) of that bill reads:

" 'Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the 5 years following the admission of Hawaii into the Union, be set aside by act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.'

"This provision of H. R. 4221 would protect the interests of the Department of Defense and, at the same time, would permit the necessary time for the determination of the land needs of the Department by providing for a 5-year period in which to withdraw for Federal use that land which is being used by the military departments but which has not actually been withdrawn on the date on which Hawaii is admitted to the Union. It is therefore recommended that S. 50 be amended to include the above-quoted language."

It is admitted in this report that section 5(d) is included to permit the military time to determine their needs for additional lands by providing for a five-year period in which to withdraw for Federal use land being used but not withdrawn on the date Hawaii is admitted into the Union.

The broad scope of section 5(e) in turning over to the State of Hawaii any land or property which the United States did not need, in some measure offsets the results imposed by the language of section 5(d), which nullifies to some extent section 5(b). As the present language of subsections (d) and (e) introduced in H. R. 888 with later additions to subsection (d) indicate, it was obviously the intention to treat the State of Hawaii fairly and equitably. It should be noted that the conveyances to the State of Hawaii of lands not needed by the Federal government are for a period of five years only and is not intended as perpetually diminishing Federally held lands.

It should be noted that in the cases involving Indian lands previously discussed in Part II the courts have construed statutes of Congress liberally in favor of the Indians who are wards of the Nation and dependent wholly on its protection and good faith. Likewise in the case of Hawaii it is obviously the intention of Congress to treat the State of Hawaii fairly and equitably.

Where an Act is ambiguous and fairly susceptible of two constructions, it is permissible to consider whether the legislature could have intended a construction which is inequitable. In the case of *United States* v. *City National Bank of Duluth,* 31 F. Supp. 530 (1939), the court stated:

> "It is to be presumed that the legislature did not intend a law to work a hardship or injustice and it is a reasonable and safe rule of construction to resolve any ambiguity or absurdity in a statute in favor of a just and equitable operation of the law." Citing 25 R.C.L. section 258.

The court, in *Sorrells* v. *United States,* 287 U.S. 435 (1932), stated:

> "To construe statutes so as to avoid absurd or glaringly unjust results foreign to the legislative purpose is, as we have seen, a traditional and appropriate function of the courts."

Where the terms of the statute were not reasonably certain as to the intended application to particular cases, the court stated in *Age-Herald Publishing Company* v. *Huddleston,* 207 Ala. 40, 92 So. 193, 37 A.L.R. 898:

> "Though their general intent and application are clear, they should be given such a construction as is conducive to fairness and justice and in harmony with the general spirit and policy of the statute rather than one which is offensive thereto if that construction is reasonably inconsistent with the language used."

The court further stated that where the language is so lacking in clearness and precision that they may in reason mean either one thing or another, the considerations of fairness, justice and policy will be given weight in the ascertainment of legislative intent and may even be decisive of that intent.

In *Bankers Trust Company* v. *Bowers* (C.C.A. 2) 295 F. 89, 31 A.L.R. 922, the court stated:

> "Where a construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be vetoed if another and more reasonable interpretation is present in the statute." Citing *Milton* v. *Moore,* 178 U.S. 41, *Bate Refrigerating Company* v. *Sulzberger,* 157 U.S. 37.

The court stated further that unless the language compels such a result, the construction placed thereon should avoid unjust consequences.

In the case of *Hawaii* v. *Mankichi,* 190 U.S. 197 (1903), the court was faced with the construction of language used in the Newlands Resolution. The court stated in its opinion:

> "But there is another question underlying this and all other rules for the interpretation of statutes and that is what was the intention of the legislative body. Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of

> authorities to the effect that the intention of the law-making power will prevail even against the letter of the statute or as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske,* 23 Wall. 374, 380; 'A thing may be within the letter of the statute and not within its meaning and within its meaning though not within its letter. The intention of the lawmaker is the law.' "

The court citing *Plumstead Board of Works* v. *Spackman,* L.R. 13 Q.B.D. 878, 887 further stated:

> "If there are any means of avoiding such an interpretation of the statute (as will amount to a great hardship), a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice, but to my mind a judge ought to struggle with all the intellect that he has and with all the vigor of mind that he has against such an interpretation of an act of Parliament and unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

IV

Scope of Words "Land or Property" Used in Section 5(e)

Section 5(e) of the Hawaii Statehood Act provides that within five years after Hawaii is admitted into the Union each Federal agency controlling "any land or property" retained by the United States pursuant to subsections (c) and (d) shall report regarding its need and if no longer needed by the United States it shall be conveyed to the State of Hawaii. The language referring to any land or property used in this section is very broad in scope and concept. The only restriction and limitation to the language in section 5(e) is that it shall be pursuant to subsections (c) and (d). The scope of subsection (d) presents no problem as it is expressly limited to "public lands or other public property" which in subsection (g) is defined as lands and properties that were ceded to the United States by the Republic of Hawaii or acquired in exchange for lands or properties so ceded.

Section 5(c) on the other hand provides that "any land and other properties" set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive Order, (3) Proclamation of the President or (4) Proclamation of the Governor shall remain the property of the United States subject only to the limitations imposed thereunder. Part VI hereinafter explains the position of the State of Hawaii as to the meaning of the words "subject, however, to limitations."

