

## Of Time and the River: Crown and Government lands and the Ongoing Quest for Justice in Hawai'i (as amended)

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### Part I. Where are we?

Aloha. A lot has happened since the last forum sponsored by the American Constitutional Law Society on April 17 last spring. The last forum provided the springboard for the letter to Secretary of State John Kerry by OHA's Chief Executive Officer, Kamana'ono Crabbe. Almost immediately the Department of Interior notified Hawaii that it would conduct fifteen hearings throughout the islands for the purpose of exploring rules to facilitate a Government to Government relationship between Native Hawaiian and the United States.

Those fifteen hearings became the talk of the summer. To many of us, the objective of the DOI proposal was to administratively recognize Native Hawaiians as a Federally Recognized Tribe. The statewide hearings were vibrant and emotional. At the hearings there was overwhelming opposition to the DOI proposals. As Dr. Keanu Sai put it, "the sleeping giant has awakened." Those supporting "Federal Recognition" chose to put their position in writing by filing their testimony with the Department of Interior. Two camps emerged, "Federal Recognition" and "De-occupation."

### II. More Education: A Common Ground

As I reflected on the DOI hearings it came to me that the two camps do have elements in common. The first was the expressed need for more education. People wanted to know more—more about international law and more about the economics of independence? Would our lives be better under an independent nation? Does the United States have sovereignty over the Hawaiian Islands? Would independence or federal recognition solve the problems of the high cost of living and housing? Would either path address the dearth of good paying and appropriate jobs for our youth, the demise of open spaces and the death of our fishing industry?

Even those supporting federal recognition, such as OHA, agreed that there was a need for more education. OHA decided that the sovereignty convention or "aha" be postponed for six months on the basis of the need for more education. We, at the law school, have started a course, "To Grow a Nation." There should be courses in every department of the University at Manoa: in the business and medical schools, in political science, social welfare administration, tourism, agriculture, and so forth. This concern should be a priority at the University of Hawaii—for all campuses. Moreover, each department and agency of the State of Hawaii should be exploring

these issues and what changes will be effected. OHA could fund this education—providing the monies for local, national and international scholars, scouring the world for relevant information and similar histories -- asking what are the possibilities? What are the pros and cons? What should be our future?

### III. Our Shared Kuleana: The Crown and Government lands

The second point shared by both camps, by all of us, is the legal status of the so-called "ceded lands." Hawaii has a total of 4 million acres. 1.8 million acres of those lands are these "ceded lands." These are the Crown and Government lands, lands of the Kingdom of Hawaii that were confiscated by the Provisional Government lands and the Republic of Hawaii. They were supposedly "ceded" or transferred by the Republic of Hawaii in 1898 to the United States by the Joint Resolution of annexation.

In short, the Joint Resolution, the act of annexation of sovereignty, was supposedly also a deed. The United States claimed it is the deed by which all public property, all public lands were transferred to the United States on July 7, 1898. During the territorial period much of these public lands were secured for federal or territorial use by executive orders, either by the President of the United States or the Governor of the Territory. At statehood the United States "ceded" the public lands it no longer needed back to the State of Hawaii. Hence, the use of the term "ceded lands." By the Act of Admission those lands were to be held in trust for both the general public and native Hawaiians.

The issue of the legal status of the Crown and Government lands is the nine hundred pound gorilla in the room. For both camps, federal recognition, or de-occupation, for the Hawaiians everywhere, from the man on the street, to the trustees of the Bishop Estate and all the Alii trusts; from the Civic Clubs, to the Homesteads, to the student at Manoa to the Hawaiian working on the docks---it is about "land"—it is about the lands the United States and the State took—it is about the "ceded lands."

Whether we are a Hawaiian National, Native Hawaiian or native Hawaiian on Homestead land--whether we are Hawaiian in halaus, Hawaiian musicians, Hawaiian students, or Hawaiians working in State Government lands — we are all responsible for the status of our public lands. It is clear to me that the Crown and Government lands do not belong to the United States or to the belong State of Hawaii.

The Joint Resolution had no power to take our public lands: it was neither a treaty nor a deed. How can it have such power, it was merely an act of the United States Congress? If an act of the United States Congress could acquire the public lands of Hawaii, an act of the Kingdom of Hawaii, by its House of Nobles and Legislature, could also acquire the public lands of the United States. The very meaning of "sovereignty" is the absolute power over your own territory and property. The United States and the Kingdom of Hawaii as subjects under international law have no power to take the property of another state and no other state can take their public property. The only means of transferring property is by treaty. There was no treaty. The Joint resolution was not a treaty. [See Appendix A]

What we have in common is our responsibility for the *aina*. It is all about land: Crown and Government lands and the lands of the Alii trusts. The commentator Richard Borreca wrote about the Crown and Government lands in the "Insight Section" of the *Star-Advertiser* on July 20, 2014. He said, the DOI hearings were in a sense misleading, a diversion from the real question that was never asked:

"The questions of "nation within a nation" or "tribal relationship" or "leave Hawaii to figure it out for itself" were not answered.

