Mrs. Copeland

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Peyton Ford,
The Assistant to the Attorney General
George T. Washington, Assistant Solicitor General

March 17, 1949

Letter of January 17, 1949, from the Attorney General, Territory of Hawaii, concerning Statehood for Hawaii.

To Chambers 3/30/49

This is in response to Mr. Chambers' memorandum of January 26, 1949, requesting my views with respect to a letter dated January 17, 1949, from Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii.

Introduction

Enclosed with Mr. Ackerman's letter is a copy of H. R. 49, as it passed the House in the Eightieth Congress. The bill is entitled "An Act to enable the people of Hawaii to form a constitution and State government and to be admitted into the Union on an equal footing with the original States," and is substantially similar to H. R. 49 introduced on January 3, 1949, in the Eighty-first Congress. The latter bill was reported favorably with amendments by the House Committee on Public Lands (H. Rept. 254, 81st Cong., 1st sess.).

The letter relates to those provisions of the bill which provide for the establishment of a Federal district court in the new State, particularly sections 9, 10, 11, and 14. Subsequent to the introduction of H. R. 49 in the Eightieth Congress and its passage by the House, Title 28 of the United States Code was revised so as to include certain matters theretofore covered by the Hawaiian Organic Act (48 U.S.C. 491, et seq.). The bill as re-introduced still contains these provisions. The Hawaiian Statehood Commission has accordingly recommended that certain provisions of the Statehood bill be deleted and that a separate bill be introduced which would amend Title 28

in the event Hawaii became a State. The Attorney General of Hawaii has been requested to prepare drafts of proposed bills, and it is in this connection that the advice of the Attorney General of the United States is requested.

There is at present in Hawaii a court known as "The United States District Court for the District of Hawaii."[1] While in matters of jurisdiction, powers, and procedure, this court is in all respects equal to the Federal district courts in the States (H. Rept. 308, 80th Cong., 1st sess., p. 6), it was not created pursuant to Article III of the Constitution and hence is known as a "legislative court." Mookini v. United States, 303 U.S. 201, 205. If Hawaii becomes a State, this legislative court would be replaced by a "constitutional court," that is to say, one created pursuant to Article III. The two judges of the territorial court were appointed for a term of six years each.[2] Judges of Article III district courts hold office during good behavior.

4/ The questions submitted by the Attorney General of Hawaii are set forth and considered seriatim:

1. (a) The enclosed proposed drafts are intended to continue in office the two federal judges who are incumbents upon the admission of Hawaii as a state. Pursuant to section 134 of the new Title 28 the present term of office for a district judge

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1/ The court was formerly known as the "United States District Court, Territory of Hawaii" (see 48 U.S.C. 642a). The name of the court was changed in the revision of Title 28 of the United States Code to the "United States District Court for the District of Hawaii" (see 28 U.S.C. 91, 132(a) and H. Rept. 308, 80th Cong., 1st sess., p. 6). Acquisition of statehood by Hawaii will not require any further change in the name of the court, but the fact that the old and new courts would have the same name creates a problem of identification for the draftsmen of the enabling legislation.

2/ See 28 U.S.C. 134 and 28 U.S.C., 1946 ed., sec. 643. Judges Delbert E. Metzger and J. Frank McLaughlin, the present incumbents, were reappointed on September 28, 1945, and February 22, 1943, respectively. Judge McLaughlin was appointed for a new term, and his appointment was confirmed by the Senate on March 17, 1949 (95 Cong. Rec. 2773).

in Hawaii is six years. Upon the admission of Hawaii as a state the term of office, under the Constitution, automatically would become the same as that of other judges of the United States courts, that is, during good behavior. The question arises whether the incumbent federal judges, having been appointed by the President and approved by the Senate, may be continued in their offices, or whether under the Constitution new appointments would be necessary.