Congress has in section 5(c) again used language which is very broad in scope and concept. It could easily have provided that the "lands and other properties" covered therein are restricted to the "lands and other properties" mentioned in subsection (a) and subsection (b). Such restrictive language, however, was not used and Congress has instead provided in subsection (c) that "any lands and other properties" on the date of admission set aside for the use of the United States under any of the methods of transfer set forth shall remain the property of the United States, subject to certain limitations imposed and also to the limitations imposed by section 5(e). It should be noted that subsection (d) contains a limitation not contained in subsection (c). Section 5(d) provides: "Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) . . ." Obviously there is a reason for the restriction inserted in subsection (d) and the absence of it in subsection (b), Congress intended subsection (d) to be restrictive and intended to give a broad scope to subsection (c). It is therefore our contention that subsection (c) stands by itself, that it is not solely limited to the lands mentioned in subsections (a) and (b) and that it includes more than lands in subsections (a) and (b).

The words "any land and other properties" are further defined in subsection (g) as including public land and other public property and the term "public land and other public property" means lands ceded by the Republic of Hawaii or lands acquired in exchange for lands so ceded.

The language used in this definition is likewise very broad in scope and not restrictive to (1) ceded lands, (2) ceded lands and lands acquired in exchange for ceded lands or (3) ceded lands, lands acquired in exchange for ceded lands and lands acquired by the Territory of Hawaii by purchase, condemnation, gift or donation. If Congress had intended to limit and restrict the definition of the words to a particular type of property they could easily have so provided without difficulty.

It has been held that the word "includes" is a word of enlargement and not of limitation. *People* v. *Western Air Lines,* 268 P. 2d 723, 733, 42 Cal. 621. *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95. *United States* v. *Gertz,* 249 F(2) 662.

The words "lands and other properties" are also used in paragraph (a) which provides as follows:

> "Sec. 5(a). Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title."

To determine the meaning of the words as used in this section, we refer again to subsection (g) that the term includes public lands and other public properties. Taking this definition, it should be noted that in subsection (a) the words apply to ceded lands as well as lands acquired by the State by purchase, condemnation, gift or donation. Taking such a broad application and use of the words "lands and other properties" in subsection (a), can it be argued that it was used in a restrictive sense in subsections (c) and (e)? We cannot agree with such an interpretation. It must have been the intention of the Congress to include in subsections (c) and (e) all lands however acquired by the United States, by gift, donation, purchase or condemnation. An argument that it was all inclusive in subsection (a) and

of limited and restricted meaning in subsection (c) is inconsistent and creates confusion in interpretation. Clearly the intent was to be consistent and to treat both governments fairly and equitably.

We further do not feel that Congress intended to leave a gap in the statute which would be the case if Federally acquired or condemned lands are not to be included within its scope. It is not likely that Congress had forgotten to mention that lands owned by the United States in fee by purchase or condemnation shall remain the property of the United States. It is the contention of the State of Hawaii that these lands were covered by Congress by the broad and all-inclusive language used in section 5(c) and that therefore all lands in which the United States had an interest, legal or equitable, were taken care of by the section. Within five years from the date of admission into the Union, each Federal agency controlling any land or property of the United States must report the facts of its need to the President and if the lands are no longer needed they shall be returned or conveyed to the State of Hawaii.

The House Committee on Interior and Insular Affairs in House Report No. 1564 pertaining to H. R. 11602, the Hawaii Omnibus Bill, stated the following regarding the scope intended by subsection 5(e) of the Hawaii Statehood Act:

> "The committee takes this opportunity to make clear that subsection (e)'s reference to 'land or property that is retained by the United States' includes, in some cases (namely, those covered by subsection (c)), all lands whether it falls within the definition of public land given in the act or not and, in other cases (namely, those covered by subsection (d)), only public land as that term is there defined."

V

Meaning of the Words "Set Aside" in Section 5(c)

As previously mentioned, in interpreting the scope of the words "land or property" in section 5(e), the provisions of section 5(c) are relevant as the "lands or property" in section 5(e) are "pursuant to sections 5(c) and 5(d)." Section 5(c) states that any lands and other properties on the date of Hawaii's admission into the Union which are set aside pursuant to law for the use of the United States under any (1) act of Congress, (2) Executive order, (3) Proclamation of the President or (4) Proclamation of the Governor remains the property of the United States, subject to the limitations imposed therein.

General Counsel for G. S. A. urges that the term "set aside" in section 5(c) should be used in a restricted sense and that it has been used principally in relation to reservations of public property under section 91 of the Hawaiian Organic Act. It should be noted that these words "set aside" have never been used in section 91 or the Treaty of Annexation of 1897 or the Newlands Resolution, approved July 7, 1898, numbered 55 (30 Stat. 750). Section 91 merely states that ". . . the public property ceded and transferred to the United States by the Republic of Hawaii . . . shall remain in the possession, use and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purpose of the United States by direction of the President or of the Governor of Hawaii."

The term "set aside" has various meanings and connotations, depending on the manner in which said term is used. *Commissioner of Internal Revenue* v. *Strong Mfg. Co.*, 124 F.2d. 360 (1941). The court there further stated that where a particular construction of a statute will produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in

the statute. The court went on further to say that where the meaning is uncertain, a statute will be construed so as to avoid unnecessary hardship. Citing *Burnet* v. *Guggenheim,* 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748. It is generally interpreted to mean "to set apart for a purpose; to reserve." Webster's New International Dictionary.

