

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF	)	CASE No. BLNR-CC-16-002
Contested Case Hearing)	
Re Conservation District Use	)	WRITTEN DIRECT TESTIMONY
Application (CDUA) HA -33568	)	OF WILLIAMSON B. C. CHANG
for the Thirty Meter Telescope	)	AS TO APPLICANT'S LACK OF
at the Mauna Kea Science Reserve ,	)	TITLE TO THE SUMMIT
Ka'ohe Mauka, Hamakua,	)	OF MAUNA KEA AND THE LACK OF
Hawai'i, TMK (3) 4-4-015:009)	)	TERRITORIAL SUBJECT MATTER
	)	JURISDICTION OF THE BOARD OF
	)	LAND NATURAL RESOURCES TO
	)	ISSUE THE PERMIT
	)	CONTESTED CASE HEARING
	)	DATE: October 18, 2016
	)	TIME: 9:00 a.m.
	)	HEARING OFFICER: Hon.
	)	Riki May Amano (Ret.)
)	
)	

WRITTEN TESTIMONY OF WILLIAMSON CHANG

I. The Critical Preliminary Issue is Whether or not the State, by its Board of Land and Natural Resources has Territorial Subject Matter Jurisdiction¹

There are two preliminary issues that must be resolved. Although such issues are not

¹ See Chang, Darkness over Hawai'i: Annexation Myth Greatest Obstacle to Progress," 16 Asian-Pacific Law and Policy Journal 70 at pages 94 -102. (2016)
http://blog.hawaii.edu/aplpj/files/2015/09/APLPJ_16_2_Chang.pdf [Last checked April 8, 2016 750pm]

Received
Office of Conservation and Coastal Lands
2016 Oct 16 11:07 am
Department of Land and Natural Resources
State of Hawaii

listed in the Amended Notice of Contested Case Hearing, See Order of Hearings Officer Hon. Judge Riki May Amano, (Ret.), October 5, 2016. Such issues are always in issue in any legal proceeding, whether a judicial or administrative proceeding of this nature. The first issue is thus whether or not the adjudicative body, in this case, the Board of Land and Natural Resources, by this Contested Case proceeding, as authorized under the Rules of the Board of Land and Natural Resources, has territorial subject matter jurisdiction.² Since this is a proceeding as to an incident of the use of land on the Island of Hawaii, whether or not the BLNR has jurisdiction over the summit of Mauna Kea, TMK (3) 4-4-015:009 there must be territorial subject matter jurisdiction or any judgment is void ab initio. This statement contends that the Board does not have such subject matter jurisdiction because Mauna Kea is not within the jurisdiction of the State of Hawaii as defined by federal and state law. The territorial boundaries of the State of Hawaii set forth in three state and federal laws. The first law defining the boundaries of the State of Hawaii was Section Two of the Admission Act, An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. 86-3. Said section states that:

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 (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.³

² *Durfee v. Duke*, 375 U.S. 106 (1983) ("The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska. . . ." Stewart, J.)

³ This language may seem quite obtuse and contrived, and it is. Congress, and in particular, the Senate Committee on Interior and Insular Affairs was well aware of the defective nature of the Joint Resolution.

In 1954 the committee was given a report from the Congressional Research Service providing knowledge that there has been strong doubt over time as to very capacity of a joint resolution to acquire any territory, including the Hawaiian Islands.

Moreover, the committee was undoubtedly aware of the vehement objections to the capacity of the joint resolution made during the Senate debate in 1898. Such statements were public and in the Congressional record. Any suspicions were further aggravated by the territorial boundary brought before the Senate Committee on Interior and Insular affairs in 1953 by the representatives of the Hawai'i Statehood Commission.

The Hawai'i Statehood Commission, and its chair, Mr. C. Nils Tavares, a former Attorney General of the Territory could not explain the imprecision used in the proposed state constitution to define the boundaries of the new state. Whereas other states and territories were always defined as precisely as possible, by metes and bounds, or longitude and latitude, or lines running from natural monuments or existing political boundaries, the proposed description of the boundaries brought forth by Mr. Tavares was pitiful.

The explanations for this simplistic description of Hawai'i, which provided no positive means of determining the dominion of the future state were equally weak and unpersuasive. For months, during the Spring of 1953, Congressmen and Senators hammered away at Mr. Tavares feeling that the people of Hawai'i were insulting Congress with their simplistic proposal.

Those congressmen and senators did not know, however, that the defect in the description of the boundaries of the Territory of Hawai'i, when brought forth in 1953, were the result of the failure of the United States to ratify the treaty of 1897 with the Republic of Hawai'i. Lacking a treaty, there was no agreed description as to the lands and waters that had been turned over, if such had occurred to the United States. Much like many others, the congressmen and senators assumed that the Hawaiian Islands had been acquired by a treaty. All territory acquired by the United States subsequent to the Revolution had been acquired, in some sense or the other, by a treaty, even if the treaty constituted a peace treaty concluding a war. Many people make the same assumption today that Hawai'i was somehow acquired by a treaty or agreement. It was not.

The 1953 Congress and the Senate Committee on Interior and Insular Affairs would learn that there was no treaty and that Hawai'i had been supposedly acquired by a joint resolution, a mere act of Congress. Lacking a mutual treaty, the United States was in the position of an interloper. The United States was like a person who had found a bicycle on the roadside, not bought one. The United States like the "finder" had no papers to prove ownership. And having no such papers, it could not, of course, prove that what it claimed and had actually been acquired by a mutual contract, or, in this case a treaty. The legislative history thus reveals that it became clear at this point in time, to only a certain few senators and congressmen that this was a unique case. The United States had been claiming Hawai'i as territory of the United States without any legal basis. When researched, it became clear that there was a huge objection in 1898 to claiming Hawai'i by a joint resolution. The Senate Committee asks for a report on this very point. They received a report from Charles Tansil, of the Congressional Research Service, which cited to scholars and others who doubted the power of a joint resolution to acquire any territory, let alone, that of Hawai'i. This was news to many senators and congressmen. It was bad news. The United States was in the midst of the cold war with the Soviet Union. The United States could never reveal the secret that it had occupied the Hawaiian Islands since 1898. In the heightened political tension of the Cold War the United States was purportedly the ideal of democracy and fair play. It was, in the eyes of Americans, the Soviets who conquered, undermined, or intervened in the national affairs of other sovereign nations in violation of the law of nations.

Thus, at one point a confused United States went before the United Nations and admitted Hawai'i was a colony, volunteering to place Hawai'i on the list of non-self-governing territories maintained by the United Nations. In time, this policy would change and all efforts would be made to Americanize Hawai'i, admit it as a State in the Union, and thus put to rest forever any questions as to how Hawai'i was originally acquired in 1898.

In order to accomplish this objective, Congress and the Senate Interior and Insular Affairs Committee had to completely redraft the boundary description as taken from the Organic Act which established the form of government for Hawai'i in 1900. One of the members of the Committee created under the Joint Resolution, Walter Frear, it would appear, had carelessly described the dominion of the Territory of Hawai'i as those islands acquired by the Joint Resolution of 1898.

This simple and puzzling definition stood apart from all other descriptions of states or territories of the United States. Other territories such as Utah, or Arizona, or New Mexico, and other States such as Oregon were defined in precise terms, by metes and bounds, and positive markers, such as referents to natural monuments or political lines, or by longitude and latitude. These other territorial descriptions were long and laborious. They should be. There is nothing more important to a nation, or a political entity than clear boundaries. Boundaries describe where the sovereignty or power of one nation begins and another ends. More wars have been fought over disputed boundaries than any other issue. The world has suffered enormous anguish over time as to challenges to territorial boundaries.

