IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 12, Original

STATE OF HAWAII, *Plaintiff*

v.

DAVID E. BELL, *Defendant*

On Motion for Leave to File Complaint

PLAINTIFF'S REPLY BRIEF

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The defendant does not challenge the standing of the State of Hawaii to bring this action, the jurisdiction of this Court over the action, or the particular appropriateness of this Court as a forum. However, defendant claims that the suit is barred by sovereign immunity and that, on the merits, the complaint does not state a claim upon which relief can be granted. We shall reply to these two contentions in turn.

I. THIS ACTION IS NOT BARRED BY ANY CONCEPT OF SOVEREIGN IMMUNITY

The defendant suggests that this action "presents a suit against the United States to which it has not consented." (D. Br. 14). The United States is not a part of record to this suit, and the State's complaint seeks relief only against the defendant Bell. What defendant suggests, however, is that the suit is in legal effect one against the United States, or, to alter the phraseology, that the United States is an indispensable party to the suit. (D. Br. 15). These contentions are without substance. The crucial point is that the plaintiff State could win this action, and the United States would be under no compulsion as to any land in the category in question.

1. *This suit is not one to establish an interest in property of the United States.*—Regrettably, the defendant has, numerous times in his brief, misstated the relief sought in the State's complaint. The defendant asserts that this suit is one seeking an order of conveyance of the property of the United States (D. Br. 16); that "a final decree cannot be made without affecting" the United States' interest (D. Br. 16); that it is one "to establish an interest in . . . property of the United States (D. Br. 17); that it "involves the disposition of unquestionably sovereign property" (D. Br. 23).

These allegations are manifestly incorrect. The prayer of plaintiff's Complaint (Para. XV, p. 11) is simply for relief against certain action taken by defendant in excess of his statutory powers. The relief sought is that defendant abandon the restrictive interpretation of Section 5 of the Hawaii Statehood Act which he has promulgated, and rescind his directions

to executive agencies not to process reports on land excluded by his restrictive interpretation. Declaratory and injunctive relief against the defendant to this end is sought only as to the respect in which it is claimed that he has exceeded his statutory powers.

To reiterate the plain import of our Complaint, as developed in our opening brief (pp. 59-64): The State does not seek to try title to any land. It recognizes that title to the housing projects, and to any other land or property to which this controversy may have practical application, is in the United States. It does not pray for a decree ordering a conveyance of any specific properties—the housing properties, or any other. It does not ask the Court to consider the Federal Government's need for any specific properties—the ultimate question under §5(e). The State concedes that no final determination of governmental need has been made in respect to the properties known to be in the contested category, or as to any others which may fall within it. The suit seeks only the removal of a bar which the defendant, acting beyond his statutory authority, has imposed upon the processes for the making of determinations in respect of such properties.—Accordingly, the line of cases cited by the defendant to the effect that a suit to compel a disposition of the property or funds of the United States is barred by sovereign immunity, is beside the point.[1]

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[1] These cases are found at D. Br. 17-19, and are all clearly distinguishable: *The Siren,* 7 Wall. 152 (1867), dealt with the question whether a libel in admiralty could be maintained against a vessel taken under prize by the United States, or against the proceeds of its sale; *Stanley* v. *Schwalby,* 162 U.S. 255 (1896), was an action "to try title to a parcel of land, part of the military reservation of the United States at San Antonio" (162 U.S. at 266); *In re Ayers,* 123 U.S. 443 (1887), involved a bill to restrain the

2. *This suit is properly brought only against the defendant, to restrain him from action taken in excess of his statutory powers.*—(*a*) The relief sought herein is not disposition of the property of the United States, but rather a restraint on the defendant from exceeding his statutory authority. The law is clear that here the defense of sovereign immunity does not avail the defendant, since he is not vested with the authority of the sovereign when he exceeds his statutory authority. See *Greene* v. *McElroy,* 360 U.S. 474, 493 (1959); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 690-91 (1949); *Philadelphia Co.* v. *Stimson,*

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collection of taxes by suit in the name of a state. Coming to the 20th century citations, *Oregon* v. *Hitchcock,* 202 U.S. 60 (1906), will be discussed below; *Cummings* v. *Deutsche Bank,* 300 U.S. 115 (1937), sought a decree for delivery of property in the possession of the alien property custodian and the question was whether the government's consent to the suit had been withdrawn; *Minnesota* v. *United States,* 305 U.S. 382 (1939), was a condemnation action against property in which the United States had an interest, in which the question was whether sovereign immunity had been waived; *Maricopa County* v. *Valley National Bank,* 318 U.S. 357 (1943), involved an attempt to impress a tax lien on property belonging to the RFC, a governmental agency, in which the question was whether under the relevant acts of Congress, such a lien might have been imposed; *Great Northern Insurance Co.* v. *Read,* 322 U.S. 47 (1944), was a suit to recover taxes paid to an agency of the State, in which a money judgment was sought; *Mine Safety Appliance Co.* v. *Forrestal,* 326 U.S. 371 (1945), was a bill to enjoin the defendant, the Secretary of the Navy, from withholding, by way of offset, sums otherwise due to the plaintiff on Navy contracts; the suit was held obviously to be one to reach the government's funds, maintainable only in the Court of Claims; *United States* v. *Alabama,* 313 U.S. 274 (1941), appears to be a miscitation, even under the standards implied by the preceding cases. Cf. Hart & Wechsler, *The Federal Courts and the Federal System* (1953), p. 1176, n. 2.

223 U.S. 605, 620 (1912), and cases cited. Cf. 3 Davis, *Administrative Law Treatise* (1958), p. 552. The claim is one of action in excess of statutory authority, not simply one sounding in tort. Cf. *Malone* v. *Bowdoin,* 369 U.S. 643, 646-47 (1962).

To be sure, in a loose way of speaking, this action "involves" the government's land. But it is not within the category of cases to which the doctrine applies that sovereign immunity bars an action to compel a "disposition" of government land. This is because the present action is not one to compel such a disposition. It is, rather, simply one to restrain the defendant from an action in excess of his statutory powers—an action anterior to the processing of the lands and to the determination of which parcels shall be conveyed. As such, it is maintainable under the familiar authorities which hold that action in excess of an officer's statutory powers may be remedied by an injunction suit brought against him alone. And *Work* v. *Louisiana,* 269 U.S. 250 (1925), discussed in our opening brief (pp. 62-63), and further below (pp. 9-11), makes it clear that this doctrine applies even though the statutory provision and the action involved have something to do with government property. See also *Northern Pac. R. Co.* v. *North Dakota,* 250 U.S. 135, 151-52 (1919); *Payne* v. *Central Pac. R. Co.,* 255 U.S. 228, 238 (1921); *Payne* v. *New Mexico,* 255 U.S. 367 (1921). Cf. *West Coast Exploration Co.* v. *McKay,* 213 F. 2d 582, 596 (D.C. Cir. 1954), *cert. denied,* 347 U.S. 989 (1954); *Clackamas County* v. *McKay,* 219 F. 2d 479, 492 (D.C. Cir. 1954), *vacated as moot,* 349 U.S. 909 (1955).

