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Page 1

Darkness over Hawaii: Annexation Myth Greatest Obstacle to Progress

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To: Delegates to the Hawaiian Convention to Establish a Governing Entity

Synopsis:

Native Hawaiians are not ready for a convention. We are not ready for big decisions. We know little about the world. The world is ignorant about Hawaii. Justice Scalia in his recent remarks on the law and history pertaining to Hawaii displayed some of that ignorance. His remarks revealed the extent and consequences of the campaign of deception asserting that Hawaii was acquired by a joint resolution. This claim is not only false. It is impossible.

Justice Scalia is not the only one deceived. The Hawaii Supreme Court, in a 2013 ruling on the effects of annexation, blithely ignored the most basic of all state laws—those describing the boundaries of Hawaii. Truth telling through re-education of Hawaiians and the rest of the world is just beginning.

Whether one supports restoration of the Kingdom or Tribal recognition, what Hawaiians need now is more scholarship about the world-- particularly as to the world of newly emerging sovereign states and the history of decolonization. We should not let Washington push us into tribal status. The path we take must be fully informed and selfless.

Part I: Introduction: The Myth that Hawaii was annexed by the United States

The world, and particularly America, is deeply ignorant about Hawaii. In 1897, the United States failed to ratify a treaty that would have acquired Hawaii.¹ A year later, the United States

¹ William Adam Russ, Jr., *The Hawaiian Republic (1894-98) And Its Struggle to Win Annexation* pages 178-227 (1961) (Susquehanna Press London and Toronto)

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Page 2

turned to legislation, a Joint Resolution of Congress to annex Hawaii. Americans believe that Hawaii is territory of the United States and accept the claim that Hawaii was acquired by a Joint Resolution of Congress in 1898.

This is the official view of the United States.² Based on this claim the United States exercises sovereignty and jurisdiction over the Hawaiian Islands as territory of America.

This paper shows that these claims are false. Since 1898, the governments of the United States and the State of Hawaii have deliberately misled the people of Hawaii, the United States and the world. Current scholarship in Hawaii, such as here, are proving these claims false. Yet, the grip

² The United States Department of State, Office of the Historian states the following about the acquisition of the Hawaiian Islands:

The McKinley Administration also used the war as a pretext to annex the independent state of Hawaii. In 1893, a group of Hawaii-based planters and businessmen led a coup against Queen Liliuokalani and established a new government. They promptly sought annexation by the United States, but President Grover Cleveland rejected their requests. In 1898, however, President McKinley and the American public were more favorably disposed toward acquiring the islands. Supporters of annexation argued that Hawaii was vital to the U.S. economy, that it would serve as a strategic base that could help protect U.S. interests in Asia, and that other nations were intent on taking over the islands if the United States did not. At McKinley's request, a joint resolution of Congress made Hawaii a U.S. territory on August 12, 1898.

See United States Department of State, Office of the Historian, Milestones, Milestones: 1866–1898 The Spanish-American War, 1898 <http://history.state.gov/milestones/1866-1898/spanish-american-war> [Last Visited February 22, 2015 1:30 PM HST]. The website describing the Annexation of Hawaii was taken down in the Fall of 2014: Annexation of Hawaii, 1898

Notice to readers: This article has been removed pending review to ensure it meets our standards for accuracy and clarity. The revised article will be posted as soon as it is ready. In the meantime, we apologize for any inconvenience, and we thank you for your patience.

<http://history.state.gov/milestones/1866-1898/hawaii>. [Last Visited February 22, 2015 1:25 PM HST]

of the century of deception, denationalization and brainwashing reaches far and deep into American and Hawaiian society.

The destruction of this falsehood is the most important next step for Native Hawaiians. Whether they seek restoration of the Kingdom of Hawaii or Recognition as a Federal Indian Tribe Native Hawaiians must learn the truth about Annexation. Annexation was strongly opposed in 1898 during the Senate debate. That debate came to be known as "Great Debate to Save the Older America."³ Yet, those American voices of opposition in 1898 have long been forgotten. That debate and opposition, a transformative event in American history, has virtually disappeared from American history.

Ignorance about the Great Debate is also pervasive in Hawaii. Many Native Hawaiians do not bother to educate themselves. They assume that restoration of a Native Hawaiian government is so slim a possibility that seeking the truth is an exercise in futility.

As such, many Native Hawaiians are willing to accept the status quo. Or, they favor the alternative of United States recognition of a limited number of Native Hawaiians as a Native American Indian Tribe. Such status as a tribe offers Native Hawaiians few lands and few new benefits. Recognition as a Tribe is far less than what Hawaiians deserve and far less than what the truth commands.

Other Native Hawaiians are quickly learning the true status of the Hawaiian Islands. At the Department of Interior hearings on proposed tribal recognition during the summer of 2014 Native Hawaiians in opposition frequently echoed the words of those Senators who sought to block annexation in 1898. These were the words heard from Native Hawaiians during those summer hearing.

"The Joint Resolution was incapable of acquiring Hawaii. Only a Treaty could annex Hawaii. The Treaty of 1897 was never ratified by the United States. Annexation by resolution was unconstitutional. It would destroy the integrity of the Constitution and undermine the basis of the American Republic."

³ William Adam Russ, Jr., *The Hawaiian Republic (1894-98) And Its Struggle to Win Annexation* (1961) (Susquehanna Press London and Toronto) "The debate in Congress over the joint resolution was, says Dennett, "One of the greatest . . . in American congressional history." See page 299. The "Older America" was the America of the values of the founders of the Constitution: America should not become an imperial nation with colonies. The strict letter of the Constitution should be followed. The United States should be limited to the 48 contiguous states. The United States should not acquire any territory or nation without the consent of the people of that territory or nation.

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Page 4

Their statements were virtually the same words used by Hawaiian patriots who spoke against annexation in 1897. Native Hawaiians today should recognize that many Americans in 1898, particularly these Senators who opposed annexation, stood by the Hawaiian people. That alliance has disappeared. It should be resurrected today. Such an alliance could begin again by education—both in Hawaii and the United States.

This article has three parts. In Part II, I describe the "Great Debate to Save the Older" America, where Senators opposed to annexation filibustered hoping to stave off annexation. In Part III, I show that only two senators could conjure arguments that the joint resolution could acquire Hawaii. Both attempts failed as they were based on faulty reasoning.

In Part IV, I show that the greatest proof of the myth of annexation by the Joint Resolution lies in the trail of subsequent problems left by the Joint Resolution. Such problems reveal its failure: a failure, most of all, to be found in the very laws of the United States describing its claim to the Hawaiian Islands.

The impotency of the Joint Resolution and the fact that it was not a treaty led to two federal statutes that plainly acknowledged this failure. Those statutes admit that the Joint Resolution never acquired Hawaii. Both the plain language of the Organic Act of 1900,⁴ which created the Territory of Hawaii and the plain language of Act of Admission in 1959⁵, which admitted Hawaii as a State, intentionally exclude the Hawaiian Islands from the dominion of the Territory and the State.

Part II: The Great Debate to Save the Older America—The Attempt to block Annexation

The words of opposition Senators in 1898 are proof that America a century ago knew that annexation by resolution was impossible. Those words were true and prophetic. The Joint Resolution could not acquire Hawaii. Moreover, the Joint Resolution was unconstitutional and violated the basic tenets of American democracy.

I wonder what would happen if those Senators, true patriots and faithful to the original values and understanding of the Constitution of the United States, could be heard today? I wonder how those today who have embraced the myth of annexation would respond to the arguments against annexation made in 1898.

⁴ An Act to Provide a Government for the Territory of Hawaii, Act of April 30, 1900, 31 Stat 141.

⁵ An Act to Provide for the Admission of the State of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3, 73 Stat 4.

For example, what would happen if Associate Justice Antonin Scalia, who publicly stated that annexation as constitutional and effective, met with those in 1898 who bitterly opposed annexation? What would happen if Justice Scalia heard the speeches of Senators Allen, White, Turley and Bacon in 1898?

