

Darkness over Hawaii:  
The Annexation Myth Is the Greatest Obstacle to  
Progress

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ABSTRACT

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

*Before moving ahead, Native Hawaiians must study and learn about the various forms of government throughout the world. Others around us know little about our real history. We, too, may not know our full history. We must gather more knowledge before making the momentous decisions which are the ostensible objectives of this convention. Justice Scalia, an extremely educated and esteemed constitutional scholar is an example of how little the world knows about the history of Hawai‘i.*

*Recent remarks by Justice Scalia reveal the extent and*

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*consequences of the campaign of deception asserting that Hawai‘i was acquired by a joint resolution. This claim is not only false. It is impossible. The inability of the Joint Resolution to acquire the territory of the sovereign nation of Hawai‘i was emphatically pointed out during the Senate debate on the Joint Resolution in the summer of 1898.*

*Justice Scalia is not the only one deceived. The Hawai‘i 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 Hawai‘i. Truth-telling through re-education of Native Hawaiians—and the rest of the world—is just beginning. One must not underestimate the tremendous need for knowledge that must precede such an enormous task as nation-building*

*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 the current United States administration in Washington push us into tribal status. The path we take must be fully informed. Native Hawaiians must fully comprehend all the advantages and disadvantages of Federal Recognition as a Tribe.*

#### I. INTRODUCTION: THE MYTH THAT HAWAI‘I WAS ANNEXED BY THE UNITED STATES

The world, particularly the United States of America, is deeply ignorant about the history of Hawai‘i. In 1897, the U.S. failed to ratify a treaty to acquire Hawai‘i.<sup>1</sup> A year later, the U.S. turned to legislation, a Joint Resolution of Congress, to annex Hawai‘i.<sup>2</sup> There is a pervasive belief among Americans that Hawai‘i was acquired by this joint resolution of Congress in 1898, and thus is presently the territory [and a State] of the U.S.

This is the official view of the U.S. with respect to the status of Hawai‘i.<sup>3</sup> Based on this claim, the U.S. exercises sovereignty and jurisdiction over the Hawaiian Islands as American territory.

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<sup>1</sup> WILLIAM ADAM RUSS, JR., *THE HAWAIIAN REPUBLIC (1894-98) AND ITS STRUGGLE TO WIN ANNEXATION 178-227* (1961).

<sup>2</sup> See *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (1898)*, available at [www.ourdocuments.gov/doc.php?flash=true&doc=54](http://www.ourdocuments.gov/doc.php?flash=true&doc=54).

<sup>3</sup> The United States Department of State, Office of the Historian states the following about the acquisition of the Hawaiian Islands: [“officially declares that Hawaii was acquired by a joint resolution.”] [replace starting with the word “states”][delete colon]

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

This paper will show that these claims are false. Since 1898, the governments of the U.S. and the State of Hawai‘i have deliberately misled the people of Hawai‘i, the U.S., and the world. Current scholarship in Hawai‘i, is proving these claims false.<sup>4</sup> Yet, the grip of a century of deception, denationalization, and deliberate ignorance of the obvious 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 Hawai‘i 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.<sup>5</sup> That debate came to be known as the

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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]. It should be noted that the website describing the Annexation of Hawaii was taken down in the fall of 2014 and replaced with the following notice to the public. This need for a revision of the history of Hawaii by the Official Historian parallels the emerging scholarship as presented by this article.

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.

United States Department of State, Office of the Historian, Milestones, Milestones: 1866–1898 Annexation of Hawaii, 1898, <http://history.state.gov/milestones/1866-1898/hawaii>. [Last Visited February 22, 2015 1:25 PM HST]

<sup>4</sup> See, e.g., THOMAS J. OSBORNE, ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM, (1998); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I (1999); HAUNANI-KAY TRASK: WE ARE NOT HAPPY NATIVES (2001); KAMANAMAİKALANI BEAMER, NO MAKOU KA MANA: LIBERATING THE NATION (2014); Williamson B.C. Chang, *Federal Jurisdiction*, 16 GOLDEN GATE U. L. REV. (1986); KEANU SAI, UA MAU KE EA-SOVEREIGNTY ENDURES: AN OVERVIEW OF THE POLITICAL AND LEGAL HISTORY OF THE HAWAIIAN ISLANDS (2011); Ke‘ōnu SĪ, *American Occupation of the Hawaiian State: A Century Unchecked*, HAW. J. OF LAW AND POL. (2004).

<sup>5</sup> The best source showing American opposition to annexation can be found in the Senate Debates themselves. See 31 Congressional Record pages 6141 to 6710 55th Cong. 2nd Sess. which would include citations to newspapers as well as the speeches of Senators. See the following as generally examining the debate over Hawaii and the global expansion of the United States in 1898: BARBARA W. TUCHMAN, THE PROUD TOWER: A

“Great Debate to Save the Older America.”<sup>6</sup> Yet, those American voices of opposition in 1898 have long been forgotten. Despite being such a major event, the debate over annexation, and the views of those who stood in opposition, have virtually disappeared from American history.<sup>7</sup>

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PORTRAIT OF THE WORLD BEFORE THE WAR, 1890-1914 (1966); ROBERT L. BEISNER, TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898-1900 (1968); WALTER LAFEVER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION 1860-1898, (1998); DAVID TRAXEL, 1898: THE BIRTH OF THE AMERICAN CENTURY (1999); WHITNEY T. PERKINS, DENIAL OF EMPIRE: THE UNITED STATES AND ITS DEPENDENCIES (1962); THOMAS J. OSBORNE, ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM, (1998); STANLEY KARNOW, IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES (1989); HENRY GRAFFE, ED., AMERICAN IMPERIALISM AND THE PHILIPPINE INSURRECTION (1969); MARGARET LEECH, IN THE DAYS OF MCKINLEY (1959); H. WAYNE MORGAN, WILLIAM MCKINLEY AND HIS AMERICA (1963); HOWARD BEALE, THEODORE ROOSEVELT AND THE RISE OF AMERICA TO WORLD POWER (1956); ERNEST MAY, IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER (1961); FREDERICK MERCK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A NEW INTERPRETATION (1963); RICHARD HOFSTADTER, MANIFEST DESTINY AND THE PHILIPPINES, *in* AMERICA IN CRISIS (Daniel Aron, ed., 1952); FRANK FRIEDEL, THE SPLENDID LITTLE WAR (1958); WILLIAM A. RUSS, JR., THE HAWAIIAN REPUBLIC (1894-98): AND ITS STRUGGLE TO WIN ANNEXATION (1961); AND RICHARD FRANKLIN PETTIGREW, THE COURSE OF EMPIRE: AN OFFICIAL RECORD (1920).

<sup>6</sup> “The debate in Congress over the joint resolution was, says Dennett, ‘One of the greatest . . . in American congressional history.’” RUSS, *supra* note 1, at 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. *Id.*

<sup>7</sup> Historians, even those who have concentrated solely on the annexation, almost universally conclude that the Joint Resolution constituted a successful annexation of Hawaii. Only recently have authors been successful in challenging the myth of annexation. *Compare* THOMAS J. OSBORNE, ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM (1998) (

“After Hawaii was brought into the Union, it was easier to acquire other dependencies even though the difficult process of treaty ratification was involved. This point is illustrated by the fact that the Hawaiian debate of the 1890s lasted more than five years and was terminated by the approval of a joint resolution because a treaty would not pass the Senate. However, within approximately seven months of the passage of the Newlands measure the United States acquired Guam, the Philippines, Puerto Rico and Wake Island.”);

WILLIAM A. RUSS, JR., THE HAWAIIAN REPUBLIC (1894-98) AND ITS STRUGGLES TO WIN ANNEXATION (1961) (“Hawaii was annexed at last, but the people of the islands could not know that fact for a week Secretary Day hastened to inform Minister Sewall and the Hawaiian Government that the islands were at last American ” “With this major difficulty solved, preparations were made for the formal transfer of the islands to the United States.”); BARBARA W. TUCHMAN, THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR 1890 TO 1914 (1963) (“Annexation of Hawaii was formally ratified on July 7, four days after the war in Cuba was brought to an end by a naval battle

Ignorance about the Great Debate is also pervasive in Hawai‘i. 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; while some favor the alternative: U.S. recognition of a limited number of Native Hawaiians as a Native American Indian Tribe. Such status as a federally recognized tribe offers Native Hawaiians few lands and few new benefits. Perhaps it might offer some legal protection against constitutional challenges—but that is not a sure thing. Recognition as a Tribe is far less than what Hawaiians deserve and far less than what the history of U.S.-Native Hawaiian relations demands in terms of reparations, restitution, or sovereignty.<sup>8</sup>

Yet, Native Hawaiians are just now 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 who sought to block tribal recognition virtually echoed the words of those Senators who sought to block annexation in 1898. During those summer hearings, Native Hawaiians rejected the Department of Interior’s proposals to promulgate rules by which Native Hawaiians would be administratively recognized as a Federally Recognized Tribe, because:

“The Joint Resolution was incapable of acquiring Hawai‘i. Only a Treaty could annex Hawai‘i. 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.”<sup>9</sup>

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off Santiago.”); GAVAN DAWES, *SHOALS OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS*, 290-91 (1968) (“President McKinley signed the resolution on July 7, and a week later to the day the news arrived at Honolulu. The annexationist press was delirious with excitement. The native Hawaiians were desperately gloomy. Liliuokalani, who had been on the American Mainland, came home sadly on August 2, ten days before the transfer of sovereignty was to take place. With this out of the way, the ceremony of transferring sovereignty could be held”); and LAWRENCE FUCHS, *HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY* 36 (1961); with COFFMAN, *NATION WITHIN: THE HISTORY OF AMERICAN OCCUPATION OF HAWAII‘I* (2009); NOENOE DE SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM*, 160 (2004); and Umi Perkins, *Is Hawai‘i an Occupied State?*, *THE NATION* (January 16, 2015), <http://www.thenation.com/article/194745/hawaii-occupied-state#>.

<sup>8</sup> See, e.g., Lisa Kubota, *Federal panel hears opposition to Native Hawaiian recognition plan*, *HAW. NEWS NOW*, June 23, 2014, at [www.hawaii-newsnow.com/story/25849763/native-hawaiians-express-anger-at-federal-govt](http://www.hawaii-newsnow.com/story/25849763/native-hawaiians-express-anger-at-federal-govt).