For this reason, the original boundaries as crafted by Frear were appalling and almost laughable to Congress in 1953 but for the very seriousness of the issue. This lack of carefully drawn boundaries was directly a result that the United States had never concluded a treaty of cession with Hawai'i. The United States had simply taken, or more accurately occupied Hawai'i under the ardor, patriotism and bullishness of men such as Theodore Roosevelt and William McKinley. McKinley even considered taking Hawai'i by an executive order when the Treaty of 1897 failed to be ratified in the United States Senate. The taking of Hawai'i by a mere act of Congress, a joint resolution was clearly a mistake. The proof of the mistake would live forever in the territorial boundaries describing the Territory of Hawai'i and later the State of Hawai'i.

In 1953 and 1954 it became the mission, a sort of secret mission and Manhattan project, of the Senate Interior and Insular Affairs Committee to rectify the sloppiness of the people of Hawai'i. The work of the people of Hawai'i in drafting boundaries in the proposed Constitution created by a constitutional convention was simply thrown out. The existing boundaries of the Territory of Hawai'i had caused its own legal problems in Hawai'i, most which were kept secret, but known to C. Nils Tavares. On one occasion the Supreme Court of the Territory of Hawai'i wondered out loud if there were any boundaries to Hawai'i. Questions persisted such as were the channel waters between the main islands part of Hawai'i, as originally claimed by Kamehameha III? Were the Palmyra Islands, some 990 miles to southeast of Oahu part of Hawai'i given that they were annexed by Kamehameha IV. A company called Island Airlines sought to avoid federal CAB regulation by claiming that by flying within the islands, albeit over open ocean more than three miles from shore, their planes were still within the territory of the

Kingdom of Hawai'i. These two issues, the channel waters and Palmyra Island would be a thorn in the side of the Senate Committee on Interior and Insular Affairs.

Tavares, at first, claimed that the channel waters would be within the new State as the channel waters had always been considered part of Hawai'i. He would make the same claim as to the Palmyra Islands, although nearly 1000 miles away, part of another chain of islands, but considered part of the County of Honolulu.

From early 1953 to the middle of 1954, the Senate Interior and Insular Affairs Committee worked in semi-secrecy. Non--public secret hearings were held in March of 1953. Numerous task forces were created combining experts from various federal departments and agencies. The objective became clear. It would not be possible for Congress to change the essential dominion of the Territory of Hawai'i. Instead, the Senate Committee had the task of burying that definition in beneath a pile of confusing, contradictory, and deceptive language. The Committee produced six drafts. The final product was Committee Print Six. It was a nightmare in terms of legal language and drafting boundaries. For example, one would assume that it would make sense to simply refer to each of the main Hawaiian Islands by name, and include them in the future State of Hawai'i. No. The Committee adopted language which chose to name island that would not be in the State of Hawai'i, such as Kingman Reef and Midway. There is no mention of Oahu or Maui, or the Island of Hawai'i. Midway was never territory of the Kingdom of Hawai'i so excluding it made little sense. One may as well exclude Manhattan Island, New York, for that matter.

This practice of naming islands to be excluded arose from the policy to exclude Palmyra from the State of Hawai'i. For odd reasons, the owners of Palmyra had offended the Committee. During World War II the Navy sought to negotiate with the family to establish a naval base and air station on Palmyra. The family balked and upped the rent. Oddly, the Navy caved in, paid the higher rent and never chose to undertake the obvious path of condemning Palmyra as necessary for national security, thus paying the owners a just compensation. Everywhere else the Navy ran Hawai'i during world War II. The inexplicable reluctance of the Navy to condemn and seize Palmyra for the United States was never understood by the 1954 Senate Committee. Even more odd, the minute the war was over the Navy packed up and left Palmyra. Nevertheless, the United States was required to foot the bill for a clean-up of Palmyra when the family prevailed upon Congress to pass a private bill compensating the family for hardships suffered during World War II. Elsewhere in the Hawaiian Islands, the military took lands without compensation, never cleaned up waste and arsenal and were deaf to claims for compensation.

At some point, a powerful member of the Senate Interior and Insular Affairs Committee, hearing this history, took a strong dislike to the owners of Palmyra. Thereafter he insisted that Palmyra, a part of the Kingdom of Hawai'i, as well as the Republic of Hawai'i in 1898, was to be kept out of the new state of Hawai'i. Thus, the present definition of Hawai'i excludes Palmyra. In order to effectively cover this odd decision, the description of Hawai'i thus was created by naming other islands to be excluded, some, like Midway, which had never been part of Hawai'i.

On the issue of the channel waters, always part of the territory of Hawai'i, Senators took a strong dislike when they discovered that Hawai'i utilized the archipelagic theory of island boundaries, and claimed that the channel waters between the main islands were akin to the islands themselves and thus within the boundaries of the Territories. The immediate reaction of the Senate Committee was astonishment. They felt betrayed by this small state. The Senate was now being asked to admit as a State a territorial area much larger than the small islands that dotted the maps of Hawai'i.

Senators recoiled at the desire of Mr. Tavares to include the channel waters much as they had initially recoiled upon learning that there was no treaty acquiring the Hawaiian Islands. The Senators made their decision, Hawai'i would have to relinquish the channel waters to the United States.

The Hawai'i Statehood Commission and its chairman, first Mr. Tavares, then Delegate Farrington, and finally his wife, Mrs. Farrington and no say in any of these matters: Palmyra was out of the State and the channel waters were out of the State.

Committee Print Six differed vastly from the provision as to the boundary of Hawai'i submitted by the people of Hawai'i. The Senate Committee told the Hawai'i delegation to turn around, reconvene the constitutional convention and amend the proposed convention, already ratified, so that its boundary description read in the same cryptic manner as that of Committee Print Six. The amendment of the proposed constitution was impossible. Delegates had passed away and the constitutional convention could never be reconvened.

If both the Act of Admission, containing the terms of Committee Print Six, was passed into law admitting Hawai'i, and if, at the same time, Congress accepted the Constitution of the State of Hawai'i as written by the people, there would be two vastly different legal descriptions of the boundaries of Hawai'i. Clark Clifford, the future Secretary of War for Lyndon Johnson was called into to settle this mess. His solution was that Hawai'i would be admitted under the condition that unless a majority of the Hawai'i electorate did not adopt the crazy language of Committee Print Six, exclude Palmyra and the channel waters, Hawai'i would not be admitted as a State. These conditions were written in to the Admission Act as Section 7b, but no one in Hawai'i was told about them. The people were not told of about Committee Print Six. They were simply told to vote for, as set forth in question two of the plebiscite, the new federal territorial description. In the press they were told that the new description made no changes to the existing territory of Hawai'i. This was a lie. The new description excluded the channel waters and Palmyra. The people were never given the actual text of Committee Print Six but were told that unless they approved Committee Print Six, which was not available for public purview, statehood would have denied. Instead, the people were told this plebiscite was all about whether they wanted statehood---again.

The whole purpose of Clark Clifford's work was ensuring that the two descriptions of the State of Hawai'i, one in the Admission Act and the other in the State Constitution were exactly the same. This was to be accomplished without informing the people of Hawai'i. Thus, one

governor, still believing that the channel waters were within the jurisdiction of the State of Hawai'i loudly protested to international ears when a Soviet submarine ploughed through a channel between two of the main islands. When informed that the State no longer possessed the channel waters the people of Hawai'i were somewhat outraged.