In *Glenn* v. *Glenn,* 41 Ala. 582, the court said, "To allot is usually understood as meaning to set apart a portion of a particular thing or things to some particular person." Where the word "appropriate" was used, the court in *State* v. *Derham,* 39 S.E. 379 held that it meant set apart or to designate for a particular purpose.

Where a parcel of *public land* is "set aside" for a particular purpose pursuant to law, it is set apart, reserved or severed from the mass of other public lands and is no longer subject to the general laws applicable to the public lands until it is withdrawn from such use by an Act of Congress. *Wilcox* v. *McConnel,* 15 Pet. 513, (1839). Likewise, where a parcel of *private land* is acquired by purchase, donation, condemnation, exchange or otherwise by the Federal government for a particular purpose, there is no question that said parcel of land is set apart or severed from the other public lands of the government and that it cannot be used for any other purpose without the authority of Congress. In an opinion rendered on October 24, 1919, the Judge Advocate General of the United States Army stated:

> "Inquiry is made whether any additional legislation is needed to establish a national cemetery at Camp Lewis, Washington . . . The Congress in the Army appropriation act of August 29, 1916 (39 Stat. 619, 623), having authorized the Secretary of War to accept for the United States lands 'for permanent mobilization, training, and supply stations,' and the Camp Lewis tract having been donated and conveyed for such purposes, no part of the land can be devoted to any other purpose without the authority of Congress which is vested with the Constitutional power 'to dispose

> of and made needful rules respecting the territory and other property of the United States.' "

In *Jones* v. *Oklahoma City,* 137 P. 2d. 233 (1941), a case involving the condemnation of private land for a public use, the court in interpreting the term "appropriate" said:

> "It is noted that the petition for condemnation of the property referred to the specific statute authorizing it to acquire fee simple title to property . . . Throughout the proceedings it is noted that when reference is made to the taking of the land the word 'appropriation' is used. A well-understood meaning of the word 'appropriate' is *'to set apart for, or assign to, a particular purpose or use, in exclusion of all others.* Webster's New International Dictionary. 3 Words and Phrases, p. 803 et seq. . . . *Condemnation is an enforced sale and the condemnor stands toward the owner as buyer toward seller."* (Emphasis added.)

And in *Wulzen* v. *Bd. of Sup'rs.,* 101 Cal. 15, 35 Pac. 353 (1894), the court said:

> *"To condemn land is to set it apart or expropriate it for public use."* (Emphasis added.)

See also *New Orleans* v. *United States,* 10 Pet. 661 (1836).

The Attorney General of the United States in an opinion dated August 23, 1922, Vol. 33 Ops. 288, where four parcels had been acquired under specific authority of Congress for naval purposes, stated that these parcels cannot be transferred without specific authority conferred by Congress and that authority to transfer these tracts from the Navy Department to the Department of Commerce is wanting. The opinion further stated:

> ". . . in every instance the tracts . . . were acquired under specific authority granted to that end by Congress itself. Under the Constitution (Art. IV, Sec. 3) 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the

> territory or other property belonging to the United States'; and I am unaware of any statute by which it has empowered the Secretary of the Navy to surrender control over these tracts, avowedly acquired for naval uses, by permanent transfers to other executive branches, however desirable the proposed governmental uses may be . . ."

This case is to be distinguished from the cases involving the public domain where lands may be transferred to another department for new uses by the President. (33 Ops. 436, February 3, 1923).

Thus, when Congress used the term "set aside" in section 5(c), it must have intended that word to cover all the lands that have been set apart or severed from the other public lands owned by the Federal government, regardless of whether such lands set aside for a particular purpose have been acquired by cession, purchase, donation, condemnation, exchange or otherwise.

The words "set aside" are also used in section 16(b) of the Hawaii Statehood Act, which reads in part:

> "(b) Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer (sic) to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: . . ."

There is no difficulty here. Congress is merely recognizing that the lands that have been *acquired by cession* by the United States must be set aside for a particular use by Act of Congress or executive order or proclamation of the President or by the Governor of Hawaii to set it apart from the other public lands and that the lands acquired by the United States by purchase, condemnation, donation, exchange or otherwise are set aside for a particular use by the act of acquisition itself.

VI

Meaning of the Words "Subject to Limitations" in Section 5(c)

Section 5(b) states that the United States grants to the State of Hawaii, upon its being admitted to the Union, the United States' title to *all* the public lands within the boundaries of the State of Hawaii, *except* those lands which had been previously set aside for the use of the United States, under any (1) Act of Congress, (2) Executive order, (3) Proclamation of the President or (4) Proclamation of the Governor of Hawaii, "which lands shall remain the property of the United States, *subject only to the limitations,* if any, imposed under (1), (2), (3) or (4), as the case may be." (Emphasis added.)

The word "limitation" has certain known and distinct meanings. In the case of *Starnes* v. *Hill,* 16 S.E. 1011 (1893), the court said:

> "The word 'limitation' has two well-known and distinct meanings. In the one, the primary meaning, it signifies a marking out the bounds or *limits of the estate created;* in the other, it signifies simply the creation of an estate." (Emphasis added.)