(*b*) Moreover, the law is not in accord with the defendant's suggestion that the controlling test is whether

the action which would follow upon granting the plaintiff relief is "official action."[2] (See D. Br. 21). Action revoking any unauthorized course of action may well be "official action." The action revoking the

[2] The defendant, in support of this proposition, cites a lengthy string of cases (D. Br. 22-23) which have nothing to do with the present suit, which is one to restrain action taken in excess of statutory authority, and not seeking a conveyance or disposition of government property or funds. To take the defendant's 20th century cases first: *Naganab* v. *Hitchcock,* 202 U.S. 473 (1906), was a case identical to *Oregon* v. *Hitchcock, supra,* in which a restraint on conveyance of lands was sought; *Wells* v. *Roper,* 246 U.S. 335 (1918), was a bill to enjoin a government contracting officer from terminating a government contract, where he clearly had statutory and delegated authority to do so; *Ex parte New York,* 256 U.S. 490 (1921), involved an attempt, in an admiralty suit, to obtain a decree selling "the goods and chattels of the State of New York"; *Worcester County Trust Co.* v. *Riley,* 302 U.S. 292 (1937), was a bill seeking to require the taxing officials of two states to interplead their claims for estate taxes, there being no allegation that either was acting without authority; *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459 (1945), was a refund suit for taxes undertaken against funds in the State's hands. As to the 19th century cases, Chief Justice Marshall's opinion in *Governor of Georgia* v. *Madraza,* 1 Pet. 110 (1828), made it clear that if the Governor's actions had exceeded his authority, he would have had to answer in person (1 Pet. at 124); *Louisiana* v. *Jumel,* 107 U.S. 711 (1883) and *New York Guaranty Co.* v. *Steele,* 134 U.S. 230 (1890), were bills to compel the levying of taxes; *Cunningham* v. *Macon & B. R. Co.,* 109 U.S. 446 (1883) was a bill seeking to set aside an executed conveyance of property to the State of Georgia; *Hagood* v. *Southern,* 117 U.S. 52 (1886), was a bill to compel receipt of repudiated state notes in payment of taxes; *Pennoyer* v. *McConnaughy,* 140 U.S. 1 (1891), involved a bill to enjoin the conveyance of land by officials under an unconstitutional statute; the action was allowed, with a dictum that the defendants could not be compelled "to perform any act toward perfecting the title of the [complainant]" (140 U.S. at 16); *Belknap* v. *Schild,* 161 U.S. 10 (1896), was a suit for an injunction against the use of government property on the ground that it embodied a patented device; the Court held that action a suit against the government's property, but indicated that the officers would be liable in damages; and *Smith*

denial of a passport is an official action, yet it is established that suits to set aside the denials of passports, on particular grounds, are not barred by sovereign immunity. See *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Dayton* v. *Dulles,* 357 U.S. 144 (1958).[3] Likewise, a directive setting aside the denial of a security clearance by the Defense Department would be ineffective if it were made simply in the name of a private citizen; and likewise one setting aside the rendering of a military discharge in a less-than-honorable character. Yet suits to compel such official actions are entertained. See *Greene* v. *McElroy, supra; Harmon* v. *Brucker, supra.* And cf. *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959). Moreover, the fact that as a practical matter the official issuance of a passport (a piece of government property, incidentally), or a security

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v. *Reeves,* 178 U.S. 436 (1900) was a suit for recovery of taxes in the hands of the State. Uniformly, then, these cases either (i) involved attempts to establish an interest in government property or funds, which the present complaint does not, or (ii) did not involve any claim that the officers were acting beyond their statutory authority. In many of the cases, the point is clear that a claim of action in excess of statutory authority would have made the officers amenable to suit, despite their offices. See, *e.g., Worcester County Trust Co.* v. *Riley, supra; Wells* v. *Roper, supra; Pennoyer* v. *McConnaughy, supra.* See also *Stanley* v. *Schwalby,* note 1, *supra.*

[3] If the action is essentially one to set aside the unauthorized action of the official defendant, it does not appear to matter that "affirmative" prayers for relief are also included in the complaint. For example, in *Dayton* v. *Dulles,* 357 U.S. 144 (1957), the plaintiff, inter alia, sought a declaratory judgment against the Secretary of State: that plaintiff "is entitled to a passport under the statutes of the United States"; and a judgment enjoining the Secretary of State "from continuing to deny a passport to plaintiff" and directing the defendant Secretary of State "to issue a passport forthwith" to plaintiff. See 146 F. Supp. 876, 877 (D.D.C. 1956). In any event, even prayer 4 of the Complaint here, which defendant has chosen for particular attack (D. Br. 22) is related only to the particular legal question at issue here.

clearance, or an honorable discharge, might be expected to follow upon the grant of relief in such suits, has never been taken to be an indication that the action is barred on the theory of sovereign immunity.

This is not a suit demanding "affirmative" relief in any sense precluded by the sovereign immunity doctrine. In this suit, as well as in the precedents which we rely on, it is recognized that if there is some other legal basis—apart from the point at issue in the suit—for refusing to issue the passport, denying the security clearance, refusing the honorable discharge, or declining to take further steps to process or convey the land, the officer against whom the decree is entered may with impunity decline to take the affirmative action. See *Vitarelli* v. *Seaton,* 359 U.S. 535, 546 (1959).—Once again, here the State's complaint does not seek a conveyance of any specific land, or of any land whatsoever. It seeks simply to remove an unauthorizedly-imposed bar to the operation of the procedures under the Statehood Act. The State concedes that all other matters as to the processing of Federal land under the Statehood Act are left open by this suit.[4]

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[4] The defendant suggests that inasmuch as the defendant's conduct also amounts to a breach of the compact between the United States and the State of Hawaii, this suit is barred under the cases holding actions brought against government officers to compel specific performance of government contracts precluded by sovereign immunity. (D. Br. 24-25). But those cases simply establish that, in the absence of a showing of conduct exceeding statutory authority, mere participation in a breach of contract will not form the basis of a suit against a government officer in his private capacity. There is no suggestion in the cases cited by the defendant that where an officer has exceeded his statutory authority, making him responsible in his private capacity to suit, and making the suit not one against the sovereign, the fact that his action also amounts to a breach of contract would oust the courts of jurisdiction under the sovereign immunity doctrine.

3. *This suit is governed by Work* v. *Louisiana.*—The distinction between what this suit is, and what it is not (or between what it is and what the defendant represents it to be) is illustrated by the distinction between *Oregon* v. *Hitchcock,* 202 U.S. 60 (1906), and *Work* v. *Louisiana,* 269 U.S. 250 (1925). In the *Oregon* case, the State claimed that certain lands, which the Government was about to patent to Indians, were swamp or overflowed lands and therefore should be given to the State under a statute which so provided.[5] The State sought a decree restraining the Secretary of the Interior from deeding the lands to the Indians and a decree establishing title to the lands in question in itself. This Court held the bill barred under the doctrine of sovereign immunity. Thus, the Court recognized that the determination of which lands were overflowed was one reposed within the discretion of the executive (202 U.S., at 70) and that a bill to compel conveyance of land by the United States was one against the sovereign. (*Id.,* at 69).

