IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 12, Original

STATE OF HAWAII, *Plaintiff*

v.

DAVID E. BELL, *Defendant*

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

SHIRO KASHIWA
Attorney General of the State of Hawaii

WILBUR K. WATKINS, JR.
Deputy Attorney General of the State of Hawaii
Honolulu, Hawaii

THURMAN ARNOLD
ABE FORTAS
PAUL A. PORTER
1229 Nineteenth Street, N. W.
Washington 6, D. C.

April 1962

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N. W.
Washington 6, D. C.

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

The judicial power of the United States extends to this case, as one between a State and a citizen of another State, under Article III, Section 2, Clause 1 of the Constitution.

The case is within the original jurisdiction of this Court, as one to which a State is a party, under Article III, Section 2, Clause 2 of the Constitution, and as an action or proceeding by a State against a citizen of another State, under 28 U.S.C. § 1251(b)(3). It is an action by a State to prevent the frustration and violation of the terms of the compact pursuant to which it was offered and it accepted membership in the Federal Union.

STATUTES AND REGULATIONS INVOLVED

1. The Hawaii Statehood Act, Public Law 86-3, March 18, 1959, 73 Stat. 4, 48 U.S.C. (Supp. II 1960) pages 1257-1261, is set forth and printed as Exhibit A to the Complaint in the Appendix. (App., pp. 1-19).

The provisions of Section 5 of that Act primarily involved herein are as follows:

> (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.

2. Bureau of the Budget Circular No. A-52, November 14, 1960, 25 Fed. Reg. 12633, is set forth and printed as Exhibit F to the Complaint in the Appendix. (App., pp. 25-33). Paragraph 3 is as follows:

> 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.

3. Bureau of the Budget Transmittal Memorandum No. 1 to Circular A-52 (August 22, 1961) is set forth and printed as Exhibit G to the Complaint in the Appendix. (App., pp. 33-34). In essence, Transmittal Memorandum No. 1 confirmed the tentative definition set forth in paragraph 3 of Circular No. A-52, above, and recited that "Lands and other properties which are not covered by the definitions in paragraph 3 [of the Circular] may be disposed of as otherwise authorized by law."

QUESTIONS PRESENTED

Whether Section 5(e) of the Hawaii Statehood Act —providing for reports, from Federal agencies holding "any land or property" in Hawaii, of their continued need therefor; for a determination of whether "such land or property" is still needed by the United States; and for the mandatory conveyance to the State of "the land or property" no longer needed by the Federal government—includes land acquired by the United States by condemnation, purchase and gift?

Whether lands or other properties acquired by the United States in Hawaii by condemnation procedures, under an Act of Congress authorizing their acquisition for a specific Governmental use, and through those procedures set aside for the use of the United States, fall within the scope of "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 . . . Act of Congress," as used in Section 5(c), the antecedent of Section 5(e)?

Whether the defendant acted in excess of his statutory authority in excluding "any land or property" acquired by the United States by condemnation, purchase or gift from the reporting, evaluation and conveyance procedures established under Section 5(e)?

STATEMENT OF THE CASE

The Hawaii Statehood Act linked Hawaii's admission to the Union with a final settlement of sixty years of tangled intergovernmental land affairs in Hawaii.

The Act offered statehood to the Territory on certain "terms or conditions of the grants of lands or other property" to the State (Section 7). The terms and conditions of the land grants were set forth in Section 5.

In basic terms, Section 5 was designed to "grant" and confirm to the new State: the public lands of the Republic of Hawaii (all of which were ceded to the United States when it annexed Hawaii in 1898); the lands owned by the Territory of Hawaii; and "any" and all other Federal lands not still required for Federal purposes:

(i) Subsection (g) set forth the meaning of the two basic statutory terms, "lands and other properties," and "public lands and other public property." "[L]ands and other properties" was the broader. It spoke without qualification or condition. "Lands and other properties" was defined solely by words of enlargement. For purposes of the Act, the phrase "lands and other properties" was to include, but not be limited

to, "public lands and other public property." In turn, "public lands and other public property" was narrowly circumscribed; it reached only ("means, and is limited to") the substantial ancient government domain taken by the United States from the Republic of Hawaii at the time of the Joint Resolution of Annexation approved July 7, 1898. (Ex. B, App., pp. 20-22).

(ii) Subsection (b) built on these statutory terms. By it, the United States granted to the new State the *"public lands"* acquired from the Republic as a result of annexation sixty years earlier.

(iii) Subsection (c) retained as Federal property "[*a*]*ny* lands and other properties"—including but not limited to "public lands"[1]—that on the date Hawaii was admitted into the Union were set aside for a Federal use under any prior Act of Congress, Executive Order or proclamation of either the President or the Governor of the Territory.

(iv) But Subsection (e) established procedures for determining whether the land and property thus retained for specific Federal uses were still required by the national government. It provided that within five years "each Federal agency having control of *any land or property*" retained under Subsection (c) was to make a report of the facts concerning its continued need for *"such land or property"* and, if it were determined that the *"land or property"* was no longer

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[1] Insofar as it applied to "public lands," subsection (c) was an exception to subsection (b). See the text of subsection (b) which makes this clear.

Emphasis is supplied throughout this Brief, unless otherwise noted.

needed by the United States, "it shall be conveyed" to the new State.[2]

This controversy arises out of the defendant's unauthorized attempt to attach to the words "any land or property" a limitation and qualification which is not in the Statehood Act. The defendant, David E. Bell, acting as Director of the Bureau of the Budget, pursuant to delegation of authority under Section 5, has failed and refused to carry out the Congressional mandate of Section 5 with respect to certain "lands and other properties." Beyond his statutory authority and in conflict with the statutory direction of the Congress, he has attempted to exclude certain "lands and other properties" from the review procedures set forth there.

1. Following its enactment by the Congress, the Hawaii Statehood Act was submitted to the voters

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[2] Land grants are common to statehood acts. In fact, as pointed out in *United States* v. *Wyoming,* 331 U.S. 440, 443 (1947), in the case of the lands first acquired by the United States by purchase, "the Federal Government has included grants of designated sections of the public lands for schools purposes in the Enabling Act of each of the States admitted into the Union since 1802. This Court has frequently been called upon to construe the provisions and limitations of such grants." Typical provisions are those contained in the Act of February 22, 1889, c. 180, 25 Stat. 676, providing for the admission of North Dakota, South Dakota, Montana and Washington.

The grants in the Hawaii Statehood Act were, of course, different—as they were in the case of Alaska's admission, Pub. L. 85-508, July 7, 1958, 72 Stat. 339, 48 U.S.C., pp. 7894-7900. Hawaii was not a public lands territory. In contrast with the states of the West, it is small and densely populated. Accordingly, there were no vast unappropriated Federal lands from which selected portions could be granted, as was the practice with the statehood acts of the 19th and early 20th century. The special provisions of Section 5 were the result.

of Hawaii for adoption or rejection. A referendum on specific propositions was called for. These propositions were: whether Hawaii should be admitted as a State; whether the State's permanent boundaries should be restricted as set out in the Statehood Act; and whether

> (3) All provisions of the Act . . . 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.

These propositions, including the proposition accepting the terms and conditions of the "grants" of "lands or other property," were overwhelmingly accepted by the voters of Hawaii on June 27, 1959, and Hawaii became a state on August 21.[3]

2. Over a year later, by Executive Order No. 10889, dated October 5, 1960, 25 Fed. Reg. 9633 (Ex. D, App., p. 23), there was delegated to the office of the Director of the Bureau of the Budget the authority to receive the reports required under Section 5(e) with respect to Federal "land or property" still held for Federal purposes, to make the prescribed final determinations of need, and to execute the conveyances of such properties for which there was no longer a Federal

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[3] The President's Proclamation of Admission, Proclamation No. 3309, August 21, 1959, 24 Fed. Reg. 6868, found that "the people of Hawaii have duly adopted the propositions required to be submitted to them by the act of March 18, 1959," and therefore that the "admission of the State of Hawaii into the Union on an equal footing with the other States of the Union is now accomplished."

The General Assembly of the United Nations, at the request of the United States, U.N. Gen. Ass., 14th Sess., Annexes, Agenda Item No. 36, at 100, 114, 127-128 (Doc. No. A/4226) (1959), then confirmed that Hawaii was no longer a non-self-governing territory subject to the reporting requirements of Article 73 e of the Charter. *Id.* at 127-128 (Resolution 1469 (XIV)).

requirement. By Executive Order 10960 of August 21, 1961, 26 Fed. Reg. 7823 (Ex. E, App., p. 24), the delegation was clarified. The specific authority delegated to the Director of the Bureau of the Budget was stated in the later Executive Order to be the authority provided by Section 5(e):

> (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.

3. More than a month after the delegation under Section 5(e), the then Director of the Bureau of the Budget issued a crucial document which foreshadowed this controversy. Although neither the Act nor the executive delegation contemplated any redefinition of Section 5(e), Budget Circular No. A-52 announced new and rigid limitations on the categories of "any land or property" subject to the reporting, evaluation and conveyance procedures. (Ex. F, App., pp. 25-33).

The Circular was directed to the heads of all Executive Departments and Establishments. It stated, in paragraph 3, that pending further determination of the scope of section 5(e) of the Hawaii Statehood Act, the phrase "land or property" should be defined to be limited to lands acquired by cession, lands acquired in exchange for such ceded lands, and lands owned by the Territory. Land and property acquired by the United States by purchase, condemnation or gift were excluded. The agencies were called on for reports of continued need only in respect of the lands covered by the new definition (paragraph 6), and provision was made for evaluation and conveyance, under the manda-

tory provisions of Section 5(e), only of the limited land and property covered by the new definition in paragraph 3 of the Circular.

