No. 12, Original

In the Supreme Court of the United States

OCTOBER TERM, 1961

STATE OF HAWAII, PLAINTIFF

v.

DAVID E. BELL, DEFENDANT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

Defendant, David E. Bell, opposes plaintiff's motion for leave to file its complaint on the following grounds:

1. The complaint presents a suit against the United States to which it has not consented.

2. The complaint fails to state a claim upon which relief can be granted.

STATUTES INVOLVED

The Hawaii Statehood Act, 1959 (73 Stat. 4, 48 U.S.C. (Supp. II 1960), pp. 1257–1261), and the Joint Resolution of Annexation 1898 (30 Stat. 750) are set forth in the separately bound appendix to the complaint (Exh. A and B, App. 1–19, 20–22).

Sections 91 and 73(q) of the Hawaiian Organic Act of 1900 (31 Stat. 159, as amended, 48 U.S.C. 511, 677) are set forth in the appendix to this brief (*infra*, pp. 63–66).

STATEMENT

Section 5(e) of the Hawaii Statehood Act (App. 1–19),[1] provides that:

> (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.

The land which must be so processed is "land * * * retained by the United States pursuant to subsections (c) and (d)." Subsection (c)[2] states:

> (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 * * *.

Section 40 of the Hawaii Omnibus Act of July 12, 1960 (74 Stat. 411) directed the President to prescribe procedures to assure the uniformity and coordination of the agency reports submitted to him pursuant to § 5(e) of the Statehood Act. The President, assisted by the Director of the Bureau of the Budget, received

[1] "App." refers to the appendix to the complaint.

[2] Subsection (d) is not relevant. See note 18, p. 30, *infra*.

memoranda of law from Hawaii and various federal agencies on the question whether the land described in § 5(c) and thereby incorporated in § 5(e) was limited to land which had once belonged to Hawaii and later been "set aside" by certain statutory procedures for the use of the United States or included all land in Hawaii owned by the United States at the time of the Statehood Act. More particularly, the question was whether § 5(c) included land acquired by the United States from private persons by purchase, condemnation, or gift. Differing views having been expressed, the President requested the opinion of the Attorney General.

Pending the issuance of the Opinion of the Attorney General, the President, on October 5, 1960, "designated and empowered" the Director of the Bureau of the Budget to perform the functions "vested in the President by § 5(e) of the act of March 18, 1959, providing for the admission of the State of Hawaii into the Union, 73 Stat. 6, (1) to receive the reports required by the provisions of that section, and (2) to determine that certain land or property is no longer needed by the United States."[3] On November 14, 1960, the Director issued Budget Circular No. A–52 (Ex. F, App. 25–33), establishing procedures for rendering the reports described in § 5(e) of the Statehood Act. The Circular required such reports to be made only as to lands which had once belonged to Hawaii and been "set aside" in certain technical ways for the United States. The provision for conveyance to Hawaii of lands deter-

[3] Executive Order No. 10889, 25 Fed. Reg. 9633 (App. 23).

mined to be unneeded [4] was similarly limited. Pending the Attorney General's opinion as to the scope of § 5(e), however, the Circular directed the agencies not to dispose of any land in Hawaii controlled by them.

On June 12, 1961, the Attorney General furnished the President a detailed opinion, 42 Ops. Atty. Gen. (No. 4),[5] which concluded that the lands referred to in §§ 5(c) and 5(e) did not include lands obtained by purchase, condemnation or gift, but were limited to lands which had once belonged to Hawaii, *i.e.,* lands either ceded to the United States when Hawaii was annexed and later taken for the uses of the United States pursuant to § 91 of the Hawaiian Organic Act (48 U.S.C. 511) or lands acquired by the Territory and "set aside" for the United States pursuant to § 73(q) of the same Act (48 U.S.C. 677). On August 22, 1961, the Director of the Budget amended Circular No. A–52 to limit the instruction not to dispose of Hawaiian lands to those lands within § 5(e) as interpreted by the Attorney General. Lands not within that interpretation, it provided, "may be disposed of as otherwise authorized by law." [6]

The State of Hawaii thereupon filed with this Court a motion for leave to file a complaint in an original action, invoking the jurisdiction of this Court under

[4] The Director was delegated the President's authority to convey unneeded lands on August 21, 1961. Executive Order No. 10960, 26 Fed. Reg. 7823 (Exh. E, App. 24).

[5] Exh. H, App. 35–59.

[6] Transmittal Memorandum No. 1 to Bureau of Budget Circular No. A–52 (Exh. G, App. 33–34) and Budget Circular No. A–52 (Exh. F, App. 25).

Article III, Section 2, clauses 1 and 2, of the United States Constitution. See also 28 U.S.C. 1251(b)(3). The complaint alleges (Par. IV) that § 5(e) of the Hawaii Statehood Act, *supra,* requires all federal agencies having control over any land or property retained by the United States pursuant to § 5(c) of the Act to "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." It is then alleged (Par. V) that the duties imposed on the President by Section 5(e) have been delegated to the defendant, David E. Bell, Director of the Bureau of the Budget, who, in carrying out his delegated function, issued a directive on November 14, 1960 (Budget Cir. No. A–52), that unlawfully and without statutory authority required reporting by the various federal agencies only of land ceded to the United States in 1898 or "acquired by the Territory of Hawaii and set aside for Federal use." This directive, it is alleged, excluded "lands or property acquired directly by the United States by purchase, condemnation, gift or otherwise."

Plaintiff asserts (Par. IX) that there are four specific parcels of land—housing areas acquired by the United States in condemnation proceedings—that have been reported by the Department of the Navy as being no longer needed for any defense requirement.

Plaintiff says (Par. X) that it believes these and other lands are no longer needed by the United States and would be conveyed to the State of Hawaii "if the defendant ceased and desisted from his erroneous construction" of § 5(e) of the Hawaii Statehood Act. In paragraphs VII and VIII, it is alleged that on August 22, 1961, following an opinion of the Attorney General dated June 12, 1961, the defendant "directed" that all federally acquired property which had been omitted from the reporting requirements of § 5(e) of the Hawaii Statehood Act "should be disposed of as otherwise authorized by law."

The prayer seeks two types of relief—mandatory and declaratory. In the first category, plaintiff prays that a decree be entered (1) directing the defendant to "cease and desist" from (a) refusing to request from executive departments reports relating to land or property of the United States in Hawaii acquired by purchase, condemnation, gift, or otherwise, (b) refusing to make the statutory determination as to the need of the United States for such land "or refusing, if not needed, to convey the same to the State of Hawaii" and (c) refusing to cancel his order on the subject designated as "Bureau of the Budget Transmittal Memorandum No. 1 to Circular No. A–52," and (2) requiring the defendant to request and receive reports covering lands acquired by purchase, condemnation or gift from all federal agencies and, if such lands are no longer needed, convey them to the State of Hawaii. In the second category, plaintiff asks for a declaration by this Court that § 5(e) of the Hawaii Statehood Act extends to land and

property acquired by the United States by purchase, condemnation, gift, or otherwise, and that the State of Hawaii is entitled to have a statutory determination made with respect to the continuing federal need for such property.

SUMMARY OF ARGUMENT

Plaintiff's motion for leave to file a complaint should be denied for two separate reasons. First, the complaint states only a claim against the United States, or to which the United States is an indispensable party, and the United States has not consented to the suit. Second, the complaint does not state a cause of action upon which relief can be granted.

I

A. The decisions of this Court have firmly established the applicability of the doctrine of sovereign immunity to a suit by a State against the federal government. *Kansas* v. *United States,* 204 U.S. 331. Moreover, an action brought by a State against the United States without its consent must be dismissed if it is in substance against the United States even if the action is nominally brought against a federal official. *Oregon* v. *Hitchcock,* 202 U.S. 60. In the light of these principles the motion to file a complaint should be denied because of the lack of consent of the United States to suit. For, whether viewed in terms of the subject matter of the cause of action asserted or in terms of the relief demanded, the claim stated in the complaint can only be litigated in an action to which the United States is a party.

B. The subject matter of the complaint is the respective rights of Hawaii and the United States to property owned by and in the possession of the United States. In such an action the United States is an indispensable party for it has "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 139. The substantial interest of the United States is made indisputably clear by the plaintiff's demand that the defendant be ordered to convey to Hawaii property now owned by and in the possession of the United States.

The fact that it is conceded that plaintiff has no present interest in or title to the property in issue fully distinguishes this case from cases such as *Land* v. *Dollar,* 330 U.S. 731, and *Work* v. *Louisiana,* 269 U.S. 250. In each of these cases the United States was found not to be indispensable by application of a rule allowing suits "brought to enjoin [a government official] * * * from enforcing an order, the wrongful effect of which will be to deprive [the private claimant] * * * of vested property rights." *Ickes* v. *Fox,* 300 U.S. 82, 96. In *Land* v. *Dollar, supra,* at 737–738, the Court carefully distinguished cases such as this "where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property" and in *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371,

the Court held that the United States was an indispensable party to such actions.

C. This suit, which seeks to compel the defendant to exercise governmental powers to perform a number of affirmative actions in an official capacity, is barred by the long-established rule, repeated in *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 691, n. 11, that a suit claiming unauthorized actions of an official fails "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."