However, in *Work* v. *Louisiana,* the Secretary of the Interior, in construing the same statute, arbitrarily added the requirement that not only must the lands to be turned over to the States be swamp or overflowed lands, but that they must also be nonmineral lands. The State brought a bill against the Secretary urging that he had acted beyond his statutory authority in excluding the category of mineral lands from the scope of his determinations as to whether lands were swamp or overflowed lands, and hence conveyable to the State. This bill—which did not seek a restraint on conveyance of Government property, or any declaration of title—

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[5] The Act of Sept. 28, 1850, c. 84, 9 Stat. 519.

was held not to be barred by sovereign immunity. (See our Opening Br. 62-63).

The *Work* case is a square precedent for the action here. Unlike the State in *Oregon* v. *Hitchcock,* Hawaii does not seek an order for the conveyance of any land, or a determination of the ultimate question of Federal need for the properties—analogous to the question of the land being "swamp or overflowed" in the *Oregon* case. Rather, as in *Work,* the State simply seeks to restrain the officer from excluding from the ambit of his determinations a category of land, on the ground that the statute does not empower him to exclude that category of land from the group of lands which he must process and about which he must make a final determination.

In the *Work* case, the Secretary of the Interior, without statutory authority, excluded the category of mineral lands from the lands subject to the determination processes under the Act in question. Here, the defendant has excluded the category of lands acquired by the United States by purchase, condemnation, or gift, from the lands which he must process under §5(e) of the Statehood Act.—The *Work* case, then, which is based on the same principles at the *Greene, Harmon* and *Vitarelli* cases, and the other modern judicial review cases, is a controlling precedent here; despite the defendant's self-contradictory assertions, it is incapable of factual distinction[6] and

[6] The defendant attempts to distinguish the *Work* case on the basis that title to the land in question there was in the State. (D. Br. 18). We can only suggest a rereading of the case to make it plain that this was not the basis on which the doctrine of sovereign immunity was held not to apply. Moreover, the basis of distinction contended for by the defendant is self-contradictory;

its authority has never been weakened in this Court.[7]

II. THE COMPLAINT STATES A CLAIM UPON WHICH THE PLAINTIFF STATE IS ENTITLED TO RELIEF

In this section of our brief, we reply to the defendant's contentions that the Complaint fails to state a claim upon which relief can be granted. (D. Br. 27-60). Like the defendant, we will extensively discuss the merits of the cause under this topic.

A. The Defendant Misconstrues Subsections 5(c) and 5(e) of the Statehood Act as Merely Dealing With Lands and Property Otherwise Covered By Subsections 5(a) and 5(b). They Rather Are Independent Provisions, Meaning What They Plainly Say

The defendant's brief makes it plain that the crucial substantive issue between the parties in this case is whether Congress meant what it said when it enacted §§5(c) and 5(e) of the Hawaii Statehood Act.

In §5(c), Congress provided as follows:

> "(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United

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if the fact that the plaintiff insisted that title was in him while the government claimed that title was in it were to obviate the applicability of the doctrine of sovereign immunity—which would be the case under the defendant's reading of *Work*—an anomalous result would be created. Such a case would present an obvious action to "try" the respective property interests in the land, which is exactly the sort of suit which the precedents indicate is barred by the sovereign immunity doctrine. See *Louisiana* v. *Garfield*, 211 U.S. 70, 77 (1908); *cf.* the Solicitor General's Brief for Petitioner in *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), pp. 26-28.

[7] The incidental reference to the *Work* case in *Ickes* v. *Fox*, 300 U.S. 82 (1937), is hardly a basis for putting a gloss on that decision.

> States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be."

And in §5(e) Congress, referring to "any land or property" retained pursuant to §5(c), ordered that federal agencies make reports on all such land or property, and that if any such property were no longer needed by the Government, it should be conveyed to the State of Hawaii.

There appears to be no dispute between the parties that the coverage of the reporting and conveyance procedure established by §5(e) is identical with the scope of §5(c), at least insofar as the issues in the present case are concerned. Accordingly, the crucial issue is as to the proper interpretation of §5(c).

The defendant—while raising certain incidental questions as to the meaning of "set aside" in §5(c)—has chosen to rest the primary weight of his case upon the argument that §5(c)'s coverage (and hence that of §5(e)) only extends to lands and property which otherwise would be the State's property under §§5(a) and 5(b).—That is, to territorial property (§5(a)), and to "the public lands and other public property," (§5(b)), *i.e.,* the property ceded to the United States pursuant to the Annexation Resolution of 1898. The defendant's brief identifies the basic issue in the case as whether the sole function of §5(c) is—as defendant contends—simply to reserve certain properties from "the grants made in §§5(a) and 5(b)." (D. Br. 38)

The defendant's contention is that §5(c) is both in "origin" and in "function" solely an exception from

the grants otherwise made in §§5(a) and 5(b). (D. Br. 46)—The State contends that it is such neither in "origin" nor in "function," but that it is rather, as it plainly reads on its face, a general provision for the retention of land and property in Hawaii by the United States—upon which, as to land and property found to be unneeded by the United States within the period provided by law, §5(e)'s conveyance procedures operate.

The State's basic position is that §5(c) means what it says: that it covers "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 of the four means specified in the subsection.

1. *In order to construe Section 5(c) as a mere exception to Sections 5(a) and 5(b), it is necessary for the defendant to assume that in drafting Section 5(c) the Committee made a series of four careless errors in drafting a single subsection—which by extraordinary coincidence made it read on its face the exact opposite of what the defendant claims the Committee intended.* —In the light of the plain language of §5(c) the task of interpretation which provides for the results desired by the defendant is a difficult one. The object of this interpretation is to prevent processing under §5(e) of land which the United States bought from private parties or acquired through condemnation and which it no longer needs for its own use. That land clearly must be processed under §5(e) unless it is not included in §5(c).

The defendant's difficulty arises from the fact that land which the United States acquired by condemnation is clearly within the literal meaning of §5(c).

The defendant therefore tries to resolve this difficulty on the theory that the language of §5(c) which appears to include lands acquired by the United States by condemnation was the result of careless draftsmanship which did not express the real intention of Congress. It seems to us impossible to conclude that the relevant phrases in §5(c) were inserted because of inadvertence or carelessness.

(*1*) The first error in draftsmanship which one must assume the Committee made, if the defendant's interpretation is correct, was the use of the term "Any land" at the beginning of §5(c). This term is defined in §5(g). That definition clearly includes land acquired by the United States by condemnation. So it is necessary for the defendant to assume that the draftsman or the Committee when they wrote these words in §5(c) had temporarily forgotten the definition in §5(g). Or alternatively, it is necessary to assume that the draftsman or the Committee used a frivolously broad definition of "any land" in §5(g). All that is meant, according to the defendant's version, by the definition of "any land" in §5(g) is: (i) territorial land; and (ii) "public" or ceded land.—If this were the case, one must marvel at the unnecessary use of a sweeping definitional provision in §5(g). If the defendant's version were correct, the easy alternative would have been to have defined "any land" in terms simply of territorial plus ceded land, or to have used a narrower term, both in §5(c) and in §5(g). The defendant is thus forced into the untenable position that the words "Any land" are not relevant to the interpretation of this section.[8]

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[8] See the defendant's final point, D. Br. 58 *et seq.*: "The Phrase 'Any Land or Property' used in Sections 5(c) and (e) . . . is not the Relevant Language in any Event." But obviously the scope of that language is very much in issue.