A. Justice Scalia on the Annexation of the Hawaiian Islands

Justice Antonin Scalia of the United States Supreme Court recently aired his opinions on the legality and constitutionality of the annexation of Hawaii. His statements to a George Washington University Native Hawaiian student on February 11, 2015 were recently published in "Civil Beat" the daily Honolulu, on-line newspaper. He would have heard the voices of Senators Allen of Nebraska, White of California and Bacon of Georgia. These men were prominent and respected American leaders. They quoted from the same Constitution used by Justice Scalia. Yet, those Senators defied the Administration's rush to annex Hawaii. They were heroes to the Hawaiian people then, as they should be today. They defended the independence of Hawaii. Yet, the United States Senators were American patriots as well, defending the United States Constitution and the values of the "Old America."

Let us start with the recent remarks of Associate Justice Scalia of the United States Supreme Court. As much as any single person in the United States today his opinions are critical to the fate of Native Hawaiians. His voice and legal position on the issues in *Rice v. Cayetano*⁶ and the public lands case changed forever the life of Native Hawaiians.

On February 11, 2015 a Hawaiian student, Jacob Aki, at George Washington University, asked Justice Scalia, who was speaking at George Washington, the following question:

"Does the Constitution provide Congress the power to annex a foreign nation through a Joint Resolution rather than a Treaty?"

Scalia turned the question back at Aki: "Why would a treaty be needed? He said.

"There is nothing in the Constitution that prohibits Congress from annexing a foreign state through the means of a joint resolution. If the joint resolution is passed through both the U.S. House and Senate, then signed by the president, it went through a "process."

⁶ *Rice v. Cayetano* 528 U.S. 495 (2000) (Scalia was part of the opinion of the Court) *Rice v. Cayetano* held unconstitutional the voting system electing trustees to the Office of Hawaiian Affairs. By that system, only Native Hawaiians, defined as persons with any Hawaiian ancestry could vote for trustees.

Scalia proceeded to the history of Hawaii. He implied that Hawaii was just another colony of Spain, taken in the Spanish-American War, like the Philippines and Puerto Rico.⁷

Justice Scalia was clearly wrong on all points.

First, aside from conquest and acquisition by prescription⁸ it is only by treaty that one sovereign nation can take the territory of another sovereign. Second, the joint resolution, as an act of Congress has no power to acquire another sovereign and independent nation. Third, Hawaii was not a colony of Spain. Hawaii was not acquired by the United States in the Spanish American War.⁹

⁷ "Justice Scalia then proceeded to talk about how that same process was used to acquire the Philippines—which he points out, "we gave back"—and Puerto Rico.

I asked him. "What happened in the case of Hawaii when it was annexed in 1898?"

His answer: "It's the same thing." He ended his response by commenting that in terms of international law, well, there have been hundreds of years worth of problems there."

"Supreme Court Justice Antonin Scalia, Hawaii and Annexation: A Student from Hawaii queried the judicial firebrand about the way the U.S. took formal control of the Islands. He got an answer." From Civil Beat, Honolulu, Hawaii, February 11, 2014, by Jacob Bryan Aki.

⁸ In a subsequent article, I will present arguments that the United States did not acquire Hawaii by either the doctrine of conquest or the doctrine of acquisitive prescription. First, the United States has never claimed its acquired Hawaii by either principle. Second, even if the doctrine of conquest is applicable, as of the critical date of 1898, the later admissions of the United States, as described herein, undermine such a claim. Third, the doctrine of acquisition by prescription requires consistent acts of the claimant, namely, acts of sovereignty, or *titre de souverain*, by which the claimant acts consistently with its claims as to sovereignty. Again, United States' own admissions that it has never acquired the Hawaiian Islands, as contained in Part II, herein, undermine any claim of acquisition by prescription.

⁹ Hawaii was not a colony of Spain. See Treaty of Paris December 10, 1898. In that treaty, ratified by both the United States and Spain, Spain directly ceded the sovereignty and territory of the Philippines, and Puerto Rico to lands to the United States.

The Treaty of Paris contained precise descriptions of the lands ceded, measured in longitude and latitude, metes and bounds and natural monuments. There was no treaty as to the annexation of Hawaii. Consequently, there was no description, in a similar manner, by metes and bounds, natural monuments, names of islands and lines of longitude and latitude as to the lands and

B. Senators who Opposed Annexation: The Great Debate of 1898

Let us pretend that Scalia was on the floor of the United States Senate in the summer of 1898. These are the words he would have heard: First, Senator William Allen of Nebraska and other Senators would have reminded Justice Scalia that a joint resolution is merely an act of Congress and has no power to reach out and acquire foreign territory or a foreign country:

Mr. Allen. A Joint Resolution if passed becomes a statute law. It has no other or greater force. It is the same as if it would be if it were entitled "an act" instead of "A Joint Resolution."

That is its legal classification. It is therefore impossible for the Government of the United States to reach across its boundary into the dominion of another government and annex that government or persons or property therein.

But the United States may do so under the treaty making power, which I shall hereafter consider.¹⁰

And

Mr. President, how can a joint resolution such as this be operative? What is the legislative jurisdiction of Congress?

Does it extend over Hawaii? May we in this anticipatory manner reach out beyond the sea and assert our authority under a resolution of Congress within the confines of that independent nation?

Where is our right, our grant of power, to do this? Where do we find it? Some assume to discover it in the supposition that there has been a cession, which has in truth never been made.

waters that constituted the Hawaiian Islands. Lacking such treaty, the United States could not specifically describe what land and waters it received from the Republic of Hawaii, the government of the Nation of Hawaii. As pointed out in this article, the lack of such description followed from the lack of a treaty thereby the Joint Resolution could not acquire any lands and territories. This would be hidden by carefully drafted, deceptive statutory language as to the boundaries of Hawaii. Its effect would extend until today.

¹⁰ Statement of Senator Allen July 4 1898 31 Congressional Rec at 6636

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Page 8

*Hawaii is foreign to us. We base our jurisdiction upon a falsehood desired to be made conclusive in a resolution the verity of which is said cannot be attacked, however groundless it may be.*¹¹

In addition, Senator Turley of Tennessee added:

Mr. President I wish to illustrate this by just the condition of affairs which is before the Senate now. It is admitted that if the Joint Resolution is adopted the Republic of Hawaii can determine whether or not it will accept the provisions contained in the joint resolution.

*In other words, the adoption of the resolution does not consummate the transaction. The Republic of Hawaii does not become a part or the territory of the United States by the adoption of the joint resolution, but after its adoption and signature by the President and after it becomes the law of the land the Republic of Hawaii may refuse to accept the terms contained in it and remain an independent and sovereign state.*¹²

Senator John Coit Spooner of Wisconsin, the greatest constitutional lawyer in the history of the Senate spoke:

*Mr. John Coit Spooner: Of course, our power would not be extraterritorial.*¹³

A host of other Senators reaffirmed the same point:¹⁴

¹¹ Statement of Senator Allen 31 Cong Rec. at 6636 July 4, 1898, 55th Cong. 2d Sess.

¹² See remarks of Senator Turley, 31 Cong Rec. at 6336, June 25, 1898, 55th Cong 2d Sess.

¹³ Statement of Senator Spooner, 31 Cong Rec. at 6636, July 4, 1898, 55th Cong 2d Sess.

¹⁴ Mr. Spooner. "It is not a question of degree. It is a question of possibility."

Statement of Senator Spooner 31 Cong Rec. at 6485, June 30, 1898, 55th Cong 2d Sess.

Mr. Turley. "The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself."

Statement of Senator Turley 31 Cong Rec. at 6339, June 25, 1898, 55th Cong 2d Sess.

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Page 9

The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries.

It does not consummate itself.¹⁵

Senator Augustus Bacon of Georgia made the unforgettable point that if the United States by legislation could take Hawaii by legislation it could do so as to Jamaica. If that were true, any nation could acquire any other. Hawaii could acquire the United States.

Mr. Bacon . . . If the President of the United States can do it in the case of Hawaii, he can with equal propriety and legality do it in the case of Jamaica,¹⁶

Congress was not given the power to annex a foreign state, except in the admission of that nation as a state.

Under the law of the equal sovereignty of states, one independent and sovereign nation such as the United States cannot take another nation, such as Hawaii by means or its own legislative act.