Thus, in the Constitutional Convention of 1978, the terms carefully wrought by the Senate in 1954 were changed by an amendment to section one of Article XV of the Hawai'i State Constitution. That provision was the exact replica of Committee Print Six. The delegates to the convention were outraged that dominion that had been part of the Kingdom of Hawai'i had been taken by the United States---without the people knowing. Thus, the 1978 constitutional convention amended the territorial boundaries of the State to include the channel waters by adding the word "archipelagic" in describing the waters that comprised the waters of the State. Technically, this violated the compact of admission particularly the condition subsequent by which Hawai'i was admitted as a State. Technically, Congress had a legal basis for ousting Hawai'i as a state. No such action has been taken since 1978, largely because the whole of the story is far too embarrassing to the United States.

Nonetheless, there are two different official boundaries describing the State of Hawai'i. The description in the State Constitution contains the channel waters and thus creates a State larger than that originally admitted. Palmyra was excluded from the State of Hawai'i to a kind of no-man's land. All the records relating to conveyances and ownership of Palmyra were taken from the State Bureau Conveyances and lodged in the office of clerk of the United States District Court for the District of Hawai'i.

Some twenty years ago, Native Hawaiians, claiming to be descendants of Queen Kalama, who they asserted had a property interest in Palmyra announced this claim without filing a quiet title action. Instead, the irate owners of Palmyra, much in keeping with their earlier behavior, brought suit against the Native Hawaiians for "slander of title." In defense of the Native Hawaiian claimants, their attorney raised the question as to where the action would be heard? Would it be State Court or Federal Court and could the owners prove that the real property laws of the United States, or those of the State of Hawai'i were even applicable. For those statements the attorney was slapped with the harshest Rule 11(e) fine probably in the history of the State and Federal Courts in Hawai'i. He was fined 76,000 dollars for simply raising the possibility that Palmyra, once part of the Kingdom of Hawai'i and never part of the United States, was not within any jurisdiction, once it was excluded by Committee Print Six from the future State of Hawai'i. In some sense, Palmyra, was the "last Hawaiian place," the last real property not under United States or State of Hawai'i jurisdiction, and arguably thus under the jurisdiction of the Kingdom of Hawai'i--which had annexed the island in the first place.

The Rule 11(e) fine was not enough. Senator Inouye decided that the only means of ending any questions about Palmyra, and really about the legal effect of the Joint Resolution of 1898, was for the United States to buy Palmyra outright, making the United States the owner of Palmyra whether or not the United States had sovereignty over the island. Thus, a private-public partnership was formed between the United States and the Nature Conservancy of Hawai'i to purchase Palmyra under the rubric of protecting its wildlife. There would be no more questions

When stripped down to its essence, this section while not denoting that the island of "Hawaii" is within the State of Hawaii, does state that "all the islands, . . . included in the Territory of Hawaii on the date of the enactment of this Act, . . ." shall be deemed the territory of the State of Hawaii. This is also true of Section One of the Hawaii State Constitution, Article XV, as amended by the Constitutional Convention of 1978, ratified November 7, 1978, which state the same language, with a single exception:

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 the Admission Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters; but this 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.

For all intents and purposes, at this point, both the Admission Act of 1959, and the Constitution of the State of Hawaii state that the islands that were defined as within the Territory of Hawaii are now within the State of Hawaii. Thus, if one turns to the description of the territorial boundaries under the Organic Act of 1900, an Act to Provide a Government for the Territory of Hawaii, 31 Stat. 141 (1900), one finds in Section Two, that only those islands

about Palmyra. Such, however, did not terminate the puzzle as to how the State acquired such government lands as Mauna Kea. The chairperson of the Nature Conservancy of Hawai'i at the time, was, of course, Suzanne Case, the present Chair of the Board of Land and Natural Resources.

See the records of the Staff of S. Comm. on Insular and Interior Affairs, 83d Cong. (Committee Prints 1-6, 1954) (on file with Lib. of Cong.). *See also* The Center for Legislative Archives, *Records of the Committee on Interior and Insular Affairs and Its Predecessors*, NAT'L ARCHIVES, at www.archives.gov/legislative/guide/house/chapter-13-interior-and-insular-affairs.html.

.

.

acquired by that act of Congress⁴, 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:

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.⁵

Thus, the Board of Land and Natural Resources, of the State of Hawaii, has jurisdiction as to the summit of Mauna Kea, which is on the island of Hawaii only if the island of Hawaii was acquired by said Joint Resolution of 1898, known as the "Newlands Resolution," which the United States claims as the basis for both sovereignties over the Hawaiian Islands and the ownership of government lands of the former Kingdom of Hawaii after July 7, 1898.

The Joint Resolution of 1898 did not acquire the Island of Hawaii, for a number of reasons. First, a joint resolution as a mere act, or bill of Congress has no power to acquire the territory of another foreign, independent and sovereign nation. As of 1898, Hawaii was a sovereign, independent and sovereign nation and not territory of the United States. Under the international law of that time, a nation could acquire territory of another sovereign nation by means of conquest, treaty of cession or by acquisitive prescription.

The United States did not conquer Hawaii, nor has ever made any claim that it acquired

⁴ "Joint Resolution to Provide for annexing the Hawai'i an Islands to the United States," 30 Stat 750 (July 7, 1898)

⁵ The 1915 notes to Section Two of the Organic Act read as follows:

"The Hawaiian group consists of the following islands: Hawai'i, Maui, Oahu, Kauai, Molokai, Lanai, Niihau, Kahoolawe, Molokai, 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."

However, these are merely notes, not the law itself, and were added in 1915, probably by Walter Frear, long after the effective date of the Organic Act and only after the problems with section two of the Organic Act became apparent.

Hawaii by conquest. Hawaii was not acquired by a treaty in that the Treaty of Annexation of 1897 failed. That treaty did not receive ratification by the United States Senate as required by the United States constitution. The doctrine acquisitive prescription, akin to the doctrine of adverse possession in real property law does not apply. Moreover, the United States has never claimed acquisitive prescription. The United States has always maintained that Hawaii was acquired by joint resolution.

Nonetheless, this position has been undergoing review. In 1988 the Justice Department provided an opinion by which it admitted it could not identify the constitutional power for the acquisition of Hawaii.⁶ Moreover, the State Department has had doubts about its position on

⁶ See "Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea," "Memorandum Opinion for the Legal Adviser of the Department of State," 12 U.S. Off. Legal Counsel 238 (O.L.C.) 1988 WL 391019 (October 4, 1988) (Douglas Kmiec, Esq.):

"This argument, [that Texas was precedent for the annexation of Hawai'i] however, neglected one significant nuance: Hawai'i 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).⁷ Moreover, as one constitutional scholar wrote:

The constitutionality of the annexation of Hawai'i, 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. Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 427 (2d ed. 1929).

"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 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 Hawai'i by joint resolution." *Accordingly, it is doubtful that the acquisition of Hawai'i can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.*"

the annexation of Hawaii. The official website of the Historian of the United States Department of State originally posted a description of the history of Hawaii admitting that the United States "annexed" Hawaii.⁷ Thus, as of today, that description has been deleted and replaced by the following statement:

"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."⁸

First, a joint resolution has no capacity to acquire the territory of another sovereign nation for such a claim violates the basic principle underlying international law of the equality of sovereignty of nations. Namely, Hawaii and the United States, regardless of their different size or military power, are deemed to possess absolute law making power over their own territorial realm. They are equal in sovereignty. The United States has no more power to acquire Hawaii by an act of its Congress then Hawaii has the power to acquire the United States

⁷ **"Milestones: 1866-1898 Annexation of Hawai'i, 1898**

America's annexation of Hawai'i in 1898 extended U.S. territory into the Pacific and highlighted resulted from economic integration and the rise of the United States as a Pacific power.

* * * *

Dole sent a delegation to Washington in 1894 seeking annexation, but the new President, Grover Cleveland, opposed annexation and tried to restore the Queen. Dole declared Hawai'i an independent republic. Spurred by the nationalism aroused by the Spanish-American War the United States annexed Hawai'i in 1898 at the urging of President William McKinley. Hawai'i was made a territory in 1900, and Dole became its first governor. Racial attitudes and party politics in the United States deferred statehood until a bipartisan compromise linked Hawai'i's status to Alaska, and both became states in 1959."