(2) Assuming that the words "Any land" were carelessly used in subsection (c), the second error in draftsmanship was the failure to limit those words to the lands conveyed by subsections (a) and (b) to which the defendant claims subsection (c) is merely an exception. The existence of such an error is unbelievable because in the succeeding subsection, §5(d), the draftsman did explicitly make §5(d) an exception to §5(b) in the following language:

> "Any public land or other public property that is conveyed to Hawaii by subsection (b) of this Section"

Following this precedent the draftsman should have made the first line of §5(c) read as follows: "Any land or other property that is conveyed [or, "would otherwise be conveyed"] to Hawaii by subsections (a) or (b) of this section . . ." [9]

The defendant's conclusion that the draftsman's failure to use this language was careless becomes even more improbable for the following reason: it was unnecessary in order to make §5(d) an exception to §5(b) to refer to §5(b) in that section. This is because the term "public land" used in §5(d) had been defined by §5(g) to include only those lands which were granted to the State of Hawaii by §5(b). On the other hand, when the draftsman used the term "Any lands" in §5(c) the definition included lands condemned by the United States unless it was specifically limited as an exception to §5(a) and §5(b). Therefore, the drafts-

[9] As the defendant concedes (D. Br. 53, n. 26), § 5(d) was introduced into the bill at the same time as § 5(c). Both provisions are found in H.R. 888, 86th Cong., 1st Sess., the ancestor of H.R. 4221, 86th Cong., 1st Sess., the "clean bill" drafted by the House Committee. This simultaneous introduction of the two provisions makes it clear that the distinction in wording was not accidental.

man who was so meticulous as to make §5(d) an exception to §5(b), even though it was not strictly necessary, suddenly became so careless in writing §5(c) that he failed to use the same language—even though it was absolutely necessary to get the result which the defendant claims he intended.

(*3*) The next error in draftsmanship which must be assumed in order to support the defendant is the inclusion in §5(c) of the expression that the lands retained under it shall "remain" the property of the United States. According to the defendant, the use of the term "any lands" instead of the term "public lands" in §5(c) was intended simply to include in §5(c) territorial lands (§5(a) lands) which had been set aside by the Territory for the use of the United States pursuant to §73(q) of the Hawaiian Organic Act.—But those lands never were the property of the United States, title to them having always remained in the Territory of Hawaii. The use of the language in §5(c) that the lands "shall remain" the property of the United States contradicts the defendant's explanation of why §5(c) speaks in terms of "any lands." For this reason, the defendant must claim again that the words of §5(c), under his interpretation, were carelessly or inadvertently used.[10]

In the succeeding §5(d) the draftsman does not use the words "*shall remain* the property of the United

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[10] Similarly, in alternative versions of the legislation, such as H.R. 1918, 86th Cong., 1st Sess., which the defendant claims to have been the ancestor of the final form of the bill, where the retention, reporting and conveyance provisions were limited to ceded lands, or to territorial and ceded lands, the language used as to the retention was "shall be" the property of the United States. The change made in § 5(c) indicates, again, that § 5(c) was intended as a general retention provision.

States." Instead, §5(d) states "and the lands or property so set aside . . . *shall be* the property of the United States." Certainly, the change from the word "be" in §5(d) to "remain" in §5(c) cannot be regarded as careless, since it fits in perfectly with the other language of §5(c). The use of the word "remain" is perfectly consistent with our interpretation of §5(c) as a general retention provision. Once again, only when viewed as a general retention provision rather than a simple exception to §§5(a) and 5(b) does the broad language chosen by Congress for §5(c) make sense.

(*4*)(*a*) Another mistake which the draftsman of §5(c) carelessly committed, if the defendant's version be credited, is in his use of language describing the setting aside of land, for in §5(c) the draftsman used a broader terminology to cover the concept of the setting aside of land than is used elsewhere in the entire Act.

Thus, § 16(b) of the Act reserves authority in the United States over lands which prior to the admission of Hawaii were controlled or owned by the United States,

> "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."

Certainly if the identical language in the above section *had* been used to describe or modify the term "Any lands" in § 5(c) that section would have read as follows: "Any lands and other property that are *set aside by Act of Congress.*" That language might

well not have included land set aside by condemnation. A reasonable interpretation of lands "set aside by Act of Congress" could limit such lands to those specified in a particular act. Lands taken by condemnation are not specified until the proceedings are begun. Therefore, it became necessary under §16(b) specially to mention that it covered lands acquired by condemnation.

From this, the defendant argues (D. Br. 44):

> "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)."

But §5(c) did not use the identical language of §16(b). It changed the words of §16(b) "set aside by act of Congress" into the following language: "Any land *set aside pursuant to law under any* . . . act of Congress." That change clearly includes lands acquired by condemnation. There would be no conceivable purpose for that change except to include lands acquired by condemnation. After that change was made in §5(c), it was not necessary specifically to refer to condemned lands.

Therefore, §§16(b) and 5(c) when read together affirmatively show that the draftsman in neither section intended to omit from the purview of the act lands condemned from private parties by the United States.

Moreover, the distinction in language between §§5(c) and 16(b) is confirmed by §5(d) of the Act, as well as by earlier versions of the legislation. A form of language quite similar to that in §16(b) is used in the final Act in §5(d), where the only reference is to the "pub-

lic" lands. Again, this serves to point up the distinction in the terminology in §5(c). Earlier versions of the Act indicate the same distinction. For example, in H.R. 1918, 86th Cong., 1st Sess., the defendant's putative parent for the final form of the bill (as well as in the forms of legislation used in prior Congresses)[11] where the retention provision was specifically related simply to the lands covered by §§5(a) and 5(b), a form of wording identical to that in §16(b) and §5(d) of the final Act was employed. In the light of the restricted references of the retention clause in those bills, that narrower language was appropriate. This again simply points up the distinction between the final form of §5(c) and these other provisions.[12]

* * *

(*b*) The greatest significance of the comparison between §5(c) and §16(b) is that it demolishes the historical argument which the defendant makes as to the meaning of the words "set aside" (D. Br. 39-41). Briefly stated, that argument is this: Prior to the final

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[11] See the form used in H.R. 49, H.R. 339, H.R. 1243, and H.R. 1246, and S. 50, 85th Cong., 1st Sess., as quoted in defendant's brief, p. 47.