One of the exhibits attached to Mr. Ackerman's letter is a draft of a proposed bill prepared by a member of the Statehood Commission. Mr. Ackerman evidently wishes to know whether the following section of the proposed bill would be valid:

> 10 SEC. ____. Upon the admission of Hawaii as a State of the Union, the United States District Court for the District of Hawaii, constituted by Chapter 5 of Title 28, shall thenceforth be a court of the United States with judicial power derived from Article III, Sec. 1 of the Constitution and the judges thereof shall thenceforth hold office during good behavior and shall be entitled to retirement and disability benefits of Sections 371 and 372, Title 28, U. S. Code.

The proposed provision does not expressly state that the judges of the territorial district court shall continue in office as judges of the Article III court without reappointment. It is clear, however, from Mr. Ackerman's letter that this is the primary purpose of the proposed section. I believe it is questionable whether Congress could constitutionally continue the present judges of the legislative court in office as judges of the new constitutional court and thus dispense with the necessity for their reappointment. If and when Hawaii becomes a State, the territorial district court will cease to exist (Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 48), the terms of the incumbents will lapse, and a new court will come into existence. Congress in creating the district court for the new State can, of course, provide for the

transfer of pending litigation, property, equipment, and records from the old court to the new. It can designate the new court the "successor" of the old, but it is doubtful whether it can constitutionally fill the newly created positions without trenching upon the appointment prerogatives of the President and the Senate. Cf. 39 Op. A.G. 61, citing Springer v. Philippine Islands, 277 U.S. 189; State v. Henry, 118 Tex. 449, 16 S.W. (2d) 809. While it can be argued that the approval by the President of such legislation would be tantamount to Presidential appointment and Senate confirmation and that the House concurrence can be disregarded, it would seem none the less that this method of filling federal offices was not intended by the Constitution. For, should the President veto such legislation, Congress by enacting it over his veto could completely preempt his appointive prerogative. Moreover, the considerations which enter into the selection of a judge who is to serve for life are no doubt quite different from those involved in the selection of a judge who is to serve for a fixed term. It is for the President and the Senate alone to determine, in the order named, whether they are qualified. The President and the Senate should not be asked to decide this issue in reverse order or to permit the House of Representatives to share in the process of selection.

10 (b) If the incumbent judges are to be continued in office on the theory that no material change in the United States District Court has occurred upon the admission of the State, the further question arises as to whether the subject matter of sections 12 and 13 of H. R. 49 is necessary so far as the federal court is concerned, and if such subject matter is to be included with respect to the federal court, is it proper to refer to the United States District Court for the District of Hawaii, on and after the admission of the State, as the "successor" of the United States District Court for the District of Hawaii as constituted prior to the admission of the State?

10 (c) It should be noted that whether or not the United States District Court for the District of Hawaii is to be considered as the same court after the State is admitted as it was before, there are certain laws of the United States having an application within the Territory which such laws could not have within a state, and no doubt, in any event, there should be some saving provision as to causes of action already arisen and criminal offenses already committed.

As the incumbent judges cannot be continued in office without reappointment, it is unnecessary to decide whether sections 12 and 13 of H. R. 49 might otherwise be deleted. Section 12 would prevent pending cases from abating, provide for their transfer to appropriate State courts or to the Federal district court, designate such courts as the successors of the present courts in the Territory, and provide for the transfer of files and records. Section 13 would give litigants the same type of appellate review that exists in other states and would extend their right of appeal to cases decided prior to statehood in which appeals had not been perfected. In view of the importance of the matters covered by these sections, they should, in my opinion, be retained. Comparable provisions are contained in the enabling act for New Mexico and Arizona (act of June 20, 1910, 36 Stat. 557). This statute (secs. 15, 32) uses the term "successors" in reference to the new State and Federal courts (see also sec. 13 of H. R. 206, 80th Cong., 1st sess., a bill to provide for the admission of Alaska as the Forty-ninth state). There would thus appear to be precedent for the use of the term in H. R. 49.

10 2. The enclosed Exhibit "B" is intended to preserve to all judges having years of service under section 373 of Title 28, credit for such service, and it is in this sense that section 373 of Title 28 is not to be repealed. Under the enclosed draft, persons serving as judge of the United States

District Court for the District of Hawaii after the admission of the State could, in computing years of service, include prior judicial service in any court mentioned in section 373. The drafting of the provisions as to retirement and disability benefits is somewhat dependent upon the final determination of the question as to the continuance in office of the incumbents. (Paragraph 1 above.) I should like to obtain your views as to the proper handling of the matter of retirement and disability benefits.