Senator Stephen White of California made an eloquent plea to stop the Joint Resolution:

Whatever may be said of the past history of this country or of the records to which senators have adverted; there is one proposition, which cannot be contested, mainly, that there is no precedent for this proposed action.

States have been admitted into the Union, territory has been acquired and has been annexed by treaty stipulation, but there is no instance where by a joint resolution it has been attempted not only to annex a foreign land far remote from

Mr. Allen. "Whenever it becomes necessary to enter into any sort of a compact or agreement with a foreign power, we cannot proceed by legislation to make that contract."

Statement of Senator Allen 31 Cong Rec. at 6636, July 4, 1898, 55th Cong 2d Sess.

¹⁵ Statement of Senator Turley, 31 Cong Rec. at 6339, June 25, 1898, 55th Cong 2d Sess.

¹⁶ Statement of Senator Augustus Bacon at 31 Cong. Rec. 6148 to 6152 June 20, 1898, 55th Cong. 2d. Sess.

*our shores, but also to annihilate a nation, to withdraw it from the sovereign societies of the world as a government. . .*¹⁷

Senator Allen of Nebraska also added:

Mr. President the Constitution must begin and end with the territorial jurisdiction of the United States: It can not reach beyond the boundaries of our Government.

*It would be as lifeless and impotent as a piece of blank paper in Canada or in the Hawaiian Islands; and so with a statute or joint resolution.*¹⁸

Senators opposed to opposition stood fast not only on the proposition that the Joint Resolution had no power to acquire Hawaii, but also on the fact that the use of a Joint Resolution in place of a Treaty was unconstitutional. Senator Bacon of Georgia was particularly vocal about the unconstitutionality of the Joint Resolution.

If such were possible, as Senator Bacon implies, then the legislature of Hawaii can take the United States by its own legislation. The only means by which one nation can acquire the sovereignty and jurisdiction of another nation is by some kind of consensual act usually in the form of a treaty. Justice Scalia's belief in the constitutionality of annexation would have encountered stiff opposition in the Senate in 1898:

Two propositions are plain: First, that territory can only be annexed or acquired by treaty,

*second, that the president under the Constitution may occupy the Hawaiian islands under the war power and by virtue of his office as Commander in Chief of the Army and Navy.*¹⁹

It is unconstitutional to acquire a foreign nation by a joint resolution of the United States House and Senate. Such a process amounts to an "end run" around the foreign affairs powers delegated solely to the President and the Senate.²⁰ A legislative act like a Joint Resolution undermines the

¹⁷ Statement of Senator Stephen M. White at 31 Cong. Rec. Appendixes 591 to 595 June 21 1898, 55th Cong. 2d. Sess.

¹⁸ Senator Allen July 4 1898 31 Congressional Rec at 6636

¹⁹ See remarks of Senator Allen at 31 Cong Rec. at 6635, June 23, 1898, 55th Cong 2d Sess.

²⁰ Mr. Allen: When that power is expressly conferred on the President and on two thirds of the Senate, can it be exercised by the other House?

Constitution's careful allocation of powers by which the House is excluded from matters of Foreign affairs. The Federal Government is a government of limited powers. Unless a power is specifically delegated to a certain branch or branches, other parts of the Federal government are denied such a power. Justice Scalia know this. He is a firm believer in strict construction.

As Senator Bacon later added:

Mr. Bacon The proposition which I propose to discuss is that a measure which provides for the annexation of foreign territory is necessarily, essentially, the subject matter of a treaty,

and that the assumption of the House of Representatives in the passage of the bill and the proposition on the part of the Foreign Relations Committee that the Senate shall pass the bill, is utterly without warrant in the Constitution.²¹

Enacting a joint resolution requires a mere majority of the Senate and House.²² The use of joint resolution to accomplish a treaty with a foreign sovereign nation undermines the explicit delegation of the treaty making power to the President and the Senate. The Senate must ratify a treaty by super-majority of two-thirds of those Senators present.

Statement of Senator Allan 31 Cong Rec. 6586, June30, 1898, 55th Cong 2d Sess. And see:

Mr. Allen: I cannot myself conceive of any instance where we can deal with another nation involving the question of jurisdiction over or territory independent of the methods of a treaty.

Statement of Senator Allen 31 Cong Rec. at 6335 June 25, 1898, 55th Cong. 2d Sess. And See:

Mr. President, when we reflect as to the lines which demark the jurisdiction of the legislature, we must confine that department to our nation. We cannot as I said before extend our legislative right to act without until there has been some authority by which that which is without is brought within.

Statement of Senator Allen 31 Cong Rec. at 6335 June 25, 1898, 55th Cong. 2d Sess.

²¹ Mr. Bacon at 31 Cong Rec. at 6145, June 20, 1898, 55th Cong 2d Sess.

²² Mr. Allen. ". . . The House has no jurisdiction over the subject matter whatever."

Statement Senator Allen, 31 Cong Rec. at 6634, July 4, 1898, 55th Cong 2d Sess.

It was precisely because of this super-majority that the McKinley administration turned from the Treaty of 1897 to use a Joint Resolution. A Joint resolution requires only a majority of both Houses to pass.

Mr. Bacon. If Hawaii is to be annexed it ought certainly to be annexed by a constitutional method;

*and if by a constitutional method, it can not be annexed, no Senator ought to desire its annexation.*²³

Moreover, Allen of Nebraska added:

Mr. Allen. But as respects the treaty-making power, the President is authorized to open negotiations with foreign countries and enter into treaties of all kinds, subject to the right of the States as represented in this Chamber to approve or reject;

*and whenever we depart from this specific and plain pathway, we abandon the provision, the letter, the spirit, and the policy of the Constitution.*²⁴

C. The 1988 Legal Opinion of the Department of Justice: Constitutionality

Much later, in 1988, counsel for the Justice Department reached the same conclusion. Mr. Kmiec, counsel for the Department of Justice examined the annexation of Hawaii and searched for a constitutional basis for annexation. Ultimately, he concluded that he could not identify the constitutional power enabling annexation.²⁵ Such an admission of failure, given that the United

²³ Statement of Senator Bacon at 31 Cong Rec. at 6152, June 20, 1898, 55th Cong 2d Sess.

²⁴ Senator Allen at 31 Cong Rec. at 6636, July 4, 1898, 55th Cong 2d Sess.

²⁵ That legal opinion states:

"The United States also annexed Hawaii by joint resolution in 1898. Joint Res. 55, 30 Stat. 750 (1898). Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again, Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report pronounced, "the joint resolution for the annexation of Hawaii to the United States . . . brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." S. Rep. No. 681, 55th Cong. 2d Sess. 1 (1898).

This argument, however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, "the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition." Andrew C. McLaughlin, *A Constitutional History of the United States* 504 (1936).

Opponents of the joint resolution stressed this distinction. *See, e.g.*, 31 Cong. Rec. 5975 (1898) (statement of Rep. Ball).³⁰ Moreover, as one constitutional scholar wrote:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. . . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force -- confined in its operation to the territory of the State by whose legislature it is enacted.

¹ Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 27 (2d ed. 1929).

Representative Ball argued:

Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution to admit new States. Opponents of the annexation of Texas contended that even that express power did not confer the right to admit States not carved from territory already belonging to the United States or some one of the States forming the Federal Union. Whether, therefore, we subscribe to the one or the other school of thought in that matter, we can find no precedent to sustain the method here proposed for admitting foreign territory. [Hawaii—author's addition]

31 Cong. Rec. 5975 (1898). He thus characterized the effort to annex Hawaii by joint resolution after the defeat of the treaty as "a deliberate attempt to do unlawfully that which can not be lawfully done." *Id.*

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. The stated justification for the joint resolution -- the previous acquisition of

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Page 14

States has the burden of proving ²⁶ how it acquired Hawaii, is a virtual confession of failure and thus the lack of United States sovereignty over Hawaii. Many Senators asserted that taking

Texas -- simply ignores the reliance the 1845 Congress placed on its power to admit new states.

It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea"

Department of Justice Office of the Legal Counsel "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea" 1988 OLC LEXIS 58; 12 Op. O.L.C. 238 October 4, 1988.