<sup>9</sup> Similarity between the 1898 opposition in the United States Senate and the opposition of Native Hawaiians to the Department of Interior hearings in the summer of 2014 can be seen in the videotaped DOI hearings, 15 in all, starting with the recording of

Native Hawaiians today should recognize that many Americans in 1898, particularly the Senators opposed to annexation during the debate on the Joint Resolution, stood by the Hawaiian people. The history of the 1898 debate and the history of the opposition to annexation have been forgotten today. The alliance between Native Hawaiians and Americans opposed to annexation is now part of the distant past. Thus, a new Hawaiian-American alliance seeking acknowledgment, reparations, or restoration of the sovereign status of Hawai‘i must now begin anew by re-examining the debate of 1898.

This article has three main parts. In Part II, I describe the “Great Debate to Save the Older” America, where Senators opposed to annexation filibustered, hoping to stave off the annexation of Hawai‘i. In Part III, I show that only two senators came forth to present arguments that the joint resolution had the capacity to acquire the Hawaiian Islands. Both Senators’ attempts failed because their arguments were rejected by the Senate as either nonsensical or illogical. In Part IV, I show that the most significant proof that Hawai‘i was acquired by a joint resolution is a myth, leaving a trail of subsequent problems. This most compelling proof of the joint resolution’s failure to annex Hawai‘i is found in the laws of the United States that define the territorial boundaries of the Territory of Hawai‘i in 1900 and the State of Hawai‘i in 1959. The Joint Resolution is not a Treaty and has no capacity to acquire the dominion or territory of a foreign, sovereign nation. Rather, the Organic Act of 1900,<sup>10</sup> which defined the boundaries of the Territory of Hawai‘i, and the plain language of the 1959 Act of Admission,<sup>11</sup> which defined the boundaries of Hawai‘i and admitted it as a State of the Union, explicitly and intentionally excluded the Hawaiian Islands from the dominion of the Territory and the State.

## II. THE GREAT DEBATE TO SAVE THE OLDER AMERICA—THE ATTEMPT TO BLOCK ANNEXATION

The speeches of U.S. Senators opposed to the acquisition of Hawai‘i as territory of the U.S. in 1898 constitute proof that America in 1898 was well aware that a Joint Resolution, a mere act of Congress, had no capacity to acquire the dominion of a foreign nation. The speeches of

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the first hearing and proceeding from there: “DOI Meetings on Native Hawaiian Recognition #1” at <https://www.youtube.com/watch?v=GkHoVjIcu0w> [last visited May 10, 2015]; *see also e.g.*, “Department of Interior vs. Hawaiian Nationals Testimony, Keaukaha, HI July 2, 2014” <https://www.youtube.com/watch?v=XDNsTiy16d4> [last visited May 10, 2015]. More of these hearings can be accessed on YouTube by searching: “DOI hearings Hawaiians.”

<sup>10</sup> An Act to Provide a Government for the Territory of Hawaii, Act of April 30, 1900, 31 Stat 141.

<sup>11</sup> 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.

those Senators also prophesied the harms that enactment of the Joint Resolution would cause both the constitution and the country. The Joint Resolution was not only incapable of acquiring Hawai'i; it was also unconstitutional in its avoidance of the power over foreign affairs directly delegated to the President. Moreover, the annexation of Hawai'i without a plebiscite of the people of Hawai'i violated the fundamental tenet that the legitimacy of government is derived from the consent of the governed.

How would an eminent constitutional scholar such as Justice Scalia, a man who has, perhaps, unconsciously, accepted the "myth of annexation," respond to the logical speeches of Senators who persistently pointed out the obvious: the joint resolution, an act of Congress, had no power to acquire the dominion of a foreign nation? To take this further, what would the consequences be, legal and otherwise, if all of the modern U.S. Senate, indeed all of America, were to hear the debate on the capacity of the Joint Resolution as it was argued during the summer of 1898?

#### A. *Justice Scalia on the Annexation of the Hawaiian Islands*

Justice Antonin Scalia of the U.S. Supreme Court recently aired his opinions on both the constitutionality and ability of the Joint Resolution of 1898 to annex the Hawaiian Islands. His statements to a Native Hawaiian student at George Washington University were recently published on February 11, 2015, in "Civil Beat," a daily, on-line newspaper in Honolulu.<sup>12</sup> One wonders what Justice Scalia would say in response if he were thrust back in time into the middle of the Senate Annexation debate in 1898. 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. These Senators defied the Administration's rush to annex Hawai'i. They defended the independence of Hawai'i. They were heroes to the Hawaiian people then, as they should be today. Equally important, these United States Senators were American patriots as well, defending the United States Constitution and the values of the "Older America."

Let us start with the recent remarks of Associate Justice Scalia of the U.S. Supreme Court. As much as any single person in the U.S. today, Justice Scalia's opinions are critical to the future of Native Hawaiians. His legal position in *Rice v. Cayetano*<sup>13</sup> and *Hawai'i v. Office of Hawaiian Affairs*<sup>14</sup> changed forever the lives of Native Hawaiians.

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<sup>12</sup> Jacob Bryan Aki, *Supreme Court Justice Antonin Scalia, Hawaii and Annexation*, CIVIL BEAT, Feb. 24, 2015, at [www.civilbeat.com/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation/](http://www.civilbeat.com/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation/).

<sup>13</sup> *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.

<sup>14</sup> *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S. Ct. 1436 (2009).

On February 11, 2015, Jacob Aki, a Hawaiian student at George Washington University, asked Justice Scalia, who was speaking at George Washington, the following question:<sup>15</sup>

“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 continued:

“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.”

Scalia proceeded to the history of Hawai‘i. He implied that Hawai‘i was just another colony of Spain, taken in the Spanish-American War, like the Philippines and Puerto Rico.<sup>16</sup>

Justice Scalia was clearly wrong on all points. First, aside from conquest and acquisition by prescription<sup>17</sup> it is only by treaty that one sovereign nation can acquire the territory of another sovereign nation under the international legal doctrine of equal sovereignty of nations. Second, the Joint Resolution, as an act of Congress, had no power to acquire another sovereign and independent nation under the U.S. Constitution. Third, Hawai‘i was not a colony of Spain, thus Hawai‘i

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<sup>15</sup> Aki, *supra* note 11.

<sup>16</sup> *Id.* “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.”

<sup>17</sup> In a subsequent article, I will present arguments that the United States did not acquire Hawaii by 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 as to] its claims of sovereignty. Again, the United States’ own admissions that it has never acquired the Hawaiian Islands, as contained in Part II, undermine any claim of acquisition by prescription. *See, e.g.,* Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and A Modest Proposal*, 16 *CONN. J. INT’L L.* 1, 13 (2000).

could not have been acquired by the U.S. as a result of the Spanish American War.<sup>18</sup>

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

Let us pretend that Justice Scalia was on the floor of the U.S. 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. As Senator Allen said:

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.<sup>19</sup>

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. Hawai‘i is foreign to us. We

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<sup>18</sup> Hawaii was not a colony of Spain. *See* Treaty of Paris of 1898, Dec. 10, 1898, 30 Stat. 1754. In that treaty, Spain directly ceded the sovereignty and territory of the Philippines, Guam, and Puerto Rico to the United States. *See generally* Benjamin R. Beede, *The War of 1898 and U.S. Interventions 1898-1934* (2013).

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, using metes and bounds, natural monuments, names of islands or lines of longitude and latitude as to the lands and 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 lack of such description followed from the lack of a treaty of annexation. This lack of a description arising from the lack of a treaty would be hidden by carefully drafted, deceptive statutory language of the boundaries of Hawaii. That language would continue to deceive until today.

<sup>19</sup> Statement of Senator Allen, 31 Cong. Rec. at 6636 July 4, 1898. 55<sup>th</sup> Cong. 2d Sess.

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 .<sup>20</sup>

Senator Turley of Tennessee also weighed in, adding:

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 Hawai'i 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 Hawai'i 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 Hawai'i may refuse to accept the terms contained in it and remain an independent and sovereign state.<sup>21</sup>

Senator John Coit Spooner of Wisconsin, perhaps the greatest constitutional lawyer of his time,<sup>22</sup> also spoke, saying, "Of course, our power would not be extraterritorial."<sup>23</sup> A host of other Senators reaffirmed the same point:<sup>24</sup>

The Joint Resolution itself, it is admitted, amounts to

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<sup>20</sup> Statement of Senator Allen, 31 Cong. Rec. at 6636 July 4, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>21</sup> See remarks of Senator Turley, 31 Cong. Rec. at 6336, June 25, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>22</sup> "He is concededly the greatest parliamentary debater of his day," William Howard Taft said of him, "and really deserves the title, so much misapplied, of a great constitutional lawyer." See DOROTHY GANFIELD FOWLER, JOHN COIT SPOONER: DEFENDER OF PRESIDENTS 394 (1961) (quoting from the Washington Post, March 4, 1907).

<sup>23</sup> Statement of Senator Spooner, 31 Cong. Rec. at 6636, July 4, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>24</sup> 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, 55<sup>th</sup> 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, 55<sup>th</sup> Cong. 2d Sess.

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, 55<sup>th</sup> Cong. 2d Sess.

nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself.<sup>25</sup>

Senator Augustus O. Bacon stated that if the U.S. could annex Hawai'i by a Joint Resolution, and evade the enumerated separation of powers in the Constitution as to foreign affairs, it could do the same to any foreign nation. Senator Bacon noted that under the principle of the equal sovereignty of nations, no nation, can, with only its lawmaking power, acquire the territory of another sovereign nation:

If the President of the United States can do it in the case of Hawai'i, he can with equal propriety and legality do it in the case of Jamaica.<sup>26</sup> 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 Hawai'i by means or its own legislative act.

Senator Stephen Mallory White of California made an eloquent plea to stop the Joint Resolution. Senator White noted that under Article IV of the Constitution, Congress could admit a new State by legislation or Joint Resolution, but where the U.S. merely acquires territory from another sovereign, such acquisition must take the form of a treaty. Thus, the acquisition of Hawai'i as a territory, not a state, could only be achieved under the powers over foreign affairs—which are delegated solely to the President:

Whatever may be said of the past history of this country or of the records to which senators have diverted; 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 our shores, but also to annihilate a nation, to withdraw it from the sovereign societies of the world as a government. . .<sup>27</sup>

Senator Allen of Nebraska also added:

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

<sup>26</sup> Statement of Senator Augustus Bacon at 31 Cong. Rec. 6148 to 6152 June 20, 1898, 55<sup>th</sup> Cong. 2d. Sess.