D. The complaint, while purporting to state a claim based on the allegedly unauthorized actions of the defendant, in fact demands specific performance of the obligation assumed by the United States under the Statehood Act. The suit is therefore barred by the long-settled rule of this Court that federal courts are without jurisdiction to entertain proceedings seeking an injunction directing specific enforecement of a contract made by the sovereign, although the complaint is nominally against an individual public official.

II

A. The Republic of Hawaii, upon annexation in 1898, ceded to the United States all property owned by it. By § 91 of the Hawaiian Organic Act of 1900, 31 Stat. 141, 159, Congress provided that the new Territory was to retain the possession and use of the ceded lands "until otherwise provided for by Congress, or taken for the uses and

purposes of the United States by direction of the President or of the governor of Hawaii." Title to the properties remained in the United States.

In addition to the ceded properties, the United States has from time to time acquired property by purchase or condemnation from private owners and so has the Territory. Under § 73(q) of the Organic Act, property purchased by the Territory could, like the ceded property, be "set aside" for federal use by direction of the Governor. Property purchased by the United States, of course, always remained in federal possession.

When in 1959 Hawaii was admitted to Statehood, it was obviously appropriate that the properties owned by the Territory outright, and those that had been ceded to the United States in trust for the Hawaiian people, should be turned over to the new State, and that was admittedly the primary purpose of § 5 of the Statehood Act. The question is whether § 5 also gave Hawaii the properties that had been acquired by the United States by purchase or condemnation from private owners.

B. The structure and language of the Act make clear that it deals only with Territorially-owned properties (of whatever kind) and United States-owned *ceded* properties. That is admittedly the scope of the basic granting provisions, §§ 5 (a) and (b). The only function of §§ 5 (c) and (e), upon which the State relies, is to define the extent of the *exceptions* from the grants made in §§ 5 (a) and (b)—*i.e.*, together they except from the properties otherwise

granted to the State those set aside (§ 5(c)), and still needed (§ 5(e)), for federal use.

Subsection (a) grants to the State all properties owned by the Territory "Except as provided in subsection (c)." Subsection (b) grants to the State all properties that had been ceded to the United States in 1898, again "Except as provided in subsection (c)." Subsection (c), the exception to which (a) and (b) refer, then provides:

> 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 * * *.

Read in the light of the history of governmental land holdings in Hawaii, it is plain that the lands referred to in § 5(c) are those once in the possession of the Territory which had been withdrawn ("set aside") for federal use under §§ 91 and 73(q) of the Organic Act. First, the methods by which "set asides" are made—by Act of Congress or direction of the President or the Governor—are precisely those by which the Organic Act had authorized ceded properties and Territorially-owned properties to be set aside for federal use, and the enumeration of those means in § 5(c) is a pointed reference to that authority. Second, the term "set aside" itself has come to be the technical term for the withdrawals made under §§ 91 and 73(q) of the Organic Act. Finally, the

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term "set aside" suggests merely a transfer of use and possession, not an acquisition of fee ownership; one does not usually speak of a purchase as a "setting aside" of the seller's property for the buyer's use.

Every inference to be drawn from the Act thus reinforces the conclusion that § 5(c) serves solely as an exception to the grants made in §§ 5 (a) and (b) and, like them, applies only to Territorially-owned properties and United States-owned ceded properties (*i.e.,* the kinds of property that might be "set aside" for federal use by executive or congressional directive pursuant to §§ 91 and 73(q) of the Organic Act). Property independently purchased by the United States from private owners remains the property of the United States, not by virtue of § 5(c), but because the Act does not dispose of them.

Section 5(e), which provides for a reevaluation of the Federal need for the "set aside" properties reserved under § 5(c) and a later conveyance to the State of those found to be unneeded, is admittedly limited to properties retained "pursuant to" § 5(c). Since properties purchased or condemned by the United States are not dealt with in § 5(c), § 5(e) likewise does not apply to them.

C. The government's interpretation of § 5(c) is confirmed by the use of identical language in § 16(b), where (in a provision reserving legislative jurisdiction) ceded lands *"set aside by Act of Congress or by Executive order or proclamation of the President or*

the Governor of Hawaii for the use of the United States" (emphasis added) and properties "acquired by the United States by purchase, condemnation, donation, exchange, or otherwise" are listed as mutually distinct categories. Unless the italicized words were used in an entirely different sense in §5(c), that section cannot include the purchased or condemned lands which are treated as distinct in § 16(b).

D. The legislative history of the Statehood Act removes whatever doubt might be left as to the scope of § 5(c) and, therefore, of § 5(e). In all the prior bills, the reservation of properties "set aside * * * [etc.]" for federal use appeared as separate, but identically worded, provisos to subsections (a) and (b). In that form, there could be no doubt (and the State admits) that they served solely as exceptions to the basic grants. The only change in the Act as passed is that, in the final rewriting of the bill, the redundant provisos were consolidated in a separate subsection (c) which was then incorporated by reference in the granting provisions, (a) and (b). No note was taken in the hearings, committee reports, or debates of that drafting change, and it was plainly not intended to effect a revolutionary departure from the scope of the grants made in all the prior bills (territorial and ceded properties only) and, for the first time, to include in the grants property purchased or condemned by the United States.

ARGUMENT

I

THE ACTION SHOULD BE DISMISSED AS A SUIT AGAINST THE UNITED STATES TO WHICH IT HAS NOT CONSENTED

The complaint filed with this Court plainly reveals that the cause of action presents a suit against the United States to which it has not consented. Both the general principles involved and their application to the facts of a case such as this one have been settled by the prior decisions of the Court. The motion for leave to file the complaint should therefore be denied.

A. A STATE HAS NO GREATER POWER THAN A PRIVATE INDIVIDUAL TO BRING AN ACTION AGAINST THE UNITED STATES WITHOUT THE CONSENT OF THE UNITED STATES

The decisions of this Court have firmly established the applicability of the doctrine of sovereign immunity to a suit by a State against the federal government. Ever since *Kansas* v. *United States,* 204 U.S. 331, this principle has been accepted without qualification. See, *e.g., Minnesota* v. *United States,* 305 U.S. 382, 387 ("The exemption of the United States from being sued without its consent extends to a suit by a State", Brandeis, J.) and *Arizona* v. *California,* 298 U.S. 558. Moreover, the issue of lack of consent to suit should properly be decided at this stage of the proceedings. "A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party." *Arizona* v. *California,* 298 U.S. 558, 572.

Finally, as in the case of a suit by a private party, the immunity of the United States to an unconsented

suit by a State cannot be circumvented by the procedural device of suing federal officials, as citizens of other States, in the original jurisdiction of this Court. If the suit is in substance against the United States, the action against a federal official must be dismissed. See, *e.g., Oregon* v. *Hitchcock,* 202 U.S. 60, and *New Mexico* v. *Lane,* 243 U.S. 52.

B. THE UNITED STATES IS AN INDISPENSABLE PARTY BECAUSE THE ACTION IS ONE TO DETERMINE THE RIGHT OF THE UNITED STATES TO RETAIN TITLE TO LANDS OBTAINED BY PURCHASE OR CONDEMNATION

More than a century ago this Court laid down the now classic definition of indispensable parties to an action: "persons who * * * have * * * an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 139. This general formulation, which is carried over into Fed. R. Civ. P. 19,[7] embodies two primary considerations: the effect upon the absentee of an adjudication between the parties present and the power of the court to effect a final determination of the matters at issue without the absentee's presence.[8] Both of these apply with unusual force to the present action and, under this Court's precedents, require denial of the motion to file the complaint.

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[7] See *Wesson* v. *Crain,* 165 F. 2d 6, 8.

[8] See Note, *Indispensable Parties in the Federal Courts,* 65 Harv. L. Rev. 1050; Reed, *Compulsory Joinder of Parties in Civil Actions,* 55 Mich. L. Rev. 327; *Developments—Multiparty Litigation,* 71 Harv. L. Rev. 874, 879 *et seq.*

1. Hawaii's complaint alleges that the Director of the Bureau of the Budget has refused to determine whether lands in Hawaii acquired by the United States by purchase, condemnation, or gift are surplus to the needs of the United States when, under Hawaii's interpretation of the compact, any such lands found to be surplus should be conveyed to Hawaii.[9] The State asks that the defendant be ordered to make such a determination and that the Court decree that any such property which is no longer needed should be conveyed to Hawaii rather than sold or used for the purposes of the United States.[10] The subject matter put in issue by the complaint is therefore the respective rights of Hawaii and the United States to any property which the United States has obtained by purchase, condemnation, or gift and which is determined by the President or his delegate to be no longer needed by the United States.

It is plain on the face of the complaint that the subject matter of the litigation directly involves a substantial property interest of the United States and "that a final decree cannot be made without * * * affecting that interest." *Shields* v. *Barrow, supra.* If the defendant, Bell, is ordered to process condemned and purchased land for potential conveyance to Hawaii, it is the United States and not a private citizen from Massachusetts which will be denied an owner's right to choose the time and method of disposing of its property. If the defendant, Bell, is ordered to convey to Hawaii any condemned or

[9] Complaint XIII, pp. 10–11.

[10] Complaint XV, 3, 5–7, pp. 12–13.

purchased land found to be no longer needed, it is the United States and not Bell which will be deprived of property now held in its name and of which the United States concededly now enjoys the full beneficial ownership.