4. The Director had previously invited the views of the new State of Hawaii and of several interested federal departments on the question of what properties were included within Section 5(e). The Department of Interior—which, of course, had been, through its Division of Territories, responsible for the administration of the Territory for many years, and which had participated directly in the legislative process leading to the Statehood Act—had taken a position contrary to the position that the Director of the Budget Bureau took. Section 5, it said, should be read as it was written; and Section 5(e) reached "lands and other properties" without limitation or qualification:

> I [the Associate Solicitor, for Territories, Wildlife and Parks, Department of Interior] 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). (Opinion of the Associate Solicitor, Department of the Interior, Ex. I, App., pp. 62-63).

The State of Hawaii agreed with the Department of Interior (Ex. J, App., pp. 71-105). The Department of Defense and the General Services Administration, however, took a contrary view.

The Section 5(e) controversy was ultimately submitted to the Attorney General, who issued his opinion on June 12, 1961 (Ex. H, App., pp. 35-59). He concluded, in spite of the views of the State and of the Interior Department, that the phrase "land or property", although defined without qualification in the Act, was nevertheless limited. He read it as reaching only lands covered by Sections 5(a) and 5(b); that

is to say, lands either owned by the Territory, or Federal lands falling within the more restrictive phrase "*public* lands and other public property."

5. Accordingly, on August 22, 1961, Defendant issued Transmittal Memorandum No. 1 to Circular No. A-52 (Ex. G, App., pp. 33-34). Referring to the Attorney General's opinion, he reaffirmed the tentative redefinition of Section 5(e) of the Act as contained in paragraph 3 of Budget Circular No. A-52, and directed the holding agencies to limit need reports to ceded lands and Territorial properties. All other surplus Federal land and property in Hawaii—that is to say, all lands which the Federal government had acquired by purchase, condemnation, or gift—were not included in the Section 5(e) procedures and were to "be disposed of as otherwise authorized by law." (*Id.*, at 34).

6. Defendant's reinterpretation of Section 5(e) had a particularly demonstrable effect on certain specific parcels of land. Although Budget Circular No. A-52 had directed the holding agencies not to report on properties acquired by purchase, condemnation or gift, the Budget Bureau had specifically directed the Navy Department to furnish need reports for certain of its properties in response to a special request of the Governor of the new State. As a result, the Navy Department, on March 28, 1961, prior to the distribution of Transmittal Memorandum No. 1 to Circular A-52, had submitted four separate reports as to its need for four specific parcels which had not been acquired by any of the methods specified in paragraph 3 of Circular A-52. (Ex. K, Items I, II, III, & IV, App., pp. 106-10).

These four properties were four low-income housing projects in the general vicinity of Pearl Harbor, Hono-

lulu, Hawaii. The lands had been acquired by condemnation from private owners during World War II. Their total land cost to the United States had been less than $200,000. The four had long been administered by an agency of the Territory of Hawaii, the Hawaii Housing Authority, under lease or license from the Navy Department, under which the Authority had collected rents, maintained the properties and turned the net income over to the Navy.

On March 28, 1961, the Navy reported to the Bureau of the Budget that it had no present or foreseeable requirement for the lands. It further stated that it had communicated with both the Air Force and the Army with respect to the lands and stated that "no defense requirement has materialized." (Ex. K, App., pp. 106-10).

Defendant, however, has refused further to process the four housing properties, or to convey them to the State if no longer needed. By his unlawful reading of Section 5(e), at least in respect of these specific parcels (and as to all other lands and property which may be similarly situated legally), defendant has denied to the State the right to have the determination of continued Federal need made without regard to the source of title; he has forestalled the conveyance of the land, if no longer needed, to the State; and he has opened the door for a sale to private interests under the Federal Property and Administrative Service Act of 1949. (63 Stat. 377, 40 U.S.C. §§ 471 *et seq.*) This he was not authorized to do by statute.

The effect of this unauthorized action by the defendant, in practical terms, is as follows: Hawaii's public housing program will be disrupted. The State will

either be forced to negotiate for, or to bid at a disposal proceeding for the housing properties in question—properties which it is currently operating, which are a part of its housing program, and which under the law, should be, upon a determination of no continued Federal need, deeded to it. If it cannot reach agreement with the United States as to the fair market value of the properties, or if its bid is unsuccessful in a competitive disposal proceeding, it will be forced to purchase or condemn the properties in question from the successful party at the surplus disposal sale, or abandon them as far as its public housing program is concerned. This could involve paying a middleman's profit to a private surplus property purchaser. Similar situations would present themselves with respect to any and all other properties having similar legal characteristics—that is, properties acquired by the Federal Government in Hawaii after the annexation of 1898, and set aside for particular Federal uses, by purchase, gift, condemnation or the like, which are currently excess to Federal needs, or which will become excess within the five-year period after the date of Hawaii's statehood.

SUMMARY OF ARGUMENT

I. This suit presents a case or controversy between adverse parties to which the judicial power of the United States extends. The State of Hawaii seeks vindication of its property rights, and the maintenance of certain of its vital governmental functions, concretely and adversely affected by the unauthorized actions of the defendant.

The suit falls squarely within the original jurisdiction of this Court as established by the Constitution

and confirmed by statute. As a suit to prevent the defendant, purporting to act under the provisions of the compact pursuant to which Hawaii became a State, from frustrating and violating the terms of that compact, it is peculiarly suitable for determination in this Court. Moreover, the suit's freedom from factual dispute, and the importance of its subject matter, and of obtaining a prompt, final decision of the questions presented, likewise make it suitable for determination in this Court.

II. A. The defendant acted in conflict with the Statehood Act in excluding land and property which the Federal government had acquired, after the annexation of Hawaii, through purchase, condemnation, gift, or otherwise, from the procedures for reporting, need-evaluation, and (if not needed Federally) conveyance to the State, established by Section 5(e) of the Statehood Act. The language of Section 5(e) is broad, and must be read as covering what it plainly extends to, "any land or property," retained by the United States. This view is supported by the broad definitional provisions of Section 5(g) and is reinforced by the broad use of the similar term "any lands and other properties" in other contexts in Section 5.

B. Moreover, the language of Section 5(e) must be read in the plain sense contended for, since the land-grant provisions of the statehood admission scheme were expressly submitted to the electorate of the Territory of Hawaii for popular ratification and acceptance. No suggestion of an artificial, narrow meaning was made to them, and the words of Section 5(e), "any land or property", must be interpreted in their common, direct and natural sense as they were understood by the Hawaiian electors.

C. The legislative history of the Hawaii Statehood Act confirms this reading of Section 5(e). In earlier Congresses, statehood bills were introduced which would have limited the Federal land grants to the new State to the land acquired by the United States by cession at the time of the annexation of Hawaii in 1898. Two types of such bills, together with the form of the bill which finally became law, were before the Congress and the House Committee which reported out the final legislation during the Congress in which the Statehood Act was passed. The Committee and the Congress, from among these alternatives, made the choice of a land grant provision broader than one simply limited to the lands acquired by the United States through the 1898 annexation. This choice by Congress, to subject "any land or property" retained by the United States to a need-evaluation and conveyance procedure, must be respected. Moreover, in the very next session of Congress, the House Committee which had initiated the Statehood Act expressly confirmed that Section 5(e) was designed to cover "all land whether it falls within the definition of public land given in the act or not."

This plain, inclusive construction of the statute is supported by the policy considerations which were crystallized by Congress in the statute. The grant to the State of property acquired after 1898 and not needed by the United States was no more than a partial compensation to Hawaii for its sacrifices of land, including the continued post-statehood retention by the United States of considerable land from the 1898 cession. In contrast, the defendant's construction introduces irrational distinctions into the Act, unsupported by any policy considerations, between properties acquired in the name of the Territory after 1898 and

properties directly acquired by the Federal government after 1898; imputes to Congress an intent to impair important governmental projects of the new state; and attributes to Congress an impractical approach to Hawaii's peculiar land problems.

E. The Attorney General's opinion, on which the defendant's action complained of is based, is erroneous. It rests primarily upon a misconstruction of the term "set aside" in Section 5(c), to which Section 5(e) refers. The Attorney General erroneously and arbitrarily construed "set aside" as extending only to a narrow segment of the transactions which result in the setting aside of property for the use of the United States. His view overlooks the fact that the condemnation procedures utilized to acquire the lands most directly concerned here resulted, in every sense of the word, in the setting aside of those lands for the use of the United States for specific purposes. Not only is there no evidence to support the Attorney General's narrow, arbitrary and artificial construction of the term "set aside," but all the relevant materials indicate that no such narrow meaning for the term is supportable. The Attorney General also relied upon a demonstrably false analogy with Section 5(f) of the Act, and upon a view of the statute which is demonstrably erroneous in other respects.

III. This action is not barred by sovereign immunity: A. The defendant's action was plainly outside his statutory authority. It did not represent the exercise of any discretion vested in him by law. For his plainly unauthorized act, interfering with the rights of the State of Hawaii, the defendant must answer as an individual, without the immunity of the sovereign.

B. Moreover, sovereign immunity does not apply by reason of any relationship of the property of the United States to the subject matter of the action. The State does not here seek to try title to any specific property. It recognizes that title to the lands in question is in the United States. It does not ask the Court to review the question of the need of the United States for any specific property. Hawaii simply asks that the defendant be enjoined from persisting in his unauthorized restriction on the scope of the lands to be processed under Section 5(e) of the Act. This action, complained of here, is but an unauthorized and unlawful use of power, under asserted color of statutory authority, to prevent agencies of the government from making reports required by law, and a failure—although required by law—to make determinations in accordance with such reports. It has been squarely held in this Court that a suit brought against an officer, seeking judicial review of an allegedly unauthorized administrative decision to exclude categories of government-owned land from processing under a statutory procedure of this nature, does not constitute a suit against the United States. *Work* v. *Louisiana,* 269 U.S. 250 (1925).