<sup>27</sup> Statement of Senator Stephen M. White at 31 Cong. Rec. Appendixes 591 to 595 June 21 1898, 55<sup>th</sup> 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 Hawaiian Islands; and so with a statute or joint resolution.<sup>28</sup>

Senators opposed to annexation stood fast not only on the proposition that the Joint Resolution had no power to acquire Hawai‘i, but also on the fact that the use of a Joint Resolution in place of a Treaty was unconstitutional. Senator Augustus O. Bacon of Georgia was particularly vocal as to the unconstitutionality of the Joint Resolution. If Hawai‘i could be acquired by a joint resolution,<sup>29</sup> then the legislature of Hawai‘i “could acquire the United States by a Joint resolution of its own.”

The only means by which one nation can acquire the sovereignty and jurisdiction of another nation is by a treaty indicative of mutual consent. Justice Scalia’s belief in the constitutionality of annexation by joint resolution 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.<sup>30</sup>

It is unconstitutional to acquire a foreign nation by a joint resolution of the U.S. House and Senate. Such a process amounts to an “end run” around the foreign affairs powers delegated solely to the President.<sup>31</sup> A legislative act such as a Joint Resolution undermines the

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<sup>28</sup> Statement of Senator Allen, 31 Cong. Rec. at 6636 July 4, 1898. 55<sup>th</sup> Cong. 2d Sess.

<sup>29</sup> See Bacon, *supra* note 26.

<sup>30</sup> Statement of Senator Allen, 31 Cong. Rec. at 6635 July 4, 1898. 55<sup>th</sup> Cong. 2d Sess. Cong.

<sup>31</sup> “When that power is expressly conferred on the President and on two thirds of the Senate, can it be exercised by the other House? Statement of Senator Allen, 31 Cong. Rec. 6586, June 30, 1898, 55<sup>th</sup> Cong. 2d Sess. See also Statement of Senator Allen 31 Cong. Rec. at 6335 June 25, 1898, 55<sup>th</sup> Cong. 2d Sess.:

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

Constitution's careful allocation of powers by which the House was deliberately prohibited from having any power over foreign affairs. The Federal Government is a government of enumerated powers. Unless a power is specifically delegated to a certain branch or branches of government, other parts of the Federal government are denied such a power. Justice Scalia knows this. He is a firm believer in strict construction of the constitutional limitation on federal powers.<sup>32</sup>

As Senator Bacon later added:

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 preposition on the part of the Foreign Relations Committee that the Senate shall pass the bill, is utterly without warrant in the Constitution.<sup>33</sup>

Enacting a joint resolution requires a mere majority of the Senate and House.<sup>34</sup> The use of a joint resolution to create a treaty with a foreign sovereign nation undermines the explicit delegation of the treaty making power to the President and the Senate. As opposed to passing a mere act or joint resolution, the Senate must ratify a treaty by super-majority of two-thirds of those Senators present.<sup>35</sup>

It was precisely because of this super-majority requirement that the McKinley Administration turned from the Treaty of 1897, which had failed to gain a super-majority, to the use of a Joint Resolution. A Joint Resolution requires only a majority of both Houses to pass. Senator Bacon protested, saying, "If Hawai'i is to be annexed it ought certainly to be annexed by a constitution method; and if by a constitution method, it cannot be annexed, no Senator ought to desire its annexation."<sup>36</sup> Moreover, Senator Allen of Nebraska added:

But as respects the treaty-making power, the President is authorized to open negotiations with foreign countries and

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<sup>32</sup> "Justice Scalia has been a strong proponent of constitutional federalism. See Bradford Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS U. L.J. 753 (2003).

<sup>33</sup> Statement of Senator Bacon, 31 Cong. Rec. at 6145, June 20, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>34</sup> "The House has no jurisdiction over the subject matter whatever." Statement of Senator Allen, 31 Cong. Rec. at 6634, July 4, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>35</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>36</sup> Statement of Senator Bacon, 31 Cong. Rec. at 6152, June 20, 1898, 55<sup>th</sup> Cong. 2d Sess.

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.<sup>37</sup>

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

In 1988, during the administration of President Reagan, Douglas Kmiec, counsel for the Justice Department, reached the same conclusion. Mr. Kmiec examined the annexation of Hawai‘i and searched for a constitutional basis for annexation. He concluded that he could not identify the constitutional power enabling the U.S.’ annexation of Hawai‘i.<sup>38</sup> Such an admission of failure, given that the U.S. has the burden

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<sup>37</sup> Statement of Senator Allen, 31 Cong. Rec. at 6636, July 4, 1898, 55<sup>th</sup> Cong. 2d Sess.

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“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).<sup>30</sup> 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.

<sup>1</sup> Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 27 (2d ed. 1929). Representative Ball argued:

of proving<sup>39</sup> how it acquired Hawai‘i, is a virtual confession of the lack of U.S. sovereignty over Hawai‘i.

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“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.”

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 cannot 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 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.

<sup>39</sup> 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. In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon 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 Mayen* (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; 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) [the burden of proof in cases claiming dominion by prescription rests on party claiming

Many Senators, during the 1898 debate, prophesized that such an unconstitutional taking of Hawai‘i would result in profound damage to the country and the Constitution. Thus, Senator Bacon of Georgia, one of the most senior members of the Senate, argued that to take Hawai‘i 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 the entire 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.<sup>40</sup>

### III. NO LEGISLATIVE HISTORY SUPPORTING THE CAPACITY OF THE JOINT RESOLUTION

During the debate on the Joint Resolution to annex Hawai‘i, only two senators stood and attempted to explain how a joint resolution of Congress could acquire the Hawaiian Islands. Those two senators were Senator Stewart of Nevada and Senator Foraker of Ohio.

Both Senator Stewart and Justice Scalia claim that Congress, by joint resolution, can pass anything it desires. This is true. The real question is whether such an enactment would have any force of law in the real world. Senator William Morris Stewart claimed, “sure, you can take foreign territory by passing a mere bill.” He claimed that the U.S. could unilaterally extend its border into Mexico by three hundred miles. When asked how this was possible, Stewart said that if such a law was enacted by Congress, the President, under the “faithful execution”<sup>41</sup> clause of the Constitution had to enforce such a law.<sup>42</sup>

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dominion.

<sup>40</sup> See the Statement of Senator Bacon at 31 Congressional Record 31 Cong. Rec. at 6156, June 20, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>41</sup> Article II, Section 3 of the Constitution requires the President to “take Care that the Laws be faithfully executed.” U.S. Const. art. II § 3.

<sup>42</sup> 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

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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?

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.

Astonished Senators asked Stewart if the U.S. could annex the United Kingdom or other sovereign and independent nations. Senator Stewart replied, “We can annex anything.”<sup>43</sup> When asked whether such an act was constitutional Stewart acknowledged Senator Caffrey’s description of Stewart’s view: “What is a Constitution among friends.”<sup>44</sup>

Senator Joseph B. Foraker was the only other Senator to express a theory as to how a joint resolution of the U.S. could acquire Hawai‘i. Senator Foraker claimed that the joint resolution was a treaty on which the signature of only one party was required—that of the U.S. When he was asked why?—he stated that it was so because the other party “died” Namely, he claimed that upon annexation Hawai‘i “died”—“ceased to exist” and thus only the U.S. needed to sign the treaty.<sup>45</sup>

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In effect, Senator Stewart was actually describing acquisition of territory by conquest. 31 Cong. Rec. 6369 (1898) (remarks of Senators Caffrey, Stewart, Teller and Allen).

<sup>43</sup> Statement of Senator Stewart, 31 Cong. Rec. 6369, June 25, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>44</sup> 31 Cong. Rec. at (July, 1898) 55<sup>th</sup> Cong. 2d Sess. (Remarks of Senators Caffrey and Stewart):

Mr. Caffrey: The argument of the Senator from Nevada reminds me of an answer given 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.

<sup>45</sup> 31 Cong. Rec. at 6335, June 23, 1898, 55<sup>th</sup> Cong. 2d Sess. (Remarks of Senators Foraker and Allen).

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.

Senator Foraker was seeking to justify why Hawai‘i was not being acquired by treaty. As such, the power of foreign affairs was not triggered and Congress could acquire Hawai‘i by a mere majority of both Houses. Senator Foraker also claimed that “annexation” existed in his home state of Ohio. He claimed that cities and towns in Ohio could “annex” adjoining towns and municipalities. The legal process for the annexation” of towns and cities is clearly a different kind of “annexation.”<sup>46</sup> Ultimately, when Senator Foraker was pushed to the limit on all of his various theories, he conceded and was forced to admit: “You cannot annex Hawai‘i by Joint Resolution.”<sup>47</sup>

A vociferous minority in the Senate loudly protested the annexation of Hawai‘i. Although the majority of Senators voted in favor

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.

<sup>46</sup> 31 Cong. Rec. 6585 (June 30, 1898), 55<sup>th</sup> Cong. 2d Sess. (Remarks of Senators Foraker and Allen).

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

Statements of Senators Allen and Foraker, 31 Cong. Rec. at 6336, June 25, 1898 55<sup>th</sup> Cong. 2d. Sess.

<sup>47</sup> 31 Cong. Rec. 6636 (July 4, 1898) 55<sup>th</sup> Cong. 2d Sess. (Remarks of Senators Allen and Foraker):

Mr. 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 cannot 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.”

of the Joint Resolution, they did so because annexation was a war measure. Spain declared war on the U.S. on April 22, 1898. The U.S. declared war on Spain on April 2, 1898.<sup>48</sup> Hawai‘i was to be a coaling station for American ships passing to the Philippines. The acquisition of Hawai‘i by the U.S., although Hawai‘i was not territory of Spain, was clearly a means of facilitating the war with Spain. The majority in the Senate that voted for the Joint Resolution purportedly did so to support their country and administration while at war, no matter what the Administration sought from Congress.<sup>49</sup>

As a matter of legislative history, there is no evidence in the record explaining how the Joint Resolution would acquire Hawai‘i. When one examines the whole of the House and Senate debates on the Joint Resolution in the Spring and Summer of 1898, no member of Congress ever explained how the Joint Resolution would have the capacity to acquire the Hawaiian Islands. In a sense, there is no evidence that it was Congress’ intent to acquire Hawai‘i. Congress merely passed a law claiming to annex Hawai‘i.<sup>50</sup> The U.S. proceeded to take control of Hawai‘i under the pretext of both the war and the non-existent powers of a Joint Resolution. The Joint Resolution was both unconstitutional and an impotent instrument for acquisition.