See Office of the Historian: United States Department of State--Milestones 1866-1898. at <https://history.state.gov/milestones/1866-1898/hawaii>. This older version was by obtained using the Wayback Machine software on the internet.

⁸ United States Department of State, Office of the Historian, Milestones: 1866–1898 The Spanish-American War, 1898 at <http://history.state.gov/milestones/1866-1898/spanish-american-war>, [Last Visited February 13, 2015] [Last checked October 13, 2016 1055 am HST]

by an act of its then legislative assembly.

Second, the legislative history of the Joint Resolution, as found in the Senate and House debates on the Joint Resolution in 1898 make clear this very point.⁹ There were numerous Senators who stood to oppose the joint resolution on the grounds that it lacked the capacity to acquire Hawaii.¹⁰ This objection must be distinguished from the claim that the Joint Resolution

⁹ See the various objections of Senator William Allen of Nebraska:

"Mr. Allen: No foreign nation has the power, by its own legislation, or by its own courts to quiet title to or acquire the real property within the dominion of another sovereign. All nations possess equal powers of sovereignty. Sovereignty is the absolute law making authority of a government within its territorial boundaries. It must follow therefore, that if each government is absolutely sovereign within its own boundaries, it has absolutely no sovereignty beyond its own boundaries into the dominion of another sovereign.

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."

The Constitution and the statutes are territorial in their operation: that is, they cannot have any binding force or operation beyond the territorial limitation of the government in which they are promulgated. In other words, the Constitution and statutes cannot reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property there.

I hold, without further discussion that under the rules I have stated, the treaty-making power, which includes the power of acquiring additional territory rests exclusively in the President and the Senate, that it is an executive power which in its very nature cannot be exercised by the House of Representatives, and that the only method of exercising it is by treaty and not by joint resolution or act of Congress; and the case of Texas, when rightly understood, forms no exception to this rule; Therefore, an attempt to annex or acquire territory by act or joint resolution of the Congress is in violation of the letter, spirit and policy of the constitution.

Mr. President the Constitution must begin and end with the territorial jurisdiction of the United States: It cannot 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."

Statements of Senator Allen at 31 Cong. Rec. 6634, 6635, 6636, 6336, 6339 (1898) 55th Cong 2d Sess.

¹⁰ Senator White of California spoke for many when he declared:

was unconstitutional. The joint resolution was unconstitutional, as it amounted to an "end run" around the foreign affairs power as solely vested in the President and the Senate under the constitution, but the claim of lack of capacity is not merely a claim that annexation was "wrong" or "unconstitutional." Rather, the claim of taking another nation by a law of one's own nation is fantastic, impossible, and incoherent.

Third, the Joint Resolution did not have, as an actual effect, the imposition of sovereignty over Hawaii. The Republic of Hawaii never consented to the Joint Resolution. **The Republic of Hawaii repudiated the United States' claim that the joint resolution made Hawaii territory of the United States. Most pertinent to the case here, the United States claimed that the Joint Resolution also transferred title to the crown and government lands held by the Republic of Hawaii to the United States.**

Mauna Kea is former government lands of the Kingdom of Hawaii. Indeed, the Republic of Hawaii, by its President, Sanford Dole continued to effect grants and transfers of the crown and government lands to private parties, against the wishes of the United States, after the effective date of the Joint Resolution, July 7, 1898. President Dole was warned by the

"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 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 for remote from our shores, but also, to annihilate a nation, and 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."

Statement of Senator White of California 31 Cong. Rec. Appendix at 560 (June 21, 1960) See also the Statement of Senator Allen 31 Cong. Rec. 6636 (July 4, 1898), 55th Cong. 2d Sess.

"Mr. President, the Constitution must begin and end with the territorial jurisdiction of the United States: It cannot 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 Hawai'i an Islands; and so with statute or joint resolution."

United States to stop. The Attorney General of the United States issued an opinion that the Republic of Hawaii no longer had title or ownership to the crown and government lands. Nevertheless, President Dole continued to defy the United States and convey crown and government lands to private parties.¹¹

This practice so offended President McKinley that the President issued an executive order declaring that all such conveyances by President Dole, or the Republic of Hawaii, was "void ab initio" and that the Republic of Hawaii must return all monies received in exchange for such lands. Dole and the Republic of Hawaii continued to make grants well after the effective date of the Joint Resolution.¹²

The Attorney General of the United States issued a second opinion declaring the conveyances by the Republic after the effective date of the Joint Resolution to be void.¹³ The Republic still made conveyances. In effect, the Republic took the correct position that the Joint Resolution had no power to do either 1) impose the sovereignty of the United States over the whole of the Hawaiian Islands and 2) to claim ownership of the crown and government lands.

¹¹ "To The PRESIDENT. . . .the local government of the Hawaiian Islands are about to dispose at public auction of portions of the public lands of Hawai'i, and suggesting that in view of the provisions of the resolution of annexation, approved July 7, 1898, such action on the part of the Hawaiian authorities is without legal warrant or authority, . . .I have given attentive consideration to the question raised by these papers, and have no hesitation in advising you that the officers of the existing government in said islands have no authority to sell or otherwise dispose of the public lands in the Hawaiian Islands, and that any such sales or agreements to sell will be absolutely null and void as against the Government of the United States." Public Land-Hawai'i 22 U.S. Op. Atty. Gen. (1899)

¹² " Mr. President. By an Executive order bearing date of September 11, 1899, you directed 'that all proceedings taken or pending for the sale or disposition of public lands in the Hawaiian Islands shall be discontinued; and that if any sales or agreements for sale of said public lands have been made since the adoption of the resolution of annexation the purchasers shall be notified that the same are null and void, and any consideration paid to the local authorities on account thereof shall be refunded.'" Public Lands - Hawai'i 22 U.S. Op. Atty. Gen. 627 (1899)

¹³ "The existing government of Hawai'i very clearly, by the resolution of annexation, parted with all ownership of the public lands of Hawai'i. Indeed, it is scarcely an adequate *632 expression of the fact to say that it parted with the ownership, because that government, as a sovereign power, was dissolved and ceased to exist. Its public property, including lands, became vested in the United States, and only by the authority or direction of the United States could those lands be disposed of." Public Lands - Hawai'i 22 U.S. Op. Atty. Gen. 627 (1899)

Differences between the United States and the Republic of Hawaii over title to the government lands became so divisive that President Dole commissioned a special emissary, General A.S. Hartwell, a former judge, to proceed to Washington and present the position of the Republic that the United States did not own the crown and government lands. General Hartwell, in his October 31, 1899 letter to President McKinley states the position of the Republic. Namely, the only means of acquiring either sovereignty or ownership of the public lands was by the proper ratification of the Treaty of 1897.¹⁴

The Joint Resolution could not be held out as a substitute for ratification. This was made clear in the Treaty of 1897 under article VII. Finally, the terms of the Treaty and the Joint Resolution vastly differed such that never was a "meeting of the minds," between both countries, as to the terms and conditions of annexation. Thus, in his letter¹⁵ Hartwell writes that the Joint Resolution is merely a statute, an act, not a treaty¹⁶ and the terms of the Joint Resolution differ substantially from the terms of the Treaty.¹⁷ The refusal to accept