C. Finally, the issue is one purely of law, not of discretion, since the defendant has not even purported to exercise his discretion here. The remedy sought is simply the setting aside of the defendant's erroneous legal determination and the removal of this unauthorizedly imposed bar to consideration of the question of continued Federal need on its merits. Thus, the case is squarely within the doctrine of *McGrath* v. *Kristensen,* 340 U.S. 162 (1950), and concepts of unreviewable discretion and sovereign immunity are no bar to the narrow, particularized relief sought by the State.

ARGUMENT

I. THE CASE IS WITHIN THE JUDICIAL POWER OF THE UNITED STATES, AND WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT, UNDER ARTICLE III, SECTION 2, CLAUSES 1 AND 2

This is an action by the State of Hawaii against David E. Bell, a citizen of the State of Massachusetts, instituted in this Court under authority of Article III, Section 2, Clauses 1 and 2, of the Constitution of the United States.

A. This Is a Case or Controversy

1. The State's interest is direct, substantial and distinctly adverse. The defendant's action affected the State's property rights.[4] He barred the reporting, determination of Federal need, and conveyance under Section 5(e) of the Hawaii Statehood Act of all land and property acquired by the United States in Hawaii by purchase, gift or condemnation. An immediate practical consequence of this determination, as the Attorney General recognized, was to block the conveyance to the State of land "on which are now located a large portion of Hawaii's public housing units" (Ex. H, App., p. 44).

2. As alleged in the Complaint and as more fully shown hereafter, it was defendant's exclusion of the public housing areas, and of all lands and properties similarly situated legally, from Section 5(e) procedures which has injured, and threatens further injury to, the State. Relief is properly sought against him.

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[4] Contrast *Georgia* v. *Stanton*, 6 Wall. 50, 77 (1868); *Massachusetts* v. *Mellon*, 262 U.S. 447, 484-85 (1923), where the plaintiff States were seeking vindication of "political" rights and raised only "abstract questions of political power."

He is the person with the "ability and authority . . . to effectuate the relief which" the State seeks.[5] The remedy sought is only that he undo what he has done. The State seeks nothing more than defendant's revocation or correction of paragraph 3 of Budget Circular A-52, and his revocation of Transmittal Memorandum No. 1, and the reporting, evaluation and, if not needed, the conveyance of those properties, including the housing properties, to which it is entitled under the solemn Statehood Act compact, and which are vital to its public low-income housing program.

B. The Case or Controversy Is One to Which the Judicial Power of the United States Extends

This suit is within the judicial power of the United States, under Article III, Section 2, Clause 1, as a controversy between a State and a citizen of another State—between the State of Hawaii and the defendant, a citizen of Massachusetts.

As we have said, defendant is a direct party in interest and the proper party defendant. He is the proper person to whom the remedial powers of the Court should be addressed. He acted beyond his authority under the Statehood Act and is thus amenable to suit.

The State is also a proper party. As stated, defendant's action has seriously affected and irreparably injured it in its property rights. If defendant's unauthorized determination prevails, Hawaii will be denied the conveyance of the four housing properties—and other properties as well, perhaps—to which it is

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[5] *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603 (1957); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 53 (1955).

entitled under the solemn Statehood Act compact, and which are essential to its public low-income housing program.

While we do not press it as a basis for jurisdiction, we note that the case is also within the judicial power of the United States (likewise under Article III, Section 2, Clause 1), as one arising under the laws of the United States. The rights of the State of Hawaii to have the four housing properties reported, evaluated and conveyed to it if not needed, were created by the Hawaii Statehood Act.

C. The Case Is Within the Original Jurisdiction of This Court

In view of the direct property and Governmental interest of the State, the case is properly within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution, as one "in which a State shall be a party." And see 28 U.S.C. § 1251(b)(3), confirming the original jurisdiction of this Court in this suit, as one between a State and a citizen of another state.[6] The existence of original jurisdiction in this case is, it is respectfully submitted, too clear for extended discussion.

Not only is this case one to which the original jurisdiction of this Court under the Constitution unquestionably applies, but this suit is one singularly appro-

[6] Although this Court "has repeatedly said that it [the original jurisdiction] can be exercised without further enabling action by Congress." Hart & Wechsler, The Federal Courts and the Federal System (1953), p. 218. See *Kentucky* v. *Dennison,* 24 How. 66, 96 (1861).

It is a prerequisite to the original jurisdiction of this Court that the suit be one to which the judicial power of the United States extends. See *Pennsylvania* v. *Quicksilver Co.,* 10 Wall. 553, 556 (1871). We have demonstrated in Part B, p. 20, *supra,* that such is the case as to this suit.

priate for determination here. This suit presents a situation in which the original jurisdiction is invoked by a State, as party plaintiff, in its sovereign capacity. The State in this action seeks to prevent and restrain the defendant, purporting to act under authority granted by the compact under which Hawaii became a State, from frustrating and violating one of the basic and essential provisions of that very compact.

The controversy arises out of a solemn compact of statehood incorporated in the Statehood Act. The Federal Union offered Hawaii statehood upon certain terms and conditions. One of the terms and conditions —which was a subject for explicit ratification by the people of Hawaii—was that the United States would make "grants of lands or other property" no longer needed, to the State, on the terms of those "grants" as fixed by the Statehood Act. This proposition was expressly accepted by the people of Hawaii and on this basis Hawaii became a member of the Union. An executive official of the Federal Government, acting outside his authority, has refused to carry out the procedures agreed to for the determination and conveyance of the surplus properties. The State complains of this action here, and seeks this Court's relief against it. Clearly, the questions are accordingly of such a fundamental character and dignity as to present a matter appropriate for original determination by this Court—a suit to prevent frustration of the compact by which its newest member joined the Federal Union.

Other factors also make this case appropriate for original determination[7] in this Court: *Firstly,* it can

[7] Neither the so-called "diversity" provision, 28 U.S.C. § 1332, nor any other statutory provision invests the District Courts with jurisdiction over a suit between a State and a citizen of another State.

scarcely be contemplated that any of the essential facts in this action will be in dispute. The questions presented are essentially and fundamentally questions of law.

Secondly, the questions are of obvious public importance; and the controversy is one in which a speedy and final answer is desirable, so that the processes contemplated by section 5(e) of the Statehood Act may go forth. The competing legal positions of the parties are already fully crystallized, as the materials set forth in the Appendix demonstrate.

Thirdly, the appropriate relief, if the State's substantive position is correct, is limited and precise. The State seeks no intrusion into complex administrative or discretionary processes of the Executive. It does not seek an order directing the transfer of specific property. It asks only that the defendant revoke his unauthorized restriction on the land and property subject to the Section 5(e) procedures, so that those procedures may be carried out as the Congress and the electors of Hawaii agreed.

II. THE DIRECTOR OF THE BUREAU OF THE BUDGET ACTED IN CONFLICT WITH THE STATEHOOD COMPACT IN EXCLUDING AFTER-ACQUIRED FEDERAL PROPERTIES FROM THE REPORTING, EVALUATION AND CONVEYANCE PROCEDURES OF SECTION 5(e)

A. The Language of the Act Demonstrates That Section 5(e) Reaches "Any" and All Federal "Land or Property" in Hawaii

Section 5(e) of the Hawaii Statehood Act requires that within five years each Federal agency holding "any land or property" which has been retained by the United States at the time of statehood report the facts concerning its continued need. If "the land or prop-

erty" is determined to be no longer needed "it shall be conveyed" to the State.

This is simple and straightforward. The term "any land or property" in Section 5(e), and the parallel phrase "any lands and other properties" in Section 5(c) to which 5(e) refers, means "any land or property." It is unqualified and inclusive. The United States and the people of Hawaii have agreed, as a part of the statehood compact, that lands previously set aside for Federal use would not automatically pass at the time of statehood, but that within five years all Federal agencies holding such lands would determine if they are still legitimately needed by the United States. If not, the lands are to be conveyed to the new State. There is no exception, stated or implied. The four parcels, particularly affected here, constituting "a large portion of Hawaii's public housing units," are not excluded from the reporting, evaluation and conveyance procedures of Section 5(e) merely because the underlying land was first acquired by the United States by process of condemnation.

The Section 5(e) functions—to receive the agency reports of need and to make the final determinations and conveyances—were delegated to the Director of the Bureau of the Budget about a year after statehood. Following that delegation, the defendant's predecessor tentatively promulgated a restricted "definition" of "land or property" for purposes of Section 5(e). Defendant later made this "definition" permanent.

In defendant's view, the term does not reach property acquired by the United States by purchase, condemnation or gift. He has ruled that the agreement to review and convey surplus Federal lands in Hawaii extends only to lands the United States ac-

quired either upon the original cession from the Republic of Hawaii in 1898, as well as lands and property acquired in exchange therefor, or acquired from the Territory. He has instructed all Federal agencies, for purposes of the Statehood Act, to ignore land held by them which was acquired by purchase or condemnation and has refused to review and convey any such properties. The immediately observable, and the major result of his determination is to bar the reporting, evaluation and conveyance, if no longer needed, of a "large portion" of Hawaii's public housing; and to open the door for sale of these vital properties to private interests with consequent disruption of Hawaii's housing program and hardship to the residents of the four housing areas.