In the words of Senator Bacon of Georgia, this deliberate disregard of logic, the Constitution, and basic American values was a massive departure from fundamental American principles. Annexation was the beginning of a revolution that would ultimately destroy the U.S. as it was then-known:

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

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<sup>48</sup> See generally EDWARD F. DOLAN, *THE SPANISH-AMERICAN WAR* (2001).

<sup>49</sup> See Transcript of a “closed session” of the United States Senate, Monday April 29, 1898 “War between the United States and Spain,” where the Senate discussed the annexation of Hawaii as necessary to prosecute the war. (On file with author). Congressional support of the President in times of war is not unusual; see the Gulf of Tonkin Resolution as to the beginning of United States involvement in the Vietnam War. The Gulf of Tonkin Resolution or the Southeast Asia Resolution, Pub.L. 88–408, 78 Stat. 384, enacted August 10, 1964, was a joint resolution that the United States Congress passed on August 7, 1964, in place of a Congressional declaration of war.

<sup>50</sup> This intent to accomplish the impossible by acting as if Congress had such power did not go without criticism. Hawaii would be taken by “pretext.” The United States Department of State Office of the Historian states in their account of the Spanish American War that: “The McKinley Administration also used the war as a pretext to annex the independent state of Hawaii.” See <https://history.state.gov/milestones/1866-1898/spanish-american-war> [last visited May 6, 2015]. This original “pretext” became an official policy of deliberate deception from 1898 until the present.

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 restrictions.<sup>51</sup>

#### IV. EVIDENCE OF THE FAILURE OF THE MYTH OF ANNEXATION-THE PROBLEM OF DEFINING THE BOUNDARIES OF THE STATE OF HAWAII

Since there was no mutual treaty between the U.S. and the Republic of Hawai'i, there was no objective metes and bounds description of the islands and waters conveyed by such a treaty to the U.S. There was, in effect, a break in the chain of sovereignty. The Republic of Hawai'i never did pass dominion to the U.S. The Joint Resolution was incapable of giving dominion. The U.S. received nothing. This was likely a problem that the McKinley Administration did not foresee. It meant however, that there was—according to U.S. law—nothing within the Territory of Hawai'i in 1900. The emptiness of the Territory was covered up by a boundary description claiming that the islands and waters acquired by the Joint Resolution constituted the dominion of the Territory of Hawai'i. However, the Joint Resolution had no power to acquire anything—the Territory was truly bereft of any dominion. Thus, starting with the Organic Act, the Territory of Hawai'i and the U.S. simply pretended, acting as if the Hawaiian Islands were within the U.S. They could not, however, produce a description of that dominion, thus deceiving the public into believing the Hawaiian Islands were really a part of the Territory of Hawai'i. The deception worked—but for those who knew the problem, there were enormous difficulties that arose in handling simple questions of property law. For instance, one little-known goal of statehood was to redraft a boundary description that was more effective at deceiving the people while solving some of the problems that arose during the territorial period—such as whether the channel waters between the main islands were within the dominion of the U.S. After much labor and many secret sessions, the Senate Committee on Interior and Insular Affairs produced, after five different drafts, a proposed boundary description that apparently met those needs. Committee Print Six would become the new boundary description for Hawai'i.<sup>52</sup> It was incredibly complex. It also excluded the

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<sup>51</sup> Statement of Senator Bacon at 31 Congressional Record 31 Cong. Rec. at 6152, June 20, 1898, 55<sup>th</sup> Cong. 2d Sess.

<sup>52</sup> Staff of S. Comm. on Insular and Interior Affairs, 83d Cong. (Committee Print 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](http://www.archives.gov/legislative/guide/house/chapter-13-interior-and-insular-affairs.html).

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Committee Print Six is so unlike all other boundary descriptions of all other territories and states that it is necessary to present here an account of the legislative history of this statute. Otherwise, one may think that the odd nature of this provision was just mistakes or the product of shoddy drafting. Make no mistake; Committee Print 6 was the product of intensive work. It was no accident.

In order to understand Committee Print Six, one must appreciate the history and the objectives behind the drafting of all boundaries statutes for Hawaii after 1898. Those who drafted these statutes, whether they were Justice Frear in 1899 or Senator Clinton Anderson in 1954, had two goals: First, these statutes had to be truthful---they couldn't lie, Hawaii was not a territory of the United States. Second, these statutes must be extraordinarily deceitful---they must be puzzles by which the ordinary person could determine their underlying truth.

From March 1953 until January 1954, the Senate Committee on Interior and Insular Affairs sought to perfect Frear's definition. That committee had to make two changes to Frear's definition. They had to exclude the channel waters and the island of Palmyra. Including the channel waters was too risky. Any ship or submarine plowing the waters between Oahu and Kauai and Hawaii would be stopped by the United States Navy. If the submarine was detained and boarded, its flag Nation would challenge the United States as to how it acquired the channel waters. The United States, of course, would have no answer. There was no chain of sovereignty supporting United States sovereignty over the channel waters.

The exclusion of the islands of Palmyra is harder to pin down in legislative history. It is clear that a leading member of the Senate Committee, Senator Clinton P. Anderson dislike the owners of Palmyra. It is not clear why he disliked them. One theory is that the owners knew that Palmyra, while in the Hawaiian Islands, was not part of the United States. They seem to flaunt this when they refused the Navy the right to condemn their island in World War II. The ostensible reason why the United States could not condemn Palmyra was that it was not territory of the United States.

This was a position that few dared take during World War II. The Navy ended up leasing Palmyra for its air station. At the end of the war, to boot, the Navy was forced to clean up the island when the owners of Palmyra secured a private bill from Congress, Anderson may have been peeved because the owners of Palmyra were not playing along with the plan: one may now that Hawaii is not part of the United States, but one never acts on the basis---or flaunts it in the face of the United States. Anderson wanted Palmyra removed from the State.

To mask the removal of Palmyra, Anderson filled Print Six Hawaii with the names of other islands would be excluded like Johnston and Kingman Reef. There was no reason to exclude Johnston and Kingman because as of 1959 they were not within the state. They were included explicitly to cover the exclusion of Palmyra. It was officially appeared that all three were being excluded because they were distant from the main islands and unpopulated. That was hardly a sincere explanation because there were many other islands of Hawaii that were distant from the eight main islands and unpopulated---but they were not excluded. Senator Daniel Inouye would eventually solve the pesky Palmyra problem by having it bought by the Nature Conservancy and the Fish and Wildlife Service. United States ownership of Palmyra was a much better mask of the lack of United States sovereignty over the island.

Committee Print Six accomplished these goals. Upon its arrival in offices of the Senate committee in January of 1954, Committee Counsel wrote a memo to Anderson claiming "we've done it." Thus, after six drafts, task forces, endless hearings, including non-public secret hearings and open but "fake" disputes with the owners of Palmyra, Senator Anderson had managed to perfect what Frear had begun. Committee Print Six was a deception that was designed to last forever, it almost did.

problematic issues: the channel waters and Palmyra Island. One problem remained: the boundary description drafted by the people contained in their proposed Constitution for the new state of Hawai‘i was vastly different in terms of language from the new federal creation. There could not be two different descriptions of Hawaii: one in the Admission Act and a different one in the State Constitution. Congress would demand that Hawai‘i replace its boundary description with the language of Committee Draft Six. It was decided that the people of Hawai‘i must vote to change their Constitution—without really knowing what they were voting on.

Thus, in the Act of Admission of 1959, the U.S. Congress required the State of Hawai‘i to accept a federally drafted definition of the boundaries of the new State.<sup>53</sup> The people of Hawai‘i were compelled to accept the new Federal description of boundaries as a condition of statehood. The people of Hawai‘i were told that the change in boundaries required by Congress was merely technical. The people were told that the change in boundaries that they must approve in question two would not change the dominion of Hawai‘i. That was true: the dominion of Hawai‘i before the change was that there was nothing in the Territory of Hawai‘i. The dominion of the new State would be equally empty. There would be no islands or waters in the State as well. The people were never told that they had been deceived by Congress since 1900 into believing that the Hawaiian Islands were within the Territory of Hawai‘i and would now also be within the State of Hawai‘i. Although it was widely taught that Hawai‘i was acquired by the Joint Resolution, the children and people of Hawai‘i were never taught the history of the Joint Resolution and the criticism made in the Senate in 1898. It was clear in 1898, as well as in 1959, that a

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<sup>53</sup> 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.

“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.”

Joint Resolution of Congress had no power to acquire the Hawaiian Islands as a territory of the U.S.

Committee Print 6 was carefully crafted to deceive.<sup>54</sup> The language of Print 6 was adopted by the people of Hawai‘i by a plebiscite on June 27, 1959.<sup>55</sup> It is evident that no one knew what they were voting on. There was no discussion of the meaning of the new boundary description. There was no discussion or questions raised as to the exclusion of the channel waters and Palmyra by the language of Section Two of the Admission Act, which copied the language of Committee Print 6. After the vote, the boundary description of the State Constitution was amended to track Section Two—although the State of Hawai‘i never followed the proper procedures for amendment as defined in the Constitution. In a very odd sense, the people of Hawai‘i voted for two contradictory propositions on June 27, 1959. The first proposition approved of statehood. That was the first question. In Question Two, the people, apparently, without any knowledge of what they were voting on, overwhelmingly agreed that there would be nothing in this new state—no islands and no waters. Congress knew this, for it was Congress that made enactment of Question Two a condition for granting statehood as approved in Question One. Thus, the myth of annexation was reborn in 1959—and lives on today.

As the case of *State v. Kaulia*<sup>56</sup> demonstrates, even the Supreme Court of the State of Hawai‘i has succumbed to the myth of annexation. In *Kaulia*, the Court denied the defendant a right be heard on his motion to dismiss for lack of subject matter jurisdiction.<sup>57</sup> The Court failed to examine Article XV of the State Constitution<sup>58</sup> and Section Two of the

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<sup>54</sup> See Comm. Print 6, *supra* note 51.

<sup>55</sup> See “The Statehood Plebiscite,” May 12, 2009, at <http://statehoodhawaii.org/2009/05/12/the-statehood-plebiscite/> (last accessed May 11, 2015). A photocopy of the original “Statehood” plebiscite ballot is available at <http://statehoodhawaii.org/images/pleballot.jpg>.

<sup>56</sup> *State v. Kaulia*, 128 Haw. at 486 (2013).

<sup>57</sup> See *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.”

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 *supra* note 52.

<sup>58</sup> Haw. Const. art. XV, § 1.