And in the case of *Price* v. *Forrest,* 35 Atl. 1072, 54 N.J. 659 (1896), the court said:

> "The . . . word 'limitation,' in its most technical sense, when used in the habendum, is an appropriate term un-

> der which to declare the nature and extent of the estate granted, *and the uses for which the grant is made.*" (Emphasis added.)

See also *Hoffman* v. *Trenton Times,* 8 A.2d 837 (1939). Thus, the phrase "*subject only to the limitations*" as used in section 5(c) signifies that the parcels of land that had been previously set aside pursuant to law for the use of the United States under any act of Congress, executive order, proclamation of the President or the Governor of Hawaii, are specifically limited to the particular uses mentioned in the document setting aside said lands. And, where an estate is made subject to a special limitation, it is known as a determinable or qualified fee, which terminates without entry when the use specified ends or ceases. *Yarborough* v. *Yarborough,* 269 S.W. 36 (1925); *Board of Education* v. *Brophy,* 106 Atl. 32 (1919); *Hoffman* v. *Trenton,* 8 A.2d 837 (1939).

In *Slegel* v. *Herbine, et al.,* 23 Atl. 996, 148 Pa. St. 236 (1892), there was a conveyance of a parcel of land to the commissioners of Bucks County, excepting and reserving unto the grantor, his heirs and assigns, forever hereafter, the free liberty and use of the granted premises and every part thereof, for an open yard, garden or grass lots with the rents, issues, and profits of the same and every part thereof. The habendum of the deed provided that the lands granted shall be held "to and for the use, intent and purposes following: That is to say to be and remain hereafter unbuilt on, in order to prevent any prisoner or prisoners making escape over said prison wall." The court in this case held as follows:

> "The grant is of the land itself, subject to a conditional reservation of the use of the surface. It seems clearly that had the grantor or his assigns undertaken to use the lands in the manner different from that permitted by the reservation, coupled with the proviso, the grantees or their successors could, by ejectment, have ousted them altogether."

The court further stated:

> "It is a rule in the construction of a statute . . . that what is clearly implied is as much a part of it as what is expressed. *United States* v. *Rabbitt,* 1 Black 61 . . . The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned, and no other. Where an estate is conveyed in fee for special purpose, 'and no other,' the fee is a base fee, determinable upon the cessation of the use of the property for that purpose. *Scheetz* v. *Fitzwater,* 5 Pa. St. 126."

In *Jordan, et al.* v. *Goldman,* 34 Pac. 371, 1 Okl. 496 (1891), by the treaties between the United States and the Cherokee Nation of May 6, 1828, and of February 14, 1833, the United States granted to the Cherokees 7,000,000 acres of land for a permanent home. The treaties further provided that "in addition to the 7,000,000 acres of land thus provided for and bounded, the United States further guarantees to the Cherokee Nation a perpetual outlet west, and the free and unmolested use of all the country west, of the western boundary of said 7,000,000 acres, as far west as the sovereignty of the United States and their rights of soil extends." The court held that the Cherokee Nation could use the lands set apart for an outlet for that purpose only, and a settlement by them or others under licenses from then on the outlet and the operation of stone quarries thereon, was unwarranted extension of the guarantee made by the treaties.

In *In Re Wolf,* 27 Fed. 606 (1886), the court citing *United States* v. *Rogers,* 23 Fed. 659, ruled that the Cherokee Indians held what is called the "Cherokee outlet" by grant from the United States and that the title thereto was a base, qualified or determinable fee.

It is generally held that the statement of purpose for which a parcel of land is conveyed does not limit the estate conveyed. However, the rule is that, in grants from

the Crown or government a conditional estate may be created when the land is conveyed for a certain purpose or with a particular intention. *Rawson* v. *Inhb. of School District, etc.,* 7 Allen 125 (Mass.), 83 Am. Dec. 670 (1863). See also *Kekuke* v. *Keliiaa,* 5 Haw. 437 (1885). Moreover, in our situation, section 5(c) clearly states that the lands previously set aside for a public use are "subject to the limitations" in the document setting aside said lands. Where any land is specifically subject to a limited use, the estate therein created is a base, qualified or determinable fee.

As previously noted, the public lands of Hawaii were originally all owned by the Republic of Hawaii. By the Treaty of Annexation and the Newlands Resolution, said lands were ceded to the United States, but held in trust for the people of the Hawaiian Islands. A careful analysis of the history of the public lands of Hawaii shows that the lands "set aside" pursuant to law for the use of the United States were all set aside for specific purposes. When those lands were no longer needed for the use for which they were set aside, they were usually returned to and placed under the control of the Hawaiian government.

The opinions of the Attorney General of the United States are not uniform as to whether or not the President of the United States may reassign from one department to another by executive order the lands that had been previously set aside for a particular use. The earlier opinion clearly stated that, once a parcel of public land has been set aside for a public use pursuant to law, the President had no authority to return said land to the public domain nor to transfer said land from one department to another department. 28 Op. 143. Subsequent thereto, an opinion rendered in 1934, 37 Op. 431, held that, where the President had set aside a parcel of public land for a public use, he may thereafter transfer said parcel of land from one department to another without first returning said land to the public domain. The reason given was

that, should the President return said land to the public domain, he had the authority to again set aside said land for another public use. Thus, instead of requiring the President to first return the land to the public domain before issuing another executive order or proclamation setting aside the same parcel of land, the opinion held that the President was authorized to directly transfer the land previously set aside from one department to another.