But the real question was not asked.

If Native Hawaiians are to be players in the debate. It is not whether the monarchy is making a comeback or whether it is all a plot to bring in casinos. The question, as it always is in Hawaii, is about the land. An estimated 1.8 million acres were seized by the federal Government lands in 1898 when the U.S. annexed Hawaii. That seized land became ceded land and it's what's at stake in any new Native Hawaiian Government lands."

Best advice: Keep your eyes on the prize."

Any new Hawaiian Government needs lands. Where is the land for a federally recognized Native Hawaiian "tribe" to come from? Kahoolawe, held in trust for the new nation, won't be enough. Neither would the Northwest Hawaiian Islands. The Hawaiian Homesteads are not a contiguous land base. As lands, here, or lands there, such homesteads could not be the territory that makes up a sovereign nation.

The question of land is the Achilles heel of federal recognition. A tribe without land would lack the territory over which to be sovereign. A federally recognized tribe might have a constitution; it might have courts, a legislature and an executive branch but it would be nothing without lands over which to exercise such sovereignty. All it would have would be power over its tribal members: the members on the Hawaiian Roll. How would it be different from the Elks Club—which has a constitution, bylaws and members but no territory? Would Hawaiians just have a clubhouse, like the Elks?

While questions of sovereignty may be new or unfamiliar; questions of land are not. Hawaiians know about land. We know about the *aina*. We know about the *Mahele*, Land Court Awards and Royal Patents. We have lost so much land that we know land---about quieting title, adverse possession and the need for a clean chain of title. Land we know.

On the other hand, Sovereignty calls for more education. Sovereignty we will study. Yet, our responsibility for the *aina*—our *aina*, calls for immediate action. As more lands are taken, as housing becomes more unaffordable housing, as more agricultural lands are lost, as more taro lands are dried up for lack of water—we must act now. The time for action was yesterday, it is also today and tomorrow. Yet, what action can we take? What tools do we have?

We have tools. The most powerful is the Joint Resolution. The United States claim that the Joint Resolution took our lands is a clear falsehood. Let us sue to stop the continuing loss of lands—let us sue for restoration or remedial reparations for the lost of “ceded lands.”

Existing efforts have been inadequate at best. The OHA settlement on Crown and Government lands was a settlement between the state and an instrument of state- OHA. OHA, after Rice v. Cayetano does not even represent the Hawaiian people. After Rice v. Cayetano, non-Hawaiians choose our Trustees. How is a settlement between OHA and the United States a settlement between Hawaiians and the real wrongdoer—the United States?

We have as a tool the Apology Resolution. Is not the implication of the Apology Resolution that the United States is the original cause of the loss of the “ceded lands?” Has not the United States admitted in the apology resolution that it received the Crown and Government lands from Government lands installed by American wrongs? Did not the United States create the 1893 rebellion? Is it not thus responsible for the very existence of the Provisional Government and the Republic of Hawaii? These are the Governments that confiscated the Crown Lands—nearly 990,000 of the 1.8 million acres of “ceded lands.” In the apology resolution of 1993, the United States Congress:

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.<sup>1</sup>

The “ramifications” of that “overthrow” is the creation of the Republic of Hawaii and the taking of the Crown lands.

Action on the Crown and Government lands will lead to education on sovereignty: The very joint resolution by which the United States claimed to take sovereignty from Hawaii is the very same instrument that it uses as a deed to justify the taking of all public lands and property of the Hawaiian Kingdom. The first two paragraphs of the Joint Resolution are printed below

Joint Resolution Providing for the Annexation of the Hawaiian Islands by the United States of America 30 Stat 750

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"Whereas the Government lands of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution,<sup>2</sup> to cede

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<sup>2</sup> Article 32 of the Constitution of the Republic of Hawaii, 1894, does not cede sovereignty or the public and crown lands to the United States, that section states:

"The President, with the approval of the Cabinet shall have the power to make Treaties with Foreign Governments subject to ratification by the Senate.

The President, with the approval of the Cabinet, is hereby expressly authorized and empowered to make a Treaty of Political or Commercial Union between the Republic of Hawaii and the United States of America subject to the ratification of the Senate."

Commentary: Sentence two of this section is redundant. Under sentence one; the President has the power to make treaties with the ratification of the "Senate." That term, "Senate," as used in Section 1 must refer to "ratification by the Senate of the Republic of Hawaii." Sentence two states that the President of the Republic may make a Treaty of "Political or Commercial Union" with the United States of America.

The term "Political Union" could mean anything---an alliance or a mutual security arrangement. The term "Political" does not mean that the Republic ceded sovereignty as is claimed in the Joint Resolution of 1898, passed by the United States.

Moreover, Article 32 seems to require explicitly that any "political or commercial treaty" of "union" be ratified by the "Senate." This second use of "Senate" in this article clearly refers to the United States Senate. It could only have one meaning. It requires that the United States ratify the Treaty of 1897 by the means set forth in Article II of the Constitution of the United States. The United States Constitution requires that the Senate ratify all treaties by "two thirds majority of those present."