Admission Act, both of which exclude the Hawaiian Islands from the boundaries of the State of Hawai‘i.<sup>59</sup>

Subject matter jurisdiction is always at issue in a court case. Indeed, the burden is on the moving party to prove the existence of subject matter jurisdiction.<sup>60</sup> The Court had a duty, to determine whether the defendant was within the State of Hawai‘i. It did not examine the statutes; rather it assumed that all courts have territorial jurisdiction. It simply took informal judicial notice that the island of Hawai‘i was within the official boundaries of Hawai‘i as defined by the State Constitution.<sup>61</sup> The official description of the boundaries of the State of Hawai‘i is contained in Section Two of the Act of Admission admitting Hawai‘i as a State. It states:

Section 2. Act of Admission (1959)<sup>62</sup>

The State of Hawai‘i shall consist of all the islands,

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The 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.

<sup>59</sup> The lower court even refused to take evidence on this issue and refused to 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. 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 jurisdiction.” The court also held that it did not err in excluding Dr. Sai’s expert testimony.

<sup>60</sup> 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)(where “the Nebraska court had jurisdiction over the subject matter of the controversy only if the land was within in Nebraska”).

<sup>61</sup> “Pursuant to HRS § 701–106 (1993),<sup>12</sup> “the [S]tate’s criminal jurisdiction encompasses all areas within the territorial boundaries of the State of Hawai‘i.” *State v. Jim*, 105 Hawai‘i 319, 330, 97 P.3d 395, 406 (App.2004).” *Kaulia*, 128 Haw. 479 at 487.

<sup>62</sup> Section 2, 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.

together with their appurtenant reefs and territorial waters, included in the Territory of Hawai'i 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 U.S. A description of a state or nation's dominion is usually described in precise and positive terms. Compare the description of Hawai'i's boundaries with the description of the boundaries of the State of Washington:

Section 61.<sup>63</sup>

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, lines defined by metes and bounds or by reference to political boundaries. The definition of the State of Hawai'i does not use metes and bounds, lines of longitude and latitude, or physical monuments.

The description of the State of Hawai'i says nothing about the lands and waters in Hawai'i. It does not name the main islands. Rather, it names islands that are not within Hawai'i. It states that among the islands excluded are Midway,<sup>64</sup> Johnston,<sup>65</sup> and Kingman.<sup>66</sup> None of these islands

<sup>63</sup> "Laws of Washington Territory Enacted by the Legislative Assembly (Tenth Biennial Session)," Wash. Sess. Laws of 1885, available at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1885pam1.pdf>.

<sup>64</sup> Midway is an unincorporated territory of the United States. On August 28, 1867, Captain William Reynolds of the USS *Lackawanna* formally took possession of the atoll for the United States. Midway is the only island in the entire Hawaiian archipelago that was not later part of the State of Hawaii. Midway was noted as territory of the United States, not of Hawaii in the Supreme Court decision in *Downes v. Bidwell*, 182 U.S. 244 (1901) ["Alaska was ceded by Russia in 1867; Midway island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and \$50,000 was expended in efforts to make it a territory;"]

was ever part of Hawai'i, either under the Kingdom or the governments that followed. Why not exclude "Manhattan, as well? Palmyra, too, is excluded. However, Palmyra was in the Kingdom of Hawaii<sup>67</sup>. Naming Midway, Johnston, and Kingman, which were never part of Hawai'i provided the state an explanation for excluding Palmyra. They were all islands that were distant from the main islands and unpopulated. The use of Midway, Johnston, and Kingman had one purpose: to provide the illusion that the exclusion of Palmyra was reasonable.

The only clue to what is in the State of Hawai'i is in the first phrase:

"The State of Hawai'i shall consist of all the islands,  
together with their appurtenant reefs and territorial waters,

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<sup>65</sup> At various times both the Kingdom of Hawaii and the United States claimed sovereignty over Johnston Island. Ultimately, when the Kingdom of Hawaii was overthrown the name of Johnston Island was omitted from the list of Hawaiian Islands. On September 11, 1909, Johnston was leased by the Territory of Hawaii to a private citizen for fifteen years. "GAO/OGC-98-5 – U.S. Insular Areas: Application of the U.S. Constitution". U.S. Government Printing Office. November 7, 1997.

<sup>66</sup> Kingman Reef has the status of an unincorporated territory of the United States, administered from Washington, DC by the U.S. Department of Interior. Kingman Reef was discovered by the American Captain Edmund Fanning of the ship *Betsey* on June 14, 1798. Captain W. E. Kingman (whose name the island bears) described it on November 29, 1853. Kingman Reef was claimed in 1860 by the United States Guano Company, under the name "Danger Reef".<sup>[6]</sup> This claim was made under by the Guano Islands Act of 1856 although there is no evidence that guano existed or was ever mined on Kingman Reef. <sup>[7]</sup> Lorrin A. Thurston formally annexed Kingman to the United States on May 10, 1922, by reading a declaration on shore. "GAO/OGC-98-5 - U.S. Insular Areas: Application of the U.S. Constitution". U.S. Government Printing Office. November 7, 1997.

<sup>67</sup> On February 26, 1862, King Kamehameha IV of Hawaii commissioned Captain Zenas Bent and Johnson Beswick Wilkinson, both Hawaiian citizens, to take possession of the atoll. On April 15, 1862, it was formally annexed to the Kingdom of Hawaii, while Bent and Wilkinson became joint owners.<sup>[7]</sup> In 1898, the United States claims that by the Joint Resolution it acquired Hawaii and Palmyra with it. On June 14, 1900, Palmyra became part of the new Territory of Hawaii.<sup>[7]</sup> To end all British claims, Congress passed a second act of annexation in 1911. This act made Palmyra the only "incorporated territory" of the United States at that time. In 1934, Johnston Atoll, Kingman Reef, and Palmyra were placed under the jurisdiction of the Department of the Navy. The Navy took over the atoll for use as the Palmyra Island Naval Air Station on August 15, 1941. When Hawaii was admitted to the United States in 1959, Palmyra was explicitly excluded from the new state as a federal incorporated territory, administered by the Department of the Interior. In December 2000, most of Palmyra Atoll was bought by The Nature Conservancy<sup>[7]</sup> for coral reef conservation and research. The Pacific Remote Islands Marine National Monument, including Palmyra Atoll, was established on January 6, 2009. The Secretary of the Interior has delegated the responsibility for supervising this National Monument to the U.S. Fish and Wildlife Service. See "Palmyra Atoll". Office of Insular Affairs. US Department of Interior. Retrieved February 25, 2013. Pacific Remote Islands Marine National Monument". Fws.gov. U.S. Fish and Wildlife Service (Retrieved July 31, 2009).

included in the Territory of Hawai‘i 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 Hawai‘i. In order to determine what is in the State. One is compelled to look back at the description of the Territory. The Organic Act states:

Section 2: Territory of Hawai‘i. 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 Hawai‘i.”<sup>68</sup>

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 a foreign sovereign state.<sup>69</sup> Therefore, by the combined effect of the two acts there are no lands and waters in the State of Hawaii!

When ratification of the Treaty of 1897 failed, the U.S. had no description of the dominion of Hawai‘i.<sup>70</sup> Such a description would be contained in a treaty, a mutual, bilateral agreement between seller and buyer: between Hawai‘i and the U.S.

Thus, lacking a description, much as is present in any conveyance of land—the U.S. had no means of describing the dominion it acquired from Hawai‘i. 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 Hawai‘i to the U.S. in 1898. Treaties, like a conveyance of land always contain a description of the territory to be conveyed.<sup>71</sup> All territory acquired by the U.S. was acquired by some sort of treaty.<sup>72</sup>

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<sup>68</sup> From the Act Establishing a Government for the Territory of Hawaii, 1900. Section Two.

<sup>69</sup> Statement of Senator Allen 31 Cong. Rec. 6636 (July 4, 1898), 55<sup>th</sup> 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 Congress or in the Hawaiian Islands; and so with statute or joint resolution.

<sup>70</sup> See Wynell Schamel & Charles E. Schamel, *The 1897 Petition Against the Annexation of Hawaii*, 7 SOC. EDUC. 63 at 402-408 (1999).

<sup>71</sup> Legal Description of Oregon Territory as Set by Treaty with Great Britain:

Section Two of the Organic Act, derived from Committee Print 6, was thus the best Congress could do in 1898. Congress could not define the new Territory of Hawai‘i, as Kamehameha III did in 1846, by naming the main islands themselves, such as “Oahu,” or “Maui.”<sup>73</sup> The Joint Resolution contained no reference to islands by name.

Treaties are either bilateral or multilateral. A joint resolution is unilateral. The U.S. unilaterally declared Hawai‘i was annexed. The Republic of Hawai‘i never ratified the Joint Resolution. The government of Hawai‘i in 1898, the Republic of Hawai‘i rejected the terms of the Joint Resolution—meaning there was no agreement between the U.S. and the Republic of Hawai‘i. Thus, one cannot claim that the Republic of Hawai‘i implicitly consented or acquiesced to the Joint Resolution. A special envoy of the Republic of Hawai‘i, General A.S. Hartwell was sent to Washington to address President McKinley and dispute the U.S. claim that Hawai‘i had no power to convey the public lands of Hawai‘i after the effective date of the Joint Resolution. In a letter to President McKinley, General Hartwell makes it clear that the Republic of Hawai‘i does not view the Joint Resolution as establishing any kind of terms binding on Hawai‘i.

Moreover, General Hartwell points out that only the Treaty of Annexation of 1897 could ever acquire the Hawaiian Islands. Therefore, given that the U.S. Senate rejected the Treaty of Annexation, the Joint Resolution which was not a treaty and merely a unilateral act of the U.S. had no effect on the Republic of Hawaii.<sup>74</sup>

A treaty between sovereign states is unlike 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.

Under the authority given to the President of Hawai‘i by the Hawaiian constitution, to negotiate a treaty of political union with the United States, subject to ratification by the

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The Oregon Treaty of 1846.

<sup>72</sup> Statement of Senator Allen, 31 Cong. Rec. 6635 (July 4, 1898), 55<sup>th</sup> Cong. 2d Sess.

<sup>73</sup> See JOHN RICORD, STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS. VOL. 1: PASSED BY THE HOUSES OF NOBLES AND REPRESENTATIVES, DURING THE TWENTY-FIRST YEAR OF HIS REIGN AND THE THIRD AND FOURTH YEARS OF HIS PUBLIC RECOGNITION, A.D. 1845 AND 1846: TO WHICH ARE APPENDED THE ACTS OF PUBLIC RECOGNITION, AND THE TREATIES WITH OTHER NATIONS (1846).