14

¹⁵ "Washington D. C. October 31, 1899

To the President

Sir

". . . . on behalf of the Government of the Republic of Hawai'i, I have the honor, very respectfully, to request a reconsideration of the Executive Order . . . directing that: *That all [sales] of public lands in the Hawaiian Islands shall be discontinued; and that the. that the same are null and void and any consideration paid . . . shall be refunded** * * *Sales of public lands, or any other governmental acts by the Hawaiian Government . . . cannot, as I respectfully submit, properly be called in question. . . ." See letter of A.S. Hartwell to President McKinley of the United States, October 31, 1899 (Hawai'i State Archives)

¹⁶ "A treaty between sovereign states is unlike a statute; the former requiring an exchange of ratifications the latter taking effect either according to its provision or under the general provisions of municipal law." See letter of A.S. Hartwell to President McKinley of the United States, October 31, 1899 (Hawai'i State Archives)

¹⁷ "The Treaty in its first article declares that "all the territory of and appertaining to the Republic of Hawai'i is hereby annexed to the United States of America under the name of the Territory of Hawai'i;" thus securing to Hawai'i a distinct political status which is not secured by the wording in the Newlands resolution... The Newlands resolution provides for such commission to recommend to Congress such legislation concerning the "Hawaiian Islands." I mention these things because I think that they show that the statute in matters of doubt ought to receive a construction in favor of the results which would naturally have followed the

"annexation" as unilaterally proclaimed by the United States ended only because of the chaos created by clash between two legal and political systems vying for control over the lands, economy, and courts of Hawaii. The Republic of Hawai'i never gave in, never consented and maintained its system of involuntary servitude, un-constitutional under the laws of the United States, its own foreign affairs, and continued to enter into new treaties after the effective date of the Joint Resolution. The Republic of Hawaii, however, was no match for the military might and political and economic weight of the United States. The economy of Hawai'i collapsed after the Chinatown fire of 1898. The chaos and confusion created an interregnum or state of affairs where the confusion over which law applied, Hawaiian or American, brought civil affairs, the economy and the application of the laws to a standstill. A report to Congress stated that Hawaii was in a state where there was "no law," it was an "interregnum."

Meanwhile, it has become apparent that there is much doubt of the extent of the power granted to the local government by the provisions of the joint resolution, and that in many important respects there is something like an interregnum in Hawaii. Many doubtful questions of admiralty and maritime jurisdiction have arisen as well as of criminal procedure, rendering it uncertain whether there is any tribunal for the decision of important questions affecting property, and any existing method by which criminals may be indicted or legal juries empanelled for their trial.¹⁸

The United States took advantage of this melt-down. The Republic of Hawaii could not solve the problem for legislation passed by the Republic would not resolve the confusion so long as the United States and President McKinley insisted that the Joint Resolution had bequeathed to the United States both the sovereignty over the Hawaiian Islands, and title to the crown and government lands. The Republic of Hawaii was thus hopelessly out-gunned. The United States had the military power to enforce its will and it did. More apropos, only the Congress of the United States had the clout to enact legislation that could be enforced, by the United States, by its monopoly on the legitimate use of police power and violence. Thus, the Republic of Hawaii came to an end, not by ceding Hawaii to the United States by treaty or consenting, either in writing or by deed to the terms of the Joint Resolution. The

wording the treaty." See letter of A.S. Hartwell to President McKinley of the United States, October 31, 1899 (Hawai'i State Archives)

¹⁸ H.R. Rep. No. 305, 56th Cong. 1st Sess. (February 12, 1900) pages 4 and 5

United States acquired Hawaii, its sovereignty and its crown and government lands by its superiority in power. There has been no lawful treaty of cession ever. Many claim the Hawaiian Islands are occupied. The very inability of the State of Hawaii to prove it has territorial jurisdiction over Mauna Kea as well as the States' inability to present a clean chain of title to lands at the summit of Mauna Kea are proof that the interregnum of 1899 has never ended.

The battle of wills continues still today. The Republic of Hawaii has been replaced by the protectors of Mauna Kea. If any protectors are arrested on the summit of Mauna Kea hereafter, the County Prosecutor of Hawaii or the State Attorney General must first prove that such arrests occurred within the State of Hawaii--as defined as "those islands acquired by the joint resolution of 1898."

Since such arrests would constitute a criminal proceeding then the County Prosecutor must prove that the element of the crime, that the accused was within the jurisdiction of the State of Hawaii, is true beyond any reasonable doubt. In light of what has presented, from the vehement objections in the Senate in 1898,¹⁹ the rejection of the Joint Resolution by the

¹⁹ See Statements of Senator White at 31 Cong. Rec. Appendix at page 551 (1898):

"Mr. White: The resolution thus refers truly to the grant contained in the Hawaiian constitution, but utterly disregards the facts when it assumes that an unratified treaty means anything. I continue the quotation:

That said cession is accepted ratified and confirmed.

What cession, Senators? Has any cession been made? Is there a lawyer upon either side of this Chamber who is willing to say that there has been a grant, a cession by Hawai'i of Hawai'i? Can a cession be made when a proposition emanates from one party unaccepted by the other? Is there anyone who has regard for those attainment which he possesses who will claim that such contract has been made? Is there any doubt about it?

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

Mr. President, what are we asked to do? The resolution which has been presented comes from the House of representatives and is but a repetition of the resolution prepared by the Committee on Foreign Relations of this body, and is to my mind upon its surface irrespective of the constitutional questions involved, I was about to say absurd in its inaccuracy.

Republic of Hawaii in 1898,²⁰ and the Justice Department Opinion of Douglas Kmiec in

Mr. White: There is no clause in the Constitution of the United States that provides for the acquisition of territory by joint resolution of Congress unless it be one single provision, and that is that the Congress may admit new States into the Union, that it was not limited to territory belonging to the United States, but that territory belonging to a foreign power might be admitted into the Union as a State.

Mr. White: 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. Whence do acts of Congress go? Upon whom do they operate? Upon the people of the United States.

Mr. White: They [Joint Resolutions] are impotent to affect the title. They are impotent to affect the title or status of property of those who live upon alien soil.

Mr. President, how can a joint resolution such as this be operative? What is the legislative jurisdiction of Congress? Does it extend over Hawai'i? 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. Hawai'i is foreign to us. We base our jurisdiction upon a falsehood desired to be made conclusive in a resolution the verity of which it is said cannot be attacked however groundless it may be. The committee in this document assert that a cession has been accomplished, because they well know that we have otherwise no power to act."

²⁰ See Letter of A.S. Hartwell, Special Emissary to President of the United States from the Republic of Hawai'i wrote in his October 31, 1899 letter to President McKinley his profound disappointment in the United States that the United States would simply pronounce that the United States had title to the government and crown lands by the congressional enactment of the Organic Act. The Organic had no power whatsoever to acquire the crown and government lands. The use of an act of Congress to acquire the Crown and Government lands, without the consent, or a treaty with the Republic of Hawai'i, was to commit the same crime as was committed by the Joint Resolution.

"Upon the enactment of the Newlands resolution [Joint Resolution] in the place of a ratified treaty, [Treaty of 1897] . . . I respectfully submit that something was required in the nature of a ratification. . . . The inchoate [not ratified] treaty provided in its seventh article for an exchange of ratifications "at Washington as soon as possible."

Until such exchange, or something equivalent to it, there could be no cession accomplished by mutual agreement.

The Senate Bill "To provide a government for the Territory of Hawai'i," introduced December 6, 1898 [The Organic Act] . . . evidently recognized August 12, 1898 as the date of the transfer of the sovereignty of the Hawaiian Islands to the United States, [and] by its

1898,²¹ as well as the enormous energy and efforts spent by Congress in disguising the boundaries of the State of Hawaii, it is safe to say that the "doubt" as to whether the Prosecutor can prove the element of a defendant-protectors "presence" within the State of Hawaii as formally defined by the State Constitution and federal law, is way beyond a reasonable doubt.