²⁶ The party claiming dominion or sovereignty has the burden of proof. See Case Concerning Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge ((Malaysia/Singapore) General list No. 130, International Court of Justice Slip Opinion page 13 12 May 2008:

Malaysia appears to forget that 'the burden of proof in respect of [the facts and contentions on which the respective claims of the Parties are based] will of course lie on the Party asserting or putting them forward. (Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 16); it is thus for Malaysia to show that Johor could demonstrate some title to Pedra Branca, yet it has done no such thing."

See also *Minquiers and Ecrehos Case*, (United Kingdom and France) 1953 ICJ Lexis 5 November 17, 1953; Judgment

In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon [*2] which it relied.

The Court then examined the titles invoked by both Parties.

See Case Concerning Territorial And Maritime Dispute Between Nicaragua And Honduras In The Caribbean Sea (Nicaragua V. Honduras) 2007 ICJ Lexis 1, 8 October 2007; Case Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan (Indonesia/Malaysia) 2002 ICJ LEXIS 6 17 December 2002; Case Concerning Maritime Delimitation In The Area Between Greenland And Jan Ma Yen (Denmark V. Norway) 1993 ICJ Lexis 214 June 1993; Case Concerning Delimitation Of The Maritime Boundary In The Gulf Of Maine Area (Canada/United States Of America) 1984 ICJ Lexis 412 October 1984;

Hawaii would result in profound damage to the country and the Constitution. Thus, Senator Bacon of Georgia, one of the oldest members of the Senate, argued that to take Hawaii by joint resolution would destroy both the Constitution and the Nation.

I desire to submit to the Senate what I consider to be a very grave question. It is a question if we pass this joint resolution not only of one revolution, of two revolutions. If we pass the joint resolution we enter upon a revolution which shall convert this country from a peaceful country into a warlike country.

If we pass the resolution we transform this country from one engaged in its own concerns into one which shall immediately proceed to intermeddle with the concerns of all the world.

If we pass the joint resolution we inaugurate a revolution which shall convert this country from one designed for the advancement and the prosperity and the happiness of our citizens into one which shall seek its gratification in dominion and domination and foreign acquisition.²⁷

Part II. No Legislative History Supporting the Capacity of the Joint Resolution

During the debate on the Joint Resolution to annex Hawaii, only two senators spoke in favor of the power of the Congress to acquire the Hawaiian Islands. Those two senators who claimed that the Joint Resolution could acquire Hawaii were Senators Stewart of Nevada and Senator Foraker of Ohio.

Senator Stewart's statements are similar Justice Scalia remarks. Senator Stewart stated that "sure, you can take foreign territory by passing a mere bill." He claimed that the United States Congress could unilaterally extend its border into Mexico three hundred miles.

See also *C.A.B. v. Islands Airlines*, 235 F. Supp. 990 (D.C. Dist Hawaii, 1964) and, *New Jersey v. New York*, 523 U.S. 767 (1998) [burden of proof in cases claiming dominion by prescription]:

²⁷ See the Statement of Senator Bacon at 31 Congressional Record 31 Cong Rec. at 6156, June 20, 1898, 55th Cong 2d Sess.

When he was asked how this possible Stewart said that if such a law was enacted by Congress, the President, under the "faithful execution" clause of the Constitution had to enforce such a law.²⁸

²⁸ Senator Stewart claimed that the resolution, by itself, could acquire the Hawaiian Islands. He asserted that if passed the Joint Resolution became law. The President of the United States must enforce all laws. That obligation made the joint resolution, *albeit legislation, self-executing*. Senator Allen challenged Stewart posing a hypothetical: would the boundary between the United States and Mexico be moved 300 miles south if the United States Congress passed such legislation:

"Mr. Caffrey. Will the Senator from Nevada permit me to interrupt him? I wish to know how he proposes to extend those limits down 300 miles into Mexico. The Senator says, "Suppose we extend them." I want to know by what rule.

Mr. Stewart: We do not propose to do it. I do not think Congress would commit such an outrage as that.

Mr. Caffrey: Exactly, but in the supposititious case of the extension of territory 300 miles into Mexico how would you do it?

Mr. Stewart: It might be done by act of Congress and if the President would sign it, he and the congress would be bound by it if Congress said the boundary line should be in another place.

Mr. Caffrey: It would surely be a peaceful act.

Mr. Stewart: It would be a purely peaceful act if Mexico did not object. If Mexico did object, it would be a case for war.

Mr. Teller: Suppose Mexico agreed, then what?

Mr. Stewart: If Mexico agreed to it, that would be the end of it.

Mr. Teller: Of course, that would be the end of it.

Mr. Allen: But suppose the Mexican Congress or the Mexican executive agreed to it; and that neither the Congress nor the executive had the authority to agree to it.

Another Senator asked: "But doesn't that mean war?—and would the taking of the dominion of Mexico be an act of War? Senator Stewart waived that objection off asserting that the treaty power and the war power were the same. Astonished Senators asked Stewart if the United States could annex Bermuda, the United Kingdom or other sovereign and independent nations. Senator Stewart replied, "We can annex anything."²⁹

Mr. Stewart: It would not matter whether they had any authority or not. If we took the territory inside of our boundary, Mexico would have no redress but war.

Mr. Allen: But to carry out the Senator's simile further suppose Congress should declare that it we a necessity to annex England and the President should approve it, would that annex England to the United States?

Mr. Stewart: Yes, if England did not object.

Mr. Allen: But suppose the people of England did object?

Mr. Stewart: Then we would have to fight for it.

Mr. Allen: And if the English parliament would consent would that bind the people of England, though the parliament lacked the authority to consent?

Mr. Stewart: If the people of England were not satisfied, they might fight too.

Mr. Allen: Then we can annex the world?

Mr. Stewart: We can annex anything. But we do not suppose that Congress is going to do those things. The fact that sovereign power exists implies that it might be abused. It is not abused in this case [Hawaii] because we know that the people of the Sandwich Islands want to be annexed to this country.

In effect, Senator Stewart was actually describing acquisition of territory by conquest. He later admitted that there was he was speaking of conquest—and thus the exercise of the war powers. 31 Cong.Rec. 6369 (1898) (remarks of Senators Caffrey, Stewart, Teller and Allen)

²⁹Statement of Senator Stewart 31 Cong.Rec. at 6369 June 25, 1898. 55th Cong. 2d Sess.

When asked whether such an act was constitutional Stewart acknowledged Senator Caffrey's description of Stewart's view: "What is a Constitution among friends."³⁰

Senator Foraker, the only other Senator to express a theory as to how a Joint Resolution of the United States could acquire Hawaii claimed that the Joint Resolution was a treaty as to which the signature of only one party was required--- that of the United States. When he was asked why?—he stated that it was so because the other party "died". Namely, he claimed that upon annexation Hawaii "died"—"ceased to exist" and thus only the United States needed to sign the treaty.³¹

30

Mr.Caffrey: The argument of the Senator from Nevada reminds me of an answer give by a celebrated ex-member of the House as to the question of whether a certain act he wanted done was constitutional. What was the reply of the gentleman? He said "What's the constitution between friends...` What is the constitution between friends of this measure who want to incorporate Hawaii into the United States by joint resolution?

Mr. Stewart: They are all friends.

31 Cong. Rec. at (July , 1898) 55th Cong. 2d Sess. (Remarks of Senators Caffrey and Stewart)

31

Mr. Foraker. We proposed that a contract was required, but in this case only one party need ratify: because I say that you cannot have a treaty without having a contract, and you cannot have a contract without having two parties to it.

Mr. Allen: That is true.

Mr. Foraker: And if one party disappears on the signing of the contract you no longer have a contract.

Mr. White: What becomes of it?

Mr. Allen: There are two parties to the contract up to the moment of its execution.

Mr. Foraker: But there is no contract until it is executed.

Mr. Allen: Very well, the moment the contract is signed and delivered it is an executed contract.

In another argument, Foraker claimed that annexation existed in his home state of Ohio. Cities in Ohio could "annex" adjoining towns and municipalities. Annexation of towns and cities is clearly a different kind of annexation.³² Ultimately, Foraker retracted his claims and admitted "You cannot annex Hawaii by Joint Resolution."³³

Mr. Foraker: But one party is dead and the contract can not continue as the term "Treaty" applies.