<sup>74</sup> See Letter of Alfred S. Hartwell, Special Agent of the Government of Hawaii in Washington D.C. to President McKinley, October 25, 1899. [from the Manuscript Collection the Papers of A.S. Hartwell, Archives of State of Hawaii]

Hawaiian Senate, such a treaty was negotiated and signed by the authorized plenipotentiaries of each country, and was ratified by the Hawaiian Senate but not by the United States Senate. Consequently that instrument failed to accomplish or to become evidence of a cession of Hawai'i to the United States.

The Joint Resolution was not a ratification of the earlier Treaty of 1897.<sup>75</sup> 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.<sup>76</sup> Thus, the U.S. 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 the Territory of Hawai'i attempted to make such a claim of dominion based on the Joint Resolution, the U.S. risked the possibility that another nation would demand proof of a valid chain of sovereignty to the islands or waters being claimed by the U.S. The chain of sovereignty was broken in 1898 because the Treaty, the only method by which the U.S. could acquire the Hawaiian Islands was never ratified by the U.S. Without such a chain of title to any islands or waters the U.S. could not prove title or sovereignty to any of the islands or their appurtenant. The failure of the Treaty of 1897 could not be replaced by a Joint Resolution with no capacity to acquire territory of another foreign sovereign.

The emptiness of the description of the Territory's boundaries stands in sharp contrast to the tangible and objective boundary descriptions used by the Kingdom of Hawai'i, the Provisional Government, and the Republic of Hawai'i. Kamehameha III, who first proclaimed the territorial boundaries of Hawai'i in 1846, described the Kingdom of Hawai'i by naming the main islands and claiming the channel waters between those 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 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

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<sup>75</sup> See generally Schamel, *supra* note 69.

<sup>76</sup> 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.

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 nations of the world accepted Kamehameha's proclamation. The Provisional Government in 1893 and the Republic of Hawai'i in 1894 simply assumed or explicitly claimed that they had succeeded to the dominion of the Kingdom of Hawai'i. The Republic of Hawai'i followed the Provisional Government in 1894 and explicitly claimed all lands and waters held by both the Provisional Government and the Kingdom of Hawai'i by a provision in its Constitution.

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"<sup>77</sup>

However, in 1898, there was a break in the chain. The U.S. could not claim it overthrew the nation of Hawai'i in 1898. In 1898, Hawai'i and the U.S. were nations, equal in sovereignty and both independent. The only means by which the U.S. could acquire the Hawaiian Islands and establish an unbroken chain of title to the lands and waters first claimed by Kamehameha III would be via a valid treaty. Lacking a treaty the U.S. could not claim that the lands and waters of the Republic of Hawai'i were now the dominion of the Territory of Hawaii. Those who drafted the original versions of the Organic Act were stymied. The Hawaiian Islands were not part of the U.S. in 1900 but the U.S. claimed and acted as if the islands were territory of the U.S. There was no valid treaty which would have provided a description of lands conveyed to and accepted by the U.S.

Thus, those, like Justice Frear, who drafted the original versions of the Organic Act, forged a description that was misleading—in claiming Hawai'i, but accurate as to the actual legal effect of the Joint Resolution. Frear came up with the clever solution of describing the Territory of Hawai'i as all islands acquired by the Joint Resolution of 1898. To those who were being taught that the Joint Resolution could acquire territory this definition made sense—it included all the Hawaiian Islands. However, the truth was that a Joint Resolution could not acquire territory of a foreign sovereign such as Hawai'i. Thus, there were no islands or

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<sup>77</sup> From Article 15 Constitution of the Republic of Hawaii Adopted July 3, 1894.

waters in the Territory. The problem that Justice Frear and others dreaded was of another nation challenging the U.S. to prove its claim and show a chain of title to either an island, like Oahu, or the channel waters historically part of the dominion of Hawai‘i and now claimed, without any grounds, by the Territory.

Thus, the substance of the U.S. claim lay squarely on the ability of the U.S. to deceive the public and the world into accepting the possibility that a Joint Resolution of Congress had the power to acquire territory.

The Joint Resolution of course, had no more power to acquire the Hawaiian Islands than a joint resolution of the Hawai‘i legislature had of acquiring the U.S. This point had been made clear in the Senate debates on the Joint Resolution. Senator White of California spoke for many when he declared:

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 far 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<sup>78</sup>

Fifteen years later, in 1915, the notes following Section Two were embellished to include the names of the major islands.<sup>79</sup> This act of adding such notes with the names of the main islands is proof that people were confused and that Section Two of the Organic Act was defective. While

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<sup>78</sup> Statement of Senator White of California 31 Cong. Rec. Appendix at 560 (June 21, 1960)

<sup>79</sup> 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.”

some have made the claim it is clear that the notes are not part of the Organic Act.

A. *The Trail of Deception*

This lack of any description for the Territory generated a host of problems during the Territorial period. The Supreme Court of the Territory remarked on the ambiguity of the boundary description:

“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 Hawai‘i as “the Islands acquired by the U.S. of America under an Act of Congress entitled ‘Joint Resolution ... annexing the Hawaiian Islands.’”<sup>80</sup>

Similar problems continued during the drive for Statehood. The lack of a description of Hawai‘i was a continuing embarrassment; Delegates to the constitutional convention in 1949 that drafted the proposed State Constitution for the new State of Hawai‘i could do no better. Their definition in the Proposed State Constitution for Hawai‘i was even simpler, and thus more curious, even though it did not alter the boundaries for the new state:

“Section 1. The State of Hawai‘i shall include the islands and territorial waters heretofore constituting the Territory of Hawai‘i.”<sup>81</sup>

The 1949 Constitutional Convention Constitution could not escape the fact that the Territory had no islands or waters. No matter how it was worded, the boundary description for the State of Hawai‘i was compelled to repeat the formula of the Organic Act. The new State would consist of the same dominion as the Territory. The State would consist of islands and waters acquired by the Joint Resolution. In effect there would also be nothing in the new State of Hawai‘i.

When the State’s proposed Constitution was first presented to Congress in 1953, Senators were embarrassed by the efforts of the Hawai‘i Constitutional Convention.<sup>82</sup> At first glance, the description was short and insipid. It was extremely shoddy for such an important provision. The Hawai‘i boundaries paled when compared with the precision used by other states. Other states were defined in precise and careful term-defined by

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<sup>80</sup> Bishop v. Mahiko 35 Haw. 608, 642 (1940).

<sup>81</sup>Art. XIII, § 1, of the proposed state constitution (on file with author).

<sup>82</sup> As Senator Smathers asked, “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 (on file with author).

metes and bounds, longitude and latitude, lines from one natural monument to the other.<sup>83</sup> Precision is paramount when it comes to boundaries. What basic law is more important than that which defines the beginning and end of one's jurisdiction?<sup>84</sup>

Hawai'i's Statehood delegation had no answers to the questions raised by the Senators. The Senators could not understand how boundaries so clearly defined during the period of the Kingdom of Hawai'i had become so hopelessly ambiguous and simplistic. The answer is simple. Those Senators like most of America simply did not remember the debates on the Joint Resolution. They too, had succumbed to the myth of annexation. They believed that the Hawaiian Islands were acquired by the Joint Resolution of 1898. Over the fifty years from 1900 to 1950 the myth had solidified into an unchallengeable truth.

The Statehood delegation from Hawai'i attempted damage control. They avoided raising the incapacity of the Joint Resolution and the emptiness of the Territory of Hawai'i. Rather the delegation tried to assert that the historical boundaries of the Kingdom were still applicable in 1950—only the language had become much simpler. The delegation presented the Senate Committee with Kamehameha III's plain and clear description—as if to imply that such boundaries had remained unchanged despite the turbulent political events since 1846.

The boundaries of Hawai'i 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 dominion as belonged to the Kingdom. Likewise, the Republic of Hawai'i in 1894 as successor to the Provisional Government held the same dominion as both the Kingdom and the Provisional Government.

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<sup>83</sup> Hearing before the Committee on Interior and Insular Affairs of the House of Representatives 84<sup>th</sup> Congress 1<sup>st</sup> sess. on" 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.

Statement of Representative Miller Feb 2 1955:

"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."

<sup>84</sup> 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).

However, the Territory in 1898 could not claim the dominion of its predecessor, the Republic of Hawai‘i. The Republic had never ceded its dominion to the U.S. Unlike the Provisional Government and the Republic there was no basis by which the U.S. could claim the dominion held by the Republic of Hawai‘i. That would have been possible if there had been a ratified and binding treaty of annexation in 1897. There was no treaty. The Joint Resolution, the purported substitute for the treaty, had no power to acquire from the Republic the dominion of the Hawaiian Islands.

Senators on the Committee of Interior and Insular Affairs did not grasp the real problem: the U.S. had never acquired Hawai‘i. Such a possibility was astonishing. The Committee moved into secret session to discuss Hawaii’s boundaries. The Committee requested a report from the Congressional Research Service. The Senators asked the CRS if there was, at any time, any question as to the capacity of the Joint Resolution to acquire the Hawaiian Islands. The report they received, from Charles Tansill would change history. Prominently featured in the report was an astonishing statement from the prominent constitutional scholar W. Willoughby in 1929:

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.<sup>85</sup>

Only a few key Senators would grasp the full meaning of the report. One Senator, Senator Clinton P. Anderson thereupon took the lead. He saw that it was his duty, as an American to draft a description of the boundaries of the future State of Hawai‘i that would continue the deception, continue the myth of annexation. There would be later hints that he did not really relish this covert work. However, there were important issues of national security involved.

Those concerns dictated that the Senate draft a description that would deceive the world into believing Hawai‘i was territory of the U.S. After all, this was 1953— the middle of the Cold War with the Soviet Union. The U.S. was the leader of the free world, the democratic world. The U.S. led the free nation in the criticism of the Soviet Union, as to Soviet intervention in the sovereignty of Eastern European nations.

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<sup>85</sup> W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES*, sec. 239, 427 (2d ed. 1929).

Senator Anderson knew that U.S. could never admit that it illegally occupied a Hawai'i. Any hint of such a fact would undermine the high moral ground that the U.S. held over the Soviet Union.<sup>86</sup>

The Senate Committee held endless hearings, convened numerous task forces, and divided the committee into those who would know and those Senators with no need to know.