The above opinion, however, is not applicable to the public lands that had been ceded to the United States pursuant to the Treaty of Annexation and the Newlands Resolution. Said documents clearly stated that the laws of the United States on public lands shall *not* apply to the ceded lands, but that Congress shall pass special legislation for said lands. In addition thereto, when a ceded land which had been previously set aside for a public use is no longer necessary for said use and is returned to the State of Hawaii, under section 5 of the Hawaii Statehood Act, the President of the United States has no authority to set aside said land for another public use.

The lands that had been previously set aside for the use of the United States and no longer being used for the purpose for which they were set aside have been returned to the State of Hawaii pursuant to section 5(c) of the Hawaii Statehood Act. In addition, in the future, whenever such ceded lands are no longer used for the purpose for which they were previously set aside, full title thereto shall be vested in the State of Hawaii pursuant to section 5(c), without any action on the part of the United States or the State of Hawaii. Thus, when Congress enacted section 5(e), it must have intended said section to cover lands which could be transferred to the State of Hawaii only by the overt act of the United States. Since lands directly acquired by the United States for a public purpose by means of purchase, condemnation, exchange or otherwise, can be transferred to the State of Hawaii only by the overt act on the part of the United States, this section 5(e) must have intended to cover said lands.

CONCLUSION

Based on the foregoing, it is the contention of the State of Hawaii that all Federal lands, including ceded lands and lands acquired by the United States, not needed by the United States, during the five years following Hawaii's admission as a State, shall be returned or conveyed to the State of Hawaii. The State of Hawaii is in accord with the opinion of the Solicitor of the Department of Interior that Congress intended to include all Federal lands within the definition of the words "lands and other properties" used in section 5(c) of the Hawaii Statehood Act. It is the position of the State of Hawaii that:

1. The government and Crown lands ceded to the United States by the Republic of Hawaii by the Treaty of Annexation of 1897, accepted by the Newlands Resolution, was held by the United States under a special trust for the people of the Territory of Hawaii. This trust has been consistently recognized by all Federal legislation involving public lands in Hawaii and further recognized throughout section 5 of the Hawaii Statehood Act.

2. The Legislative History indicates that Congress intended to compensate the State of Hawaii for the possession and use of ceded lands which it retains under section 5(c) and the free use of additional areas now under permit, license or permission, written or verbal, which it may withdraw under section 5(d).

3. The words "lands and other properties" used in sections 5(a) and 5(c) are broad in scope and not restrictive. In section 5(c) the words mean all Federal lands, including ceded lands, lands acquired in exchange for ceded lands and lands acquired by the United States.

4. The words "set aside" used in section 5(c) are not used in a restrictive or limited sense but is synonymous with the words "appropriate," "acquired" or "allot" and under section 5(c) all Federal lands "acquired" by the

United States under any of the methods mentioned in section 5(c) remain in the United States, subject to limitations.

5. The words "subject only to the limitations," used in section 5(c) impose a special limitation on the ceded lands which remain in the United States. When these lands are no longer used for the purpose for which they were set aside, title thereto automatically vests in the State of Hawaii.

Therefore, by section 5(e) all other Federal lands controlled by the United States and not needed during the five-year period after the admission of Hawaii into the Union shall be conveyed to the State of Hawaii.

(s) SHIRO KASHIWA
Shiro Kashiwa
Attorney General

(s) ALANA W. LAU
Alana W. Lau
Deputy Attorney General

(s) JON J. CHINEN
Jon J. Chinen
Special Deputy Attorney General

(s) WILBUR K. WATKINS, JR.
Wilbur K. Watkins, Jr.
Deputy Attorney General

EXHIBIT K

Department of the Navy Reports to the Budget Bureau Regarding the Four Public Housing Project Areas

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EXHIBIT K, ITEM I

John Rodgers Area Report

HAWAII PROPERTY REVIEW REPORT

Prepared pursuant to Bureau of the Budget Circular No. A-52 (Section 7)

1. AGENCY: Department of the Navy 2. DATE: 28 Mar 1961 3. NAME AND/OR LOCATION OF INSTALLATION, TRACT, OR INTEREST: John Rodgers Veterans Housing Area, Honolulu, Oahu, Hawaii 4. TYPE OR BASIC FUNCTION OF INSTALLATION, TRACT, OR INTEREST: Low-cost housing

A. SET-ASIDE ACTIONS. None.

B. METHOD OF ACQN. Acquired by condemnation proceeding in 1940, Civil No. 436, for establishment of housing for Navy personnel.

C. DESCRIPTION. Land comprises 16 acres owned in fee by the United States. The cost of this land was $14,000 and the Government has constructed improvements thereon at an initial cost of $703,611. These improvements consist primarily of 45 WWII barracks-type temporary buildings, with appurtenant utilities, sidewalks and roads. No Government personal property is involved.

D. STATEMENT OF NEED. The Department of the Navy has no present or foreseeable requirement for this property. The property has been screened with the Departments of the Army and the Air Force and no defense requirement has materialized. The Secre-

tary of Defense has been requested to authorize the reporting of the property to GSA as excess to the DOD, reserving to the U. S. easements for access and for the continued maintenance, operation and repair of utilities within the property.