Furthermore, the language of Article 32 of the Republic would reaffirm the condition set by the United States Senate Constitution that the House of Representatives of the United States would have no role in consenting to a treaty between the Republic and the United States. Of course, since the Joint Resolution was a bill it came before the House of Representatives, first. It was introduced by Representative Newlands. Thus, the claim that the Joint Resolution "completes" or "ratifies" the un-ratified Treaty of 1897 violates the terms of Article 32 of the Republic of Hawaii. Thus, the claim in the Joint Resolution is clearly false the Joint Resolution cannot be, by terms of the Constitution it cites to, the Constitution of the Republic, the ratification of a cession made by the Constitution of the Republic of Hawaii.

Indeed, there is evidence that the United States, when it passed the Joint Resolution was not even aware that the Senate of the Republic of Hawaii had ratified the Treaty of 1897. The Senate of the Republic purported to ratify the Treaty on September 9, of 1897. Nonetheless, it seems that such ratification was never transmitted to the United States.

William A. Russ, Jr., reports in his book, *The Hawaiian Republic (1894-98)* Page 365

"Sewall [the new American minister and Special Agent to Hawaii], upon looking through the Legation files [in Honolulu] found the ratification of the treaty by the Hawaiian Senate on September 9, 1897, had never

absolutely and without reserve to the United States of America *all rights of sovereignty of whatsoever* kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government lands, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government lands of the Hawaiian Island, together with every right and appurtenance thereunto appertaining: Therefore,

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and [\*\*\*56] singular the property and rights hereinbefore mentioned are vested in the United States of America.*

As seen above, there is no conveyance, as in a deed of the public lands to the United States. Equally important, there is no cession of sovereignty from the Nation of Hawaii to the United States. Crown and Government lands lead us to the issue of sovereignty. The United States took both by the Joint Resolution. The joint resolution is a "coin": on one side is sovereignty and on the other side are the "ceded lands." Our right to the Crown and Government lands is tied to our right to the persistence of the Hawaiian nation as a state under the law of nations. The theft of the Crown and Government lands is just the flip side of sovereignty. If sovereignty divides us now, let's flip the coin.

Some may argue that OHA tried this tool. It tried to the use of the Apology Resolution to stop the sale of "ceded lands." Yet, OHA betrayed us at the critical moment. When it came to the question of whether the United States had title to the "ceded lands," when the Justices of the

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formally been delivered to the United States. He secured it at the Foreign Office."

In other words, during the debate on the Joint Resolution in Congress during the summer of 1898, the United States had never even received the ratification of the Treaty of 1897 by the Senate of Hawaii! Thus, any argument that the Joint Resolution completed or ratified the Treaty of 1897, as was argued in the United States Senate in June and July of 1898, was based on pure speculation and assumption that the Republic of Hawaii had indeed ratified the Treaty.

Of course, the Treaty also specifically required ratification by the United States Senate only, and by a two thirds majority of those senators present. Thus, under no circumstances could the Joint Resolution be true---that it constituted the ratification of the Constitution of the Republic of Hawaii.

Supreme Court questioned the attorney for OHA on the effect of the Joint Resolution on the transfer of lands—the attorney misrepresented the truth. In Court he admitted that the Joint Resolution, the Newlands resolution, conveyed perfect title to the United States and the State of Hawaii.<sup>3</sup>

In the oral arguments before the United States Supreme Court on February 25, 2009, the Justices of the High Court kept asking one question to both sides: “Who has title to the ‘ceded lands.’ ”

First came the lawyer for the State of Hawaii—seeking to protect the States’s power to alienate the “ceded lands.” The lawyer for the State of Hawaii, of course, seeking to keep pure the chain of title to state claimed that the State of Hawaii had “perfect” title.

MR. BENNETT: . . . Your Honor, what our response would be is a simple one: That the issue of the State’s title would in our view be undisputed. The United States’s title is perfect and undisputable, and the State’s title is perfect and undisputable. And this Court has said that one of the functions in—in cases where respondents claim an adequate and independent State law ground is to remand the case by disabusing the state courts of incorrect notions of what Federal law either permits or requires.

Transcript of the Supreme Court Argument in OHA v. HCDC page 13  
February 25, 2009

What did the lawyer for OHA say in oral argument?

He too was asked whether the United States and the State had perfect title. This was the million dollar moment for all Hawaiians. This was the time to show the inadequacy of the Joint Resolution—to argue that the Joint Resolution had no power to convey the public or Crown and Government lands.

It was an argument that could be made and would be impossible to refute. How could a mere act of Congress, an act of one party serve as a conveyance from Hawaii to the United States? We may not know about sovereignty. We do know about deeds. All that lawyer had to do

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<sup>3</sup> When it came to the question of Crown and Government lands they failed us. OHA, before the Supreme Court, conceded that the United States and the State had perfect title to the Crown and Government lands In 2009, OHA was before the United States Supreme Court decision in the most critical case of our time: Hawaii v. Office of Hawaiian Affairs (2009) The case originated as an attempt to prevent the sale of “ceded lands.” This case, which spanned more than 14 years, concerned the ability of the State of Hawaii to sell Crown and Government lands on Maui. OHA objected. The State used the apology resolution to argue that the Apology Resolution prevented the sale of Crown and Government lands until there was a reconciliation between Hawaiian and the United States.

was announce what I show in the appendix to be true—that the Joint Resolution could not give the United States perfect title and the United States could not give the State perfect title.