Defendant erred. A reading of the statutory language proves it. Section 5(c) permitted the United States to retain "any lands and other properties" set aside for Federal use at the time of statehood. But Section 5(e) provided that "any land or property" so set aside at the time of statehood would be reviewed; if the review disclosed no continuing Federal need the land and property would be conveyed to the State. It is the State's position that the statutory language of this compact must be read as reaching—as it says—"any land or property." This, for the following reasons:—

(a) In the first place, the phrase is so defined in Section 5(g). Section 5(g) says that "lands and other properties" "includes"—but is not limited to—"public" land and property. It then restricts "public" land and property to lands acquired by the 1898 treaty of cession. If a limitation were attached to the "any land or property" phrase in Section 5(e), it should be

found in the definitional provision. But the definition does not speak in restrictive terms.[8] Rather, it says that the key phrase "includes" the more limited category of lands acquired in 1898. And if it includes, but is not limited to, the lands acquired in 1898, it must then also include, but not be limited to, the lands acquired since. Obviously, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941).

(b) And this simple and straightforward reading of the three crucial provisions is reinforced by reference to the remainder of Section 5. Subsection (a) provides that "the State . . . shall succeed to the title of the Territory . . . in those lands and other properties in which the Territory . . . now hold[s] title." The intent here is clear. The compact of statehood was designed to make provision for the succession by the State to the title of the Territory in all manner of property. "[L]ands and other properties" as used in Subsection (a) could not conceivably have been written in a restrictive sense. If Subsection (a) did not reach all categories of land—ceded, afteracquired, ex-

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[8] As the Court said in *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 189 (1941):

> . . . To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance.

See also *United States* v. *Gertz,* 249 F. 2d 662, 666 (9th Cir. 1957).

changed, condemned, purchased or donated—there would be a lacuna in the statute. Territorial property would be left in limbo, without provision for succession. "[L]ands and other properties" in Subsection (a) must be all-inclusive.

And so it must be read in Subsection (c). For given such a broad and inclusive sweep of the crucial phrase in (a), the same words in Subsection (c) cannot be interpreted in a limited sense. The phrase cannot be unqualified in Subsection (a) but qualified in Subsection (c).

Finally, subsection (c), all agree, covers after-acquired or purchased property of the Territory of Hawaii. Since it covers the after-acquired or purchased property of the Territory insofar as the control and use of that property is retained by the United States, then logically subsection (c) (and with it, subsection (e) which refers to it) should also cover the after-acquired or purchased property of the Federal Government. Otherwise such property is not provided for in the Hawaii Statehood Act. Such an omission would be inexplicable and anomalous,[9] particularly in the light of the admittedly broad scope of the reference to Territorial property in subsection (c). It would be a strained construction indeed to suggest that the words "any lands and other properties" in subsection (c) mean

[9] Lest it be thought such inclusion of a provision concerning the Federal Government's retention of its title to purchased property was unnecessary, it should be remembered that essentially the same Committee of Congress in admitting Alaska to the Union, where all federal properties had been purchased, had specifically provided for the Federal Government's retention of its title to land not conveyed to the new state. See Sections 4 and 5 of the Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, 48 U.S.C., pp. 7894-7900.

"any" land when referring to land owned by the Territory but only "some" land in other contexts.

It is accordingly the State's position that the reporting, evaluation and conveyance procedures in Subsection 5(e) reach and include "any" and all Federal properties. This is the plain and obvious meaning of plain and obvious words.

B. Section 5(e) Must Be Interpreted in the Plain Terms in Which It Was Accepted by the Electors of Hawaii

And there are special reasons why the language here must be given its natural and obvious meaning. The fundamental consideration setting the standard for the reading of this Act is that it formed an enduring and perpetual basis of the compact of admission of Hawaii as a state of the Union. This was no ordinary statute. Congress was executing not its general legislative powers granted in Article I of the Constitution, but its authority in Article IV, Section 3, Clause 1. The Act was designed to admit Hawaii "into this Union" under a permanent compact between the Federal Union and the people of the new State.[10]

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[10] Note the language of Section 4 of the contemporary Alaska Statehood Act, *supra,* note 9:

> Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the state. . . .,

coupled with the grant in Section 6 of over 100 million acres to the new state.

In discussing the compact provisions relating to land grants in the Minnesota Enabling Act, 11 Stat. 166, 167, in *Stearns* v. *Minnesota,* 179 U.S. 223, 244-45 (1900), the Court said:

> That these provisions of the enabling act and the constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to

For this purpose, Section 7 provided that the Act in all its terms should be subject first to ratification by the people of Hawaii. In that referendum the people of Hawaii were requested to give their assent to or disapproval of three propositions. These propositions were: whether the people of Hawaii agreed that Hawaii should become a state; whether they would accept for all time the boundary limitations spelled out in the Act;—and the direct question whether the voters would accept the "grants of lands or other property therein made to the State of Hawaii. . . ."

As we have said, Section 5(g) defined "lands and other properties" in broad, inclusive terms for purposes of the entire Act. No words of limitation or exclusion were used. Thus, the specific language of the third proposition submitted to referendum could only

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the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the nation.

That a State and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history.

have been understood by the electors of Hawaii as providing for the processing and conveyance of "any land or property" of whatever kind, held by the United States in Hawaii and no longer needed. There was nothing in the history of the 86th Congress' consideration of the Bill which eventually became the Statehood Act to indicate that the "grants" promised by the United States reached anything less than "any land or property" found surplus to Federal needs. No one suggested to the qualified electors of the Territory in 1959 that these words, seemingly inclusive, were misleading. There was no hint that "any" land or property meant only "some" land or property—in short, that the words meant anything other than what they said.

The voters accepted the proposition as written. It became a perpetual provision of the compact between the people of Hawaii and the Federal Union. The land grants to the State could not be revoked by the Congress, by the President or by an official of the executive branch.[11] Nothing remained to be done except

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[11] *Beecher* v. *Wetherby*, 95 U.S. 517 (1877), involved a claim by the State of Wisconsin to "land under the compact upon which she was admitted into the Union." *Id.*, at 522-23. The admission act had contained specific propositions of land grants for various purposes. The Court said (*id.*, at 523-24):

> The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the Act of Congress as a condition of the grants. With that Constitution the State was admitted into the Union in May, 1848. 9 Stat. at L., 233. *It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools.* It matters not

to determine which lands were surplus and convey them.

The words of the proposition—"any land or property"—must be interpreted and applied in their common and natural sense as they were understood by the Hawaiian electors. This is no ordinary statute. Defendant's reinterpretation is little less than the disobedience and disregard, by an individual, of a solemn compact previously made between the people of Hawaii and the Federal Union. In the case of an admissions act, more so than in the case of an ordinary statute, there ought to be a strong presumption in favor of the natural and obvious meaning of the words used. And with a proposition in an admissions acts *specifically* set before the people for acceptance or rejection, there is really no alternative. Such a proposition must be applied in the simple and direct sense understood by the electors who ratified the compact.

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whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of lands in Wisconsin could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

C. The Legislative History of the Act Shows That Section 5(e) Was Meant to be Read in the Direct and Natural Way It Was Written and Voted On

1. The language used in the final Statehood Bill was intentionally broader than that proposed in all prior Congresses.

The question of Hawaii's statehood is at least 30 years old, but the question of the tangled intergovernmental land affairs in Hawaii is even older. All previous Hawaiian statehood proposals reached ceded lands only. But the 86th Congress had before it several alternatives and chose the one which used the broader phrase "any land or property." It thus clearly intended "any" and all Federal lands and properties no longer needed for national purposes to be inventoried and conveyed.

During the 19th Century, Hawaii was a kingdom and a recognized member of the community of nations.[12] History discloses that the royal government, steadily weakened by great power rivalry in the Pacific, was finally overturned in 1895. In its place, the commercial and financial interests in the islands established a Republic. The Republic was intended to open the way to annexation by this country. A treaty of annexation with the United States was signed in Washington on June 16, 1897, but failed to win approval in the Senate. A Joint Resolution of Annexation was then introduced. The Spanish-American War had by then inflamed notions of "Manifest Destiny." The Resolution was adopted in the House and Senate respectively, on June 15 and July 7, 1898 (Ex. B, App., p. 20). Transfer of sovereignty from the Re-

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[12] See, generally, Kuykendall and Day, Hawaii, A History (Rev. Ed. 1961), *passim*.

public to the United States took place on August 12, 1898.

At that time, largely in consequence of somewhat feudal land practices in Hawaii, a substantial portion of the total land of the Islands was owned or controlled by the Republic, as successor to the Monarchy and its government and crown lands. The Joint Resolution of Annexation provided that the United States was to acquire title to the entirety of these lands (*Id.*, at 20). Thus, the annexation of Hawaii is unique in our history. Typically, of course, the great territorial expansion of the United States to the West was by purchase. In such cases, the United States acquired proprietary ownership as well as sovereignty in the area. In the only other instance of annexation—Texas—the United States acquired title only to "property and means pertaining to the public defense." Joint Resolution approved March 1, 1845, 5 Stat. 797. In the case of Hawaii's annexation, the United States took all the public land.

The direct cession of these vast properties in Hawaii gave rise to unique problems. It was recognized in the following year that the cession created a trust.[13] Thus, when Hawaii became a territory in 1900, the Organic Act provided that the lands acquired by the cession were to be maintained and administered by the Territorial government, as the instrument of the United States. Section 91, Hawaii Organic Act, 31 Stat. 159, 48 U.S.C. § 511. Section 91, however, preserved the power of the President or the Governor to take any of the ceded property for Federal use. Dur-

[13] 22 Ops. Atty. Gen. 574 (September 9, 1899); 22 Ops. Atty. Gen. 627 (November 21, 1899).

ing the next half century the United States withdrew substantial acreage from the ceded lands for defense installations and other purposes.