EXHIBIT K, ITEM II

Halawa Area Report

HAWAII PROPERTY REVIEW REPORT

Prepared pursuant to Bureau of the Budget Circular No. A-52 (Section 6b)

1. AGENCY: Department of the Navy 2. DATE: 28 Mar 1961
3. NAME AND/OR LOCATION OF INSTALLATION, TRACT, OR INTEREST: Aiea/Halawa Veterans Housing Area, Oahu, Hawaii
4. TYPE OR BASIC FUNCTION OF INSTALLATION, TRACT, OR INTEREST: Low-cost housing

A. SET-ASIDE ACTIONS. A portion of Lot 2 of PEO No. 8320, dated January 15, 1940. Copy attached as Exhibit "A".

B. METHOD OF ACQN. *Tract A.* Set aside to Army from ceded property and transferred from Army to Navy.

C. DESCRIPTION. *Tract A.* 3.230 acres—vacant area.

D. STATEMENT OF NEED. The Department of the Navy has no present or foreseeable requirement for this tract. It has been screened with the Departments of the Army and Air Force, and no defense requirement has materialized

A. SET-ASIDE ACTIONS. A portion of 30-foot right-of-way of PEO No. 2566, dated March 28, 1917. Excerpt attached as Exhibit "B".

B. METHOD OF ACQN. *Tract B.* Set aside to Army from ceded property and transferred from Army to Navy.

C. Description. *Tract B.* .877 of an acre—utility right-of-way.

D. Statement of Need. The Department of the Navy has a continuing requirement for this tract as a utility right-of-way.

A. Set-Aside Actions. None.

B. Method of Acqn. *Tract C.* Acquired through condemnation proceedings, Civil No. 535.

C. Description. *Tract C.* 127 acres acquired at a cost of $133,731.

(1) The property contains 230 WWII barracks and BOQ buildings and related facilities. The cost of the improvements was $4,448,136.

(2) The housing units contain Government personal property consisting of 100 electric refrigerators; cost—$15,000, and 65 electric ranges; cost—$8,125.

D. Statement of Need. The Department of the Navy has no present or foreseeable need for this property. The property has been screened with the Departments of the Army and Air Force, and no defense requirement has materialized. The Secretary of Defense has been requested to authorize report of the property to GSA, reserving to the United States easements for access and utility lines within the property.

EXHIBIT K, ITEM III

Manana Area Report

HAWAII PROPERTY REVIEW REPORT

Prepared pursuant to Bureau of the Budget
Circular No. A-52 (Section 7)

1. AGENCY: Department of the Navy 2. DATE: 28 Mar 1961
3. NAME AND/OR LOCATION OF INSTALLATION, TRACT, OR INTEREST: Manana Veterans Housing Area, Ewa, Oahu, Hawaii
4. TYPE OR BASIC FUNCTION OF INSTALLATION, TRACT, OR INTEREST: Low-cost housing

A. SET-ASIDE ACTIONS. None.

B. METHOD OF ACQN. Acquired by condemnation proceedings in 1945, Civil No. 529, in connection with establishment of Manana Construction Battalion Camp and storage area.

C. DESCRIPTION. Land consists of 24 acres of upland owned in fee by the United States. The land was acquired at a cost of $24,696 and Government improvements, consisting principally of 35 WWII barracks-type buildings with appurtenances, have been constructed on the 24 acres at an initial cost of $1,091,706. No Government personal property is involved.

D. STATEMENT OF NEED. The Department of the Navy has no present or foreseeable requirement for this property. The property has been screened with the Departments of the Army and the Air Force and no Defense requirement has materialized. The Secretary of Defense has been requested to authorize that the property be reported to GSA as excess to the Department of Defense subject to concurrence of Armed Services Committees of the Congress, reserving to the United States easements for access and for the continued use, maintenance, operation and repair of existing utility lines within the property.

EXHIBIT K, ITEM IV

Red Hill Area Report

HAWAII PROPERTY REVIEW REPORT

Prepared pursuant to Bureau of the Budget Circular No. A-52 (Section 7)

1. AGENCY: Department of the Navy 2. DATE: 28 Mar 1961 3. NAME AND/OR LOCATION OF INSTALLATION, TRACT, OR INTEREST: Red Hill Veterans Housing Area, Oahu, Hawaii 4. TYPE OR BASIC FUNCTION OF INSTALLATION, TRACT, OR INTEREST: Low-cost housing

A. SET-ASIDE ACTIONS. None.

B. METHOD OF ACQN. Acquired through condemnation proceedings, Civil No. 442.

C. DESCRIPTION. 35.728 acres acquired at a cost of $16,006. The property contains 62 WWII barracks buildings and related facilities. The cost of the improvements was $917,213. No Government personal property is involved.

D. STATEMENT OF NEED. The Department of the Navy has no present or foreseeable requirement for this property. The property has been screened with the Departments of the Army and Air Force, and no defense requirement has materialized. The Secretary of Defense has been requested to authorize report of the property to GSA, reserving to the U. S. easements for access and utility lines within the property.