Mr. Allen: Very well, but that party did not die until after the delivery of the Contract.

Mr. Foraker: Suppose you do not pay the money, who will there be to enforce the payment? The people of Hawaii become merged into the United States.

31 Cong Rec. at 6335, June 23, 1898, 55th Cong 2d Sess. (Remarks of Senators Foraker and Allen)

³² Mr. FORAKER: You cannot annex that people by a law or joint resolution without the consent of the people.

Mr. ALLEN: No, but—

Mr. FORAKER: We can simply propose if we originate the transaction or accept if they originate it.

Mr. ALLEN: If the Constitution and status begin and end on territorial limitation how can you annex a people beyond that limitation by statute?

Mr.FORAKER: We have that kind of law in the State of Ohio, applicable to cities of the first grade of the first class. It provides that in any city of the first grade there may be an annexation of territory whenever outlying contiguous territory will comply with certain terms and conditions, with a view of annexation which the statute designates. Now the first step is for the city to legislate by ordinance its side of the contract. That has no jurisdiction or no effect beyond the city limits. But when it is met on the other side by proper action on the part of contiguous territory then it is provided that it may be regarded as annexed, and the city jurisdiction extends to it. Now, it is upon the same general principle, though, of course, not in the same way.

Mr. ALLEN: That is a case of municipal extension

31 Cong. Rec. 6585 (June 30, 1898) 55th Cong. 2d Sess. (Remarks of Senators Foraker and Allen)

A vociferous minority in the Senate loudly protested the annexation of Hawaii. Although the majority of Senators voted in favor of the Joint Resolution, those who did, did so because annexation was a war measure. Hawaii was to be a coaling station for American ships passing to the Philippines. As a matter of legislative history, there is no evidence in the record explaining how the Joint Resolution would acquire Hawaii. The massive deception and deliberate misrepresentation as to the powers of the Joint Resolution undermined the core values of United States and its Constitution.

That is a great enough revolution Mr. President, but if we pass the joint resolution, we have entered upon a revolution which I consider greater and more to be objected than that:

that is a revolution where, because the majority has the power, it will in this body surrender the great function which the Constitution gives to the President of the United States and also to us as a part of our treaty making power;

and we will have entered upon a field where the restraints of the Constitution are no longer to be observed where the will of the majority shall obtain regardless of the constitutional restrictions³⁴

³³Mr. Allen: When we pass this resolution and it becomes a law, the transaction is consummated except of the delivery of the property.

Mr. Foraker: It would have to be accepted on the other side. We can not by a joint resolution annex Hawaii.

Mr. Allen: But the Joint Resolution says so.

Mr. Foraker: We can recite the fact that they have manifested a willingness, as shown by the treaty which we had in mind when that joint resolution was drafted to make a cession to us, but when we do not ratify the treaty, but do something else, namely pass a joint resolution the transaction is not consummated until they agree to it."

31 Cong. Rec. 6636 (July 4, 1898) 55th Cong. 2d Sess. (Remarks of Senators Allen and Foraker)

Statement of Senator Bacon at 31 Congressional Record 31 Cong Rec. at 6152, June 20, 1898, 55th Cong 2d Sess.

Part III. Evidence of the Failure of the Myth--The Boundaries of the State of Hawaii

In the Act of Admission of 1959, the United States Congress required the State of Hawaii to accept a federally drafted definition of the boundaries of the new State.³⁵ The people of Hawaii were compelled to accept the new Federal description of boundaries as a condition of statehood. That description, by its plain and clear language, excluded the Hawaiian Islands from the new State. That description was the deliberate work of Congress. That description was carefully crafted to deceive. That deception has succeeded.

As shown in the case of *State v. Kaulia*, even the Supreme Court of the State of Hawaii has succumbed to the myth of annexation. In *State v. Kaulia* 128 Hawaii 479 (2013) the Supreme Court of Hawaii denied the defendant a right be heard on his motion to dismiss for lack of subject matter jurisdiction.³⁶ The Court failed to examine Article XV of the State

³⁵ "At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a territorial general election, or a special election there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

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

(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress [date of approval of this act] and all claims of this State to any area of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

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

Section 7(b), The Admission Act, An Act to Provide for the Admission of the State of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3 73-4

³⁶ See *State v. Kaulia* at Part II. "Pursuant to HRS Section 701-106 (1993), "the State's criminal jurisdiction encompasses all areas within the territorial boundaries of the State of Hawaii. (Citing to *State v. Jim* 105 Hawaii 319, 330, 97 P.3d 395, 406 (App. 2004). The State charge Kaulia based on his conduct in Kona, Country and State of Hawaii. Thus, Kaulia is subject to the State's criminal jurisdiction in this case."

Constitution³⁷ and Section two of the Admission Act, both of which exclude the Hawaiian Islands from the boundaries of the State of Hawaii.³⁸

Subject matter jurisdiction is always at issue. Indeed, the burden is on the moving party to prove the existence of subject matter jurisdiction. The Court had a duty, to determine whether the defendant was within the State of Hawaii. It did not examine the statutes; rather it assumed that all courts have territorial jurisdiction. It simply took informal judicial notice

HRS § 701–106 (1993) provides in relevant part:

....

(5) This **State** includes the land and water and the air space about the land and water with respect to which the **State** has legislative jurisdiction.

The Supreme Court erred in that there was no proof that the Island of Hawaii was acquired by the Joint Resolution of 1898, as defined by Section two of the Admission Act and Article XV of the State Constitution. [See footnote 38]

³⁷The Constitution of the State of Hawaii, Article XV, State Boundaries; Capital; Flag and Motto.

Section 1.

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

³⁸ The lower court even refused to take evidence on this issue and allow the testimony of an expert witness Dr. Keanu Sai. This was affirmed by the Intermediate Court of Appeals and the Supreme Court. See State v. Kaulia 128 Haw. at 486 (2013): “The ICA held that **Kaulia’s** claim of lack of jurisdiction was without merit because of the territorial applicability of the **state’s** criminal jurisdiction, and that the circuit court did not err in precluding Dr. Sai’s testimony.”

that the island of Hawaii was within the official boundaries of Hawaii as defined by the State Constitution. The official description of the boundaries of the State of Hawaii is contained in Section two of the Act of Admission admitting Hawaii as a State. It states:

Section 2. Act of Admission (1959)

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

Section 2 is a strange definition. It is unlike all other descriptions of states or territories of the United States. A description of a state or nation's dominion is usually described in precise and positive terms. Compare the description of Hawaii's boundaries with the description of the boundaries of the State of Washington

Section 61.

All that portion of Oregon, while that State was a Territory, lying and being south of the forty-ninth degree of north latitude, and north of the middle of the main channel of the Columbia River, from its mouth to where the forty-sixth degree of north latitude crosses that river, near Fort Walla-Walla; thence with the forty-sixth degree of latitude to the summit of the Rocky Mountains, is organized into a temporary government by the name of the Territory of Washington. March 2 1853

The State of Washington is defined by positive markers, reflecting the real world: that is lines described by longitude or latitude, lines running from this mountain peak to that river, natural monuments, metes and bounds or by reference to political lines already drawn. The definition of Hawaii does not use metes and bounds, lines of longitude and latitude or physical monuments to define the territory of Hawaii.

The description of Hawaii says nothing about the lands and waters in Hawaii. It does not name the main islands by their names. Rather, it names islands that are not within Hawaii. [Why not name "Manhattan?"] It states that among the islands excluded are Midway, Johnston and Kingman. None of these islands was ever part of Hawaii, either under the Kingdom or the governments that followed. Palmyra, too, is excluded. However, Palmyra was in the Kingdom of Hawaii.

The only clue to what is in the State of Hawaii is in the first phrase:

"The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act,"

Thus, the lands and waters in the State today are the same lands and waters that were in the Territory of Hawaii. In order to determine what is in the State. One is compelled to look back at the description of the Territory. The Organic Act, by its section two states:

*Section 2: Territory of Hawaii. That the islands acquired by the United States of America under an Act of Congress entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall be known as the "Territory of Hawaii."*³⁹

Section 2 states that the lands and waters in the Territory are those acquired by the Joint Resolution of 1898. However, the Joint Resolution is incapable of taking or acquiring the lands and waters of foreign sovereign state.⁴⁰ Therefore, by the combined effect of the two acts there are no lands and waters in the State of Hawaii!