But it was recognized that settlement of these complex intergovernmental land affairs was essential if Hawaii were to become a State. The anomalies of extensive land ownership by the Federal Government, in trust for the people of the Territory, and yet subject to the constant threat of uncontrolled, uncompensated taking, were obviously inappropriate to the relationship of State and Nation.

The first Hawaiian statehood bill was introduced in Congress in 1919. A plebiscite was held in the Territory in 1940 approving statehood. But the Congress began serious consideration of the matter only in the 80th Congress of January, 1947. From then until the final enactment of the Statehood Act, statehood bills were constantly before the Senate and the House. Each one contemplated a land settlement.

The point, however, is that the proposals considered prior to the 86th Congress were carefully limited to ceded lands. The bills in the 83rd Congress, First and Second Sessions, are representative. They specifically provided that the United States would retain ceded lands for five years, defined the ceded lands as "all public lands and other public property," and provided for a grant to the new state of 180,000 acres of land out of the ceded domain only. The limitation to public—i.e., ceded—lands was carefully drafted and clearly understood by the Congress. As stated in Senate Report No. 886 on S. 49, 83rd Cong., 2d Sess. (1954), p. 30:

> This amendment would make explicit the intended application of the property disposition

> provisions of Subsection 3(b). In particular, it would eliminate any possibility of these 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, or through the exchange of lands acquired by these means. The desirability of clarifying the bill along the lines here proposed has been suggested by the Department of the Navy.

Thus, this Bill was carefully designed *not* to reach lands acquired by the United States directly. The Attorney General, for example, specifically stated (*Id.*, at 41):

> The bill would not affect the title of the United States to lands which have been acquired by purchase, condemnation, donation or exchange.

The bills in the 83rd Congress were typical. The legislative proposals in all subsequent Congresses—before the definitive legislation—were similarly limited to ceded lands. The language of the bills provided for conveyance to Hawaii only of "public lands and property" and the limitation was so understood by the committees which considered the proposals.

The legislation in the 86th Congress, First Session, however, was vastly different.[14] At the opening of the

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[14] In the meanwhile, Congress had enacted the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C., pp. 7894-7900, providing for a "compact" between the United States and the people of Alaska, by which Alaska received the option to select over 100 million acres of Federal land. The lands thus granted to Alaska by the United States were in excess of 25 times the entire area of Hawaii.

Session, some 24 Statehood proposals were introduced into the House and sent to the House Committee on Interior and Insular Affairs. Fourteen, including H.R. 50, introduced by Mr. Burns of Hawaii on January 7, 1959, 105 Cong. Rec. 29, were identical, and like the legislation considered in previous Congresses, limited the conveyance to the State to ceded properties. H.R. 50, for example, provided in Section 5(b) that:

> The United States hereby grants to the State of Hawaii . . . the absolute title to all the *public lands and other public property* . . . 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 . . . 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 conformable to such limitations. . . 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.*

However, five other bills, including H.R. 888, introduced by Mr. O'Brien of New York, also on January 7, 1959, 105 Cong. Rec. 47, contained new provisions. Instead of a grant of only "public lands" to the new State, H.R. 888 provided for the reporting, evaluation and conveyance of "*any* land or property". In addition to limiting "public lands" to ceded lands, the Bill contained a new definition of "lands and other properties", as including, *but not limited to,* "public lands."

A third form of proposed statehood legislation—H.R. 1918—was also introduced. (105 Cong. Rec. 376). This made the distinction between the narrower language of H.R. 50 and the broader language of H.R. 888 crystal clear. Like H.R. 888 (and unlike H.R. 50), it contained a Subsection 5(e), identical to that in the final Act, providing that not later than five years after statehood each federal agency was to report the facts concerning its continued need for retained lands, and providing for a conveyance to the State upon a determination that the land or property is no longer needed by the United States. But, like those of H.R. 50, the grant provisions of H.R. 1918 were clearly limited to *ceded* lands. Thus, there is no doubt that the House Interior Committee had before it three alternatives which clearly framed the question whether or not to establish reporting, evaluation and conveyance procedures for "any" and all retained lands.

The Committee chose the broadest form. It supported legislation based on H.R. 888. (H. Report No. 32, 86th Cong., 1st Sess.) In consequence, a clean bill —H.R. 4221—embodying the broad approach of H.R. 888, was introduced pursuant to the Committee's report. (105 Cong. Rec. 2195).

The same sharp choice was presented to the Senate, also. S. 50, as introduced, contained narrow land-grant provisions like those of H.R. 50, and like those which had characterized Statehood legislation in the preceding Congresses. However, the Senate Committee on Interior and Insular Affairs rejected this narrow language. It reported out a bill containing broad land-grant language, similar to that in H.R. 4221. See S. Rep. No. 80, 86th Cong. 1st Sess. The Senate then approved the amended S. 50, containing the broad language. (105 Cong. Rec. 3844-47).

The House then accepted the Senate bill in lieu of its own H.R. 4221. (105 Cong. Rec. 4006, 4038-39). Thus, the bill cleared by the House Committee, the bill cleared by the Senate Committee, the bill passed by the Senate, and the bill accepted by the House in lieu of its own Committee's version, all contained the broad land-grant provisions. This was in each case as a matter of choice in the context of numerous other bills taking a narrower approach.

The change of language can hardly be obscured. Congress for ten years had before it legislation clearly limiting the land grants to Hawaii to lands originally acquired by the United States by cession. In place of this, in the crucial session of Congress, the legislation proposed the granting of "any land or property" no longer needed by the United States. The distinction between the broader and narrower categories had been carefully considered. Previous Congresses had preferred the narrower version because "it would eliminate any possibility of these provisions being construed as providing for the 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. Rep. No. 886, on S. 49, 83rd Cong., 2d Sess. (1954), p. 30. But the 86th Congress abandoned this view and adopted the broader, all-inclusive wording.

The only possible conclusion is that the Act was intended to be read as written. Congress did not in the end accept the concept, proposed to it for a decade, that conveyances to the State be limited to ceded lands. It rejected the language of the earlier bills and incorporated the broader provisions which finally became

law. To hold that Section 5(e) as finally adopted does not include "any land or property", regardless of how acquired by the United States, is thus to ignore the plain legislative history, as well as the plain language, of the Statehood Act, as finally accepted by the electors of Hawaii.

2. The intention of Congress was confirmed in the very next session.

There was no hint, during the 86th Congress, that the House Bill as finally adopted reached anything less than "any" land and property. No representative of the United States, during the consideration of and referendum on the Act, suggested to the people of Hawaii that Section 5(e) was limited. It was not until months after the statehood compact had been accepted and Hawaii was admitted into the Union that the question was even raised.

By then, Congress had before it the Hawaii Omnibus Act, 74 Stat. 411, 48 U.S.C. (Supp. II 1960), pp. 1261-66, designed to make certain technical statutory changes to take account of statehood. The House Committee, which had originated H.R. 4221, took the occasion, therefore, to confirm its intention in drafting the statehood bill. In commenting on Section 41 of the Omnibus Bill, it said (H. Rep. No. 1564 on H.R. 11602, 86th Cong., 2d Sess. (1960), pp. 3-4):

> Section 41 is intended to assure uniformity in the reporting procedure prescribed in Section 5(e) of the Hawaii Admission Act. This subsection provided that all Federal agencies having control over land and property in Hawaii which is retained by the United States under the terms of the act shall report to the President on their continued need therefor and that such land and

> property as the President determines is no longer needed for Federal use shall be conveyed to the State of Hawaii. *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 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.

Thus, there can be no doubt as to the intent of Congress. The crucial words of Section 5(e)—"any land or property"—were meant to be read in the natural and inclusive way they were written. Congress was well aware of the distinction. It had used other words in previous Sessions to limit the grant to the new State to ceded lands, and to exclude after-acquired property. The new language of Section 5(e) represented a conscious choice. And the choice was confirmed by the pronouncement of the very Committee of the House in which the language originated. The legislative history of the Statehood Act demonstrates that Section 5(e) includes land and property acquired by purchase, condemnation or donation.

D. All Policy Considerations Point to a Broad Reading of Section 5(e)

There was, in fact, every reason for Congress to promise the conveyance of all Federal land not needed by the United States.

1. The conveyance of property acquired after 1898 and not needed by the United States only partially compensated Hawaii for its past and future sacrifices, including the retention of substantial ceded lands by the United States.

In the first place, Section 5(b) granted to the new State the lands acquired by the United States under the unique cession of 1898. These properties had been acquired from the Hawaiian people; most were under the administration of the Territory anyway; and their conveyance to the State was only natural and appropriate, to rectify an ancient inequity and fulfill the terms of the original trust.

But substantial portions of the original cession lands had been reserved over the years by the United States, without any cost to itself, for specific Federal functions. These lands contain substantial defense installations—including great areas of land used for training and maneuver purposes—as well as other Federal installations and buildings. Under the Statehood Act, these were not conveyed to the State as long as they were needed by the Federal Government, and so were specifically excepted from Section 5(b).

The State was entitled to compensation for the continued free use of these thousands of acres of ceded lands. This compensation was achieved—but only in part—by the provision for conveyance of "any land or property . . . no longer needed by the United States." This is the strong "equitable" consideration for the broad reach of Section 5(e), recognized by the Attorney General, that the State:

> ought to receive the surplus after acquired 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. (Ex. H, App., p. 58).