EXHIBIT L

Proceedings for Acquisition by Condemnation of the John Rodgers Housing Area

EXHIBIT L, ITEM I

Chronology of Condemnation Proceedings

John Rodgers (C.A. 436)

1. Authority: Acts of June 28 and September 9, 1940, 54 Stat. 681 and 875.
2. Secretary of Navy requests Attorney General to file Petition for Condemnation and Declaration of Taking, November 19, 1940.
3. Petition filed, November 27, 1940, *United States* v. *254.468 acres of land, more or less, in Moanalua, Honolulu, Hawaii,* D. C. Hawaii, Civil Action No. 436, October Term, 1940.
4. Declaration of taking filed, November 27, 1940.
5. Order and Judgment on Declaration, November 27, 1940.
6. Verdict on valuation of $203,574.40, July 21, 1941.
7. Order for Judgment (on Value), August 18, 1941 (Judge Metzger).
8. Judgment on Value (Judge Metzger), November 15, 1941 (nunc pro tunc as of August 18, 1941).
9. Notice of Appeal by United States (on questions of valuation) to the United States Court of Appeals for the Ninth Circuit, *United States of America* v. *John Waterhouse, Ernest Hay Wodehouse, Walter Francis Frear, and John Edward Russell, Trustees under the Will and of the Estate of Samuel N. Damon, deceased, et al.*, No. 10,104, November 15, 1941.
10. Affirmed, *United States* v. *Waterhouse,* 132 F. 2d 699 (9th Cir., January 6, 1943).

11. Petition for rehearing denied, March 2, 1943.

12. *United States* v. *Waterhouse,* October Term, 1943, No. 209, 320 U.S. 723, *cert. granted,* October 11, 1943.

13. Affirmed by equally divided court, 321 U.S. 743, January 17, 1944.

EXHIBIT L, ITEM II

THE SECRETARY OF THE NAVY

WASHINGTON

November 19, 1940

SIR:

Pursuant to the authority and appropriation contained in the Acts of Congress approved June 28, 1940 (54 Stat., 676), and September 9, 1940 (54 Stat., Chap. 717), the Secretary of the Navy has selected for acquisition 254.468 acres of land, more or less, in Moanalua, Honolulu, Oahu, Territory of Hawaii, for the establishment of necessary housing for naval personnel engaged in national defense activities, which lands are more fully described in the enclosed declaration of taking.

In my opinion it is necessary that these lands be acquired by the United States of America by condemnation proceedings under judicial process for the use aforesaid under the authority above mentioned and pursuant to the Act of August 1, 1888 (25 Stat. 357; U.S.C., title 40, sec. 257), and the Act approved February 26, 1931 (46 Stat., 1421; U.S.C., title 40, sec. 258a), and supplementary and amendatory acts. The appropriation chargeable is 17-11X0004, Emergency Fund for the President, National Defense Housing (Allotment to Navy).

In view of the necessity for immediate acquisition of this property in the interest of the national defense, it is considered impracticable to negotiate with the owners of the area to be acquired, as the time consumed in such negotia-

tions would greatly delay final acquisition. Therefore, it is requested that you cause proceedings to be commenced for the condemnation in fee simple of the lands described within the enclosed declaration of taking, subject to existing public utility easements, if any.

It is requested that the enclosed declaration of taking be filed in the cause and that possession of the lands be obtained at the earliest practicable date.

Respectfully,

/s/ FORRESTAL

THE HONORABLE
THE ATTORNEY GENERAL
Enclosure

EXHIBIT L, ITEM III

IN THE UNITED STATES DISTRICT COURT FOR THE
TERRITORY OF HAWAII
OCTOBER TERM 1940

Civil No. 436

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

254.468 acres of land, more or less, in Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of SAMUEL M. DAMON, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,

Defendants.

Petition for Condemnation

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

The petition of the United States of America brought by Angus M. Taylor, Jr., Acting United States Attorney for the District of Hawaii, acting under the instructions of the Attorney General and at the request of the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, respectfully shows as follows:

I.

The pursuant to the provisions of an Act of Congress approved June 28, 1940 (54 Stat. 676) and an Act of Congress approved September 9, 1940 (54 Stat. Chap. 717), the Secretary of the Navy is authorized and directed to acquire the hereinafter described land for the establishment of necessary housing at Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, as may in his discretion and judgment be necessary for the establishment of necessary housing for naval personnel engaged in national defense activities, which in his discretion he may deem advisable, and that the Congress of the United States of America has duly appropriated and made available funds for the acquisition of said land and the establishment of this site to be utilized for the establishment of necessary housing for navy personnel engaged in national defense activities.

II.

That pursuant to and in conformity with said authority the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has duly selected for acquisition by the United States of America the lands hereinafter described for the establishment of necessary housing for naval personnel engaged in national defense activities, and that said lands are necessary, in his opinion, for the purpose of utilizing the same as and for a site for the estab-

lishment of necessary housing for naval personnel engaged in national defense activities.

III.

That pursuant to the provisions of the Act of Congress approved August 1, 1888 (25 Stat. 357; United States Code, Title 40, Section 257) and the Act of Congress approved February 26, 1931 (46 Stat. 1421; United States Code, Title 40, Section 258(a)) and supplementary and amendatory acts, the Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has determined and is of the opinion that it is useful, proper, necessary, advantageous and to the interests of the United States of America to acquire title to the lands hereinafter described by condemnation under judicial process, and has made application to the Attorney General of the United States to cause such proceedings to be commenced, in pursuance of which application the Attorney General has instructed and directed the United States Attorney for the District of Hawaii to institute this proceeding.

IV.

The United States of America institutes this proceeding to acquire certain lands at a fair, reasonable and just compensation.

V.