One might easily say that the State has no evidence at all to offer that it has jurisdiction over the summit of Mauna Kea. It has no chain of title to demonstrate a clean set of conveyances leading back to the Mahele.

Thus contrary to the common belief of many persons today, the Republic of Hawaii did not consent to the Joint Resolution. The Republic of Hawaii did ratify the earlier Treaty of Annexation of 1897. The Republic of Hawaii never participated in the drafting of, or consented to the terms of the Joint Resolution. This is made clear in the position Hartwell took in Washington, as so clear stated in his letter of October 31, 1899 to President McKinley. Hartwell states that the only basis by which the United States could acquire sovereignty over Hawaii, or acquire title to the former crown and government lands of the Kingdom of Hawaii, was to ratify, as required by the Constitution of the United States the earlier Treaty of 1897. Such ratification required a two-thirds approval by a majority of the Senators present.

After the Treaty of 1897 had been negotiated between the Republic of Hawaii and the United States on June 16, 1897 the terms of the treaty were ratified by the Republic of Hawaii, as required by Article VII of the Treaty of Annexation. On the other hand, there was massive opposition to the Treaty by the Hawaiian people, and by Queen Liliuokalani in the fall of 1897. A special session of the Senate was convened to consider the Treaty. The administration could not gain the two thirds super majority it needed for ratification. The treaty was never even brought before the Senate for a vote. The Treaty lay dormant before the Senate until the Spanish American War began in April of 1898. McKinley claimed that he needed Hawaii as

provision section 101 [the transfer] . . . the public domain known as the Crown Lands . . . [as of] the twelfth day of August eighteen hundred and ninety-eight. [wherein prior to that time] [said lands were] the property of the Hawaiian government."

²¹12 U.S. Off. Legal Counsel 238 (O.L.C.) "Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea," "Memorandum Opinion for the Legal Adviser of the Department of State," 1988 WL 391019 (October 4, 1988) (Douglas Kmiec, Esq.)

base to invade the Philippines to defeat the Spanish. His advisor, John W. Foster proposed that instead of ratifying the treaty, that the United States unilaterally draft a joint resolution, which, as a mere act of Congress only required a majority vote of the House and Senate. Both houses would eventually pass the Joint Resolution but only over substantial objection in the Senate. The Resolution was signed into law on July 7, 1898. The Republic of Hawaii never ratified, nor consented to the terms of the Joint Resolution.

Prior to 1898, there was no question as to the boundaries of Hawaii and as to whether Mauna Kea or the Island of Hawaii was within the dominion of the Kingdom of Hawaii, the Provisional Government (1893-1894) or the Republic of Hawaii (1894-1900). In 1846 Kamehameha III proclaimed the dominion of the Kingdom so as to clearly include the main islands, which were named, as well as the channel waters between such islands.²² The Provisional Government and the Republic of Hawaii simply reaffirmed that their dominion was the same as that of the Kingdom of Hawaii.²³ Thus, there would have been no question prior to

²² Statute of Kamehameha III 1846.

'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 Hawai'i, 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.

'SECTION III. All captures and seizures made within said channels or within one marine league of the coast, shall be deemed to have been made, and shall be deemed to have entered in His Majesty's waters. The civil and criminal jurisdiction shall be coextensive with the one maritime league, and the interisland channels herein defined. And the right of transportation and transshipment from island to island, shall exclusively belong [**20] to Hawaiian vessels duly registered and licensed to the coasting trade, as in the two succeeding articles prescribed.'

n9 See Civil Aeronautics Board V Island Airlines 235 F Supp 990 (D, Haw. 1964).

²³ Article 15. Territory. "The Territory of the Republic of Hawai'i shall be that heretofore constituting the Kingdom of the Hawaiian Islands, and the territory ruled over by the Provisional Government of Hawai'i, or which may, hereafter be added to the Republic." Constitution of the Republic of Hawai'i, Article 15 (Hawai'i State Archives)

1898 that the governments prior to 1898 had jurisdiction over the government lands of Hawaii, such as that of Mauna Kea.

However, there was no cession of sovereignty from the Republic of Hawaii to the United States in 1898. The Joint Resolution lacked the capacity to convey such sovereignty. There has been a long history of doubt as to capacity of the Joint Resolution to acquire Hawaii. Such includes doubts raised by officials of the United States as well as by scholars²⁴ and others.

Most of all, there was substantial opposition in the United States Senate based on the grounds that a joint resolution was incapable of so conveying sovereignty. Only two Senators stood in June of 1898 to explain how the Joint Resolution could acquire the Hawaiian Islands.

The first, Senator Foraker claimed that the Joint Resolution was actually the substitute ratification of the Treaty of 1897 which the Senate failed to ratify by a two-thirds super majority. Senator Lindsay reminded Senator Foraker that Article VII of the Treaty of 1897²⁵ required ratification by a two thirds super-majority of the Senate.²⁶ Article VII of the Treaty,

²⁴ "The constitutionality of the annexation of Hawai'i, 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." W. Willoughby, *The Constitutional Law of the United States*, sec. 239, page 427 (2d ed. 1929).

²⁵ "Article VII. This Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate on one part; and by the President of the Republic of Hawai'i in accordance with the Constitution of said Republic, on the other; and the ratifications hereof shall be exchanged at Washington D.C., as soon as possible. Treaty of Annexation between the Republic of Hawai'i and the United States." (failed for lack of ratification by the United States) (June 16, 1897)

²⁶

Mr. Foraker: . . . The treaty that was negotiated between this Government and Hawaiian Republic has never become treaty. It has been simply negotiated. It will be a treaty if it shall be ratified, and not otherwise. Until that moment of its ratification, there is no contract between Hawai'i and the United States.

* * * *

Mr. Lindsay. If it will not disturb the senator, I should like to present this idea to him.

agreed to by the United States, compelled the United States to ratify the treaty as required by Article II of the United States Constitution and that there be a later exchange of ratifications in Washington D.C.

Senator Foraker moved to an argument that the Joint Resolution, albeit a unilateral act of the United States, was a treaty. It was a kind of treaty in which only one party or nation need sign, as the other, in this case Hawaii "died" or ceased to exist upon the conclusion of such a treaty.²⁷ Senator Foraker eventually saw the error of his ways and admitted that the United

Mr. Foraker. Yes.

* * * *

Mr. Lindsay. Article 7 of the treaty provides:

"This treaty shall be ratified by the President of the United States by a with the advice and consent of the Senate on the one part."

I wish to ask the Senator whether a joint resolution, concurred in by the two houses but passed through the Senate by less than a two thirds majority can be treated as equivalent to the ratification of a treaty by the President of the United States by with the advice and consent of the Senate?

Mr. Foraker. It is not precisely the same thing, but the legal effect of the whole transaction is necessarily the same, according to the view I entertain of ht power of Congress with respect to that particular mater because the result is an absolute cession of the territory belonging to the Republic of Hawai'i and an absolute acceptance of it on the part of the United States. Now I shall show why that is so.

Mr. Lindsay. After this joint resolution shall have been adopted and approved by the president and presented to the Hawaiian authorities I ask the Senator if they will not have a perfect right to refuse to accept the benefit if the joint resolution upon that ground that a treaty has not been ratified by the President, by and with the advice and consent of the Senate.

Mr. Foraker. Undoubtedly they would have a right to ignore all the action that they took previously having referred to the negotiation and ratification of the treaty. They could treat this whole question de novo and take action with respect to this. II do not know that anybody ever contended for the contrary.

Statements of Senators Lindsay and Foraker, 31 Cong. Rec. 6339 (1898)

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

States could not annex Hawaii by a Joint Resolution.²⁸

The remaining Senator to offer an explanation of how the joint resolution could acquire the Hawaiian Islands.²⁹ Senator Stewart ultimately claimed that the United States could annex

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.