From March of 1953 to January of 1954, six different drafts of boundaries for Hawai'i were produced. There were parameters on the committee's work: First, the myth of annexation, a myth that had succeeded since 1900 must continue. If anything, the myth must be enhanced by even more deceptive language. Second, the boundaries of Hawai'i must exclude those islands or waters that were likely to attract challenges to U.S. jurisdiction over any part of Hawai'i. Thus, the channel waters and Palmyra Island, the most attractive of such targets must now be excluded from the boundaries of Hawai'i.

There was disagreement at first. The Hawai'i delegation sought to retain the channel waters and Palmyra. Senator Anderson however was adamant, without revealing the real reasons for excluding both the channel waters and Palmyra. Excuses were invented for public and media consumption: Palmyra was too far away, 960 miles south of Oahu and moreover, it was unpopulated. Therefore, it would be more of a problem than an asset if included in the new state. The channel waters were excluded because they added so much territory to Hawai'i that Hawai'i challenged Texas in size. Moreover, the policy of the U.S. was settled on claiming only a three mile (at the time) extent as to territorial waters.

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<sup>86</sup> 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 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."

Hawai‘i could not be an exception despite its historically larger claim. Like the boundary description of 1900, the new State boundary would not name the main islands.

From March of 1953 until January of 1954 the Committee and various task forces worked on the Hawai‘i boundary description. Finally, on day in January, Stewart French, counsel to the Senate Committee threw up his hands in joy and wrote a cheery memo to Senator Anderson: “I think we have it.” Committee Print Six did the trick. It excluded the channel waters and maintained the status quo. It excluded Palmyra yet hid that exclusion by surrounding Palmyra with other island, never a part of Hawai‘i that would also be excluded. They too, like Palmyra, were distant and unpopulated. Of course there was no reason they should have been in the description in the first place, as they were not then part of Hawai‘i. The Myth would live. The deception would persist.

The decision in *Kaulia* demonstrates that Committee Print Six, as Section Two of the Admission Act, works very well. All who read it either simply ignore its language as too complex or completely misunderstand its language.

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

Of course, there is no excuse for Hawai‘i courts to fail to understand, read, and apply Hawaii’s boundary description as written. The State and Federal Courts in Hawai‘i should know better. Native Hawaiian litigants, mostly appearing *pro se*, have, on many occasions, raised the issue of lack of territorial subject matter jurisdiction. To date, all such claims have been dismissed—sometimes with an accompanying threat of sanctions under Rule 11.

These challenges should always prevail. It is the moving party that has the duty to prove territorial subject matter jurisdiction.<sup>87</sup> No plaintiff or prosecutor can prove that the Hawaiian Islands were acquired by the Joint Resolution of 1898.

For over a century, the Hawai‘i courts have either deliberately ignored the statutory boundaries of Hawai‘i, or, in ignorance, simply assumed under judicial notice that the main islands were within the Territory and State. Instead, the Courts have blindly relied on the decisions of prior courts, that territorial jurisdiction does indeed exist.<sup>88</sup>

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<sup>87</sup>See *Mikilind Co., LLC. v. Kipu*, 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”).

<sup>88</sup>Haw. R. Civ. Proc. 12:

All courts have a *sua sponte* duty to carefully examine whether subject matter jurisdiction exists. The issue of subject matter jurisdiction can be raised at any time and by any party.<sup>89</sup> It can be raised after issuance of a judgment.

In *Kaulia*, the Supreme Court's denial of the motion to dismiss without examining the actual boundary statute was either deliberate or an example of extraordinary malfeasance. Nevertheless, it also happens to be common practice. If deliberate, it reminds one of the unquestioning application of discriminatory Nazi law as to Jews in Germany before World War II. No matter what an individual judge may know about the status of Hawai'i, this practice of assuming territorial jurisdiction without careful reference to the State Constitution or the Admission Act is judicial misconduct. Nothing is more important or fundamental than whether or not a court has subject matter jurisdiction. There is no excuse for simply assuming the existence of territorial jurisdiction. The class status, ethnicity, and dress of the movant should play no role in the care that judges exercise in ruling on this issue.

Under the Rules of Professional Responsibility and the Canons of Ethics,<sup>90</sup> all parties, particularly attorneys who are officers of the court, have a duty to raise the issue of subject matter jurisdiction when it is in question.<sup>91</sup>

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.*

<sup>89</sup> Jeffrey 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](http://www.federalpracticemanual.org/node/8) (last accessed May 7, 2015).

<sup>90</sup> 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.

<sup>91</sup> Hawai'i Rules of Prof. Conduct, Rule 3.3 Candor Toward the Tribunal

The State and Federal courts have consistently 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.<sup>92</sup> His home was in Hawai'i Kai, on the island of Oahu. I presented a motion to dismiss based on the above findings. The motion stated that the burden of proving subject matter or territorial jurisdiction rested with the bank seeking the foreclosure. The motion further 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. In the motion, I argued that the plaintiff, Central Pacific Bank, as moving party, had the burden to show, by those descriptions, that the home under foreclosure was within the State of Hawai'i.

As such, it was the plaintiff Central Pacific Bank's burden to show that the island of Oahu, site of the defendant's home in Hawai'i, was actually acquired by the Joint Resolution of 1898.<sup>93</sup> After four months of

(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.

<sup>92</sup> Central Pacific Bank v. Chung, Civ. No. 96-4480-10 (1996)(First Circuit Court, State of Hawaii).

<sup>93</sup> See Makila Land Co., LLC. v. Kūpu, 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).

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.”

My client and I had agreed to withdraw the motion to dismiss once the plaintiff, the Bank, conceded on the issue of subject matter jurisdiction. My client and I knew that if we established that the Court lacked jurisdiction that, under the Rules of Civil Procedure, all previous judgments involving in rem actions, including foreclosure and quiet title actions in the State of Hawai‘i, would be void. It was not our intention to create such chaos and uncertainty in the law. We wanted to make our point—that by the Act of Admission, Section Two, and by the Hawai‘i State Constitution, Article XV, my client’s house in Hawai‘i Kai, on the island of Oahu, was not within the territorial boundaries of the State of Hawai‘i. The burden was on the Bank to prove that Oahu had been acquired by the Joint Resolution of 1898. It was impossible for the Bank to make such a proof.

Thus, we withdrew the motion to dismiss. The Bank proceeded to foreclose and did so. Our objective was to make a public point about the lack of jurisdiction in the Courts. I was also seeking to raise the issue as to whether attorneys were obligated to bring this defense under the Rule of Professional Responsibility requiring counsel to represent their client’s “zealously”. There is no better defense than a successful defense of lack of subject matter jurisdiction. Thus, I felt obligated as an attorney to at least make the motion.

Yet, my client and I knew that the judicial system was not ready to address such a sudden and cataclysmic result. It would take time and public discussion to address the best possible resolution of the lack of subject matter jurisdiction as to in rem cases in the State of Hawai‘i. We hoped that our action, including withdrawal of the motion to dismiss would begin a public dialogue about the history of Hawai‘i and potential remedies as to the lack of subject matter territorial jurisdiction.

However, no one from the Hawai‘i State Bar Association, the Hawai‘i Judiciary, or anyone whatsoever contacted me. Nothing followed from our actions. I was quite disappointed.

I was left with few options. I do believe that this defense, the lack of territorial subject matter jurisdiction, is a valid defense which arises from an act of Congress and the Hawai‘i State Constitution. A judge is bound by the rules of evidence to take judicial notice of the laws of the U.S. and the State Constitution. Judges must do so *sua sponte*. The lack of territorial subject matter jurisdiction can be raised at any time—even after a judgment.

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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).

If I had pursued this as a matter of litigation, there was a strong possibility that I would be sanctioned by the Court. If I did not raise this motion while representing a client, I would be in violation of the Rules of Professional Responsibility. If I did nothing, the Hawai'i Judicial System would continue to rest upon a major contradiction. I was eventually sanctioned. That has left but one option—to now present this matter as an academic writing.

D. *The New History: No to Federal Recognition*

Justice Scalia's statements and the opinions of the courts of Hawai'i reveal the devastating and pervasive effects of the longstanding U.S. deception as to the annexation of Hawai'i. It is a deception facilitated by the laws of the U.S., the Constitution of the State of Hawai'i, and by various decisions of State and Federal Courts.

2014 was a breakthrough year for Hawaiians. The events of 2014 started with an educational forum at the William S. Richardson School of Law. 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 the viability of Dr. Crabbe's position at OHA.<sup>94</sup>

In short order, the Department of Interior held fifteen hearings throughout Hawai'i. There was a massive outpouring of opposition to the questions presented by the Department. Much of the opposition focused on the illegality of U.S. sovereignty over Hawai'i. Many signs said: "No Treaty, No Annexation, and No to the Five Questions."<sup>95</sup>

Summer became fall. Hawaiians challenged the subject matter of the jurisdiction of Hawaii's State and Federal Courts. On October 7, 2014 there was a massive protest on Mauna Kea. Groundbreaking ceremonies on new telescopes were interrupted. The Mauna Kea protests became heated and serious when thirty-one "protectors" were arrested on April 2, 2015 for blocking construction of the Thirty Meter Telescope.

In November, 2014 the Association of Hawaiian Civic Clubs, at their annual convention, passed Resolution 14-28 which acknowledged the continuity of the independent and sovereign Kingdom of Hawai'i as a State. They declared, in that resolution that:<sup>96</sup>

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<sup>94</sup> Timothy Hurley, *OHA CEO defends letter on sovereignty*, HONOLULU STAR ADVERTISER, May 12, 2014, at [www.staradvertiser.com/news/breaking/20140512\\_OHA\\_CEO\\_defends\\_letter\\_on\\_sovereignty.html?id=258971921](http://www.staradvertiser.com/news/breaking/20140512_OHA_CEO_defends_letter_on_sovereignty.html?id=258971921).

<sup>95</sup> See Frances Kai-Hwa Wang, *Native Hawaiians to Federal Government: Give Us Back Our Kingdom*, NBC NEWS, July 11, 2014, at [www.nbcnews.com/news/asian-america/native-hawaiians-federal-government-give-us-back-our-kingdom-n151801](http://www.nbcnews.com/news/asian-america/native-hawaiians-federal-government-give-us-back-our-kingdom-n151801)

<sup>96</sup> See Association of Hawaiian Civic Clubs, 2014 Convention, Resolution 14-28 at <http://aohcc.org/index.php/convention/resolutions> [last accessed March 2, 2015, 7:00 AM HST].