2. Congress could not have intended to impair Hawaii's low-income housing program.

Furthermore, as the Attorney General points out, if the defendant's restriction of Section 5(e) prevails, a "large portion of Hawaii's public housing units" will be open for sale to private interests (Ex. H, App., p. 44). The acreage is small but their public importance enormous. They have long been administered by the Hawaii Housing Authority. The Authority leases the units, collects the rents, pays for the maintenance of the properties and turns over the net income to the Department of the Navy (Complaint, Paras. IX-XII).

Under Section 5(e), properly interpreted, these tracts undoubtedly would be conveyed to the State. As a practical consequence, the only change would be that the State would no longer have the obligation to turn over the modest surplus income to the Department of the Navy. The properties would remain part of Hawaii's vital low-income housing program. But if the defendant's interpretation is adopted, the consequences are serious and wholly out of keeping with the intention of the Statehood Act. The properties would be declared surplus. They could be passed into the general catalog of surplus Federal lands. They could be posted for competitive private bidding, and eventually sold to private interests. They could in short be removed from Hawaii's public housing program.

This is hardly justifiable. It was the purpose of the Statehood Act to welcome Hawaii into the Union, to settle the complex and tangled intergovernmental land affairs in Hawaii, and to compensate the people of

Hawaii for the continued occupation of lands acquired from the ancient Republic. We cannot conceive that Congress intended without notice to bury an obscure limitation in Section 5(e), to be used later to impair Hawaii's public housing program by opening "a large portion of Hawaii's public housing units" for private sale. In short, there is no policy consideration to support the defendant's unnatural and strained limitation of Section 5(e).

3. Nor was there any real reason to distinguish between properties acquired by the Territory and properties acquired by the Federal Government.

Furthermore, there is no way to rationalize defendant's interpretation of the Act. Section 5(e), by defendant's admission, extends to certain lands and property in addition to ceded lands; defendant has applied the reporting, evaluation and conveyance procedures not only to lands taken by the United States upon annexation but also to lands which the Territorial government purchased and turned over to the Federal government.

The Territorial government was an instrument of the national government. Whether lands were acquired for Federal use after 1898 by the Territory or by the national government would seem to be of little moment, for purposes of the question of what in equity the new State should receive. If the Congress intended to convey to the State unneeded lands which the Territory purchased and turned over, there is nothing to explain why it should have intended to hold out unneeded properties purchased or condemned by the United States.

4. Congress was seeking a practical solution to the practical problems of Federal land holdings in Hawaii.

Finally, there is every indication that the Committee which had settled the language of Section 5(e)—the House Interior and Insular Affairs Committee—was far more concerned with practical than with semantic problems. The Island of Oahu has an extraordinarily high population density; at the same time, there are extensive defense and military installations on the Island. The Committee was well aware of this. In the light of the Committee's intense and detailed knowledge of the problem of military land holdings, which had long affected economic development in Honolulu, as set forth in the Committee's Report, *Military Public Land Withdrawals,* H. Rep. No. 215, 85th Cong., 1st Sess. (1957), it is apparent that its purpose in Section 5(e) was to effect the most efficient utilization of these land holdings, regardless of how title had first been acquired.

In short, the only sensible interpretation of Section 5(e) is the simple and natural one suggested by the State: that it extends to "any" and all properties no longer needed for national purposes, including the four low-income housing properties previously described. Defendant's interpretation of the Act presumes that Congress intended, by a misleading technicality, to avoid the moral obligation to compensate the people of Hawaii for the ceded lands retained, to impair the State's public housing program, to create a meaningless distinction between property purchased by the Territory and property purchased by the United States, and finally to ignore the problem of military land holdings in the congested Honolulu area. Defendant's view of

the Act is not only wrong as a matter of law, but is unsupported by any conceivable policy considerations.

E. The Attorney General's Opinion, On Which Defendant's Crucial Transmittal Memorandum Was Based, Was Demonstrably Wrong

We turn now to the Opinion of the Attorney General (Ex. H, App., pp. 35-59), upon which the Defendant's Transmittal Memorandum No. 1 to Circular No. A-52 was based. The Attorney General glosses over the legislative history with the euphemism that the significant shift of approach in the Eighty-Sixth Congress reveals only a "change in the drafting technique" (*Id.*, at 48). He ignores the fact that the statutory language must be interpreted as it was understood by the parties to the Statehood compact. He avoids the palpable policy reasons why Congress should have provided for grants of purchased and condemned, as well as ceded, properties. And he develops, instead, an overly technical, unforeseen construction of the statutory language which is plainly wrong.

1. In construing Section 5(e), the Attorney General relied on a misconstruction of the words "Set Aside" in another subsection.

The Attorney General's Opinion is based primarily on the notion that the words "set aside" in Section 5(c) restricted the "any land or property" language of Section 5(e) to ceded and Territorial property. We would observe at the outset that if Congress had really intended to restrict the Section 5(e) procedures in this fashion, it could hardly have chosen a more misleading, circuitous and obscure drafting technique.

The Attorney General correctly notes that Section 5(e) is limited to lands retained by the United States

under Section 5(c).[15] Section 5(c) provides that the United States shall retain "[a]ny lands and other properties that . . . [on the day of admission to Statehood] are set aside pursuant to law for the use of the United States under any . . . Act of Congress. . . ."[16] He is also correct in noting that the Federal and the Territorial governments could "set aside" ceded properties, and the Territorial government could "set aside" for Federal use properties it purchased. From this, with no authority and only questionable logic, he concludes that properties acquired by the United States by purchase or condemnation and used for a Federal purpose were not "set aside":

> I am unaware of any authority to "set aside" any other category of property . . . (Ex. H, App., p. 51)

And, because he is "unaware" of any "authority" to set aside afteracquired property, he concludes that it is not within Section 5(e).

The Attorney General overlooks the fact, however, that the condemnation of property under an Act of Congress permitting the acquisition of land for a specific Federal use itself results in setting the property aside for the public purposes pleaded in the condemnation suit. In cases of condemnation, as well as in cases of purchase under an Act of Congress, the property is acquired and set aside by the act of condemnation, or purchase, for Federal use. Nothing else—no

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[15] As well as to any land or property retained under Section 5(d). Section 5(d) relates to apparently special circumstances of ceded lands controlled by the United States by "permit, license, or permission, written or verbal" from the Territory.

[16] As well as by Executive Order or proclamation of the President or Governor.

further ritual—is necessary. It is the State's position that the lands and properties acquired by the United States by condemnation or purchase, including the four low-income public housing projects particularly affected here, are within the statutory language:—"set aside pursuant to law for the use of the United States under any . . . Act of Congress . . ."

This is crystal clear from an analysis of the process of acquisition of the John Rodgers Housing land. That land was acquired by condemnation in 1941. Section 201 of the Act of June 28, 1940, c. 440, 54 Stat. 676, 681, had enjoined the Navy and War Departments and the U.S. Housing Office "to cooperate in making necessary housing available for persons engaged in national defense activities . . ." The statutory authority for acquiring and setting aside the necessary land was Section 202(b), 54 Stat. 682:

> The Navy or War Department, in connection with any project developed or leased by it, and the Authority, in connection with any project developed or assisted by it, for the purposes of this title, *may acquire real or personal property or any interest therein by purchase, eminent domain, gift, lease or otherwise.*

And Title 2 of the Supplemental Military Appropriations Act for the fiscal year 1941, Act of September 9, 1940, 54 Stat. 875, 883, had appropriated $100,000,000—

> To the President for allocation to the War Department and the Navy Department *for the acquisition of necessary land and the construction of housing units,* including necessary utilities, roads, walks, and accessories, at locations on or near Military or Naval Establishments, now in existence or to be built, or near privately owned industrial plants engaged in military or naval activities

> . . . where the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission shall certify that such housing is important for purposes under their respective jurisdiction and necessary to the national defense program. . . .

It was under this statutory authority that the land was acquired and set aside. On November 19, 1940, Acting Secretary of the Navy Forrestal notified the Attorney General that the Navy had selected the land, part of which later became John Rodgers Housing, "for the establishment of necessary housing for naval personnel engaged in national defense activities", and requested institution of condemnation proceedings (Ex. L, App., pp. 112-13).

The United States Attorney instituted the condemnation proceedings in the District Court for the Territory. *United States* v. *254.468 Acres of Land,* Civil Action No. 436, D.C. Hawaii, October Term, 1940 (Ex. L, App., pp. 113-17). The petition for condemnation specifically pleaded the authority, set forth in the two Acts of June 28, 1940 and September 9, 1940, of the Secretary of the Navy "to acquire the hereinafter described land for the establishment of necessary housing at Moanalua, Honolulu, Island of Oahu, Territory of Hawaii." It made it clear that the United States intended to acquire the property in order to set it aside for the housing purposes contemplated by the Congress (*Id.,* at 114-15):

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

The petition pleaded that it was essential to acquire the property immediately. Hence, under the Acts of August 1, 1888, 25 Stat. 357, 40 U.S.C. § 257, and February 26, 1931, 46 Stat. 1421, 40 U.S.C. § 258(a), the United States sought immediate possession and filed a Declaration of Taking. The District Court's Order and Judgment on Declaration of Taking of November 7, 1940 specifically recited that the declaration was filed "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," and "that the uses of the lands acquired are as described in said acts of authority. . . ." (Ex. L, App., p. 118).

This condemnation process set the land aside pursuant to law for the use of the United States. We can hardly imagine a clearer case of land being "set aside" pursuant to an Act of Congress. Congress declared the need for such acquisitions. It gave specific authority to acquire land by condemnation. And the title to this specific parcel was taken and set aside to the United States by formal order of the United States District Court.