Yet, what did OHA's lawyer do? He agreed with the lawyer for the State: He admitted that the United States and the State had perfect title:

MR. SHANMUGAN: Well, first of all, our whole theory has never that there is a cloud on title. To be sure, we have maintained at various points in this litigation that Native Hawaiians do have potentially valid legal claims, as well as moral and political claims, to the underlying land.

But we have never argued that the injunction in this case should be based on some assessment of the existence or validity of legal claims. To the contrary, we have consistently taken the position --and this is clear from our briefs in support of the Hawaii Supreme Court--- that any such claims would be non-justiciable.

And for that reason all we were seeking was an injunction to protect these lands until those claims could be resolved through the political process. That was all we were conceding below, and the Hawaii legislature again could readily resolve those underlying claims without in any way casting doubt on the validity of the Newlands Resolution [the Joint Resolution of Annexation] or any other federal enactment that purports to recognize absolute title—

JUSITCE GINSBURG: Can I ---

MR. SHANMUGAN: to ceded lands.

Transcript of the Supreme Court Argument in OHA v. HCDC page 13  
February 25, 2009:

Why didn't he bring up the Joint Resolution? Perhaps he was afraid of the "other side of the coin"-- sovereignty. To argue there was no perfect title would be to argue there was no sovereignty in the State of Hawaii. He didn't want to do anything to put state sovereignty over the Hawaiian Islands in jeopardy. You can't have one without the other. They come hand in hand. If the there is no title to the Crown and Government lands in the United States or State, there is no sovereignty in the United States or the State of Hawaii.

The time for OHA is past. It cannot fight the Crown and Government lands battle for us. It no longer represents Hawaiians. It is a State agency: It presented a misrepresentation before the Supreme Court because of its fidelity to the State. It presented the position of the State of Hawaii—not the Hawaiian people.

That argument was the moment---that was the moment to begin the education of the United States Supreme Court, of the people of America of the peoples and nations of the world. Will that moment come again? I believe so. Even the Supreme Court despises falsehoods. They



reversed the rule on segregation of the races in *Brown v. Board of Education*. Its predecessor *Plessy v. Ferguson* was based on the falsehood that "separate was equal." Before the truth come the falsehoods: In the end, it is the truth that must prevail.

The loss of Crown and Government lands is all around us. Crown and Government lands are constantly being given away. Barking Sands, the Pacific Missile Range Facility, in 2007, claimed in its environmental impact statement that Hawaiians had no right and no standing to those "ceded lands." Crown and Government lands may not often be "sold"-- but they are often given by quitclaim deed as was the case in Barking Sands.<sup>4</sup> These are opportunities to attack.

We can bring the case of *OHA v. HCDA* again<sup>5</sup> and we can also challenge the loss of lands elsewhere. Where? ---we could start with the Thirty Meter Telescope on Mauna Kea. We could start with tuition at the University of Hawaii. By challenging Crown and Government lands we can learn about different modes of sovereignty and independence. Let's use a dual strategy: invoke challenges in both American and international courts. Educate the United States, its Supreme Court, the World and its Courts. Use what we have been taught--American property law to invalidate the chain of title to the "ceded lands."

### III. The Alii Lands: The Tragedy of the Maryland Land Law [The Leasehold Conversion Act]

Finally, I could not end without at least saying something about the Alii trusts. These are lands that also need protection. Like the case in *Hawaii v. Office of Hawaiian Affairs* in 2009, we, as Hawaiians were not politically organized when the State took the lands of the Bishop and other Hawaiian Estates by means of the Leasehold Conversion Law. Let me briefly mention that story here. In materials for my class I wrote about the Leasehold Conversion law from the point of view of Chief Justice Richardson

The worst decision of the Supreme Court to Richardson, by far, was the decision taking allowing the State of Hawaii, by use of eminent domain to take the lands of Pauahi, the lands of the Bishop Estate. This was a first in United States Supreme Court history, the taking of private lands to enrich private people. And these were the wealthiest people in Hawaii---the people living along Kahala Avenue, the people of Portlock and Hawaii Kai. Imagine, the Bishop estate

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<sup>4</sup> See Department of the Navy, Pacific Missile Range, Barking Sands, Appendix 1, Land Use, Crown and Government lands. . . Acreage: 548.57 acres. . . . Status of Title: U.S. Owned, Set Aside by Governor's Executive Order in 1941, by conveyance of the State in 1963 and by lease in 1964 and 1965. As to legal claims by Hawaiians:

"Taken together, the foregoing facts indicate that no individual has a legal claim, based on any right of property, to any federally retained ceded lands simply by virtue of Hawaiian ancestry. As against any such claim, the Government lands chain of title, from a purely legal standpoint is unimpeachable. Even if such a claim might have existed it would appear to be barred by the 12 year statute of limitations in the Federal Quiet Title Act.