When the Treaty of 1897 failed ratification, the United States had no description of the dominion of Hawaii. Such a description would be contained in a treaty, a mutual, bilateral agreement between seller and buyer: between Hawaii and the United States.

Thus, lacking a description, much as is present in any conveyance of land -- the United States had no means of describing the dominion it acquired from Hawaii. No treaty meant there was no description-- which meant there were no lands or waters within the Territory.

This corresponds with the actual effect of the Joint Resolution-- no lands or waters were acquired by the Joint Resolution. Only a treaty could convey the lands and waters of Hawaii to the United

³⁹ From the Act Establishing a Government for the Territory of Hawaii, 1900. Section Two.

⁴⁰*Mr. President the Constitution must begin and end with the territorial jurisdiction of the United States: It can not reach beyond the boundaries of our Government. It would be as lifeless and impotent as a piece of blank paper in Canada or in the Hawaiian Islands; and so with a statute or joint resolution.*

Statement of Senator Allen 31 Cong. Rec. at 6636 (July 4, 1898) 55th Cong. 2d Sess.

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Page 25

States in 1898. Treaties, like a conveyance of land always contain a description of the territory to be conveyed.⁴¹ All territory acquired by the United States was acquired by some sort of treaty.⁴²

Section two of the Organic Act was thus the best Congress could do in 1898. Congress could not define the new Territory of Hawaii, as Kamehameha III did in 1846, by naming the main islands themselves, such as "Oahu," or "Maui." The Joint Resolution contained no reference to those islands by name.

Treaties are bilateral or multilateral. A joint resolution is unilateral. The United States unilaterally declared Hawaii was annexed. The Republic of Hawaii never ratified the Joint Resolution. The Joint Resolution was not a ratification of the earlier Treaty of 1897. A unilateral declaration is just that: one party claiming territory not agreed to by the other. It is not evidence of the conveyance of certain territory because such conveyance lacks the consent of the other party, the "seller" so to speak.⁴³ Thus, the United States could not in the Organic Act describe the dominion of the Territory by any means whatsoever, whether by metes and bounds, natural monuments or by naming the Hawaiian Islands.

If it attempted to make such a claim as to the Joint Resolution, the United States risked the possibility that another nation would demand proof. Lacking a chain of title to any islands or waters the United States could not prove title or sovereignty to any of the islands. The failure of the Treaty of 1897 denied to the United States the normal chain of title provided by treaty.

The emptiness of the description of the Territory's boundaries stands in sharp contrast to the descriptions used by the Kingdom, the Provisional Government and the Republic of Hawaii.

⁴¹ Legal Description Of Oregon Territory As Set By Treaty With Great Britain: The Oregon Treaty 1846

⁴² Statement of Senator Allen, 31 Cong. Rec. 6635 (July 4, 1898) 55th Cong. 2d Sess.

⁴³ The Joint Resolution was similar to an act of someone who, without a receipt, returns to the store of purchase for a refund. Lacking a receipt the store provides no refund. Whereupon, the individual writes his own receipt forging the name of the seller and adding his own as buyer. It is not proof of transfer for it is not proof of a consensual bilateral transaction.

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Page 26

Kamehameha III, who first proclaimed the territorial boundaries of Hawaii in 1846, described the Kingdom of Hawaii by naming the main islands:

SECTION I. The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau; commencing at low water mark on each of the respective coasts of said islands. The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island to island.

SECTION II. It shall be lawful for his Majesty to defend said closed seas and channels, and if the public good shall require it, prohibit their use to other nations, by proclamation.

The world accepted Kamehameha's proclamation as the boundaries of the Nation of Hawaii. Every government that succeeded the Kingdom of Hawaii, except the United States, could demonstrate that it acquired its dominion from its immediate predecessor. Thus, the Provisional Government that followed the Kingdom by the act of overthrow claimed all the lands and waters held by the Kingdom of Hawaii. Similarly, the Republic of Hawaii followed the Provisional Government in 1894 and explicitly claimed all lands and waters held by both the Provisional Government and the Kingdom of Hawaii:

*The Territory of the Republic of Hawaii shall be that heretofore constituting the Kingdom of the Hawaiian Islands, and the territory ruled over by the Provisional Government of Hawaii, or which may hereafter be added to the Republic"*⁴⁴

However, in 1898, there was a break in the chain.

Lacking a treaty United States not could declare what lands and waters were in the Territory in 1900. Those in Congress who drafted the Organic Act defined Hawaii as consisting of those islands, and waters, acquired by the Joint Resolution. The Joint Resolution of course, had no more power to acquire the Hawaiian Islands than a joint resolution of the Hawaii legislature had of acquiring the United States. This point had been made clear in the Senate debates on the Joint Resolution. Senator White of California spoke for many when he declared:

⁴⁴ From Article 15 Constitution of the Republic of Hawaii Adopted July 3, 1894.

There is no constitutional power to annex foreign territory by resolution, certainly not otherwise than as a State.

Whatever may be said of the past history of this country or of the records to which senators have adverted, there is one proposition which can not be contested, mainly, that there is no precedent for this proposed action?

States has been admitted into the Union, territory has been acquired and has been annexed by treaty stipulation,

but there is no instance where by a joint resolution it has been attempted not only to annex a foreign land far remote from our shores,

but also, to annihilate a nation, to withdraw from the sovereign societies of the world a government which in the opinion of the Senator from Alabama is the best government of which he has any cognizance---no instance where an act of such supreme importance has been advocated as mere legislation.?⁴⁵

Fifteen years later, in 1915, the notes following section two were embellished to include the names of the major islands.⁴⁶ Of course, adding such notes is simply proof that section two of the Organic Act was defective. The notes are clearly not law.

A. The Trail of Deception

⁴⁵ Statement of Senator White of California 31 Cong. Rec. Appendix at 560 (June 21, 1960)

⁴⁶ The 1915 notes to Section Two of the Organic Act read as follows:

The Hawaiian group consists of the following islands: Hawaii, Maui, Oahu, Kauai, Molokai, Lanai, Niihau, Kahoolawe, Molokini, Lehua, Kaula, Nihoa, Necker, Laysan, Gardiner, Lisiansky, Ocean, French Frigates Shoal, Palmyra, Brooks Shoal, Pearl and Hermes Reef, Gambia Shoal and Dowsett and Maro Reef. The first nineteen were listed in the Commission report transmitted to Congress by the message of the President, Senate Doc. 16, 55th Congress, 3d Session, 1898. U.S. Misc. Pub. 1898.

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Page 28

This lack of any description for the Territory caused a host of problems during the Territorial period. The Supreme Court of the Territory remarked on this failure.

*"Neither in the Treaty of Annexation nor in Newlands Resolution were the Hawaiian Islands and their dependencies explicitly defined. The Hawaiian Organic Act simply referred to the territory acquired from the Republic of Hawaii as "the Islands acquired by the United States of America under an Act of Congress entitled 'Joint Resolution ... annexing the Hawaiian Islands * * * approved, etc.*

Bishop v. Mahiko 35 Hawaii 608, 642 (1940)

Those problems continued during the drive for Statehood. The lack of a description of Hawaii was a continuing embarrassment. Draftsmen of the proposed State Constitution for the new State of Hawaii in 1949 could do no better than those who crafted the Organic Act. Their definition in the Proposed State Constitution for Hawaii would be the same:

*"Section 1. The State of Hawaii shall include the islands and territorial waters heretofore constituting the Territory of Hawaii."*⁴⁷

This repeated the language of the Organic Act in fewer words. The 1949 Constitutional Convention drafting the proposed Constitution for the new state could not escape the fact that the Territory had no islands or waters. No matter how it was to be dressed up the new boundary description for the State of Hawaii was compelled to repeat the formula of the Organic Act. The new State would consist of the same dominion as the Territory.