There was no need for anything else. No other obscure procedure or executive formality was appropriate to set the land aside. Nothing further remained to be done. Nothing further could be done. The land had been as securely and firmly set aside for

the use of the United States, pursuant to an Act of Congress, as it could ever be, and continued in this status through the date of Hawaii's admission into the Union. "Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use." *Wilcox* v. *Jackson,* 13 Pet. 498, 512 (1839).

But the Attorney General holds otherwise. He would give the words "set aside" a highly "technical meaning." (Ex. H, App., p. 52). They are not defined in the Act. They are, as he admits, broad and inclusive (*id.,* at 52):

> It may be admitted that the term "set aside" may have more than one meaning . . .

But because the words may have been used on occasion in describing the removal of tracts out of the general reservoir of ceded lands, or in dedicating properties acquired by the Territory by purchase or condemnation, he concludes that they could not have been used in the Act in any other sense.[17]

(a) The reasoning is built on a fallacy. Admittedly the term "set aside" had been used on occasion to refer to ceded and afteracquired Territorial properties. But there is nothing to show that in 1959 the words were not used by Congress, and understood by the people of Hawaii, in the broader, far more direct sense, to include the setting aside of land through condemnation or purchase. That the narrower use of the term is exhaustive —excluding all other situations which the words in

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[17] The Attorney General's opinion says that the phrase "set aside" goes back to the Joint Resolution of Annexation of 1898. (Ex. H, App., p. 36). That Resolution may be searched in vain for the phrase.

their natural and ordinary meaning fit—is nowhere demonstrated in the Attorney General's opinion. There is, in short, no evidence that the electors of Hawaii, and the 96 members of the Senate and the 435 members of the House of the 86th Congress intended any narrower meaning. The Attorney General postulated a nonexistent special meaning for the term, and then presumed that the Congress and the people of Hawaii were well aware of it. This was error.

(b) If the words "set aside" have been used on occasion to describe the removal of tracts of land out of the general reservoir of ceded lands, and their appropriation for specific Federal uses (as apart from the Federal Government's holding title, without making use of the land), certainly this usage simply supports the State's position here, rather than detracts from it. The same sort of appropriation for specific Federal use took place here, with respect to the lands for the housing areas. For when the lands were acquired through condemnation or purchase, they were certainly appropriated—"set aside"—for certain specific Federal Governmental purposes. They could, under the law, only have been purchased or condemned by the United States on that basis; they could not have been purchased or condemned to be held simply as inventory or for speculation.

Clearly, then, the lands in question here were "set aside" for the use of the United States. We have referred to the acts of Congress which provided the specific purposes for which the lands acquired for the housing projects were set aside. The method in which they were *acquired* is a total irrelevancy to the question whether they were "set aside" for the use of the United States.

There is every evidence that the words "set aside" are, as a matter of usage as well as of logic, applicable to lands acquired by the United States through purchase or condemnation. The question, again, as a matter of usage, is the *appropriation* of the lands for the specific Federal purpose, not the method of their *acquisition.* See, for example, *United States* v. *McGowan,* 302 U.S. 535 (1938). There, this Court reversed a Court of Appeals ruling that certain lands, which had been purchased by the United States, were not lands which had been "set apart" for the Indians. (89 F. 2d 201 (9th Cir. 1937)). This Court held that the purchased lands were, in fact, lands which were "set apart." It declared: "The Reno Colony has been validly set apart for the use of the Indians." (302 U.S., at 539).

(c) In fact, there is compelling evidence that the 86th Congress itself did not view the words "set aside" in any highly technical sense such as suggested by defendant. We note the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C., pp. 7894-7900, passed the previous year by the 85th Congress, which opened the way for the Hawaii Act. In it, in a context where there were no ceded lands, Congress referred to lands "withdrawn *or otherwise set apart. . . .*" (§ 6(e), *id.,* at p. 7895) This demonstrates that Congress, less than a year before this Statehood Act, understood the words "set aside" as broader and less technical even than the term "withdrawn."

(d) And earlier legislation, specifically relating to Hawaiian properties, contemplated no limitation on the kinds of property which could be "set aside." The Act of January 31, 1922, c. 42, 42 Stat. 360, for example, provided that the President could exchange

"any land or any interest in land [without restriction to ceded property] . . . for privately owned land . . . and thereafter *set apart* for military purposes *the lands or interest therein so acquired.*"

(e) In fact, Congress on occasion has used the very words "set aside" to refer to properties acquired by purchase and condemnation for the purpose for which they were to be "set aside." The Act of June 23, 1926, c. 661, 44 Stat. 763, authorized the acquisition of lands in a specified area

> . . . in private ownership at a price not to exceed $5 per acre, and to acquire from private owners by condemnation proceedings . . . any lands within said area which cannot be purchased at the price herein named.

The Act was entitled "An Act *Setting aside* Rice Lake and contiguous lands in Minnesota for the exclusive use and benefit of the Chippewa Indians of Minnesota."[18] And in the very session of Congress which passed the Hawaii Statehood Act, an enactment, P.L. 86-198, August 25, 1959, 73 Stat. 427, provided that certain "lands heretofore purchased . . . are hereby set aside" for the Quinault Indians.

In short, the term "set aside" obviously refers to the appropriation of land or property for a particular use—here, for the use of the United States. It clearly has no reference, in logic or usage, to the form of acquisition of the land or property—only to the use to which it is devoted.

The real question is whether the Congress and the electors of Hawaii intended to place a drastic limita-

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[18] Set forth in *United States* v. *4,450.72 Acres of Land,* 27 F. Supp. 167, 169 (D. Minn. 1939).

tion on the "any land or property" provisions of Section 5(e) in this Act, through the application of an arbitrarily limited meaning of "set aside" in Section 5(c). There is no evidence of such an intent, and ample evidence to the contrary. The Attorney General's attempt to import a limitation to Section 5(e) through Section 5(c) was error.

2. The fact that Section 5(f) imposes a trust on ceded lands does not exclude purchased and condemned lands from Section 5(e).

The Attorney General also points out that Section 5(f) imposes a trust on the State with respect to the "public lands" conveyed under Section 5(e). He suggests that if Section 5(e) were meant to convey afteracquired property there would have been a further provision in the statute imposing a trust on that property. And he concludes from this that the Congress did not intend to convey afteracquired property.

This is false logic. In the first place, the trust concept long antedated statehood and has always been limited to ceded property. Less than a year after annexation, the Attorney General concluded that the lands acquired by the cession were held in trust by the United States for the people of Hawaii,[19] and the trust principle was consistently applied thereafter only to ceded lands. There would have been no reason in the Statehood Act to extend this trust for the first time to properties acquired after 1898 out of the general tax revenues of the Federal government.

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[19] 22 Ops. Atty. Gen. 574 (September 9, 1899); 22 Ops. Atty. Gen. 627 (November 21, 1899).

The Section 5(f) trust (like its predecessor trust concept) reached the properties which the United States had acquired, under circumstances of dubious morality, from the people or government of Hawaii by annexation. As stated, the United States in no other instance had acquired by cession the entire governmental properties of any area voluntarily annexed by cession. The trust in Section 5(f) was intended to insure that these lands, after 60 years, would be put to their proper use. Afteracquired properties—both Federal and Territorial—are on a different footing. By definition, these were not acquired by cession. Hence, there was no moral consideration for imposing a trust with respect to them.

Afteracquired Federal properties were, in this sense, analogous to afteracquired Territorial properties. The Attorney General admits that afteracquired *Territorial* properties are within Section 5(e)'s procedures. But Section 5(f) imposes no trust on them either. Thus, the fact that Section 5(f) is limited in terms to ceded properties, and the fact that Section 5(e) refers to "any land or property", are perfectly consistent. The calculated difference in language in the two provisions, if anything, supports the State's position. It demonstrates that Congress was well aware of, and sensitive to, the distinction. The Attorney General can hardly read a limitation into Section 5(e) merely because the terms of Section 5(f) are limited.

3. Section 5 itself reveals the Attorney General's error.

The nub of the Attorney General's conclusion is that Section 5(e) reached only ceded and Territorial properties. By Section 5(a), the State succeeded to the land and property of the Territory; Section 5(b) granted

the ceded lands. Sections 5(c) and 5(e), in his view, reaches only these two classes of properties. The only lands which would be retained by the United States under Section 5(c), and then reported, evaluated and conveyed to the State if not needed by the United States under (e), were Territorial or ceded properties which would have passed to the State under (a) or (b) absent retention under (c). As the defendant said in his crucial Transmittal Memorandum No. 1 to Budget Circular A-52:

> 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 . . . 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. (Ex. G, App., p. 34).

This conclusion is demonstrably wrong. Subsections 5(a) and 5(b) are not the exclusive granting provisions of Section 5. Subsection 5(e) is an independent instrument. It reaches and includes lands not covered by Subsections (a) (Territorial property) or (b) (ceded lands). Section 5 itself shows this. Subsection (h) provides that:

> 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 . . .

shall cease to be effective. The emphasized language "or (e)" is crucial. It reveals that Subsections (a) and (b) are not the only sections conveying lands. Other property, not vested in or conveyed to the State by (a) or (b), is conveyed by (e).

The Attorney General and the defendant thus were plainly in error. Subsection (e) is not limited to Territorial lands under (a) and ceded lands under (b). It reaches, and was intended to reach, as it says, "any land or property" that is retained by the United States by virtue of having been set aside pursuant to the law, including afteracquired property.