Mr. Foraker: But one party is dead and the contract cannot 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 Hawai'i become merged into the United States.

²⁸ Mr. Allen: When we pass this resolution and it becomes a law, the transaction is consummated except the delivery of the property.

Mr. Foraker: It would have to be accepted on the other side. This is not the ratification of a treaty. We cannot by a joint resolution annex Hawai'i.

(Statements of Senators Allen and Foraker) See 31 Cong Rec. 6336 (1898)

²⁹ Senator Stewart claimed that the resolution, by itself, could acquire the Hawaiian Islands. He asserted that the Joint Resolution would become law. The President of the United States must enforce all laws. That obligation made the joint resolution *self-executing* legislation. Thereupon, Senator Donelson Caffrey of Louisiana challenged Stewart by 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.

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 was 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?

"anything" by a joint resolution. His argument that the United States Congress could pass anything by means of a joint resolution. The Congress could even move the border 300 miles south into the Mexico.

Senator Stewart argued that the Constitution requires the President of the United States to "faithfully execute"³⁰ all laws, the President would have to enforce that resolution. No, the President would not have to enforce a law invading Mexico. The President would have to invoke the war powers. Senator Stewart was thus confusing the war powers with the power to legislate "within" the United States by means of joint resolution.

There is no explanation nor rationale that explains how the joint resolution could acquire the Hawaiian Islands. The Republic of Hawaii after the effective date of the Joint Resolution resisted the imposition of United States sovereignty, United States law and the Constitution until the civil order of the Republic collapsed in chaos.

It came to be that the judges of the Republic of Hawaii would apply the criminal law of

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 [Hawai'i] 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. 31 Cong. Rec. 6369 (1898) (Statements of Senators Caffrey, Stewart, Teller and Allen).

³⁰ Arguably the President would have to enforce the Joint Resolution as part of his duty to "take care that the laws be faithfully executed,"

"He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

U.S. Constitution Article II, Section 3, Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

the Republic of Hawaii to convict someone such as Mr. Edwards, accused of sodomy.³¹ However, since that conviction violated the Bill of Rights of the United States Constitution, federal judges newly appointed by McKinley in Hawaii would release Edwards upon the application for a writ of habeas corpus.³² The sheriffs of the Republic would immediately re-arrest someone like Edwards sending him back to jail. Upon which, Edwards would again appeal to the U.S. Federal Judges, applying the Constitution of the United States, unlike the judges of the Republic, and seek release by means of a habeas corpus.

The Republic did not act as if it were a territory of the United States. Dole was still called a "President" instead of "Governor." The Republic of Hawaii maintained its Ministry of Foreign Affairs, its Foreign Minister, and engaged in diplomatic relations with other sovereign nation, including negotiations with Great Britain as to damages resulting from the 1893 overthrow,³³ as well entering treaties with other nations, such as Japan.

The Republic continued to register sailing vessels under the Hawaiian, not the United States flag.³⁴ The Republic ignored the application of the Chinese Exclusion Act then in force in the United States. Hawaii was not part of the United States. The Joint Resolution had no effect. Finally, the system of contract labor on the sugar plantations, a form of involuntary servitude abolished in the United States continued in Hawaii even after the effective date of the Joint Resolution.

When certain contract labors brought suit all the way up to the Supreme Court of the Republic of Hawaii, arguing that their contracts with sugar companies were void as abolished

³¹ Republic of Hawai'i v. Edwards, 12 Haw. 55 (1899) Cited at Page 20.

³² Ex parte Edwards, 13 Haw. 32 (1900) Cited at Page 20.

³³ International Law-Hawai'i-Court of Claims 22 U.S. Op. Atty. Gen. 583 (1899) (. . . all such claims should first be received by the Department of State, through diplomatic channels. . .)

³⁴ "The issuance of registry to vessels entitling them to carry national colors is an act of sovereignty, although the register itself is not a document required by the law of nations as indicative of a ship's national character; for this can be shown in other ways, as, for instance, by a consular certificate attached to the bill of sale of a vessel to an American citizen. This is evidence of national character and entitles the vessel under the consular regulations to the protection of the flag. Sea letters are also at times evidence of the national character of a vessel. "Vessels-Registers-Hawai'i, 22 U.S. Op. Atty. Gen. 578 (1899)

by the thirteenth amendment which must be, by the terms of the thirteenth amendment, somehow applicable in Hawaii, they lost. The Supreme Court of the Republic of Hawaii in 1899 ruled that the thirteenth amendment of the United States constitution was not applicable in Hawaii.³⁵

The Court held that the thirteenth amendment did not apply to Hawaii under either its language that involuntary servitude was abolished in "the United States," or "within the jurisdiction," of the United States.³⁶ In effect, according to the Justices of the Supreme Court of the Republic of Hawaii in 1899, Hawaii was neither. It was not territory of, or within, the United States. Moreover, it was not even under the jurisdiction of the United States, even if not actual United States territory.

This undermined the theory of many that if the Joint Resolution did not actually acquire Hawaii for the United States it did provide Congress with the power to later annex Hawaii in the Organic Act, two years later. That reasoning, is, of course, faulty, for one cannot bootstrap the power to acquire Hawaii by an act of Congress when Congress has no power to acquire Hawaii in the first place. Nonetheless, many persons would believe the "bootstrap" theory: The Joint Resolution did not acquire Hawaii, it merely "provided for," or "paved the way" for the later acquisition of Hawaii by vesting Congress with the power of annexation.

This claim is made by the State of Hawaii as to its title to government lands, including Mauna Kea. Namely, while the State cannot demonstrate a clean chain of title by which the United States received title to government lands in 1898 by the Joint Resolution, the State of Hawaii today claims that the Organic Act did is the basis of its perfect title to the crown and government lands. Yet, if one act of Congress, the Joint Resolution has no power to acquire, by its own act, title to the public lands of the Republic of Hawaii, how can another, later act of Congress acquire such power?

Thus, the Joint Resolution is critical to this case in two ways. First, the fact that the joint resolution could not acquire the Hawaiian Islands as territory of the United States led to an unlawful seizure of the Hawaiian Islands, and the unlawful assertion of sovereignty and

³⁵ Honomu Sugar Co. v. Sayewiz, 12 Haw. 86 (1899)

³⁶ **Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Thirteenth Amendment, United States Constitution.

jurisdiction over the Hawaiian Islands. Second, the Joint Resolution is also the basis by which the United States claims title to government lands. The State of Hawaii claims that by the Joint Resolution or by the Organic Act there was a valid conveyance of such lands to the United States. This myth can be seen in the first two clauses of the joint resolution itself.

In the first clause of the joint resolution, the United States Congress claims that the government and nation of Hawaii already ceded both sovereignty over all lands, and title to the government lands by the Constitution of the Republic of Hawaii, of 1894:

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

In the second clause of the Joint Resolution of 1898, the United States purports to accept this offer of sovereignty and title to government lands:

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

There are two clear falsehoods at play.:

First, it is not the Republic of Hawaii which is making an offer of either sovereignty over Hawaii, or title to the government lands. It is the United States. The United States, not the Republic of Hawaii wrote and enacted the joint resolution. The Republic of Hawaii had nothing to do with the Joint Resolution. The Republic did not ratify or consent to the Joint

Resolution. It is clear, from the letter written by General Hartwell to President McKinley that the Republic repudiated the terms of the Joint Resolution. The Republic also refused to consider the Joint Resolution binding. Thus, President Dole gave and granted away lands after the effective date of the Joint Resolution. The Republic acted in almost all ways to deny that the Joint Resolution had any effect.