[12] Besides underscoring the distinction between the narrower wording of the "set aside" formulation and the broader, this draftsmanship teaches the obvious lessons that appropriation of public lands, and condemnation or purchase of private lands, are two separate and distinct methods of setting aside land for a specific Federal use, and that the "public" or ceded lands in Hawaii could not be set aside for specific Federal uses *through condemnation,* inasmuch as they were already the Federal Government's property. This, moreover, is all that the two cases cited by the defendant as evidence of a restricted judicial usage of the term "set aside" actually stand for. *United States* v. *Chun Chin,* 150 F. 2d 1016 (9th Cir. 1945); *Hee Kee Chun* v. *United States,* 194 F. 2d 176 (9th Cir. 1952).

forms of the legislation, the words "set aside" had been used in the bills only with reference to public (ceded) and territorial lands. Therefore, it must be presumed that these words in §5(c) refer only to such lands, and the methods of "setting aside" land would be limited to those appropriate for such lands—those referred to in the Hawaiian Organic Act of 1900, as amended.[13]

That presumption, of course, might apply to §16(b), which refers to lands "set aside by Act of Congress." But in §5(c) the draftsmen followed the words "set aside" by new language not found in the previous history of the Act, *i.e.*, "set aside pursuant to law under any . . . Act of Congress." The defendant in his historical argument conveniently ignores this change. Had it been taken into consideration, the defendant's historical argument would have been reduced to this: Because the words "set aside by Act of Congress, proclamations" etc., did not previously cover the condemned

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[13] Even the legal opinion of the Department of Defense, which took a very narrow view of the application of §§ 5(c) and 5(e), admits that land other than that set aside by the means specified in the Act of 1900, could fall within the meaning of § 5(c). An opinion of General Counsel of the Defense Department J. Vincent Burke, Jr., given under date of June 30, 1960, to the Bureau of the Budget, refers to the Act of January 31, 1922, c. 42, 42 Stat. 360, which authorized the President to exchange "any land or any interest in land [without restriction to ceded property] . . . for privately owned land . . . and thereafter *set apart* for military purposes the lands or interests so acquired." (See our opening brief, pp. 52-53). The General Counsel admitted that "any lands acquired and set aside under this authority would appear to be within the application of Section 5(c) of the Statehood Act."

The defendant's position as to the limitation of § 5(c) to the lands covered by §§ 5(a) and 5(b) (D. Br. 45-58) is also contradicted by this opinion of the Defense Department General Counsel.

lands, therefore the new phrase "set aside *pursuant to law* under *any* . . . Act of Congress" does not cover such lands. This is a complete *non sequitur*. More than that, the very fact that the language was changed so that it covers condemned lands is conclusive that such a change was intended by Congress.

* * *

(*c*) As we indicated in our opening brief, (pp. 50-54) and as the defendant has not seriously controverted, the expression "set aside", particularly in its broad matrix in §5(c), is clearly ample to encompass the process of setting apart lands for specific Federal uses through purchase or condemnation. It is obvious that in ordinary speech when lands in private ownership are condemned or purchased by the United States for a specific federal purpose they become "set aside" for that specific federal purpose.[14] Cf. *Wilcox* v. *Jackson,* 13 Pet. 498, 512 (1839). "To condemn land is to set it apart or expropriate it for public use." *Wulzen* v. *Board of Supervisors,* 101 Cal. 15, 35 Pac. 353 (1894). "[W]hen reference is made to the taking of land the word 'appropriation' is used. A well understood meaning of the word 'appropriate' is 'to set apart for . . . a par-

[14] The defendant cites examples of the use of the term "set aside" referring to property withdrawals for specific federal uses under Sections 73(q) and 91 of the Organic Act of 1900. (Interestingly enough, Section 91, under which the vast majority of the withdrawals in question took place, does not itself use the term "set aside.") As indicated in our opening brief (pp. 46, 50-51), we do not deny that the words have been used in this context; the defendant's citations, accordingly, are somewhat superfluous. The real issue, to which the defendant does not address himself, is whether this restricted meaning of the term is the only one comprehended by §5(e).

ticular purpose or use . . .' ". *Jones* v. *Oklahoma City,* 192 Okla. 470, 475, 137 P. 2d 233, 237 (1943).[15]

This body of usage and the other examples of the general use of the terms "set aside" and "set apart" which we recounted at length in our opening brief (pp. 52-54), make it plain that both in terminological usage and in function, lands which are condemned or purchased by the Government for specific uses, as were the lands specifically in question here, are properly spoken of as "set aside." In the absence of any explicit reference to the contrary in the statute, or in any specific reference in the legislative history *pertaining to the final form of §5(c) and §5(e),* the plain language of the Act should govern. And this is confirmed by the distinction in language between §5(c) on the one hand and §§5(d) and 16(b) on the other.

2. *There is no support in the legislative history of Section 5(c) for the defendant's attempted distortion of its language.*—(*a*) The results of the cases laying

[15] Where a parcel of previously public land is "set aside" for a particular purpose, it is reserved or severed from the mass of other public land and no longer subject to the general laws applicable to the public lands until withdrawn from such use by an Act of Congress. *Wilcox* v. *Jackson, supra.* And likewise where private land is acquired by purchase or condemnation for a specific purpose, there is no question that the parcel of land is set apart from the other lands of the Government and that it cannot be used for other purposes without the authority of Congress. See 33 Ops. Atty. Gen. 288 (1922). In contrast to lands which have been set aside for specific use by condemnation, lands in the unappropriated public domain may be transferred to another department, to administer them for new uses, without legislation. See 33 Ops. Atty. Gen. 436 (1923).—Thus the effect of the acquisition of land by the Federal Government through condemnation or purchase is the same, with respect to the status of the lands as "set aside," as when unappropriated public lands are set apart for a specific use.

down the principle that on occasion the literal language of a statute may be ignored may be summed up as follows: It is only in the most unusual situations that the Court will refuse to follow the literal language. Broadly speaking, there are only two sets of circumstances which justify ignoring the plain words of the statute. The first is where the purpose of Congress can plainly be spelled out and the language of the statute conflicts with that purpose for no apparent reason. The second is where the language of the statute is so obscure that different meanings may be put upon it and, therefore, in order to make sense the court must make some interpolation.

Neither of these situations appears in this case. Accordingly, the plain language governs, and it is for the courts to "be sensitive to what Congress has written, and recall that 'It is for [the courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort.'" *Flemming* v. *Florida Citrus Exchange,* 358 U.S. 153, 166 (1958).

There is no apparent purpose of Congress in conflict with the literal language of §5(c). The only purpose of §5 that we can conceive of is the final settlement of the land interests between the United States and the State of Hawaii. The defendant fails to give any explanation of how the literal construction of §5(c) conflicts with that purpose.

The only statement of any congressional purpose contrary to the literal meaning of §5(c) that we can find in the defendant's brief runs as follows: (p. 37)

> "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."

And again on page 42:

> "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 has been before."