2. The fact that the United States is conceded to have both legal and beneficial ownership of the lands in issue fully distinguishes this case from the large number of situations in which a negative injunction is sought against an administrative official and a State or the United States is found not to be an indispensable party. This is not an action involving only the regulatory powers of the sovereign (*Ex parte Young,* 209 U.S. 123; *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496; *Brown* v. *Board of Education,* 347 U.S. 483) or the sovereign's power to take property from the plaintiff in the name of a tax (*Georgia R.R. & Banking Co.* v. *Redwine,* 342 U.S. 299; *Allen* v. *Baltimore & Ohio R.R.,* 114 U.S. 311). It is an example of what two commentators have described as "the clearest class of cases which were open to the defense of sovereign immunity * * * actions to establish an interest in, or satisfy a claim out of, property of the United States, where the United States admittedly had title and the property was in possession of its officers or agents."[11] The United States has always been recognized as the real party in interest in such cases. See, *e.g., The Siren,* 7 Wall. 152; *Stanley* v. *Schwalby,* 162 U.S. 255, 272 (1896); *Oregon* v. *Hitchcock,* 202 U.S. 60, 69 (1906); *Cum-*

[11] Hart and Wechsler, *The Federal Courts and the Federal System,* 1176. See also, id. at 1177.

mings v. *Deutsche Bank,* 300 U.S. 115 (1937); *Minnesota* v. *United States,* 305 U.S. 382 (1939); *United States* v. *Alabama,* 313 U.S. 274, 282 (1941); *Maricopa County* v. *Valley Nat. Bank,* 318 U.S. 357, 362 (1943).

Finally, the fact that title and possession of the property in issue is concededly in the United States also distinguishes this case from cases such as *Land* v. *Dollar,* 330 U.S. 731, *Larson* v. *Domestic and Foreign Corp.,* 337 U.S. 682, *Malone* v. *Bowdoin,* No. 113, October Term, 1961, decided May 14, 1962, and *Work* v. *Louisiana,* 269 U.S. 250, on the last of which plaintiff principally relies to sustain the complaint. In each of these cases the plaintiff alleged or established that it owned the property in issue and that possession of the property was wrongfully withheld.[12] While the *Larson* and *Malone* cases held that this allegation alone, without an allegation or showing of unauthorized detention, does not remove the bar of sovereign immunity, none of these cases holds that a mere allegation of an unauthorized handling or disposition of what is concededly prop-

[12] That the property, the disposal of which was in issue in *Work* v. *Louisiana,* 269 U.S. 250, was considered by the Court to be owned by the state, although bare legal title was in the United States, is made clear in the opinion of the Court at pages 255 and 256. That present ownership was crucial to the decision is established by *Ickes* v. *Fox,* 300 U.S. 82, 96, where the Court, citing the *Work* case, restates the rule that the United States is not indispensable to a suit "brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights * * *". Whether the facts of the *Work* case actually fit within that formulation, the authority of that case has in any event been so limited by the later decisions of this Court.

erty owned by and in the possession of the sovereign is sufficient to allow an action against a government official. Indeed the *Land* case, where suit was allowed, carefully distinguished cases such as this one where *only* a lack of authority is alleged and "where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin the disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress" (330 U.S. 731, 737–38). See also, *In re Ayers,* 123 U.S. 443, 500–01, and *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 50–51.

3. The indispensability of the United States to the proceeding sought to be instituted by the plaintiff is established by *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371. There the plaintiff-appellant contended that its action sought (p. 373) "to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property." Acknowledging that under its former decisions those contentions would have provided a basis for equitable relief, the Court nevertheless found that "the essential allegations * * * do not make out a threatened trespass against any property in the possession of or belonging to the appellant" and that "the suit is essentially designed to reach money which the government owns." 326 U.S. at 374, 375. "Under these circumstances," the Court held, "the government is an indispensable party * * * even though the Renegotiation Act under which the Secretary proposed to act might be held unconstitutional." 326 U.S. at 375.

In the present case there is not even an allegation of ownership of the property the disposal of which is the subject matter of the complaint. It is conceded that the condemned and purchased lands in issue are owned by and in the possession of the United States. Nor is lack of official authority to deal in a particular way with the government's property any more sufficient to sustain the complaint, without more, than it was in the *Mine Safety* case, where it was alleged that the Secretary was proposing to act under an unconstitutional statute. The motion to file the complaint without joining the United States should therefore be denied for the same reason the complaint was dismissed in the *Mine Safety* case—"In short the government's liability can not be tried 'behind its back.'" *Ibid.*

C. THE DEFENSE OF SOVEREIGN IMMUNITY BARS ANY SUIT SUCH AS THIS WHICH SEEKS A COURT ORDER COMPELLING THE DEFENDANT TO EXERICSE GOVERNMENTAL AUTHORITY BY TAKING AFFIRMATIVE ACTIONS IN HIS OFFICIAL CAPACITY

A significant way of disclosing the sovereign as the real party in interest in an action against an administrative official is to note that in order to secure the relief sought the plaintiff must of necessity endow the defendant with official character. In such circumstances the defending official cannot comply with the court's decree as an individual or private person; he must act as a government official and within the scope of his official duties. It is typically an affirmative action involving the use of government powers which can only be taken in an official capacity. It has therefore been recognized that a request for injunctive relief against official action must generally be restricted

to a purely negative prohibition of an unauthorized use of official authority.

Perhaps as a show of respect for this long-established rule, plaintiff states flatly in its supporting brief (at p. 61) that "[t]he request for relief * * * seeks nothing more than a cessation of * * * unauthorized conduct" and that "it does not require any affirmative action of the sovereign." The Court is assured that "The State asks only that the defendant be enjoined from his unauthorized restriction on the Section 5(e) procedures" (*id.* at 62). A reading of the prayer for relief reveals that these reassurances are in flat conflict with the plaintiff's demands that the defendant take a number of actions in his official capacity, affirmatively exercising governmental authority. For example, Hawaii asks that Mr. Bell be ordered to cease and desist from "refusing to request" certain reports from executive departments, from "refusing to convey" unneeded land to Hawaii, and from "refusing to cancel, set aside and revoke" an official memorandum.[13] Of course, regardless of the drafting device of using a double negative ("cease and desist from" * * * "refusing to"), each of these is a demand for an affirmative exercise of powers of the sovereign. Bell, *as a private citizen of Massachusetts,* will be ignored if he requests reports or attempts to cancel an official memorandum. *As a private citizen* Bell can no more convey United States property than could any other private citizen. Only by endowing the defendant with official character could the requested relief be secured. Indeed all pretence is

[13] Complaint XV, 1, 3, pp. 11–12.

abandoned in another paragraph of the prayer where the Court is asked to order Bell to:

> request and receive reports of need from Federal agencies having control over all land and property retained by the United States in Hawaii, including land or property acquired directly by the United States by purchase, condemnation, gift or otherwise; determine whether such land or property is no longer needed by the United States; and, if no longer needed, convey such land to the State of Hawaii; * * *[14]

These affirmative actions Bell could take only in his official capacity as Director of the Bureau of the Budget. It has always been held conclusive proof that a suit is against the sovereign when it is clear that the agent who is the nominal defendant can comply with the judgment or decree only in his official capacity.[15] *Governor of Georgia* v. *Madrazo,* 1 Pet.

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[14] Complaint XV, 4, p. 12.

[15] The sole exception to this rule is for suits for mandamus or injunctive relief to compel the performance of purely ministerial acts. See, *e.g.*, *Miguel* v. *McCarl*, 291 U.S. 442. But it is settled that a duty is not ministerial simply because it involves the construction of a statute. To the contrary, the interpretation of "a statute or statutes the construction or application of which is not free from doubt * * * is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus," *Wilbur* v. *United States*, 281 U.S. 206, 219, and the authorities there cited. See also, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318; *United States ex rel Chicago Great Western Railroad Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 62–63.

110, 123–124; *Louisiana* v. *Jumel,* 107 U.S. 711, 720; *Cunningham* v. *Macon & Brunswick R.R. Co.,* 109 U.S. 446, 453–454; *Hagood* v. *Southern,* 117 U.S. 52, 69; *In re Ayers,* 123 U.S. 443, 489; *New York Guaranty Company* v. *Steele,* 134 U.S. 230, 232; *Pennoyer* v. *McConnaughy,* 140 U.S. 1, 16; *Belknap* v. *Schild,* 161 U.S. 10, 25; *Smith* v. *Reeves,* 178 U.S. 436, 439; *Naganab* v. *Hitchcock,* 202 U.S. 473, 475; *Wells* v. *Roper,* 246 U.S. 335, 337; *Ex parte New York,* 256 U.S. 490, 501; *Worcester County Trust Co.* v. *Riley,* 302 U.S. 292, 296; *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 50; *Ford Motor Co.* v. *Dept. of Treasury,* 323 U.S. 459, 463–464.

Because the relief sought is affirmative action in an official capacity and involves the disposition of unquestionably sovereign property, the plaintiff's motion to file a complaint must be denied regardless of whether the defendant's action was unauthorized. As this Court stated in the *Larson* case (337 U.S. 682, 691, n. 11):

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

D. THE COMPLAINT ASSERTS A CAUSE OF ACTION AGAINST THE UNITED STATES FOR BREACH OF ITS COMPACT AGREEMENT WITH HAWAII

Hawaii and the United States entered into a compact, the various provisions of which imposed obligations upon one or the other of the two parties. The provision of the compact upon which Hawaii now relies makes it the duty of the United States, acting through the President: (1) to obtain and receive reports of land retained by the United States pursuant to certain other provisions of the compact; (2) to determine whether such land is needed by the United States; and (3) to convey any such land found to be no longer needed to the State of Hawaii. Hawaii's complaint, simply stated, is that the United States is failing to comply with these three obligations assumed under section 5(e) of the Hawaii Statehood Act.