Second, the Joint Resolution claims that by the Constitution of the Republic of Hawaii, Hawaii offered both its sovereignty and title to the government lands, such as Mauna Kea to the United States. There is nothing in the Constitution of the Republic that makes such an offer. At best, one might single out a provision in the Constitution of the Republic of Hawaii that merely states that the President of the Republic has the power to enter into a treaty with the United States for commerce or political union.³⁷

II. The Legal Obligations of Mandatory Judicial Notice and the State's Burden of Proof

In light of the above, the fact that the Joint Resolution was powerless to acquire either sovereignty or title to public lands results in two conclusions. First, that it is presumptively the case that the United States never acquired the Hawaiian Islands and thus has no sovereignty or jurisdiction over Hawaii.³⁸ As such, neither the State of Hawaii or the Board of Land and Natural Resources has the power, as sovereign, over Mauna Kea, as to its use, or leasing it to the Consortium.

Second, if the Joint Resolution was powerless to acquire sovereignty over Hawaii,

³⁷ “The President with the approval of the Cabinet is hereby expressly authorized and empowered to make a Treaty of Political or Commercial Union between the Republic of Hawai’i and the United States of America subject to ratification of the Senate.” Article 32 of the Constitution of the Republic of Hawai’i (July 4, 1894).

³⁸ The most fundamental jurisdiction is that of territorial jurisdiction. For example, in a case to quiet title, or as to eminent domain, an *in rem* case so to speak, if the moving party cannot prove the land is within the jurisdiction of the state, the federal and state courts lack subject matter jurisdiction. The lack of subject matter jurisdiction goes to the very power of the court. Lack of subject matter jurisdiction can be raised at any time, even after judgment. Any party can raise the issue and the court must sua sponte raise the issue and dismiss if it is aware that it lacks subject matter jurisdiction because the land is not within the courts territorial jurisdiction. *Durfee v. Duke* 375 U.S. 106 (1963) (“the Nebraska court had jurisdiction over the subject matter of the controversy only if the land was within in Nebraska”).

presumably the Joint Resolution was powerless to acquire title to the government lands upon which Mauna Kea stands. In both cases, the failure of the Treaty of 1897, followed by the failed substitution of a joint resolution in its place results in the fact that the State both lacks jurisdiction to issue the permit herein, and the University of Hawaii at Hilo cannot lease the summit of Mauna Kea, as it has no ability to prove a clear chain of title that bridges the gap of 1898.

These conclusions may not appear compelling. Nonetheless, it is compelling that the Hearings Officer, and any Court considering the issuance of the permit enforce three rules or principles of law that are clearly applicable and binding.

First, under the Hawaii Rules of Evidence, which are laws of the State of Hawaii, this tribunal and any that may hear this matter is bound to take judicial notice of territorial limitations as set forth in the boundary descriptions found in the Act of Admission, the State Constitution and the Organic Act. All three provisions are State or Federal laws. Under Rule 202(b)³⁹ it is mandatory that a court, and that would include this tribunal or contested case, must apply federal and state law. Hawaii is unique in requiring such as a matter of judicial notice but it is self-evident, that all judges, all lawyers, all military personnel take an oath of allegiance to uphold the Constitution.⁴⁰

³⁹ H.R.S. Section 626-1. Hawai'i Rules Evidence 202(b):

"Rule 202. Judicial notice of law

(b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Hawai'i Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State." (1980) Cited at Page 2, 4 and 14. Cited in Footnote 9.

⁴⁰Oath required by the Hawai'i Supreme Court

" I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution and laws of the State of Hawai 'i, and that I will at all times conduct myself in accordance with the Hawai 'i Rules of Professional Conduct."

Oath Required as to all State Public Officials

Constitution of the State of Hawai'i, Article XVI Section 4: Oath of Office.

Section 4. All eligible public officers, before entering upon the duties of their respective

Such an oath entails upholding the laws of the United States. No one is claiming that application of international law at this point. There are professional obligations that both bench and bar must acknowledge.⁴¹ The only claims here are the clear and direct obligation to obey

offices, shall take and subscribe to the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawai'i, and that I will faithfully discharge my duties as to best of my ability."

As used in this section, "eligible public officers" means the governor, the lieutenant governor, the members of both houses of the legislature, the members of the board of education, the members of the national guard, State or county employees who possess police powers, district court judges, and all those whose appointment requires the consent of the senate.

Oath Required as to all enlisted personnel and commissioned Army Officers of the United States

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." (Title 10, US Code; Act of 5 May 1960 replacing the wording first adopted in 1789, with amendment effective 5 October 1962).

⁴¹ Haw. 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 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.

and apply the laws of the United States and the State of Hawaii.

Second, both State and Federal law declare that the state's power to issue a permit in this case, and the state's assumption that it has clear title to the summit of Mauna Kea, as passed to the University of Hawaii, are based on the laws that state that the State of Hawaii consists of the islands acquired by the joint resolution of 1898. Issues as to whether or not the state territorial jurisdiction over a person, or particularly over real property, are issues of subject matter jurisdiction.

Any judicial or Board decision wherein there is no territorial subject matter jurisdiction is absolutely void and of no effect. A challenge to subject matter jurisdiction, under the Hawaii Rules of Civil Procedure, as applicable herein, can be made at any time, before a judgment, before a hearing, during a hearing, during a trial, after a trial, after judgment, and indeed, years after a judgment. A judgment lacking subject matter jurisdiction is wholly void, of no effect.

Third, the burden rests upon the moving party:⁴² the Consortium applying for the permit. In short, it is the State that has the burden of proving that the island of Hawaii, upon which Mauna Kea sits, was acquired by joint resolution by the United States in 1898. Only if the State can demonstrate how a joint resolution can acquire the island of Hawaii will the State and the Board of Land and Natural Resources have territorial subject matter jurisdiction. Equally compelling, the State has the burden⁴³ of showing that it has perfect title to the summit

See also 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 averse 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.

⁴²Jeffrey S. Gutman, 2.2. "Pleading Requirements," Federal Practice Manual for Legal Aid Attorneys, Sargent Shriver National Center on Poverty Law, *available at* www.federalpracticemanual.org/node/8 (last accessed May 7, 2015).

⁴³ Opinion of the International Court of Justice, See Case Concerning Sovereignty over Pedra

of Mauna Kea. This it must do despite the lack of any conveyance, by treaty or deed, from the Republic of Hawaii to the United States in 1898.

The party claiming title or claiming sovereignty by way of title has the burden of proving such title.⁴⁴ This means that the State must prove that in 1898 that the United States acquired sovereignty over the Hawaiian Islands and that the State acquired perfect title to the government lands upon which Mauna Kea rests.⁴⁵

The question of subject matter jurisdiction and of clear title to property are always in issue.⁴⁶ A judgment rendered where such is lacking has no force in effect. This would be true

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."

⁴⁴ 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).

⁴⁵ 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)"

of a tribunal, court, or land board of Hawaii issuing a permit to build a telescope on Mount Fuji or on Kilimanjaro. Such was precisely the dispute in 1898 and 1899 between President Dole and President McKinley. Hawaii was in 1898 a foreign country to the United States. Dole claimed the United States could not acquire title to the government lands by a mere Joint Resolution. Since that time, there has been no cession by treaty of Hawaii to the United States. There has been no conveyance of the government lands of the Kingdom of Hawaii, as held by the Republic of Hawaii to the United States, by which such was transferred to the State of Hawaii and ultimately the University of Hawaii.

The burden of proving that Hawaii is no longer a foreign country, as President Dole asserted, is on the moving party. The State of Hawaii also bears the burden of proof that the State, by its University, has perfect title to the sacred summit of Mauna Kea.

Respectfully yours,

Williamson Chang
Professor of Law

⁴⁶Haw. R. Civ. Proc. 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.*