This would seem to be in conflict with the opinion of the Attorney General in which he recognized that there was an equitable reason for transferring lands condemned by the United States to the State of Hawaii. The Attorney General said,

> "In reaching this conclusion I am aware of the equitable argument made by the State of Hawaii, *viz.*, that it ought to receive the surplus after-acquired property in compensation for the many sacrifices it had made for the United States, in particular for the ceded properties which have been set aside. However, neither the language nor the legislative history of the Hawaii Statehood Act discloses to my satisfaction a congressional

purpose to adjust in that statute Hawaii's equitable claims of this nature, however meritorious." (App., Ex. H, p. 58).

(*b*) Defendant has in no way controverted the demonstration in our opening brief that Congress had before it the most compelling reason to make conveyances of unneeded lands to the State of Hawaii: the unique land sacrifices which Hawaii had made. These sacrifices furnished the most compelling of reasons to make conveyances of unneeded federal land to the State. And the legislative history provides evidence that this purpose was acted upon.

Under §§5(a) and 5(b) of the Act, the State received nothing new from the federal government. Under §5(a) the State received only territorial lands, and only part of them. And the "ceded" lands, in part nominally conveyed by §5(b), were always lands to which the State had the strongest of moral claims, which the federal government recognized by reason of the "trust" concept. Those lands "conveyed" under §5(b) had been under the "possession, use and control" of Hawaii since 1900 under §91 of the Organic Act. The only "grant" made by §5(b), in effect, was of the freedom from continued uncompensated takings by the United States—a freedom inherent in Statehood, in any event, unless otherwise provided.—And as we shall see, even this "grant" was to be diluted by §5(d) in the 86th Congress.

Moreover, as indicated, even as to §§5(a) and 5(b) land, the State would not receive tracts which had been through the years set apart for specific federal uses. Thus, the form of the bills previous to the 86th Congress, which contained "granting" provisions like the

final §§5(a) and 5(b), simply confirmed the very serious net land loss which Hawaii had already suffered in her dealings with the federal government.

In the 86th Congress, a further loss of land by Hawaii was introduced into the picture. Certain forms of the proposed legislation in this Congress contained counterparts of the present §5(d), which provided that further ceded land could be set aside by the Federal government without compensation and then exempted from the grant under §5(b), *even after Statehood.* This could amount to as much as 114,000 acres of such land, or over 2% of the total land area in Hawaii.[16]

The year before the final enactment of the Hawaii bill, Alaska had been admitted to the Union by Congress. Under §4 of its Statehood Act, Alaska received all of its territorial land. There was, in the Alaskan situation, no equivalent to the Hawaiian "ceded" land. There had been no cession and the United States had presumably paid good money for all of the so-called "public" land in Alaska. Nonetheless, Alaska was given, by §6 of her Act, a grant of more than one hundred million acres of these federal purchased public lands—or twenty-five times the total land area of Hawaii. The disparity between the net loss which Hawaii was being asked to incur and the net gain for Alaska was enormous.

The broad, unlimited form of §§5(c) and 5(e), introduced into the Hawaii legislation in the 86th Congress, carries out a Congressional purpose to rectify these

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[16] See the letter from the Navy Department to the Senate Committee on Interior and Insular Affairs, reproduced in Hearings on S. 50, 86th Cong., 1st Sess. (1959), p. 91, and in App. Ex. J, pp. 87-88.

inequities. These broad forms of language came into the Act after the Alaskan grants were made, and they were coupled in the legislative history with the additional losses of land which Hawaii incurred under §5(d).

But the State of Hawaii does not have the burden of showing that there is an equitable reason for following the plain language of the Act. On the contrary, there is the heaviest possible burden, on a party who asks the Court to override the language of an Act of Congress, to affirmatively show that it is in conflict with the broad purpose which Congress had in mind in passing it. Here the defendant makes no showing of that kind. The policy which he claims is in contradiction of the terms of the Act is his mere assertion that since other states did not receive condemned lands, Hawaii is not entitled to them.

(*c*) Having failed to find a purpose in conflict with the language of the Act, the defendant makes a complicated argument that §5 of the Act evolved from other bills which did not contain a provision like the present §5(c) and for that reason alone the language of the present Act must be ignored. The defendant states this contention in the following language (p. 46):

> "The evolution of the Act from the prior bills show 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)."

The essence of this argument appears to be that the draftsmen of §5(c) either carelessly failed to copy or distorted language from previous bills which are claimed to be the origins of the final Act. The theory is that since Congress in these earlier bills did not in-

clude lands condemned by the United States, it is presumed that it was the intent of Congress in its final Act not to transfer such lands to the State of Hawaii—a presumption so strong that it overrides the plain meaning of the Act that was finally passed.

This kind of legislative history based on evolution from previous bills, while of relevance in the situations we have outlined above (p. 23) is completely beside the point here. The defendant has demonstrated no congressional purpose with which the words of §5(c) conflict, nor is there any ambiguity to clear up unless the words "set aside" constitute a term of art, which we have demonstrated they do not (pp. 21-22, *supra*), or unless the difference in language between §§16(b) and 5(d) on the one hand and §5(c) on the other is meaningless—which obviously it should not be taken to be. (See pp. 17-19, *supra*). We suggest, therefore, that the defendant's argument from legislative history that §5(c) is purely an exception to §§5(a) and 5(b) is unavailing.

(*d*) Nevertheless, we will analyze the defendant's evolutionary argument to demonstrate that even if it were relevant, it is completely unconvincing. The defendant's recital of legislative history amounts to no more than a demonstration that Congress rejected such bills as did not include lands acquired by condemnation, and passed a bill that did include them.

The defendant's central point is that H.R. 1918, 86th Congress, was the immediate ancestor of the final form of the bill which was passed. H.R. 1918 (set forth in D. Br. 49-50), was a form of the legislation which contained no counterpart to the present §5(c), but which contained separate provisos in §§5(a) and 5(b), declar-

ing that the land and other property otherwise subject to those sections, if set aside for the use of the United States by one of an enumerated number of means, "shall be the . . . property of the United States"; and a separate reporting and conveyance subsection based on those provisos. With this putative ancestry, the defendant argues that the final form of the bill merely reflected a drafting change from H.R. 1918, a change which simply consolidated the provisos formerly found in §§5(a) and 5(b) into a new subsection, §5(c); and that the final bill's reporting and conveyance provision should be similarly limited.

A considerable edifice of "legislative intention" is erected on this foundation. (D. Br. 49-55). On this basis, the defendant argues that an implied limitation, corresponding to this view of the legislative history, must be imposed on §§5(c) and 5(e)—that §5(c) must be limited to serving as an exception or proviso to §§5(a) and 5(b), and not be read as a general clause providing for the retention of land in Hawaii by the United States; and §5(e) must be similarly limited.

While there are many fundamental difficulties with the defendant's position, one of the most fundamental is that defendant has, in his lengthy exposition of the legislative history, made a serious error of chronology.