For almost eighty years it has been a settled rule of this Court that federal courts are without jurisdiction to entertain proceedings seeking an injunction or a writ of mandamus directing specific enforcement of a contract made by the sovereign, although the complaint may be nominally against an individual public official. This is one rule which undeniably emerges as firmly established even prior to this Court's clarifying opinion in *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682. *Louisiana* v. *Jumel,* 107 U.S. 711, 721; *Hagood* v. *Southern,* 117 U.S. 52, 68; *In re Ayers,* 123 U.S. 443, 502–504; *United States ex rel. Levey* v. *Stockslager,* 129 U.S. 470, 478; *Pennoyer* v. *McConnaughy,* 140 U.S. 1, 10–11; *Belknap* v. *Schild,* 161 U.S. 10, 18; *Tindal* v. *Wesley,* 167 U.S. 204, 219;

Ex parte Young, 209 U.S. 123, 151–152; *Hopkins* v. *Clemson College,* 221 U.S. 636, 642; *Goldberg* v. *Daniels,* 231 U.S. 218; *Wells* v. *Roper,* 246 U.S. 335; *Ex parte New York,* 256 U.S. 490, 500; *Goltra* v. *Weeks,* 271 U.S. 536, 546; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371; *Land* v. *Dollar,* 330 U.S. 731, 737. By the Tucker Act and the Federal Tort Claims Act, the United States has provided a forum which can award money damages against the Government for breach of contract and for certain types of tort, but, as these cases hold, the United States has not yet permitted itself to be sued for specific performance.

The gist of the rule applying the bar of sovereign immunity to actions such as this, and the reasons for the Court's constant reaffirmation of the principle, were shortly put in *Ex parte Young,* 209 U.S. 123, 151, where, speaking of a contract with a State, this Court said: "The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State. * * * A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had an interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." Similarly, the Court said, twenty years earlier: "* * * where the contract is between the individual and the State, no action will lie against the State, and any action

founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution." *In re Ayers,* 123 U.S. 443, 504.

It is obvious that in the case at bar plaintiff seeks to compel the defendant to do "the very things which when done would constitute a performance" of the compact by the United States, and to forbid him from "the doing of those things which, if done, would be merely breaches of the contract" by the United States.[16] And the complaint even more markedly reveals its character as a claim against the United States by praying flatly for a broad declaratory decree that "the reporting, evaluation and conveyance procedures of Section 5(e) of the Hawaii Statehood Act are not limited to the classes of land and property presently set forth in paragraph 3 of Budget Circular No. A–52."[17] As this Court pointed out in the *Larson* case, 337 U.S. at 689, n. 9, such a request for declaratory relief is plainly inconsistent with a suit against the private defendant alone.

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[16] Complaint XV, 1–4, pp. 11–12.

[17] Complaint XV, 5, p. 12. See also Complaint XV, 6 and 7, pp. 12–13.

II

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

INTRODUCTION

When Hawaii was annexed as a territory in 1898, the former Republic of Hawaii ceded to the United States all property owned by it. Some of the ceded property was later given in fee to the Territorial government and its subdivisions. Title to the rest of the ceded property remained in the United States, but possession and use was, by § 91 of the Organic Act of 1900, given to the Territory "until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii" (§ 91, 48 U.S.C. 511).

When, in 1959, Hawaii was admitted as a State, it was obviously appropriate that the ceded properties, which had been held in trust for the Hawaiian people since annexation, should be turned over to the new State. That is the main purpose of § 5 of the Hawaii Statehood Act, which, in addition to confirming title in the State to the properties owned outright by the Territory, directed conveyance to the new State of all the ceded properties still owned by the United States with the exception of those that had been set aside for federal use under § 91 of the Organic Act and were still needed for such purposes.

In addition to the ceded properties, the United States had, over the years, acquired other properties in Hawaii by purchase or condemnation from private

owners (*e.g.*, for military bases). The dispute in this case is whether § 5 of the Statehood Act provides for the conveyance to the new State of those purchased properties as well as of the ceded properties. The provisions directly relevant are §§ 5 (a), (b), (c), and (e), which provide:

> (a) Except as provided in subsection (c) of this section, the State of Hawaii * * * shall succeed to the title of the Territory of Hawaii * * * in those lands and other properties in which the Territory * * * now hold[s] title.
>
> (b) Except as provided in subsection (c) * * *, the United States grants to the State of Hawaii * * * the United States' title to all the public lands and other public property ["public" properties are defined in § 5(g) [18a] as those ceded to the United States in 1898] * * *, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. * * *
>
> (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

[18a] "(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."

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

Briefly, we interpret the above provisions as follows:

(1) Subsections (a) and (b) are the basic granting provisions, giving to the State all the property, ceded or otherwise, owned by the Territory (§ 5(a)) and all the ceded property owned by the United States (§ 5(b)) "[e]xcept as provided in subsection (c)";

(2) Subsection (c) excepts from the grant properties otherwise within it but which have been "set aside" in stated ways for the use of the United States; and

(3) Subsection (e) provides for a later conveyance of the properties excepted from the basic grants if they are determined to be no longer needed by the United States.

The statute thus deals, in our view, only with Territorial (§ 5(a)) and ceded (§ 5(b)) properties. Such properties vest immediately in the State (§§ 5 (a) and (b)) unless they have been "set aside" for federal use (§ 5(c)), in which event they are to be con-

veyed only if determined to be no longer needed by the United States (§ 5(e)). Omitting the procedural steps, the grant is simply of all ceded and Territorial properties except those set aside and still needed for federal use.[18] If that interpretation is correct, it follows that properties purchased or condemned by the United States, not being disposed of by the Act, continue to belong to the United States.

While that meaning of the statute is, we think, clear enough on its face, it appears with mathematical certainty, we will show, (a) from a consideration of the history of the governmental land holdings on the islands and the way in which each kind of interest was dealt with in the Act; (b) from the language of § 5(c) referring to property "set aside" for federal use in enumerated ways; (c) from the use of identical language elsewhere in the Act; and (d) from the legislative history of the Act.

A. THE HISTORY OF THE GOVERNMENTAL LAND HOLDINGS IN HAWAII AND THE WAY IN WHICH EACH TYPE OF HOLDING WAS DEALT WITH IN THE STATEHOOD ACT

The purpose of this Point is primarily exposition rather than argumentation. It is not meant to be

[18] Section 5(d) expands the exception slightly to include ceded lands which had not previously been formally "set aside" for federal use but which were under federal control by informal arrangements with the Territory. It extends for five years the power formally to "set aside" such property, in which event it is excepted from the basic grant in the same manner as the property set aside prior to the Act (*i.e.*, excepted unless found to be surplus under § 5(e)). The State admits that § 5(d) is limited to ceded lands and it is therefore not in issue in this case.

responsive to the plaintiff's arguments, but rather to describe the nature of the land holdings in Hawaii at the time of the Act and to state affirmatively our view of how the Act deals with them. It has argumentative force only to the extent that our reading of the Act may be found to provide a "satisfying" explanation of its several provisions and their interrelationships. In the succeeding Points of the brief we will then deal directly with the points at issue between the parties.

1. *The history of the governmental land holdings in Hawaii*

a. By the Joint Resolution of Annexation of 1898 (Exh. B, App. 20–22), the Republic of Hawaii ceded to the United States the "absolute fee and ownership" of all the extensive properties owned by it. The properties so ceded are the "public lands and other public property" defined in § 5(g) of the Statehood Act.

The Annexation Resolution provided that the ceded lands, except such part "as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes" (App. 20). To that end, the ceded properties were excepted from the existing land laws of the United States and Congress was directed to "enact special laws for their management and disposition." The direction was carried out two years later in § 91 of the Hawaiian Or-

ganic Act, 31 Stat. 159, 48 U.S.C. 511, which provided that the ceded properties:

> shall remain in the possession, use, and control of the government of the Territory of Hawaii, * * * until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; * * *

The title to such properties remained in the United States, but the President was further authorized to transfer title to the Territory of properties needed for roads, public buildings, schools, and the like. Under the Organic Act, in brief, the Territory was given (a) title to some of the ceded properties and (b) possession and use of the rest, except for (c) such properties as were withdrawn for federal use by Act of Congress [19] or by presidential or gubernatorial directive.

In addition to the formal procedures for federal withdrawal of property specified in the Organic Act, the practice developed of permitting the United States to occupy ceded lands under licenses or permits issued by subordinate territorial officials—*i.e.*, without benefit of a formal directive of the President or the Governor. At the time the Statehood Act was under consideration, it was reported that the military departments were occupying about 114,000 acres of

[19] *E.g.*, Act of August 1, 1916, 39 Stat. 432, setting aside ceded properties for the Hawaii National Park.

ceded lands under such licenses. S. Rep. No. 80, 86th Cong., 1st Sess., pp. 28–29.

b. In addition to the properties tracing from the 1898 cession, both the federal and the territorial governments from time to time acquired other properties by purchase or condemnation from private owners. By a 1941 amendment to § 73(q) of the Organic Act, the Governor of the Territory was authorized to "set aside" for federal use any properties that had been so acquired by the Territory. 48 U.S.C. 677; see H. Rep. 831, 77th Cong., 1st Sess., pp. 1–2; S. Rep. 576, 77th Cong., 1st Sess., pp. 1–2. There was thus created a class of properties, not within the definition of "public lands and other properties" (*i.e.,* ceded properties, § 5(g)), owned by the Territory, but set aside for federal use by executive action. The United States, of course, retained both title and possession of the properties purchased or condemned by it.

c. In summary, the property holdings of the Territory and the United States at the time of the Statehood Act were as follows:

I. *Territorially-owned ceded properties.*—The Territory had both title and possession of such of the ceded properties as had been conveyed to it under § 91 of the Organic Act (principally, properties used for local governmental functions).