<sup>5</sup> One plaintiff has not settled in *OHA v. HCDA*.

leased these lands to those people for a song---why demand more, for the Bishop Estate believed, by western property law that such lands could not be forcibly taken from the Estate. Large lots in Kahala were being leased for 100,000 dollars a year.

After the state forced the Estate to sell those lands to the renters, those very renters immediately resold that beachfront land for several millions. In short, the real value of those lands was in the millions. The Estate was giving those lands away---under a leasehold system that the Estate believed would never be changed. Given that the Estate would always have such lands, why charge more than a nominal land rent?

The Estate lost its power over the aina. It lost billions of dollars. No one, of course, sided with the Estate. They were the "bad guys," the monopolists. The fact is that their land rents were so low that Kahala beachfront property both house and land were selling, before the conversion law, far below the international market price for resort beachfront property. Land and houses were selling at 400,000 for both. A colleague at the law school suggested buying a Kahala home, just before the Supreme Court decision came down, as a sure fire way to make a million. He was right, immediately after the Supreme Court affirmed the Maryland Act, the Leasehold Conversion Act, those 400,000 dollar homes were selling at 1.5 million. The increase lay in the value of the land. The 100,000 dollars a year it cost to rent the land from the Bishop estate was far below the real value of the land. The post decision sales proved that point. The Estate and other estates lost billions of dollars.

Who took advantage of the opportunity to convert? The richest in Honolulu---the people of Kahala, Portlock and East Honolulu---all Bishop Estate land. Why did the Estate lease land so cheaply? The Estate believed in western property law. Before the leasehold Supreme Court decision land could only be taken for a "public use". Taking land from a private owner [the Bishop Estate] to give to another private owner [the owner of the Kahala home] had always been forbidden. The Bishop Estate case was the first time in American history that the "public use" clause was interpreted as allowing the sale from one private owner to another.

The Bishop estate always believed that it would own the lands. As such, it had little incentive to charge market or predatory lease rents for the land. It had enough monies to run the Kamehameha Schools. More important, the leasehold system in Hawaii kept housing prices lower than under a fee system. The Estate had no interest in charging the highest rents the market could bear. Why should it do that? Why should it destabilize Honolulu? Why deny to Hawaiians, Japanese and others of modest means the ability to live in Honolulu?

As the Kahala and Portlock residents sold out for millions they kept half and bought homes in the next most desirable area ---Maunalani Heights. Well, as these new buyers competed for homes in Maunalani Heights, they bid up prices there. The Maunalani Heights sellers made large profits sold and went to the next most desirable area---Hawaii Kai and Kaimuki passing along their windfall sales in higher prices in Hawaii Kai and Kaimuki. Now, what did all these sellers do with the other half of their windfall profits? They bought second homes---homes that they rented out. The Leasehold Conversion thus created a domino effect and raised housing

prices throughout Honolulu. With people buying second homes they had two mortgages. And to pay for two mortgages they had to raise rents so rents went up.

Once Bishop Estate knew that they could lose the land and the value of the land would be based on the lease-rent for the land their only sensible course of action was to raise land rents—which again raised housing prices.

Now, did the Leasehold Conversion law create affordable housing? No. The creation of affordable housing was the stated purpose of the leasehold conversion act. It was that objective by which the Supreme Court changed the law allowing private property to be taken for private property.

What was the effect of the leasehold conversion act? The Estate lost billions. More important Hawaiians, an Alii Trust lost the land—lands that would become much more valuable over time. Most important, the Estate lost the ability to hold onto the lands, to hold the aina. Once again, like the annexationists who simply took the Crown and Government lands, the lands were taken---even if it was an exchange for money. The key to Hawaiian politics has been to force Hawaiians to take money for land---money that is devalued by inflation and high housing and living costs.

People say the Bishop Estate today is rich. But land in Hawaii is everything. For Hawaiians it is more than real estate—it is the life and soul of the culture. It is the western way to assume land and money are the same.

It is incidents and history like this that needs study---study by the University, its business school, its economics department and its law school. Education is the key: It is critical to all discussions of sovereignty.

Chief Justice Richardson would have struck down the leasehold conversion law under Hawaii's state constitution as a non-public taking. The rumor is that counsel for both sides manipulated the state proceeding to keep from him. To him the conversion act was akin to the taking of the crown lands. It would never have happened under Kingdom law. It was the bitter price to pay for annexation—or at least the illusion of annexation.

#### IV. Conclusion:

Now is a moment for unity. United we prevail. Divided? History shows we lose. The issues surrounding the Crown and Government land is one where we can build consensus. Our responsibility to the aina is our kuleana.

Mahalo.