(*1*) The picture the defendant sketches is one in which the 86th Congress (i) commenced with H.R. 50, a bill very like the ones introduced in previous years, and considerably different from the form eventually passed; (ii) then moved to H.R. 1918; and (iii) then evolved, through a drafting process based on H.R. 1918, into the final form of §5.—The principal difficulty with this view is that a bill containing the provisions of §5 in virtually their final language was introduced in

the 86th Congress before H.R. 1918 was introduced.—Obviously, then, the final language of §5 was not derived by editing H.R. 1918. This earlier bill was H.R. 888, 86th Congress, a bill whose serial number, for that matter, should have suggested to the defendant the error of his chronology. The defendant does not point to any bill antedating H.R. 888 which was structured in the way in which H.R. 1918 was. Hence, it is clear that the structure of H.R. 1918 is not to be regarded as a link in the chain leading to the final Act, and that the ancestor of the final form of §5 was, as our opening brief points out, H.R. 888, which was in no way derived from H.R. 1918.

(*2*) The fact of the matter is not that H.R. 1918 evolved into the final bill through the processes the defendant suggests, but that, as set forth in our opening brief (p. 37), H.R. 1918, together with bills like H.R. 888, which exemplified the final form chosen by the House Committee on Interior and Insular Affairs, all were before the Committee as alternatives when it drafted the bill which in form became the final Act. There is no reason to believe that H.R. 1918 was given more consideration than any other proposed bill, or that it represented a developmental step along the way to the final Act.

To summarize what happened in terms of the dynamics of the legislation: Before the 86th Congress, none of the bills provided for a post-admission conveyance procedure. Early in the 86th Congress, there were introduced bills, roughly contemporaneously, which did provide for a post-admission conveyance procedure. These bills were in three categories, as to the scope of the post-admittance conveyance proce-

dures: (i) some covered "Any lands";[17] (ii) some covered only ceded lands;[18] and (iii) one covered only ceded and territorial lands.[19] The House Committee chose type (i), and a clean bill, H.R. 4221, in accord with it was reported and passed. The Senate's bill was then amended to conform with the House's, and so passed.

Obviously then H.R. 1918 was not the ancestor of the approach taken in the final §5 of the Statehood Act, since a bill virtually identical with the final form was introduced before H.R. 1918 was. Rather, H.R. 1918, with its provisos limited to the lands and properties covered in §§5(a) and 5(b), and its provision for reporting and conveyance of unneeded property similarly limited, was a contemporaneous alternative to the form of the bill finally chosen by the House Committee which became the final version of §5. The approach of H.R. 1918 was a stone which the builders of the Act rejected.[20] The conscious Congressional

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[17] H.R. 888, and various identical bills: H.R. 954; H.R. 959; H.R. 1106; H.R. 2795.

[18] H.R. 50, and various identical bills: H.R. 324; H.R. 801; H.R. 1800; H.R. 1833; H.R. 1917; H.R. 2004; H.R. 2328; H.R. 2348; H.R. 2476; H.R. 3084; H.R. 3304; H.R. 3437; H.R. 3685.

[19] H.R. 1918.

[20] The defendant also implies that the provision in H.R. 50, 86th Congress, adding to § 5(b) a second proviso continuing for five years the "restoration" provisions of § 91 of the Organic Act, is likewise an ancestor of the Bill as finally passed. (D. Br. 48-49). But H.R. 888, which was virtually identical with the final legislation, was introduced on January 7, 1959, the same day as with H.R. 50. Thus, here again, it is inaccurate to view as part of an evolutionary process leading to the final legislation, a bill so cited by the defendant.

choice of the broader form, in which §5(c) and the reporting and conveyance provision, §5(e), dependent thereon, apply not simply to land and property covered by §§5(a) and 5(b) but to "Any land," must be respected in construing §5.[21] The defendant's argument seeks "to translate this Act by a process of interpretation into an equivalent of the bills Congress rejected . . ."; as such it goes "beyond the fair range of interpretation." *Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490, 508-509 (1945).

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[21] The defendant claims (D. Br. 43) that the State is asking the Court to give no meaning to the provision of § 5(e) making reference to retentions "pursuant to subsections (c) and (d)." But this language obviously was necessary to make it clear that lands subject to the additional withdrawal provisions of § 5(d), as well as those subject to the general retention provisions of § 5(c), were to be covered by the reporting and conveyance provisions of § 5(e).

The defendant also suggests that in some way the State's reading puts a "double meaning" on § 5(c) (D. Br. 43). But in reality, § 5(c) has but one function. It is a general retention provision for all the lands in Hawaii falling within its broad scope. To be sure, some of these lands are lands which otherwise would have passed under §§ 5(a) and 5(b), but the exception clauses in those sections, in favor of the general retention provision, § 5(c), make it clear that the latter is the overriding provision. The defendant refers to § 5(d) of the Act as an "exception" which § 5(b) "had incorporated by reference." (D. Br. 36) But neither § 5(c) nor § 5(d) is "incorporated by reference" by § 5(a) or § 5(b); they are simply *referred to* in those sections. The scope of §§ 5(c) and 5(d) can only be determined by studying them in themselves. Section 5(d), in the light of its reference to § 5(b) and its use of the term "public" lands, clearly only relates functionally to § 5(b) lands. However, § 5(c), which contains no reference to § 5(a) or § 5(b), and no other words of limitation to the lands otherwise conveyed by those sections, just as clearly is a general retention provision.

B. Legislative Precedents, Essential Items of the Legislative History, and the Popular Ratification of the Act All Confirm the State's Reading of Section 5(c)

1. *Considerations of legislative precedent and purpose indicate that Section 5(c) must be taken to be what it says; a general retention provision.*—The defendant professes to express amazement that Congress should have included in the Act a provision, like §5(c), providing for the retention of lands by the United States not otherwise conveyed by the Act (D. Br. 38). His amazement leads him to suggest that §5(c) is simply an exception to §§5(a) and 5(b). But such a provision as §5(c) is neither without a very obvious precedent nor without a specific drafting purpose—in addition to the general legislative purpose of §§5(c) and 5(e) discussed above.

(*a*) Section 5(c)'s drafting purpose, of course, was to provide for a complete statutory intergovernmental land settlement in Hawaii by defining the property to be retained by the United States as well as that to be conveyed to or retained by Hawaii. As we point out in our opening brief (pp. 44, 57), the State's view of §5(c) makes §5 an exhaustive treatment of Hawaii's intergovernmental land problems; while the defendant's leaves a gap in the Act.

(*b*) Moreover, the most obvious precedent for the Hawaii Act, the Alaska Statehood Act passed the very preceding year by the Congress, contains similar general provisions for the retention of federal land other than that conveyed to the new state: "Except as provided in Section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." Section 5, Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, 48 U.S.C.,

pp. 7894-7900.[22] Thus, these two Statehood Acts, the only two, after all, enacted by Congress in close to half a century, each contain provisions which the defendant thinks are superfluous and out of place. Defendant's quarrel seems to be with Congress.

2. *The proper construction of Section 5(c) is buttressed by the official statements of those intimately connected with the development of the Act.*—On an erroneous basis, belied by the necessary implications of his own argument, the defendant throws out as irrelevant to a sound construction of the statute, (i) the opinion of the cognizant legal officer of the executive department most intimately connected with the legislation—the Department of the Interior[23]—and (ii) the express interpretation of the Committee of Congress which

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[22] This provision is in addition to a clause in Section 4 of the Alaska Act, comparable to the last sentence of Section 5(b) of the Hawaii Act, providing that one of the grants made by the Act shall be in lieu of any grants made by general legislation affecting new states.