When the State's proposed Constitution was first presented to Congress in 1953, Senators were stunned by the description of Hawaii.⁴⁸ The proposed boundaries did not resemble those of existing states. Other states had boundaries that were precise and carefully drawn, defined by

⁴⁷Article XIII, section 1, the proposed state constitution

⁴⁸ Senator Smathers. What is the State line in Hawaii? What is going to be the State line?

From the transcript of the non-public hearing of the Senate Insular and Interior Affairs Committee March 12, 1953

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Page 29

metes and bounds, or longitude and latitude, or lines from one natural monument to the other.⁴⁹ Precision was paramount.⁵⁰ After all, the boundaries of a state or nation are the most basic and important laws of all--for they define where sovereign power of state or nation begins and ends.

Hawaii's delegation had no answers to the questions by United States Senators. Senators could not understand how such clear boundaries, during the Kingdom period had become so ambiguous and simplistic. Senators could see, from Kingdom law, that the boundaries of Hawaii as promulgated by Kamehameha III were clear. The 1846 law named the islands and the channel waters as the dominion of the Kingdom. After the overthrow in 1893, the Provisional Government claimed the same area as that claimed by the Kingdom. That was clear. The Republic of Hawaii in 1894 followed suit--claiming as its territory the dominion asserted by the Kingdom and its predecessor the Provisional Government. This was also clear.

However, the Territory in 1898 could not claim the dominion of its predecessor, the Republic. The Republic had never ceded that dominion to the United States. Unlike the Provisional Government and the Republic that could successfully claim the dominion of their predecessors, there was no basis by which the United States could claim that it received the dominion held by the Republic of Hawaii. That would have been possible if there had been a ratified and binding treaty of 1897. There was no treaty. The Joint Resolution, the substitute for the treaty, had no power to acquire from the Republic the dominion of the Hawaiian Islands.

⁴⁹ Statement of Representative Miller Feb 2 1955:

Dr. Miller. I think there ought to be some place a legal description, either in the report, or in the bill or somewhere that says this is the boundary of the new State.

Hearing before the Committee on Interior and Insular Affairs of the House of Representatives 84th Congress 1st sess. on "H.R. 2535, H.R. 2536, "Hawaii-Alaska Statehood," January 25, 28 and 31 and February 2, 4, 7, 8, 14, 15 and 16 1955 at page 167

⁵⁰ Nor can we overlook a very practical question -- if the 'channels' between the islands were to be held inland waters, where would the boundaries lie? *Island Airlines Inc. v. Civil Aeronautics Board* 352 F.2d 735 (1965)

At first, Senators did not realize the real depth of the problem: the United States had never acquired Hawaii Those they finally did grasp this basic problem were caught in a problem that could not be solved ---except by drafting a description that mimicked the Territory and deceived all into believing that Hawaii had been acquired by the United States.

National security concerns dictated that the Senate draft a description that would deceive the world into believing Hawaii was territory of the United States. After all, this was 1953--- the middle of the Cold War with the Soviet Union. The US was the world's leader in criticism of Soviet intervention in the sovereignty of Eastern European nations. The United States could never admit that it occupied a Hawaii it had never acquired. Any hint of such a fact would undermine the high moral ground that the United States held over the Soviet Union.⁵¹

Those Senators who realized the truth---that the Joint Resolution did not acquire the Hawaiian Islands, did not know how to proceed. The Senate Committee slipped into secret session. Some Senators were undoubtedly aware of the real problem---others were totally in the dark.

51

“The Department considers that the admission of this Territory into the Union would be in conformity with the traditional policies of the United States toward the peoples of organized Territories under administration of those who have not yet become fully self-governing. Furthermore, it is believed that favorable action on this proposed legislation by the Congress would enable this Territory to achieve the full measure of self-government contemplated in the United Nations charter to which the United States has subscribed. It is significant to note that in the international sphere the United States can point with satisfaction to the fact that in the constitutional development of the territories administered by it, due consideration is given the freely expressed will of people of those territories. This is of special significance in the case of Hawaii where proposals for statehood are based upon the will of a substantial majority of people as expressed in a popular referendum. The grant of statehood would thus serve to support American foreign policy and strengthen the position of the United States in international affairs.”

See letter of March 6, 1953 from Thruston Morton, Assistant Secretary of State to Senator Hugh Butler, Chairman, Interior and Insular Affairs Committee, reprinted in the transcripts of the Hearing of the Committee of June 29, 1953, page 20

The Senate Committee held endless hearings, convened numerous task forces, and asked for advice. A report from the Congressional Research Service was critical-- for it established that scholars outside of the Government doubted the ability of the Joint Resolution to acquire Hawaii. Those Senators in 1953 who read this report, such as Senator Clinton Anderson of New Mexico, had knowledge of the possibility that the Joint Resolution did not acquire the Hawaiian Islands:

"It has long been held in some quarters that the annexation of Hawaii by joint resolution was unconstitutional; relations between independent nations can be governed legitimately only by treaties, inasmuch as a legislative act necessarily has no extraterritorial force. This question has never been passed upon directly by the Supreme Court, as it consistently recognized that the methods and means of acquiring territory constitute matters that are within the province exclusively of the political branches of the Government. Westel W. Willoughby, The Constitutional Law of the United States (New York, 1929, 2d Ed. Vol. I p. 429)"⁵²

From March of 1953 to January of 1954, six different drafts of boundaries for Hawaii were produced. First, the description must retain the boundaries as established by the Organic Act in 1900 as conveying the conception, albeit false, that the Hawaiian Islands were within the new State. Second, the description must exclude the island of Palmyra and the channel waters between the main islands that Kamehameha had claimed in 1846. Third, the description must hide the exclusion of Palmyra and the channel waters by naming and excluding "sham" islands. Fourth, the description must not name the main Hawaiian Islands. The Senate Committee finally found a description that served the requirements for deception: Section Two was written into the Act of Admission.

The decision in State v. Kaulia demonstrates that this deception is still persuasive. It works because all who the boundary description either ignore it entirely or make false assumptions.

B. The Failure of State and Federal Courts to examine Subject Matter Jurisdiction: The Triumph of the Myth

The State and Federal Courts in Hawaii should know better. Native Hawaiian litigants, mostly pro se, have, on many occasions, raised the lack of jurisdiction. Moreover, the

moving party in any proceeding has a duty to prove territorial jurisdiction as a matter of subject matter jurisdiction.⁵³ For a century, the courts have simply assumed the existence of territorial jurisdiction. They have not read the description of Hawaii's boundaries. Instead, the Courts have simply assumed, by judicial notice or blind reliance on the decisions of prior courts, that territorial jurisdiction does exist.⁵⁴

Yet, all courts have a *sua sponte* duty carefully examine whether there exists subject matter jurisdiction. It can be raised at any time and by any party.

In Kaulia, the Supreme Court's denial of the motion to dismiss without examining the actual boundary statute was malfeasance. Yet, it is common practice. It is a practice that violates the central rules of ethics. Under the Rules of Professional Responsibility and the Canons of Ethics⁵⁵, all parties, particularly attorneys who are officers of the court, have a duty to present to raise the issue of subject matter jurisdiction when it is in question.⁵⁶

⁵³See Makila Land Co., LLC. v. Kapu, 114 Haw. 56; 156 P.3d 482; (Intermediate Court of Appeals 2006):

("In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. State v. Zimring, 58 Haw. 106, 110, 566 P.2d 725, 729 (1977)")

⁵⁴Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(h) Waiver or Preservation of Certain Defenses.

(3) *Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.*

⁵⁵ Code of Jud. Conduct, Rule 2.2. Impartiality and Fairness

A judge shall uphold and apply the law and shall perform all the duties of judicial office fairly and impartially.**

Comments:

[1] *To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.*

[2] *Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or*

The State and Federal courts have ignored Native Hawaiians and their advocates who have challenged the subject matter jurisdiction of State and Federal Courts. Native Hawaiians, mostly pro se claimants, as well as their attorneys have been threatened with and sanctioned heavily under Rule 11(e).