II. *Territorially-owned purchased or condemned property.*—The Territory had title to the properties purchased or condemned by it. Possession and use were:

(i) in the Territory except for

(ii) such part as had been set aside for federal use by gubernatorial directive under § 73(q) of the Organic Act.

III. *United States-owned ceded properties.*—The United States had title to all the ceded properties that had not been deeded to the Territory. Possession and use were:

(i) in the Territory except for such part as

(ii) had been formally set aside for federal use by Act of Congress or by direction of the President or the Governor under § 91 of the Organic Act or

(iii) was occupied by the United States under permits or licenses issued by subordinate territorial officials.

IV. *United States-owned purchased or condemned property.*—The United States had both title and possession of properties purchased or condemned by it.

2. *The way in which each type of property was dealt with in the Statehood Act*

Read in the light of the several classes of property holdings at the time of the Statehood Act, what is at least the primary purpose (and, we will later argue, the only purpose) of each provision of § 5 of the Act becomes clear.

Section 5(a) deals solely with "properties in which the Territory and its subdivisions now hold title"—*i.e.,* classes I and II, *supra.* Title to such properties vests immediately in the State "Except as provided in subsection (c)."

Section 5(b) deals solely with "public lands and other public property"—a phrase defined in § 5(g) to mean the properties ceded to the United States in 1898—which are still owned by the United States, *i.e.*, class III, *supra*. Title to all such properties vests immediately in the State "Except as provided in subsections (c) and (d)."

Section 5(c) is the exception for "set asides" which §§ 5 (a) and (b) had incorporated by reference. It applies to "Any lands or other properties" that, at the date of Statehood, "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." That includes, of course, so much of the ceded properties still owned by the United States (class III) as had been withdrawn from the possession of the Territory "by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii" under § 91 of the Organic Act—*i.e.*, class III(ii). In addition, however, since the phrase "Any lands or other properties" in § 5(c) is not limited to ceded lands (as the plaintiff emphasizes at length), it also includes properties purchased or condemned by the Territory and "set aside" for federal use at the direction of the Governor under the 1941 amendment to § 73(q) of the Organic Act—*i.e.*, class II(ii). Such properties (classes II(ii) and III(ii)) are excepted from the grants made in §§ 5 (a) and (b) (which would other-

wise have included them) and remain the property of the United States.

Section 5(d) is the exception for informal federal occupancy which § 5(b) had incorporated by reference. It applies to any "public lands or other public property" conveyed to the State under § 5(b) (*i.e.*, United States-owned ceded properties, class III) which, at the date of admission, was "controlled by the United States pursuant to permit, license, or permission" of territorial officials—*i.e.*, class III(iii). Such properties, unlike those formally set aside (§ 5(c)), are not automatically retained by the United States, but the United States is allowed five years in which formally to set them aside for federal use by Act of Congress or executive order, in which event they do become the property of the United States.

Section 5(e) applies to any properties "retained by the United States pursuant to subsections (c) and (d)." That includes classes II(ii), III(ii), and III(iii)—*i.e.*, the "set aside" properties that were excepted by §§ 5 (c) and (d) from the broad grants made in §§ 5 (a) and (b). As to all such "set aside" property excepted from the basic grants, the President is required, within five years, to make a reevaluation of the federal need and to convey to the State any such properties which he determines are no longer needed by the United States.

It is evident, we think, that the Act as so read has a plausible, cohesive and readily understandable structure. It deals precisely and in great detail with every kind of property in Hawaii in which the people of Hawaii had at any time had an interest or equitable

claim—namely, the property purchased or condemned by the Territory of Hawaii and paid for with local revenues (class II) and all the properties that had been originally owned by the Republic of Hawaii and ceded to the United States upon annexation, whether previously deeded to the Territory (class I) or still owned by the United States (class III). The net result (omitting the procedural steps) is to give to the new State all the properties owned by the Territory plus all those originally ceded to the United States, with the sole exception of those set aside, and found by the President still to be needed, for federal use.

The one class of governmental property not specifically dealt with in the Act under our reading is property purchased or condemned by the United States from private owners (class IV). The explanation we offer is that there was no need to deal with it. Unlike their equitable claims to the ceded properties held in trust for them under the Resolution of Annexation and to properties purchased by the territorial government from local revenues, the people of Hawaii have no more claim to a surplus military base, bought and paid for by the United States out of federal funds, than do the people of any other State to surplus federal installations that happen to have been located, for strategic reasons, in their State. And if such properties were not to be given to the State, there was no reason to mention them in the Act at all, since any properties not disposed of by the Act would be undisturbed by it and remain, as they always had been, in federal ownership.

B. THE LANGUAGE OF SECTION 5(c) SHOWS THAT IT WAS INTENDED ONLY AS A RESERVATION FROM THE BASIC GRANTS OF CEDED OR TERRITORIALLY-OWNED PROPERTIES THAT HAD BEEN SET ASIDE FOR FEDERAL USE AND THAT IT DOES NOT APPLY TO PROPERTIES PURCHASED OR CONDEMNED BY THE UNITED STATES

Against our reading of the Act, set forth above, the State contends that, while the basic grants in §§ 5 (a) and (b) are admittedly limited to ceded and territorial properties, the *reservation* in § 5(c) is not limited to carving out exceptions to those grants but is also a declaration (albeit unnecessary) that properties purchased or condemned by the United States are to remain its property. It follows, the State argues, that the direction in § 5(e) to convey to the State any lands reserved under § 5(c) that are no longer needed also includes federally-purchased or condemned lands and requires their conveyance to the State if found to be surplus. There is no dispute about what § 5(e) means, for it is admittedly confined to whatever properties are retained by the United States "pursuant to subsectio[n] (c)". The focus of the controversy is the meaning and function of § 5(c). We contend that it is limited to Territorially-owned properties (otherwise within § 5(a)) and United States-owned ceded properties (otherwise within § 5 (b)) that have been "set aside" for federal use under §§ 91 and 73(q) of the Organic Act, and that its only function is to reserve such "set aside" properties from the grants made in §§ 5 (a) and (b). The State contends that, while that is admittedly one function of § 5(c), its language is broad enough to include federally-purchased or condemned property as well; and that it accordingly functions also as a declaration that

such purchased property is being retained by the United States, thereby establishing the predicate for the application of § 5(e). The language of § 5(c), we submit, will not bear the meaning the plaintiff gives to it.

1. Sections 5 (a) and (b), as we have noted, grant to the State all Territorially-owned properties and all United States-owned ceded properties "Except as provided in subsection (c)." Subsection (c) then provides:

> 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 * * *.

To bring property purchased or condemned by the United States—and to which it has unqualified title and possession—within that language, the State argues as follows: when the United States condemns or purchases property, it of course does so for its own "use"; it can condemn or purchase property only "pursuant" to an "Act of Congress"; the term "set aside" is broad enough to include a shifting of title as well as of possession; and hence, when the United States purchases or condemns property from a private owner, the property is being "set aside" (from, we suppose, all other properties privately owned) "for the use of the United States" under an "Act of Congress."

While one does not usually speak of a purchase as being a "setting aside" of the seller's property for the buyer's use, we need not stop to consider whether, as a matter of lexicography, the words used could be made to perform the service plaintiff demands of them. The statute does not use words chosen by accident, and a reference to the history of the governmental property holdings in Hawaii makes clear beyond debate what Congress meant by the words on this occasion. As we have noted, § 91 of the Organic Act of 1900 had directed that the properties ceded to the United States upon annexation in 1898 were to remain in the possession and use of the Territory:

> * * * until otherwise provided for by Congress, or taken for the uses or and purposes of the United States by direction of the President or of the governor of Hawaii. * * *

By the 1941 amendment to § 73(q) of the Organic Act, moreover, the Governor was given authority to set aside for federal use not only ceded lands but also properties that had been purchased or condemned by the Territory, and in that provision the very term "set aside" is repeatedly used. Section 5(c) patently refers, we submit, to the properties transferred from Territorial to federal use and possession under those two powers.

There are two aspects of the language of § 5(c) that confirm that reading. First, the ways in which property might be "set aside" enumerated in § 5(c)—by Act of Congress or by direction of the President or the Governor—are precisely those by which withdrawals

of ceded and Territorial property for federal use were authorized by the Organic Act, which is, plainly, more than a coincidence. Second, the term "set aside" has, as a matter of usage, become the technical term for property withdrawals under those powers. The term was so used, for example, in § 16 of the Statehood Act itself (discussed at p. 44, *infra*); in a 1922 Act directing that certain of the ceded lands be "set aside" for park purposes (Act of May 1, 1922, 42 Stat. 503); and, as noted above, in § 73(q) of the Organic Act as amended in 1941 (48 U.S.C. 677). The term has been similarly used in executive orders issued under § 91 of the Organic Act, and the annotation to that provision as it appears in the Revised Laws of Hawaii (1925), p. 106, speaks of "proclamations by the President setting aside property for military, naval and lighthouse purposes and Acts of Congress setting aside land for other public purposes." For similar usage by the court of appeals having jurisdiction over Hawaii, see also *United States* v. *Chun Chin,* 150 F. 2d 1016, 1017 (C.A. 9); *Hee Kee Chun* v. *United States,* 194 F. 2d 176, 177 (C.A. 9). Finally, as will appear in the discussion of the legislative history of the Statehood Act, the term was repeatedly used in the committee reports and prior bills in contexts unmistakably referring to property transferred to federal use under §§ 91 or 73(q) of the Organic Act.