[23] The defendant would reject the opinion of the Interior Department on the ground that it addressed itself to the interpretation of the phrase "any lands" in § 5(c) and § 5(e). (D. Br. 60). But, as we have pointed out, the meaning of that term is very much an issue in this case, despite the defendant's disclaimer. (See p. 14 and n. 8, *supra*). And in any event, the opinion of the Attorney General makes it plain that there was no such mischaracterization by the Interior Department of the essential problem presented in this matter: "The analytical difference between the two contentions is that the Department of Defense and the General Services Administration read subsection (c) merely as an exception to subsections (a) and (b), while the State of Hawaii and the Department of the Interior give it an independent broader meaning." (App., Ex. H, p. 44). (Despite the Attorney General, the Department of Defense, to an extent, did read subsection (c) as more than an exception to subsections (a) and (b). See note 13, *supra*.)

clearly, even under the defendant's version of the legislative history, made the final choice as to the form of the legislation from among the alternatives presented —the House Interior and Insular Affairs Committee.

It is plain that both saw the present issue clearly and indicated clearly that it should be resolved in the State's favor. Thus, the Associate Solicitor of the Interior Department, referring to the coverage of §§5(c) and 5(e), declared:

> "It [their coverage] is also land acquired by the United States by purchase, condemnation, donation, or by any other means, so long as the means of acquisition was pursuant to an Act of Congress, Executive order, or proclamation." (App., Ex. I, p. 63)

And the declaration of the House Committee:

> "The Committee takes this opportunity to make clear that Subsection (e)'s reference to 'land or property that is retained by the United States' includes, in some cases (namely, those covered by Subsection (c)), all land whether it falls within the definition of public land given in the Act or not." (H. Rep. No. 1564, 86th Cong., 2nd Sess. (1960), pp. 3-4).

The Committee did not suggest, of course, that "all land" in §5(c) means simply "all land otherwise conveyed under Sections 5(a) and 5(b)."

But most fundamentally, the defendant overlooks the proper import to be placed upon these two items of the legislative history. Although well reasoned, these are more than legal commentators' opinions, standing or falling upon the validity of their reasoning. They are essential, primary sources of the construction of a statute on which the more conventional legislative history

materials—committee reports and debates—do not shed a perfectly clear light.[24] One is the legal opinion of the department of government most closely associated with the matters involved in §5—the Department of Interior, speaking through its Associate Solicitor in charge of Territories; the other, the formal declaration of the House Committee which performed the final writing of the clean bill, H.R. 4221, which, as transscribed in the form of a Senate bill, finally became the legislation in question. These two views, then, are the authoritative expressions of those intimately connected with the legislative process and should be afforded great weight in confirming the plain language of the statute. See *Squire* v. *Capoeman,* 351 U.S. 1, 8-9 (1956); *Sioux Tribe* v. *United States,* 316 U.S. 317, 329-30 (1942).[25] They are more than commentaries

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[24] One example of the general texture of the Committee reports is illustrated by the passage from the House and Senate reports quoted in D. Br. at pp. 55-56, which even defendant describes, rather mildly, as "terse, and imprecise." The only description of Sections 5(a) and 5(b) in that passage consists of language which appears to amalgamate the provisions for the territorial lands and the ceded lands into one: "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 . . . ." Of course, the Territory did not have title to the ceded lands.

[25] In the case last cited, the Court said as to a subsequent declaration by a congressional committee in respect of legislation which it had reported: "This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act." 316 U.S. at 329-30.

The defendant points to the Senate Committee's failure, on the grounds that the "factors involved are too complex to be considered within the time available," to make a similar declaration. (D. Br. 60). Of course this action does not contradict the House Committee's declaration. And, as the committee of the house of congress which originated the language in question, the statement of the House Committee must be given the greatest weight. See *Steiner* v. *Mitchell,* 350 U.S. 247, 254 (1956).

on the legislative history. In a real sense, they are parts of it.

3. *The popular ratification of the land grant provisions of Section 5 of the Statehood Act confirms the plaintiff's construction of it, and militates against the defendant's imposition of implied limitations.*—The defendant's brief has simply not addressed itself to one of the most fundamental matters presented by this litigation; the effect of the mode in which the statutory provisions in question were adopted. As we stressed in our opening brief (pp. 28-31), the Statehood Act was no ordinary statute. Congress was exercising its special and solemn powers to admit States "into this Union." In line with this, §7 of the Act provided that the Act in all its terms should be subject first to ratification by the people of Hawaii. In that referendum, the people of Hawaii were requested to give their assent to, or disapproval of, three propositions, one of which was the direct question whether the electorate would accept the "grants of lands or other property therein made to the State of Hawaii."

Obviously then, the enactment, being one of a fundamental nature and for popular ratification, must be read in accordance with its plain terms as they were submitted to the electorate. The test of "common parlance" for the construction of a popularly-ratified document must be applied. See *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 539 (1944). As a state court has put the rule for construction of a popularly-ratified fundamental document: "Its words should be interpreted in the sense most obvious to the common intelligence, because a matter proposed for public adoption must be understood by all entitled

to vote." *Lincoln* v. *Secretary of Commonwealth*, 326 Mass. 313, 317, 93 N.E. 2d 744, 747 (1950).[26]

Upon such a construction, the rationale of the defendant, who would imply after the language "Any lands or other property" in §5(c) a limitation to those "otherwise disposed of by subsections 5(a) and 5(b)," is completely unacceptable. Even if Congress had such a narrow intent in the face of the Act's language—of which there is no evidence whatsoever as to the bill finally passed—such an intent, whatever effect it might be given in an ordinary statute, could not be given effect in a context in which the concurrence of another body—the body politic of Hawaii—was necessary for the legislation to go into full force and effect.—As Mr. Justice Holmes once said of a similar fundamental provision, the Statehood Act must be read in "a sense most obvious to the common understanding at the time of its adoption. . . . For it was for public adoption that it was proposed."[27]

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[26] To the same effect see, *e.g.*, *Wilson* v. *Crews*, 160 Fla. 169, 34 So. 2d 114 (1948); *State ex rel. Johnson* v. *Marsh*, 149 Neb. 1, 29 N.W.2d 799 (1947); *In re Brereton's Estate*, 355 Pa. 45, 48 A.2d 868 (1946); *Gill* v. *Nickels*, 197 Va. 123, 87 S.E.2d 806 (1955).

[27] Holmes J., dissenting in *Eisner* v. *Macomber*, 252 U.S. 189, 219-20 (1920).

CONCLUSION

For the reasons expressed in our opening "Brief in Support of Motion for Leave to File Complaint" and in this Reply Brief, the State of Hawaii submits that this action is not barred by sovereign immunity, and that the complaint states a claim upon which relief can and should be granted. Accordingly, the State's Motion for Leave to File Complaint should be granted.

Respectfully submitted,

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