## Appendix A: How I Discovered the Joint Resolution did not annex the Hawaiian Islands:

### I. "Discovering the Joint Resolution had no Power to Acquire Hawaii

So, I went to the basement of Hamilton Library and pulled out the volume of the Congressional Record that had the complete debate in the United States Senate on the Joint Resolution. It is hard to describe how I felt. The volume was an original. The pages were yellow but in beautiful print. I felt like I was going back in time. I didn't know what I would discover but I suspected it would be something remarkable.

As I opened the volume, nearly a hundred years old, and read the very words of the Senators on the Joint resolution, my heart surged. I was right. They did cheat. I sat there in stunned silence. I read passage after passage from Senators from all parts of the country. Most astonishing, these Senators, who objected to annexation, said that it would

be impossible to acquire Hawai'i by a joint resolution. A joint resolution was just a law of congress, a mere act; it had no power over territory of another sovereign nation. If the United States could acquire Hawai'i by a joint resolution or law, then Hawai'i could acquire the United States by an act of its own legislature.

It was an incredibly emotional experience. I touched the pages delicately. I looked up. The room was quiet, cool and empty. I realized then what Hawaiians had been dreaming of for years: the Hawaiian Islands had never left Hawaiian hands. The United States never acquired Hawaii. The "ceded lands," the very earth beneath me had never become lands of the United States! No one had ever taken Hawaii! It was just a false belief held by all of us. Annexation was not just unconstitutional; it was not just unlawful; it had never happened!

I went back day after day. I was stunned. I was in awe. I handled the volume and its pages gingerly. I read a few pages at a time, digesting each slowly, as if this were some great meal. I made copies and to make the best copies I went to the dollar a page color copier. The color copies were clear and crisp---and yellow---a very official looking yellow. Time and again I would look up and at the people near me, smirking with a secret known only to me: "Do you know that you're not in the United States?" When I left the library and walked or drove the streets of Honolulu everything changed. America was "here" but it wasn't really "here."

I soon developed favorite passages and favorite Senators. Allen of Nebraska was the best.<sup>6</sup> Stephen White of California was a hero.<sup>7</sup> "Pitchfork" Ben Tillman was

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1 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?

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Hawai'i is foreign to us. We base our jurisdiction upon a falsehood desired to be made conclusive in a resolution the verity of which is said cannot be attacked, however groundless it may be. The committee in this document asserts that a cession has been accomplished because they well know that we have otherwise no power to act.

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Whence do acts of Congress go? Upon whom do they operate? Upon the people of the United States. They have no efficacy beyond the United States except in so far as the influence the conduct of her people in certain excepted cases and those exceptions are more apparent than real. They are impotent to affect the title or the status of the people of who live upon alien soil. Where, then do we obtain the authority to annex unless by some treaty provision?

comical in a right sort of way. He was a racist but he loved to mock the Republican administration [the annexationist administration of McKinley]. The Republic of Hawai'i legalized involuntary servitude in the form of plantation labor. Pitchfork Ben Tillman thought it was hilarious and ironic that the Republican Party-- the party of Lincoln and anti-slavery sought to bring in the Republic of Hawai'i as territory of the United States.<sup>8</sup>

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Mr. Allen. A Joint Resolution if passed becomes a statute law. It has no other or greater force. It is the same as if it would be if it were entitled "an act" instead of "A Joint Resolution." That is its legal classification. It is therefore impossible for the Government lands of the United States to reach across its boundary into the dominion of another Government lands and annex that Government lands or persons or property therein. But the United States may do so under the treaty making power, which I shall hereafter consider.

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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 lands. 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

Statements of Senator Allen of Nebraska 31 Congressional Record 6635 and 6636 July 4, 1898.

"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. Whence do acts of Congress go? Upon whom do they operate? Upon the people of the United States. They have no efficacy beyond the United States except in so far as the influence the conduct of her people in certain excepted cases and those exceptions are more apparent than real. They are impotent to affect the title or the status of the people of who live upon alien soil. Where, then do we obtain the authority to annex unless by some treaty provision?"

Senator White at 31 Cong. Rec. 6653 (1898)

3. "The Republican party, the great party of liberty as they term themselves, the men who first discovered " the man and brother" as an equal, stand here today contradicting all their theories and professions up to this time, and say that the colored races in Hawai'i have no rights that they are bound to respect; they say that they will take Hawai'i under the protection of the Stars and Stripes and maintain a stable Government lands there,

The more I read, the more I learned. Senator Augustus Bacon explained that only by "treaty" could the United States acquire Hawaii:

"Mr. Bacon. The Senator from Ohio makes a very important concession, and if he stands by that I think he will be bound to vote against this joint resolution. The Senator from Ohio concedes that if the purpose were to cede to this Government lands a part of the territory of another Government . . . it must necessarily be in the form of a treaty, but that if the purpose were to cede to this Government a part of the territory of another Government lands it must necessarily lie in the form of a treaty, . . ."<sup>9</sup>

## II. The Principle of the Equality of Sovereignty of All States under International Law

I was stunned when I read these passages. When I put them down and thought I realized that, of course it was true. No independent and sovereign state could by its own laws annex or acquire the territory of another independent and sovereign state. If the United States could do that, then Hawai'i could acquire the United States.