4. The Attorney General is demonstrably wrong in concluding that the "Grants" extended only to land and property in which Hawaii had once had an interest.

Of course, the Attorney General is thus forced to conclude that the Act left a major gap in the land settlement. By reading afteracquired property out of Section 5, he admits that the Act constituted only a partial settlement of the complex intergovernmental land affairs in the islands.—This, despite the clearly exhaustive provisions of the Alaska Act, passed by Congress only the preceding year.[20]

The gap which the Attorney General claims to see in the Act does not exist. He claims that the Act reaches only lands in which the Territory once had an interest (Ex. H, App., p. 53):

> It [Congress] 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.

But Congress could not have been concerned solely with land and property in which either the Republic or the Territory had once had an interest. The lan-

[20] See note 9, at page 27, *supra*.

guage of the statute makes a clear distinction. It speaks of "land or property" and of "lands and *other* properties", Sections 5(e) and 5(c). Admittedly the "lands" include lands which were acquired by the cession. The United States, subsequent to the cession constructed buildings, put in improvements and otherwise made expenditures on ceded land. These improvements clearly fall within the statutory reference to "property."

The Attorney General admits that ceded "land," if not needed, is to be conveyed to the state. By the same token, the "property" on ceded land must also be conveyed to the state. But neither the Republic nor the Territory ever had an interest of any kind in subsequent Federal property improvements on ceded lands. Thus, even under the Attorney General's own interpretation, Section 5 is not limited to assets—land *or* property—once owned by the people of Hawaii. It is obviously broader. If after-constructed property improvements on ceded lands are included, after-acquired land itself must likewise be within the Act. There is no rational distinction between the two. Congress intended to settle interests in the improvements on ceded land and, as well, such land as the United States purchased subsequent to 1898, in spite of the fact that the people of Hawaii had never had an interest in either and in spite of the fact that both had been purchased by the United States at its own expense.

Thus, it is the State's position that Section 5(e) reaches, as it says, "any land or property". The holding agencies are obligated by statute and bound by solemn compact to report the continued need for the housing properties to the defendant. The defendant is bound to evaluate whether the land and property is

needed by the United States. If not, "it shall be conveyed to the State." This was the promise of the United States, duly enacted by the Congress and specifically accepted by the Hawaiian electors. Defendant's attempt to restrict the procedures of Section 5(e) finds no support in the Act and was plainly in excess of his authority.

III. THIS SUIT IS NOT BARRED BY SOVEREIGN IMMUNITY

Defendant may, however, contend that this suit is barred by sovereign immunity. It is not.

A. Defendant Acted Outside His Statutory Authority; He Cannot Claim the Immunity of the Sovereign

As the preceding section of the brief shows, the defendant's exclusion of "any land or property" acquired by condemnation from the Section 5(e) procedures was not within the statute. Section 5(e) speaks in unqualified terms of "any land or property." There is no limitation in Section 5(g). The legislative history shows that Congress intended Section 5(e) to reach property of all kinds, and that the language was not inadvertent or ambiguous. It also shows that the very Committee which originated the crucial phrasing reaffirmed its intent to cover condemned and purchased properties in the very next Session of Congress. Defendant's exclusion of these properties leaves a gap in the Act, denies Hawaii any compensation for the vast areas of ceded lands retained by the United States and directly threatens a "large portion" of Hawaii's low-income public housing program.

It was, in short, unauthorized. Congress gave defendant no power to exclude certain properties from Section 5(e). Certainly the electors of Hawaii, in ac-

cepting the compact of statehood, did not confirm any such power to him. The Hawaii Statehood Act did not authorize the defendant to restrict Section 5(e) to ceded lands, to refuse the conveyance of properties not needed by the United States or to redefine the terms of the land grants.

He cannot, therefore, claim the immunity of the United States. His was not the sovereign act of the United States. Congress adopted the Statehood Act promising "grants" to the State of "any land or property", no longer needed, as one of the elements of the statehood compact. The President signed the Act. The qualified electors of Hawaii accepted each of the specific propositions submitted to them. On August 21, 1959, the President found that the people of Hawaii had adopted the specific propositions and declared that Hawaii was admitted into the Union. This completed the statehood compact.

The State does not challenge the Statehood Act as written and accepted. It does not seek to upset this exercise of sovereignty. It seeks only to effectuate it. It challenges defendant's subsequent attempt to change the terms of the compact by executive redefinition. Congress and the people of Hawaii agreed to statehood on the condition that the United States would turn over surplus Federal land to the State and the State would forego other claims. The defendant took certain lands which the State says were part of the agreement out of the evaluation and conveyance procedures agreed to by Hawaii and the Federal Union. Defendant's determination to exclude condemned land

and property was unauthorized, was not the act of the sovereign, and was not immune from suit. For his unauthorized interferences with the rights of the State, the defendant must answer as an individual. *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-91, 695 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947); *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 619-20 (1912). And see dissenting opinion of Mr. Justice Frankfurter, *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. at 705, 716-17.

To paraphrase the majority in *Larson,* 337 U.S. at 704, the process of evaluation and conveyance of land grants promised in a solemn compact of statehood "cannot be stopped in its tracks" by the later attempt of an executive official to restrict the terms of those grants.

B. The State Seeks Only An Order Enjoining the Defendant's Unauthorized Act

The request for relief is directed solely against Defendant. It reaches only his unauthorized acts, and seeks nothing more than a cessation of his own unauthorized conduct. It does not require any affirmative action of the sovereign or the specific disposition of any particular property of the sovereign. The State does not seek to try any title.[21] It recognizes that title to the housing projects and any other land or property as to which this controversy may have practical application is in the United States.

The State does not ask for an order or declaration of the transfer of specific parcels. It does not even

[21] Contrast *Oregon* v. *Hitchcock,* 202 U.S. 60 (1906); *New Mexico* v. *Lane,* 243 U.S. 52 (1917).

ask the Court to consider the question of whether the specific public housing properties, or any other specific properties, are needed by the United States. No such determinations have been made; and this suit seeks only the removal of an erroneously-imposed bar to the making of such determinations.

The State asks only that the defendant be enjoined from his unauthorized restriction on the Section 5(e) procedures, in order to open the door to reports and evaluations of Federal need and, if then appropriate, to the conveyance to the State of the four low-income housing units.

The case is, accordingly, squarely within the doctrine of *Work* v. *Louisiana,* 269 U.S. 250 (1925). There, as here, the dispute arose out of statutes providing for the conveyance of described lands to the State. There, as here, a Federal official excluded certain categories of land from the conveyance procedures. There, as here, his exclusion was unauthorized. The defendant claimed the immunity of the United States. The Court rejected the defense. It said (*id.* at 254):

> These objections are based upon a misconception of the purpose of the suit. It is not one to establish the title of the State, as in *Louisiana* v. *Garfield,* [211 U.S. 70 (1908)], and *New Mexico* v. *Lane,* 243 U.S. 52, nor one to quiet its title, as in *Minnesota* v. *Lane,* 247 U.S. 243. The bill does not seek an adjudication that the lands were swamp and overflowed lands or to restrain the Secretary from hearing and determining this question, but merely seeks an adjudication of the right of the State to have this question determined without reference to their mineral character, and to require the Secretary to set aside the order requiring it to establish their non-mineral character or suffer the rejection of its claim. In short, *it is merely a suit*

to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.

It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. . . . A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party.

C. The Issue Is One of Law, Not of Discretion

Finally, the State does not seek to have this Court review any exercise of discretion by the defendant, or review any determination of whether the United States has a need for any specific properties. No such determination has been made. The question whether any specific properties are still needed by the United States is not in issue here. This is so precisely because defendant has unlawfully refused to make any determination of need in respect of land and property acquired by condemnation. We do not seek an ultimate order of conveyance of any specific parcel—as to which administrative discretion and judgment would admittedly come into play—because defendant has prevented the exercise of such discretion and judgment by his erroneous legal interpretation of the Act.

The challenged act in this case is defendant's order to other agencies not to submit reports of need as to the class of properties in question, and his own stated refusal to make the final determinations of need as to them. This was based on his holding that Section 5(e) did not reach land originally acquired by the United

States by purchase, condemnation or gift. But the perimeters of Section 5(e)'s application—within which administrative judgment as to need might function—must be marked by legal standards, reflecting the terms of the compact of statehood agreed to by the United States and the people of Hawaii.

Thus, the remedy sought here is the setting aside of the error of law and the removal of the bar to consideration of the matter on its merits. See *McGrath* v. *Kristensen,* 340 U.S. 162, 169 (1950). As in *McGrath* v. *Kristensen,* the determination of the defendant that, as a matter of law, a certain category of matters is outside the statutory procedures—here, that Section 5(e) includes only a restricted catalog of lands—is a legitimate subject of review. An action to review such a determination constitutes an actual controversy between the State and defendant, and one as to a question of law, not of discretion. What conclusion defendant may reach, in respect of the continued Federal need for such specific parcels of condemned land, once this bar to consideration is removed, is another and wholly different matter, which the State does not, and could not, litigate at this time.

CONCLUSION

For the foregoing reasons, the State of Hawaii urges the Court to grant the Motion for Leave to File Complaint.

Respectfully submitted,

SHIRO KASHIWA
Attorney General of the State of Hawaii

April 1962.

WILBUR K. WATKINS, JR.
Deputy Attorney General of the State of Hawaii
Honolulu, Hawaii

THURMAN ARNOLD
ABE FORTAS
PAUL A. PORTER
1229 Nineteenth Street, N.W.
Washington, D. C.

Of Counsel:
ARNOLD, FORTAS & PORTER
1229 Nineteenth Street, N.W.
Washington, D. C.