2. Quite apart from the language of § 5(c)—and the pointedness of its reference to specific historical

antecedents—it is worth noting the awkwardness of the State's reading of the Act. In the first place, unlike the set-aside ceded and territorial properties which would otherwise have passed to the State under §§ 5 (a) and (b), there was no reason whatever to "declare" in § 5(c) that federally purchased property—property unqualifiedly owned by the United States, purchased from private owners with federal funds (in most cases, military department appropriations), and in which the people of Hawaii had never had any interest—would remain the property of the United States after the adoption of the Act as it had been before. None of the prior bills—which the State admits were limited to ceded and territorial properties (see pp. 45–58, *infra*)—had contained such a declaration, and it can hardly be claimed that the declaration the State finds in § 5(c) was added for purposes of "clarity"; the only thing "unclear" is the declaration the State purports to find, not the status of federally purchased property without it.

The only reason the State could claim for such a declaration having been made in § 5(c) would be to provide—anticipatorily, as it were—a predicate for the operation of § 5(e). The argument is that Congress specifically "reserved" such property, not to remove it from the scope of any granting provision, but solely in order that a later exception narrowing the scope of the reservation (§ 5(e)) would operate as an affirmative grant of such property.

Not only is that an awkward (and very likely unique) way to make a grant of property, but the effect of that reading would be to render totally superfluous the limitation of § 5(e) to lands retained by the United States "pursuant to subsections (c) and (d)." That limitation was presumably meant to distinguish between properties retained solely by force of § 5(c) and those otherwise retained (*i.e.*, by absence of any provision giving them away). Plaintiff's reading of § 5(c) as applying to all federal property, purchased or ceded, deprives that limitation of any meaning. Nothing is excluded by it, and § 5(e) would have exactly the same effect as though the phrase, "pursuant to subsections (c) and (d)," were omitted entirely and the President were directed simply to convey to the State "any land or property that is retained by the United States" and found to be unneeded.

In short, in order to attribute to Congress a purpose to make an affirmative grant by the device of an exception to an unnecessary reservation, the State asks the Court to give no meaning to one provision of the Act (the "pursuant to" phrase of § 5(e)) and a double meaning to another (§ 5(c)).[20] The contrivance—for that is all the argument comes to—bears too heavy a weight to stand.

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[20] That is, under plaintiff's reading, § 5(c) is to function as (1) an exception from the granting provisions (§§ 5 (a) and (b)) of properties otherwise within them, plus (2) a declaration of the retention of properties not within the granting provisions in any event.

C. THE USE OF IDENTICAL LANGUAGE IN SECTION 16(b) OF THE STATEHOOD ACT CONFIRMS THE INTERPRETATION OF SECTION 5(c) AS APPLYING ONLY TO THE CEDED AND TERRITORIAL PROPERTIES OTHERWISE GRANTED TO THE STATE BY SECTIONS 5 (a) AND (b)

Section 16(b) of the Statehood Act reserves for the United States legislative jurisdiction over all lands held for Defense or Coast Guard purposes:

> whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise * * *.

That provision, it may be seen, describes "set aside" properties in language substantially identical to § 5(c), distinguishes between such properties and those purchased or condemned by the United States, and expressly makes the reservation of jurisdiction applicable to both types of holdings. For Hawaiii to prevail in this action, the Court would have to hold that the same words ("set aside * * *") which, in § 16(b), describe one of two carefully distinguished types of property were used, in § 5(c), to describe and include both types.[21]

[21] Plaintiff's reading of § 5(c) would also produce what seems an anomalous result under § 5(f) of the Act. That provision directs that the ceded lands owned by the United States and granted immediately to the State under § 5(b) or later conveyed to it under § 5(e) "shall be held by said State as a public trust" for stated public uses. That these terms and conditions were not imposed on properties previously given outright to, or acquired by, the Territory (i.e., ceded lands that had been deeded to the Territory and lands the Territory had itself purchased or con-

D. THE LEGISLATIVE HISTORY OF THE STATEHOOD ACT MAKES CLEAR THAT THE LAND GRANTS ARE LIMITED TO PROPERTY OWNED BY THE TERRITORY AND CEDED PROPERTY OWNED BY THE UNITED STATES AND DO NOT INCLUDE PROPERTY PURCHASED OR CONDEMNED BY THE UNITED STATES.

Plaintiff's argument from the legislative history is not lacking in boldness. It begins by noting that, although the question of Hawaiian statehood is 30 years old and was under active consideration for a decade prior to the final Act, "All previous Hawaiian statehood proposals reached ceded lands only" (Br. 32) and that, whenever the question arose, care was taken to make sure that the grants did not apply to properties independently purchased or condemned by the United States (Br. 34–35). By its failure to claim otherwise, we take it that the State also acknowledges that there is not a word in the committee reports or debates on the Act as finally passed suggesting that the Act differed in that respect from all the predecessor bills. It might be supposed that the natural inference to be drawn is that no such difference was intended, since so marked a departure from so long-established a pattern would hardly go unnoticed. Yet it is from such

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demned) is readily understandable. If, however, Congress had intended to give to the new State properties to which it had never before had any claim (i.e., those purchased or condemned by the United States), it is difficult to understand why it would exclude the property thus given as a pure act of bounty from the terms and conditions of the trust. Particularly is that true if, as the State claims, the purpose of the grant of purchased property was to compensate for the ceded lands that had been set-aside and withheld. The depletion having been of "trust" properties, their replacement, if intended, would surely have been added back to the "trust."

inhospitable sources that the State purports to draw support for its interpretation. Its reasoning is this: (1) the Act as passed in "plain language" gave Hawaii surplus condemned lands; (2) in that respect, it was in sharp contrast to all the prior bills, which had not done so; (3) faced with the choices thus presented, Congress adopted the Act as passed and therefore must have intended what its "plain language" said; (4) thus the "plain legislative history" as well as the "plain language" of the statute shows that the Act was intended to give Hawaii surplus condemned lands. In short, the statute says it; Congress must therefore have intended it; and that proves that the statute says it. Needless to say, there is more of substance than that to be found in the legislative history, and what is there conclusively establishes the opposite meaning.

1. The evolution of the Act from the prior bills shows that § 5(c) was in origin—as we contend it is in function—solely an *exception* from the grants otherwise made in §§ 5 (a) and (b).

a. We start with Hawaii's admission that *all* of the bills prior to that adopted were limited to ceded and Territorially-owned properties and none made a grant of properties that had been acquired by the United States by purchase or condemnation. By the 85th Congress, the form of the land-disposition provisions most frequently proposed was that contained, in identical language, in § 5 of H.R. 49 and S. 50, § 103 of H.R. 339 and 1243, and § 3 of H.R. 1246, all introduced in the First Session of that Congress. The land-grant provisions of those bills consisted of only two subsections, (a) and (b) (quoted in the Attorney

General's opinion printed in the appendix to the complaint (Exh. H, App. 47–48, n. 19)). In brief:

> Subsection (a) provided that all lands or other property title to which was in the Territory should become the property of the State, "*Provided, however,* That as to any such lands or other property * * * 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 [at the date of admission] * * *, the United States shall be and become vested with absolute title thereto * * *."
>
> Subsection (b) granted to the State "all the public lands and other public property in Hawaii" title to which was in the United States, "*Provided, however,* That as to any such lands or other property * * * 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 [at the date of admission] * * *, the United States shall retain absolute title thereto * * *. As used in this subsection," the term "public lands" means those ceded to the United States in 1898.

The basic scope of subsections (a) and (b), it may be seen, was the same as that in the Act ultimately adopted, with (a) applying to all Territorially-owned properties, ceded or otherwise, and (b) applying to United States-owned ceded properties. Each subsection, however, contained its own proviso reserving from the grant any "such" properties that had been

"set aside" for federal use. Finally, the properties set aside at the date of admission vested irrevocably in the United States; there was no provision for a re-evaluation of the need for the set-aside properties and for a later conveyance of those found to be unneeded.[22]

b. Further progress towards the Act as finally adopted is reflected in H.R. 50, introduced in the 86th Congress, 1st Sess. Although otherwise identical to the bills, described above, in the 85th Congress, it added to § 5, subsection (b) a second proviso:

> *Provided further,* That the provisions of section 91 of the Hawaiian Organic Act * * *, which authorize the President to restore to their previous status lands set aside for the use of the United States, shall * * * continue in effect for a period of five years * * *.[23]

That initiated the principle, later appearing in § 5(e) of the Act as adopted, of a post-admission reevaluation of the need for the properties set aside and their subsequent conveyance to the State if not needed. Since it was framed as a proviso solely to subsection (b), however, it applied only to the properties dealt with in that subsection (United States-owned ceded properties). Although there was a similar "set aside" exception in subsection (a) (Territorially-owned

[22] There was also, of course, no counterpart to what became § 5(d), providing a grace period after admission during which additional properties could be set aside, but that provision is unimportant for present purposes.