The claim that an act of Congress could acquire the Hawaiian Islands violates the most basic principle of international law--the equality of sovereignty of states. All states under international law are absolutely sovereign within their territorial boundaries. That is, the laws of the Government of each state are final and absolute within their dominion. Thus, the laws of the United States are final and absolute within the territory of the United States. Since Hawai'i is a State under international law, its laws, its sovereignty is also absolute and final within its territorial boundaries. If the laws of each, the United States and Hawai'i, are absolute within their respective territories, how can the United States, by a law of its own, acquire the territory of Hawaii? Such is an impossibility.

This is more than to say it is "wrong," or "unlawful," or "unconstitutional." It is, rather, "impossible"—which is to say that it cannot happen. In other words, what we mean when we say a state is "sovereign" is precisely opposite to what the United States claims—a "sovereign" state is one which cannot be "acquired" by a law or joint resolution of another sovereign state.

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notwithstanding the fact that 50,000 able bodied men of the 109,000 people of the islands are today in a condition of slavery."

Senator Tillman 31 Congressional Record 6533 June 25, 1898

<sup>9</sup> Statements of Senator Bacon 6148 to 6152 June 20 1898

Sometimes I use an analogy. There is an old riddle that asks: "What happens when the immovable object meets the irresistible force?" It is a tough question. Intuitively, one wants to say something like: "there is a big collision, or 'boom'." It's a trick question. To answer it, we can use a device used in philosophy and science called "possible worlds theory." If we postulate or conjure up a world in which there is an "immovable object" it is a world in which there can never be an "irresistible force." And if we think of a world in which there is an irresistible force there can never in that world be an immovable object. In short, there can never be a world in which there exists both an immovable object and an irresistible force. What we mean by "immovable object" is a world in which there are no irresistible forces.

The same applies to the word "sovereign" as applied to states in international law. If all states are sovereign in international law, all states have absolute lawmaking power over their dominion. If so, the meaning of sovereign is that there is no state which can by its legislative act acquire the dominion of another sovereign state. Just as there is no world in which both an immovable object and an irresistible force exist, there can be no world in which there are sovereign states and in which an act of law of another state can acquire the territory of another state.

### III. The Three Modes of Acquisition of Territory: Discovery, Conquest and Treaty

There are only three modes by which a state under international law can acquire additional territory: by the doctrine of discovery, by conquest and by treaty. The doctrine of discovery permits a state to seize and declare territory that is not the territory of another sovereign. Such territory was *terres nullius* or territory--subject to the sovereignty of no state. Since sovereign states were civilized only if they were Christian, European Christian nations claimed to "discover" and claim sovereignty over the lands of non-Christian nations in the third world. Any land that was not inhabited by Christians was available to be "discovered", claimed, and exploited.

The United States has never claimed that it "conquered" the Hawaiian Islands. Conquest is in international law the acquisition of territory through force. The United States "annexation" of Hawai'i in 1898 did not result from the absolute destruction of the civil structure of the Hawaiian Government lands. The use of war or aggression is a violation of the United Nations charter. The United States has never claimed it acquired the Hawaiian Islands by "conquest" or *debellatio*.

Thus, the only basis by which the United States can claim acquisition of Hawai'i is by treaty. The point was made in the Senate debates on the Joint resolution in 1898, that all the territory acquired by the United States has been acquired by Treaty:



"And Mr. President if we will turn to the precedents we will find this assertion well sustained by the history of our country.

Alaska came to us by treaty from Russia March 30, 1867.

Arizona was included in the Territory of New Mexico ceded to the United States by Mexico by treaty of February 2, 1848. Its boundary was extended south by the Gadsden Treaty of December 3, 1853\_June 30, 1854.

Florida came to us from France by treaty February 22, 1810.

Louisiana came to us by Treaty of April 30, 1803

New Mexico came to the United States from Mexico by treaty of February 2, 1848.

Santo Domingo was proposed to be annexed by treaty in 1869, but it failed. That treaty contained a clause for the assent of a vote of the people which was taken in March 1870 and they voted 1006 and 9 against.

In 1867 the United States negotiated a treaty with Denmark for St. Thomas and St. Johns, and the assent of the people of those islands was made a condition precedent, and they voted "aye" about January 18, 1868 but the treaty failed."<sup>10</sup>

Thus, even where the United States went to war, as it did with Mexico, defeating Mexico and acquiring territory—the eventual annexation was sealed by a Treaty ending such war.

Thus, the whole crux of the matter is very simple. The question is this: By what treaty did the United States acquire the Hawaiian Islands as territory of the United States?

First, and foremost, the burden of proving sovereignty is always on the nation claiming sovereignty.<sup>11</sup> It is the United States which must present proof of an act by

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<sup>10</sup> See Statement of Senator Allen at 31 Cong. Rec. at 6636

<sup>11</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."

which it acquired the Hawaiian Islands. Since the United States does not claim it acquired Hawai'i by discovery or conquest, it must show the existence of a treaty. There are three draft treaties of annexation: 1854, 1893 and 1897 between the United States and Hawaii. The treaty of 1854, a secret treaty, proposed that Hawai'i become a State of the United States. Statehood was unacceptable to the United States. The treaty of 1854 never proceeded beyond the status of a draft.