That the land which it is necessary for the United States to acquire for the purpose hereinbefore set forth is situated at Moanalua, Honolulu, Island of Oahu, Territory of Hawaii, contains an aggregate of two hundred fifty-four and four hundred sixty eight thousands (254.468) acres of land, more or less, all as set forth upon the maps attached hereto and made a part of this Petition and marked Exhibits "A", "B" and "C", respectively.

That the land is more fully described as follows:

[technical description of land omitted]

VI.

That the estate to be taken for said public uses and purposes is the full fee simple title, absolute thereto.

VII.

That the information acquired by this petitioner indicates that the following persons are the purported owners of or may have some interest in the lands which are part and are contained in the interior boundaries of the above described areas:

> JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR AND JOHN EDWARD RUSSELL, Trustees under the Will of the Estate of SAMUEL M. DAMON, deceased, HONOLULU PLANTATION COMPANY, BISHOP NATIONAL BANK OF HAWAII AT HONOLULU, TERRITORY OF HAWAII, CITY AND COUNTY OF HONOLULU, JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, unknown owners and claimants,

whom are hereby made parties defendants to the end that they may come into this Court and by proper pleadings establish their claims if any.

And in this behalf the Petitioner further avers and shows that JOHN DOE ONE TO JOHN DOE FIFTY, INCLUSIVE, and MARY ROE ONE TO MARY ROE FIFTY, INCLUSIVE, named herein as defendants, are fictitious names and represent owners and claimants of interests in said property, the true names of whom are unknown to Petitioner and are therefore made parties to this action by the name and description as aforesaid.

The above named defendants generally and all and singular the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors, assigns of each and every of the above named persons, and all unknown owners, lienors, and claimants having or claiming

any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees of and users and holders of said land and all owners or claimants to easements in, on, over, across or through said land; and all persons, companies, and corporations claiming any title or interest to or in the whole or any part of any of said tracts of land; are hereby made parties defendant to the end that they may come into Court and by proper pleadings make claim to said lands, or to the proceedings arising therefrom.

WHEREFORE, Petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all orders, judgments and decrees necessary to bring all of the owners of the said land before this Court and will make all unknown parties having any interest therein parties defendants hereto, and will proceed to fix the value of said lands according to the law in such instances applicable and the amount of compensation to which the owners thereof are entitled for such appropriation and made and have entered all such further orders, judgments, and decrees as may be necessary to vest the entire and unencumbered fee thereof in the United States of America, and to make just distribution of the final awards among those entitled thereto as expeditously as possible.

THE UNITED STATES OF AMERICA
Petitioner,

By ANGUS M. TAYLOR, JR.
Acting United States Attorney
District of Hawaii

By /s/ JOHN E. PARKS
John E. Parks
Assistant United States Attorney
District of Hawaii

[Verification and jurat omitted]

EXHIBIT L, ITEM IV

Order and Judgment on Declaration of Taking

[Caption omitted]

It appearing to this Court that on the 27th day of November, 1940, the United States of America filed herein a Petition for Condemnation of certain lands hereinafter described and that together therewith was filed a declaration of taking signed by James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, under and by virtue of the provisions of the Act of Congress approved June 28, 1940 (54 Stat. 676) and the Act of Congress approved September 9, 1940 (54 Stat. Chap. 717) and pursuant to the provisions of the Act of Congress approved August 1, 1888 (25 Stat. 357) and the Act of Congress approved February 26, 1931 (46 Stat. 421) and therein setting forth the taking of the fee simple title to said lands and that the uses of the lands acquired are as described in said acts of authority; and further setting forth the ascertaining of just compensation for said lands to be deposited into the Registry of this Court to the use of the persons entitled thereto in the amount of the estimated compensation for the purchase of said lands;

WHEREAS, it further appears that there has been paid into the Registry of this Court the sum of ONE HUNDRED TWENTY THREE THOUSAND EIGHT HUNDRED SEVENTY ONE DOLLARS and NINETY FOUR CENTS (123,871.94), with schedules designating the funds as the estimated just compensation for the taking of said lands, said land being described as follows:

[technical description of land omitted]

And good cause appearing.

It is hereby ORDERED AND ADJUDGED that the title to the lands hereinabove described is indefeasibly vested in the United States of America.

And it is further ORDERED AND ADJUDGED that the owners, claimants, and occupants of said lands and every part and parcel thereof forthwith deliver to the petitioner herein, and to its duly authorized agents, the immediate and exclusive possession of said lands.

And it is further ORDERED that a certified copy of this ORDER with a certificate of the Clerk of this Court showing the payment into the registry of the court of the sum hereinabove set forth, shall be served upon each and every person or persons in possession of said lands.

And it is further ORDERED that due and legal service be had upon all of the persons, firms and corporations named as defendants or claimants in the petition on file herein, and all and singular their heirs, husbands, wives, devisee, executors, administrators, representatives, alienees, successors and assigns of each and every named person, firm and corporation, and all unknown owners, lienors, and claimants having or claiming any title, estate, equity or lien, and all occupants, lessees, licensees and users and holders and owners of and claimant to easements in, on, over, across or through said lands; and all persons, companies and corporations claiming any title to or in any of said tract of land requiring said parties to answer in this cause setting forth any claim, right, title, interest or possession of any kind or nature in and to said described lands.

Dated at Honolulu, Territory of Hawaii, this 27th Day of November, 1940.

s/ D. E. METZGER,
D. E. Metzger, *Judge*