[23] That provision had originated in a House committee amendment to one of the bills in the prior Congress. See H. Rep. 2700, 85th Cong., 2d Sess., p. 24.

properties of any kind), there was no post-admission "restoration" provision applicable to them and any such properties set aside at the date of admission would vest irrevocably in the United States.

c. The final step in the evolution towards the Act appears in H.R. 1918 in the 86th Congress, the relevant text of which is set forth below.[24] As may be seen, the provision for post-admission conveyance of the reserved set-asides was taken out of subsection (b) (where it had appeared in H.R. 50, *supra*) and placed in a separate subsection. Otherwise, subsections (a) and (b) remained substantively unchanged, with each continuing to have its own separately-stated exception for set-aside lands. They were, however, simplified in style, with the language being considerably closer to the final Act and with the reservations of set-asides being stated as "exceptions" rather than as "provisos". Thus, subsection (a) granted to the State all Territorially-owned lands—

> * * * except as follows: Any such lands or other property that are, on the date Hawaii is admitted into the Union, set aside by Act of Congress or by Executive order or proclamation

[24] Sec. 5. (a) The State of Hawaii and its political subdivisions, as the case may be, shall have and retain all the lands and other public property title to which is in the Territory of Hawaii or a political subdivision thereof, and such lands and other property shall remain and be the absolute property of the State of Hawaii and its political subdivisions, as the case may be, subject to the constitution and laws of said State, except as follows: Any such lands or other property that are, on the date Hawaii is admitted into the Union, set aside by Act of Congress or by Executive order or procla-

> of the President or the Governor of Hawaii, pursuant to law, for the use of the United States * * * shall be the absolute property of the United States * * *.

Subsection (b) similarly granted to the State all United States-owned "public lands" (*i.e.,* ceded lands)

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mation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States whether absolutely or subject to limitations, shall be the absolute property of the United States, subject to such limitations, if any.

(b) The United States hereby grants to the State of Hawaii, effective upon the date of its admission into the Union, the absolute title to all the public lands and other public property within the boundaries of the State of Hawaii as described herein, title to which is in the United States immediately prior to the admission of such State into the Union, except as follows: Any such public lands or other public property that are, on the date Hawaii is admitted into the Union, set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii, pursuant to law, for the use of the United States whether absolutely or subject to limitations, shall be the absolute property of the United States, subject to such limitations, if any. As used in this subsection, the term "public lands and other public property" means, and is limited to, the lands and other properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or other properties so ceded. The lands hereby granted shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Not later than five years after 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 subsection (a) or (b) 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, he shall convey it to the State of Hawaii.

* * * * *

"except as follows: Any such public lands or other public property that * * *" (*etc.*, repeating the language of the exception in subsection (a)).

The provision for the post-admission conveyance of reserved set-asides, having been placed in a separate subsection, was totally rewritten (1) to extend it to set-asides reserved under subsection (a) (*i.e.*, of Territorially-owned properties) as well as those reserved under subsection (b) (*i.e.*, of United States-owned ceded properties) and (2) to make the conveyance mandatory if the President determined that the reserved set-asides were no longer needed. Except that it referred to "any land or property that is retained by the United States pursuant to subsection (a) or (b)" rather than, as in the Act, to that retained under subsection (c), its language, it may be seen, was in every material respect identical to that of § 5(e) of the final Act.

Notwithstanding the identity of the post-admission conveyance provision to § 5(e) of the Act—and that it equally used the phrase "any land"—the State concedes that, like all the bills preceding it, H.R. 1918 did *not* apply to property purchased or condemned by the United States.[25] The reason for the concession,

[25] Plaintiff's statement that H.R. 1918 was limited to *ceded* properties (Br. 37), however, is correct only if the reference is confined to properties owned by the United States; Territorially-owned purchased properties set aside for federal use were also subject to the post-admission conveyance provision, and it is for that reason that it was necessary in that provision, as in § 5(e) of the Act, to refer to "any land" rather than "any public land." For the sake of avoiding confusion, we might also point out that the plaintiff's citation to § 5(e) of H.R. 1918 (Br. 37) is incorrect; the provision was then numbered § 5(c).

it should be noted, is not any difference in the wording of the post-admission conveyance provision—for there was none—but the location of the set-aside reservations: so long as they appeared as separate provisos to subsections (a) and (b), it was indisputable that they were solely exceptions to the basic grants and thus applied only to properties otherwise within those grants (*i.e.,* Territorially-owned properties and United States-owned ceded properties).

d. We come finally to the bills in the form of the Act as passed—*e.g.,* H.R. 888 and 4221 (the bill actually passed was S. 50, amended to conform to H.R. 4221). These are the bills described by the State as "vastly different" from H.R. 1918 (Br. 35–37). The "vast differences" are these:

(1) The duplicating exceptions for set-aside properties were removed from subsections (a) and (b) and placed in a separate subsection (§ 5(c)) to which cross-references ("Except as provided in subsection (c)") were made in subsections (a) and (b). The language of the new subsection (c) was substantially identical to that of the former duplicating provisos with the exception of the introductory words. The exception to subsection (a) in H.R. 1918 had referred to "Any such lands or other property" (referring to the Territorially-owned lands dealt with in that subsection) and the exception to subsection (b) had referred to "Any such public lands or other public property" (referring to the United States-owned ceded lands dealt with in that subsection). Since the new subsection (c) had to be broad enough to encompass both, it began "Any lands and other properties * * *." As noted, the qualifying language—"that

* * * are set aside * * * [etc.]"—remained substantially identical to that of the formerly separate provisos.

(2) To conform to the relocation of the set-aside reservation, the post-admission conveyance provision (§ 5(e)) referred to "any land or property that is retained by the United States pursuant to subsection (c)" rather than, as in H.R. 1918, to "any land or property that is retained by the United States pursuant to subsection (a) or (b)."[26]

e. Inasmuch as the State concedes that H.R. 1918, like all prior bills, was limited to Territorially-owned properties and United States-owned ceded properties, its claim to properties acquired by the United States by purchase or condemnation is premised entirely upon the relocation, in the Act as passed, of the reservation of set-aside properties—*i.e.*, the consolidation of the formerly duplicating separate provisos into a single subsection. By that relocation, the State implies, Congress intended to effect a sweeping and revolutionary change in the scope of the land grants from all the prior bills it had considered. Patently nothing of the sort was intended. The change was solely a technical drafting change, an elimination of unnecessary duplication, and the final step in the steady process towards simplification of subsections (a) and (b)—a process that had already seen, for example, the removal from subsection (b), and re-

[26] The definition of "public lands," formerly in subsection (b) itself, was also placed in a separate subsection (g), but with admittedly no change of substance. Section 5(d), extending for five years the power to make further set-asides was a new substantive addition, but there is no issue here about that provision.

location in a separate subsection, of the post-admission conveyance provision.[27]

What a comparison of the Act with the prior bills reveals, in fact, is that the reservation of set-aside lands was never intended as anything more than an exception from the basic grants in subsections (a) and (b) and was, like the basic grants, limited to Territorially-owned properties and United States-owned ceded properties. Except for modifications necessary to encompass in one provision the exceptions to both of the basic granting provisions (§§ 5 (a) and (b)), § 5(c) is worded substantially identically to the separate provisos to (a) and (b) contained in the prior bills. In particular, the language "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," as used in those provisos, was carried over virtually verbatim from H.R. 1918 into the new subsection (c). As used in the provisos, it necessarily referred to the properties transferred from Territorial to federal use under the authority given by §§ 91 and 73(q) of the Organic Act. The same phrase was presumably meant to denote the same type of transfer of possession when it was relocated in a separate subsection. More broadly, the very fact that subsection (c) originated as separate provisos to subsections (a) and (b) demonstrates that it, like them, was intended solely as an exception from the basic grants made in subsections (a) and (b).

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[27] Compare also the removal from subsection (b) of the definition of "public lands," note 26, *supra*.

Finally, and by itself conclusively, the consolidation of the separate provisos of the prior bills into a single subsection of the new one passed without comment in the committee reports and the debates. Plaintiff contends that, by that modification, Congress abandoned the principle, established through a decade of legislative consideration of statehood proposals, of limiting the land grants to Territorial or ceded properties and, for the first time, included in the grants properties purchased or condemned by the United States. That such a drastic departure from precedent could have been intended, without a word's being said in the hearings, the committee reports, or the debates, is incredible.

2. The inferences to be drawn from the evolution of the various drafts of the bill are confirmed by more than the failure of the committee reports to take note of any substantive change. For the committee reports are not silent in other respects and what they do say demonstrates affirmatively that §§ 5(c) and (e), like §§ 5(a) and (b), were thought to dispose only of ceded and Territorially-owned properties. In summarizing the relevant provisions of the bills in the form ultimately passed (H.R. 4221 and S. 50, amended to conform to H.R. 4221), the House and Senate committees both stated (H. Rep. 32, 86th Cong., 1st Sess., p. 5; S. Rep. 80, 86th Cong., 1st Sess., pp. 2–3):

> When Hawaii was annexed in 1898 the crown lands of the former monarchy and the Government lands became Federal lands. Through the years some of these lands have been *set aside*

> for special purposes and others have been exchanged for different lands. * * * The Territory has administered the public lands, except Federal reservations, for the United States since annexation and has collected the revenues and spent them for public purposes.
>
> Section 5 of the bill provides that the State of Hawaii shall succeed to the title now held by the Territory to most of the remaining ceded lands, saving to the United States title to all lands *set aside* for public use under acts of Congress, Executive orders, or Presidential or gubernatorial proclamations. The section also provides that title to any public lands which are controlled by the United States under permit, license, or permission issued by the Territory of Hawaii and which may during the ensuing 5-year period be set aside for the use of the United States by congressional act or Presidential order shall remain in the United States. It also retains in effect the President's authority *to restore lands to their previous status* after admission. The use of and benefits from the granted lands will remain the same as they now are. [Italics supplied.]