*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 Association further declared that Hawai‘i, 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. Therefore the burden is on the U.S., as the claimed successor to the Hawaiian nation, to prove how Hawai‘i was acquired by the U.S.<sup>97</sup> Later in 2014, students at the University of Hawai‘i at Hilo lowered the American flag and insisted that the Hawaiian flag fly higher than the U.S. flag. In April of 2015 these University of Hawai‘i at Hilo students reached an agreement with the University administration to fly the Hawaiian flag above the American flag.<sup>98</sup>

The false history of Hawai‘i, which has been taught to date in Hawai‘i’s schools, is beginning to be exposed. The dominant story in 2015 has been the clash at Mauna Kea as to whether a Thirty-Meter Telescope will be built on the summit of that sacred mountain.

The media has continuously portrayed this as a conflict between Hawaiian religion and science. The media and many others have refused to accept that the real question is one of jurisdiction and power. If the U.S. never acquired the Hawaiian Islands as territory of the U.S. they have no sovereignty and jurisdiction over its lands, including MōunāKeā; the State of Hawai‘i has no power to permit building and desecration on this sacred mountain; and the State has no power to arrest those Native Hawaiians and others who have a duty to protect their sacred elder-Mauna Kea.

Those arrested will raise the defense that the State of Hawai‘i and the Department of Land and Natural Resources has no jurisdiction to arrest them. It is the State that has the burden of proving subject matter jurisdiction. It is the State that must prove that Mauna Kea is territory of the U.S. As described in this article, the very laws of the U.S. clearly state that Mauna Kea was never owned by the State of Hawai‘i. Who then, is breaking the law? The protesters blocking the construction? Or the State that permits building a stadium-sized telescope on land which, by its own Constitution, it lacks territorial jurisdiction?

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<sup>97</sup> *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 ..”).

<sup>98</sup> *UH Regents Meeting In Hilo Packed For Mauna Kea Agenda*, BIG ISLAND VIDEO NEWS, Apr. 16, 2015, at [www.bigislandvideonews.com/2015/04/16/uh-regents-meeting-in-hilo-packed-for-mauna-kea-agenda/](http://www.bigislandvideonews.com/2015/04/16/uh-regents-meeting-in-hilo-packed-for-mauna-kea-agenda/).

Or, are the criminals the Native Hawaiians and their supporters who are blocking the building on lands of their homeland—lands as to which the U.S. and the State have no jurisdiction. It is not clear how oppressive the grip of the myth of annexation will end. But end it must and end it will. The truth must prevail—if the “rule of law,” is to still apply within this part of the world.

#### V. CONCLUSION

The myth of annexation is an enormous dark cloud over the Hawaiian Islands. 117 years ago, American patriots in the Senate made it clear that annexation by a Joint Resolution was impossible. The Joint Resolution was like some cruel and inhuman weapon. The U.S. chose to use, for the only time in history, this weapon on a friendly nation, a humble nation and a people that trusted in American principles and law.

For more than a century this legal atrocity, has been deliberately hidden from both the victims in Hawai‘i and the world. The contradictions and cognitive dissonance generated has created enormous damage, confusion, and anger in the Hawaiian people. Hawaiians take their anger out on those who cannot legally retaliate—on their spouses, their children, and themselves. Anger destroys when turned on the self—it is manifested by addictions, depression, over-eating, diabetes, and petty acts of violence. Anger turned inward has sent many Hawaiians to jail—not in Hawai‘i but in Arizona.

For the next generation of Hawaiians and non-Hawaiians Hawai‘i has become unlivable. There are no affordable homes. There are no waters in the streams. Hawaiians have no jobs worthy of their education. They must work twice or three times as hard to make a living. More Hawaiians live outside than within the Hawaiian Islands. Foreigners buy the best lands, spray chemicals on Hawaiian lands, create unaffordable housing, and drive rents sky-high.

Meanwhile, politicians, the media, and the leaders of the U.S., such as the Secretary of State<sup>99</sup> and the Attorney General<sup>100</sup> ignore Hawaiians

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<sup>99</sup> See letter of May 5, 2014 from the Chief Executive Officer of the Office of Hawaiian Affairs, Dr. Crabbe, to United States Secretary of State John Kerry, Page 3, addressing specific questions to the Secretary of State:

First, does the Hawaiian Kingdom as a sovereign independent State continue to exist as a subject of international law?

Second, if the Hawaiian Kingdom continues to exist, do the sole-executive agreements bind the United States today?

Third, if the Hawaiian Kingdom continues to exist and the sole-executive agreements are binding on the United States, what effect would such a conclusion have on United States domestic legislation, such as the Hawaii Statehood Act, 73 Stat 4 and Act 195?

Fourth, if the Hawaiian Kingdom still continues to exist and the sole-executive agreements are binding on the United States, have members of the Native Hawaiian Roll

when Hawaiians politely ask about the effect of the Joint Resolution. Nonetheless, to date, neither Eric Holder nor John Kerry has responded to questions regarding the political status of Hawai‘i. They, of all people, as leaders of the U.S. fear for the future—fear for a future where Hawai‘i is not securely yoked as their pivot to Asia.

The U.S. fears for the money and trade it may lose if the true status of Hawai‘i is made known. Meanwhile, under the spell of the myth of annexation, Hawaiians suffer an unexplainable angst that creates disease and early death. Now they want Mauna Kea. A foreign consortium consisting of partners of various nations such as China, India, Canada, and Japan, along with Caltech and the University of California at Berkeley, now seek to build on Hawai‘i’s most sacred mountain, not to revere or celebrate it—as people revere and celebrate Mount Fuji, Kilimanjaro, or Everest, but to use Mauna Kea, its strength, grace, and magnificence simply as a ladder to the stars.

The myth of annexation of Hawai‘i is an embarrassment to the U.S. The myth undermines the standing of the U.S. as a leader of the world. The truth about the myth shows the U.S. to be hypocritical—forcing other nations to abide by the “rule of law” while it ignores that rule in Hawai‘i. Much as the U.S. admitted its guilt as to the wrongful overthrow of the Kingdom of Hawai‘i, it must soon admit its wrongdoing as to annexation.

The world will not come to an end. Hawai‘i need not fall into chaos. The first step must be the truth. Hawai‘i must learn the truth about its history. Otherwise, nothing will change. Without truth Mauna Kea dies. Without the truth Hawaiians will disappear. Many, far too many, will either go insane or die of self-inflicted wounds.

At the end of this year, by state law, Hawaiians must gather in convention to create a new governing entity. Hawaiians must create a government amidst the illusion of U.S. sovereignty. Hawaiians must create a government without the necessary resources such as lands, housing, and a government with power over the environment, over the land, over Mauna Kea. Without truth the nation-building convention this fall becomes a mere stage on which puppets play. Truth about the myth of annexation is the first door to liberation, to breathing freely, to sanity, and to progress.

Simply recognizing Native Hawaiians as a Federal Indian Tribe will not solve the basic problem. The U.S. has no jurisdiction in Hawai‘i.

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Commission, Trustees and Staff of the Office of Hawaiian Affairs incurred criminal liability under international law?

<sup>100</sup> See letter from Williamson B.C. Chang, Professor of Law, University of Hawaii at Manoa, William S. Richardson School of Law to United States Attorney General Eric Holder of September 17, 2014 Reporting Felonies in accordance with 18 U.S.C. Section 2144.

The U.S. has no more authority to federalize Hawaiians in Hawai'i than it has the authority to declare that Anglo-Saxons in the United Kingdom are a federally recognized Indian tribe.

After truth must come study and knowledge. Native Hawaiians need time of study; time to slow down. A society cannot execute 180-degree turn on a dime. There is a new canoe in Hawai'i. Like the world-wide voyage of the *Hokulea*,<sup>101</sup> the voyage to be taken by the Hawaiian convention will take planning, much planning. It will also take reconciliation and compromise. However, before the reconciliation, before the new Hawai'i, there must be the Truth.

As our late Queen said in her poem "A Queen's Prayer," we must forgive, but not forget."<sup>102</sup> In our search for truth, we must retain the

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<sup>101</sup> *Hōkūle'a* is a full-scale replica of a *wa'a kaulua* a Polynesian double-hulled voyaging canoe. Launched on 8 March 1975<sup>1</sup> by the Polynesian Voyaging Society, she is best known for her 1976 Hawai'i to Tahiti voyage performed with Polynesian navigation techniques without modern navigational instruments. The primary goal of the voyage was to further support the anthropological theory of the Asiatic origin of native Oceanic people of Polynesians and Hawaiians in particular, as the result of purposeful trips through the Pacific, as opposed to passive drifting on currents, or sailing from the Americas. A secondary goal of the project was to have the canoe and voyage "serve as vehicles for the cultural revitalization of Hawaiians and other Polynesians." See Finney, Ben; Among, Marlene; ... [et al.] *Voyage of Rediscovery: A Cultural Odyssey through Polynesia*. Illustrations by Richard Rhodes. Berkeley, Los Angeles, London: University of California Press. (1994).

<sup>102</sup> Queen Lydia Lili'u Loloku Walania Wewehi Kamaka'eaha, *Queen's Prayer (Ke Aloha O Ka Haku)* March 22, 1895, available at [http://www.huapala.org/Q/Queens\\_Prayer.html](http://www.huapala.org/Q/Queens_Prayer.html) (Composed by Queen Lili'uokalani, while she was under house arrest at Iolani Palace. This hymn was dedicated to Victoria Ka'iulani, heir apparent to the throne).

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  
But forgive  
And cleanse

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

Amen

values of our ancestors. We gather the truth with humility not as the source of vengeance and revenge but as the foundation for a better future. The true history of Hawai‘i 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.”<sup>103</sup>

Our ancestors were humble. Our late Queen was humble. Our kupuna<sup>104</sup> are humble. We shall be humble. For all of this, through the qualities and lessons taught by our ancestors, we have glimpsed the truth and shall prepare for the future.

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<sup>103</sup> ANIL DUTTA MISHRA, *GANDHISM AFTER GANDHI* 133 (1999).

<sup>104</sup> “Ancestors.” See “Kupuna,” Ulukau: Hawaiian Electronic Library, at <http://wehewehe.org/gsd12.85/cgi-bin/hdict?e=q-11000-00---off-0hdict--00-1----0-10-0---0---0direct-10-ED--4-----0-11p0--11-en-Zz-1---Zz-1-home-kupuna--00-3-1-00-0--4----0-0-11-00-0utfZz-8-00&a=d&d=D10044>.