In the aftermath of the rebellion of January 17, 1893, the Committee of Safety that named itself "the Provisional Government lands," sent a delegation of four to Washington to negotiate a treaty of annexation with Secretary of State John W. Foster of the United States. The trip was financed by Charles Reed Bishop. The delegation arrived on February 4, 1893.

Foster did negotiate with the rebels and a draft treaty was produced on February 14, 1893. It was submitted to the Senate but no action was taken. A new president, Grover Cleveland, had just been elected. He was to be sworn in to office in March of 1893. The Senate wanted to see what position the new President would take on Hawaii. Cleveland was opposed to immediate annexation of Hawai'i and wanted an investigation. Thus, he withdrew the treaty from the Senate in March of 1893. The Senate would never vote on the treaty.

Cleveland appointed James Blount, a Georgia Congressman, to conduct a comprehensive investigation of the role of the United States in the rebellion. Blount's

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

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

The Court then examined the titles invoked by both Parties.

See Also Case Concerning Territorial And Maritime Dispute Between Nicaragua And Honduras In The Caribbean Sea (*Nicaragua v. Honduras*) 2007 ICJ Lexis 1, 8 October 2007; Case Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan (Indonesia/Malaysia) 2002 ICJ LEXIS 6 17 December 2002; Case Concerning Maritime Delimitation In The Area Between Greenland And Jan Ma Yen (*Denmark V. Norway*) 1993 ICJ Lexis 214 June 1993; Case Concerning Delimitation Of The Maritime Boundary In The Gulf Of Maine Area (*Canada/United States Of America*) 1984 ICJ Lexis 412 October 1984; and see *C.A.B. v. Islands Airlines*, 235 F. Supp. 990 (D.C. Dist Hawaii, 1964) See Also, *New Jersey v. New York*, 523 U.S. 767 (1998) [burden of proof in cases claiming dominion by prescription]:

report led Cleveland to conclude that the rebellion would not have taken place but for the actions of the American minister to Hawaii, John L. Stevens. Blount was comprehensive and meticulous in his investigation.

As a result, the United States Secretary of State and President Cleveland concluded that the landing of United States military forces and the actions of Minister Stevens violated the sovereignty of the Kingdom of Hawai'i under international law, violated treaties between the Kingdom and the United States and constituted an unlawful act of aggression. On December 18, 1893 the President, by message to the people of the United States and the world, admitted such wrongs violated international law and promised to restore the Government of the Kingdom of Hawaii.

President Cleveland failed to restore the Government of the Kingdom of Hawaii. Thus, it is clear that the Treaty of 1893 failed.

William McKinley, who favored annexation of Hawaii, was elected President in 1896. In 1897 a delegation of four annexationists from Hawai'i met with United States Secretary of State John Sherman and drafted a treaty of annexation---the Treaty of 1897. The Treaty was presented to the United States Senate. It was discussed in secret session, which was traditional as to treaties. It was clear that it did not have the necessary support to acquire the two thirds super majority. Thus, a vote was never taken. Nonetheless, President McKinley did not withdraw it from the Senate. The Treaty of 1897 would also fail to gain the constitutionally required support of a two-thirds majority of the Senators present

It is clear that the primary obstacle to the Treaty was the objection of the Hawaiian people including non-Native Hawaiians who were citizens of the Kingdom of Hawaii. More than 21,000 persons signed carefully prepared petitions in opposition to the Treaty. These 21,000 persons constituted a majority of the Hawaiians and Hawaiian Nationals. Opposition was spirited and vigorous. Senator Pettigrew of South Dakota made a trip to Hawai'i in the fall of 1897 to investigate on his own. He recorded his observations in a book "Course of Empire." He wrote vehemently against annexation. In his book he described a visit to a Hilo church which particularly moved him. When he asked of the congregation who was opposed to the Treaty the whole of the Church stood.

The Ku'e petitions were the primary reason for the failure of the Treaty of 1897. The Ku'e petitions succeeded: the Treaty failed. The United States failed to acquire the Hawaiian Islands. Nonetheless, all of us, Hawaiians and non-Hawaiians have been led to believe that the Joint Resolution, a mere act of Congress, passed a year later acquired and annexed the Hawaiian Islands.

As I read the statements the Congressional Record, Senator after Senator would proclaim that the Joint resolution was not a treaty. The key point, however, is that it was the United States that never ratified the Treaty of 1897. In an ironic fashion, though we believe today that Hawai'i was annexed by treaty "by the United States," it was the

United States itself that rejected the treaty. Hawaii, it is claimed, was annexed by the Joint Resolution.

Nonetheless, we have been led to believe that the Joint resolution of 1898 had the effect of a treaty. Yet, we have seen, from the statements made by the senators opposed to the Joint resolution, that the joint resolution is not a treaty, it is merely an act of Congress. It can have no actual force on the dominion and territory of another sovereign nation."

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