Although the summary is terse, and imprecise as to some of the details of the statute, there are three respects in which it is significant. The first is the negative one that there is not a hint that properties purchased or condemned by the United States, or anything other than territorial or ceded properties, are being given away. Second is the use of the term "set aside" in

reference exclusively to ceded properties. Third, and perhaps most significant, is the description of § 5(e) as "retain[ing] in effect the President's authority to restore lands to their previous status after admission" (*i.e.,* during the five-year period provided in § 5(e)). The antecedent to that statement, plainly, is § 91 of the Organic Act, which, having authorized ceded lands in the possession of the Territory to be taken for federal use by direction of Congress, the President, or the Governor, had added: "And any such public property so taken for the uses and purposes of the United States may be *restored to its previous status* by direction of the President * * *" (emphasis added) (48 U.S.C. 511). Section 5(e) was thus viewed simply as a continuation for five years of the power the President had had under § 91 of the Organic Act to terminate the set-asides of ceded properties authorized by that Act and thereby "restore" the lands to the possession of the Territory (their "previous status"). Moreover, even apart from the antecedent in the Organic Act, the language in the committee report, "restore lands to their previous status," is plainly appropriate *only* to a conveyance to the State of properties the Republic or Territory had at one time owned or possessed (either ceded or territorial) but which had been taken from the Territory for federal use. It can hardly describe a conveyance to the State of property that the United States had condemned or purchased from private

owners, for as to such properties the Territory had never had an interest to be "restored."

From the legislative history, therefore—as from the face of the Act—the only conclusion possible is that § 5 (c), like its antecedent provisos, was intended to be and is solely an exception from the basic granting provisions of properties otherwise within them but which have been "set aside" for federal use in one of the designated ways. Its scope is therefore limited to Territorially-owned properties (otherwise granted to the State by § 5(a)) and to United States-owned ceded properties (otherwise granted to the State by § 5(b)). And since the scope of § 5(c) admittedly controls the scope of § 5(e), it follows that the State is not entitled under § 5(e) to properties purchased or condemned by the United States, whether or not surplus to its needs.

E. THE PHRASE "ANY LAND OR PROPERTY" USED IN SECTIONS 5 (C) AND (E) WAS NECESSARY TO ENCOMPASS TERRITORIALLY-OWNED LANDS SET ASIDE FOR FEDERAL USE AND IS NOT THE RELEVANT LANGUAGE IN ANY EVENT

Throughout its brief, the State repeatedly emphasizes that §§ 5 (c) and (e) refer to "any land or property" and that, under the definition in § 5(g), that phrase is not limited to ceded properties. We concede the fact, but it proves nothing and presents a false issue.

As the foregoing argument shows, the limitation of the Act derives, not from the words "any land," but from the qualifications that follow it. Section 5(e)

starts, to be sure, with the term "any land," by itself unlimited—not even, indeed, to lands located in Hawaii [28]—but the initially open-ended category is immediately confined to that "retained by the United States" and then, narrowing the scope further, "pursuant to subsectio[n] (c)." Subsection (c), in turn, though again starting with the broad term, "Any lands," immediately narrows it to those "set aside" for federal use in enumerated ways. Our argument is simply that the "set aside" clause—the ultimate determinant of the scope of § 5(c) and, hence, of § 5(e)—refers specifically to ceded and territorial lands transferred from the possession of the Territory to the possession of the United States under §§ 91 and 73(g) of the Organic Act.

[28] It is perhaps worth noting that plaintiff's purportedly "literal" argument would, applied "literally," equally entitle Hawaii to surplus properties of the United States located anywhere in the world. It is only in §§ 5 (a) and (b) and § 5 (c)'s reference to the Organic Act's "set aside" authority that a limitation, in terms, to Hawaiian lands can be found. The plaintiff denies that any of those references confine the scope of § 5(c), yet it limits its claim, without explanation (though not surprisingly), to lands in Hawaii. We assume its explanation is that the failure (on its reading) to confine § 5(c) to lands located in Hawaii was a mere Congressional oversight, to be remedied by implication from the nature of the Act as a whole. That is, having read out of § 5(c) the limitations on its scope to be drawn from §§ 5 (a) and (b) and the Organic Act, the plaintiff then finds it uncomfortably open-ended and is forced to read back into it an "implicit" limitation to Hawaiian lands. Were it needed, that difficulty is further evidence of the lack of cohesion or structure in the statute as the plaintiff would read it.

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Even if the result of our argument were to limit the operative scope of the provisions to *ceded* lands, there would be nothing unusual in that process of limiting, by later qualification, unlimited introductory words. In fact, however, §§ 5 (c) and (e) are not, under our reading, limited to *ceded* lands (i.e., "public lands" as defined in § 5(g)). Both of those provisions admittedly, and necessarily, apply also to Territorially-owned property acquired by purchase or condemnation and set aside for federal use under § 73(q) of the Organic Act. As we have shown from the legislative history, that is the very reason why the broader term "any land" was used in those subsections. Whether it comes from the plaintiff, a government official,[29] or a post-enactment committee report,[30] argument about the meaning of that term remains beside the point.

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[29] See the opinion of the former Associate Solicitor of the Department of the Interior printed as Exhibit I to the Complaint (App. 59–70). On their respective merits, that and the contrary opinion of the Attorney General (Exh. H, App. 35–59) may speak for themselves.

[30] See H. Rep. 1564, 86th Cong., 2d Sess., pp. 3–4, quoted by the plaintiff (Br. 39–40). Whether the House Committee's "advisory opinion" was meant to be responsive or was purposefully equivocal, its force is in any event counter-balanced by the Senate Committee's express refusal to endorse it. S. Rep. 1681, 86th Cong., 2d Sess., p. 4, not cited by plaintiff, states: "The committee considered possible interpretations of section 5(e) of the Hawaii Statehood Act of 1959. No interpretation is offered at this time. The sense of the committee is that the factors involved are too complex to be considered within the time available and require independent consideration at a later date."

CONCLUSION

For the foregoing reasons it is submitted that the complaint presents a suit against the United States to which it has not consented and that the complaint fails to state a claim upon which relief can be granted. For each of those reasons leave to file the complaint should be denied.

Respectfully submitted,

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JUNE 1962.

APPENDIX

Sections 91 and 73(q) of the Hawaiian Organic Act of 1900, 31 Stat. 154, 159, as amended (48 U.S.C. 511, 677) provide:

> SEC. 91. Except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, approved July 7, 1898, numbered 55 (30 Stat. 750), shall remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof, or the University

of Hawaii, by direction of the governor when thereunto authorized by the legislature: *Provided, That when any such public property* so taken for the uses and purposes of the United States, if, instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section.

* * * * *

SEC. 73. * * * (q) [1] All lands in the possession, use and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall, except as otherwise provided by the Congress, be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the Governor, and all patents and deeds of such land shall issue

[1] As amended by Act of August 21, 1941, 55 Stat. 658. H. Rep. 831, 77th Cong., 1st Sess., pp. 1–2, and S. Rep. 576, 77th Cong., 1st Sess., pp. 1–2, explained the purpose of the amendment as follows: "Senate Concurrent Resolution No. 11 of the Legislature of Hawaii, adopted April 19, 1941, sets forth that the Hawaiian Organic Act providing for taking of lands for the uses and purposes of the United States has been held as applying only to the public property ceded and transferred to the United States by the Republic of Hawaii under joint resolution of annexation, approved July 7, 1898. The purpose of this bill is to amend section 73, subsection (q) of the Hawaiian Organic Act for the purpose of authorizing the Governor of Hawaii to set aside for the uses and purposes of the United States any lands acquired by the Territory since the annexation, and in addition to those ceded by the Republic of Hawaii. * * *"

from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawaii, as amended by this chapter, shall, except as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the Governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory; the provisions of this section may also be applied where the "public purposes" are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States. The commissioner is authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the Governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawaii into full force and effect. All officers and employees under the jurisdiction of the commissioner shall be appointed by him, subject to the Territorial laws of Hawaii relating to the civil service of Hawaii, and all such officers and employees shall be subject to such civil service laws.

Within the meaning of this section, the management of lands set aside for public purposes may, if within the scope of authority conferred by the legislature, include the making of leases by the Hawaii Aeronautics Commission with respect to land set aside to it, on reasonable terms, for carrying out the purposes for which such land was set aside to it, such as for occupancy of land at an airport for facilities

for carriers or to serve the traveling public. No such lease shall continue in effect for a longer term than fifty-five years. If, at the time of the execution of any such lease, the Governor shall have approved the same, then and in that event the Governor shall have no further authority under this or any other Act to set aside any or all of the lands subject to such lease for any other public purpose during the term of such lease.

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