C. Testing Subject Matter Jurisdiction

In 1999, I was counsel for a defendant homeowner in a foreclosure action.⁵⁷ His home was in Hawaii Kai, on the island of Oahu. I presented a motion to dismiss based on the above findings. I stated that the burden of proving subject matter or territorial jurisdiction was on the bank seeking foreclosure. I noted the description of the boundaries of the State, which are in Section two of the Admission Act and Article XV of the State Constitution. I stated that the plaintiff, as moving party, Central Pacific Bank had burden to show, by those descriptions that the home under foreclosure was within the State of Hawaii.

As such, it was the plaintiff Central Pacific Bank's burden to show that the island of Oahu, situs of the defendant's home in Hawaii, was actually acquired by the Joint Resolution of

disapproves of the law in question.

[3] *When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.*

⁵⁶ Hawai'i Rules of Prof. Conduct, Rule 3.3 Candor Toward the Tribunal

(a) *A lawyer shall not knowingly:*

(1) *make a false statement of material fact or law to a tribunal;*

(2) *fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;*

(3) *fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;*
or

(4) *offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.*

⁵⁷ Central Pacific Bank v. Chung, Civ. No. 96-4480-10 (1996)(First Circuit Court, State of Hawaii)

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Page 34

1898.⁵⁸ After four months of delays requested by Central Pacific Bank, counsel for the Bank stood before the judge and stated: "Your honor, if what Professor Chang says is true, then nothing we have done in this court is valid."

D. The New History: No to Federal Recognition

Justice Scalia's statements and the opinions of the courts of Hawaii reveal the devastating and pervasive effects of the longstanding efforts of the United States deception as to annexation. It is a deception facilitated by the laws of the United States and the decisions of State and Federal Courts.

The year 2014 was a breakthrough for Hawaiians. The events of 2014 started with an educational forum at the law school. The forum led to Dr. Crabbe's letter to Secretary Kerry. That letter was rescinded by OHA but not without a firestorm of controversy over both the letter and of the viability of Dr. Crabbe's position at OHA.

In short, order, the Department of Interior held 15 hearings throughout Hawaii. There was a massive outpouring of opposition to the questions presented by the Department. Much of the opposition focused on the illegality of United States sovereignty over Hawaii. Many signs said: "No Treaty, No Annexation and No to the Five Questions."

Summer became fall. Hawaiians challenged the subject matter of the jurisdiction of Hawaii's State and Federal Courts. There was a massive protest on Mauna Kea: Groundbreaking ceremonies were interrupted. Mauna Kea was followed by Resolution 14-28 of Association of Hawaiian Civic Clubs and a grass roots protest by students at the University of Hawaii at Hilo who insisted that the Hawaiian flag fly higher than the flag of the United States.

⁵⁸ See *Makila Land Co., LLC. v. Kapu*, 114 Haw. 56; 156 P.3d 482; (Intermediate Court of Appeals 2006):

"In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. *State v. Zimring*, 58 Haw. 106, 110, 566 P.2d 725, 729 (1977) (citations omitted). The plaintiff has the burden to prove either that he has paper title to the property or that he holds title by adverse possession. *Hustace v. Jones*, 2 Haw.App. 234, 629 P.2d 1151 (1981); see also *Harrison v. Davis*, 22 Haw. 51, 54 (1914). While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. *Shilts v. Young*, 643 P.2d 686, 689 (Alaska 1981). *Accord Rohner v. Neville*, 230 Ore. 31, 35, 365 P.2d 614, 618 (1961), reh'g denied, 230 Ore. 31, 368 P.2d 391 (1962)"

This "false history" of Hawaii has been exposed. At the end of 2014, a broad spectrum of the Hawaiian community embraced the new history as the basis for a different path. In November, the Association of Hawaiian Civic Clubs convened their 55th convention at the Waikaloa Hotel on the Island of Hawaii. The resolution they passed, Resolution 14-28, reflected the immense changes in the Hawaiian's view of history. They declared, in that resolution that:⁵⁹

NOW, THEREFORE, BE IT RESOLVED, by the Association of Hawaiian Civic Clubs at its 55th annual convention at Waikoloa, Hawai'i, this 1st day of November, 2014, that it acknowledges the continuity of the Hawaiian Kingdom as an independent and sovereign State.

The final language of the actual resolution followed a number of "whereas" clauses--- statements which majority of the convention found to be unconverted facts. Their findings were, among others that Hawaii was a nation as of 1843, independent and of equal sovereignty to the United States, that therefore a joint resolution of the United States had no more power to acquire Hawaii, then a law of the Hawaii legislature had to acquire the United States.

The Association declared that Hawaii, sovereign and independent as of the Anglo-Franco declaration of 1843, was subject to the presumption under international law of its continuity as a state. The burden is on the United States to prove, as the claimed successor to the Hawaiian nation, the events by which the nationhood of Hawaii was acquired by the United States.⁶⁰ That was the question to Secretary Kerry and former Attorney General Holder. It was a question that they could not answer and that they dared not answer.

E. Conclusion:

The myth of annexation is an enormous dark cloud over the Hawaiian Islands. On its face, annexation is clearly false. 122 years ago, American patriots in the Senate made this clear. Their voices have been lost to history. The myth of annexation has left a residue of anomalies and inexplicable legal contradictions over time. The truth has eventually become known. The deception must end.

⁵⁹ See Association of Hawaiian Civic Clubs, 2014 Convention, Resolution 14-28 at <http://aohcc.org/index.php/convention/resolutions> [last check March 2, 2015 7:00 AM HST]

⁶⁰ Oklahoma v Texas 260 U.S. 606, 638 (1923, Illinois v. Kentucky, 500 U.S. 380, 384 (1991 and Illinois v. Kentucky, 500 U.S. 380, 384 (1991 ("Accordingly, New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island. . . .")

The annexation of Hawaii is an embarrassment to the United States. It undermines the standing of the United States as a leader of the world. It shows the United States to be hypocritical--- forcing other nations to abide by the "rule of law" while it ignores that rule in Hawaii. Much as the United States admitted its guilt as to the wrongful overthrow of the Kingdom of Hawaii, it must soon admit its wrongdoing as to annexation. The world will not come to an end. Hawaii need not fall into chaos.

The truth is necessary for Native Hawaiians and all peoples of Hawaii to move on. It is necessary for the United States and the world to move on. Simply recognizing Native Hawaiians as a Federal Indian Tribe will not solve the basic problem. The United States has no jurisdiction in Hawaii. It cannot create a tribe by executive authority or congressional legislation. The United States has no more authority to federalize Hawaiians in Hawaii than it has the authority to declare that Anglo-Saxons in the United Kingdom are a federally recognized Indian tribe. Pretense and deception are no longer viable.

Native Hawaiians need a time of study; a time to slow down. A society cannot execute a 180-degree turn on a dime. There is a new canoe in Hawaii. Like the world-wide voyage of the Hokulea, the voyage to be taken by the Hawaiian convention will take planning, very much planning.

It will also take reconciliation and compromise. However, before the reconciliation, before the new Hawaii, there must be the Truth.

As our late Queen said in her poem "A Queen's Prayer," we must forgive, but not forget."⁶¹ In our search for truth, we must retain the values of our ancestors. We gather the truth with

⁶¹ Your loving mercy

Is as high as Heaven
And your truth
So perfect

I live in sorrow
Imprisoned
You are my light
Your glory, my support

Behold not with malevolence
The sins of man

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Page 37

humility not as the source of vengeance and revenge but as the foundation for a better future..The true history of Hawaii will produce for all a better world. As Gandhi said:

"The seeker after truth should be humbler than the dust. The world crushes the dust under its feet, but the seeker after truth should so humble himself that even the dust could crush him. Only then, and not till then, will he have a glimpse of truth."

Our ancestors were humble. Our late Queen was humble. Our kupuna are humble. We shall be humble. For that, the qualities and lessons taught by our ancestors we have glimpsed the truth and shall prepare for the future.

But forgive
And cleanse

And so, o Lord
Protect us beneath your wings
And let peace be our portion
Now and forever more

Amen

Queen's Prayer (Ke Aloha O Ka Haku) - by Queen Lili`uokalani, Composed by Queen Lili`uokalani, March 22, 1895, while she was under house arrest at Iolani Palace. This hymn was dedicated to Victoria Ka`iulani, heir apparent to the throne.