Federal judges appointed to hold office during good behavior are entitled to retire with full pay at 70 years of age, if they have served at least 10 years (28 U.S.C. 371). Retirement for disability is also provided for at either full or one-half pay (28 U.S.C. 372). The law makes no distinction between the types of judgeships held, and it would appear that successive service as a district and circuit court judge would be counted in determining whether the judge had served for the requisite period.

Retirement is also available to judges of district courts of the Territories. Section 373 of Title 28 provides:

> Any judge of the United States District Courts for the districts of Hawaii or Puerto Rico, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone or the District Court of the Virgin Islands and any justice of the Supreme Court of the Territory of Hawaii who resigns, retires, or fails of reappointment or is removed by the President of the United States upon the sole ground of mental or physical disability, after attaining the age of seventy years and after serving as judge of one or more of such courts, at least sixteen years, continuously or otherwise, shall continue to receive the salary which he received when he relinquished office.
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> If such service aggregated less than sixteen years but not less than ten years he shall receive that proportion of such salary which the total aggregate number of years of his service bears to sixteen.
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> Service in any of such courts shall be included in the computation of aggregate years of service.

It will be noted that while a judge of a Territory is entitled to have his service in another Territory included in computing his years of service for purposes of retirement, no provision is made for the possibility that a judge of a Territory may be appointed to a judgeship having life tenure, much less the further possibility that the judge in such case might have served in a Territory that has become a State. The draft enclosed with Mr. Ackerman's letter (Exhibit "B") contains a section that would preserve the retirement rights of any person appointed to the Federal district court in the State of Hawaii who had served as a judge in any of the Territories, and would thus protect the rights of the present incumbents should they be appointed to the new court. The section reads as follows:

10 SEC. ____. The admission of Hawaii as a State of the Union shall not effect the repeal of Sec. 373 of Title 28, but thereafter any person serving as judge of the United States District Court for the District of Hawaii may in computing years of service for the purpose of Chapter 17 of Title 28 include judicial service prior to Statehood in any court included within Sec. 373 on the date of Hawaii's admission to Statehood.

Although it would not appear to follow as a matter of law that the admission of Hawaii would effect the repeal of section 373, there would seem to be no objection to the inclusion of a provision, either in the enabling act or in a separate bill, designed to preserve the retirement rights of the present judges in the event they are appointed to the new court. Whether appointees to the new judgeships should receive full credit for years served as a Territorial judge is, of course, a question of legislative policy for Congress. However, if provision of this sort should be enacted, it would seem to discriminate in favor of the new federal court to be created in Hawaii. Consideration should probably be given, therefore,

to the advisability of broadening the proposed section to cover the possibility that other territories might be admitted to statehood and, aside from the question of statehood, to preserve the retirement rights of any territorial district judge who is appointed to an Article III court. There would appear to be no reason why judges of the courts enumerated in section 373 should be given credit for service therein only if they become judges of the new federal court in Hawaii and not if they become judges of any other Article III court.

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3. The second paragraph of the first section of the enclosed Exhibit "B", besides making an amendment of section 333 of Title 28 so as to include federal judges in Hawaii in judicial conferences, makes a general amendment of Title 28, "by deleting any and all provisions therefrom which except or include said court /the United States District Court for the District of Hawaii/ by reason of its not previously having had judicial power stemming directly from Article III, sec. 1 of the Constitution". It would seem desirable, if time is available, to make a complete review of Title 28 and specify exactly what amendments are intended. * * *

Before considering what other sections of Title 28 might require amendment in the event Hawaii becomes a State, the proposed change in section 333 should be briefly considered.

Section 333 requires the Chief Judge of each circuit to hold annual conferences of the circuit and district judges of the circuit who reside within the continental United States. The proposed amendment would add the words "or in the State of Hawaii" to the words "within the continental United States". There would appear to be no legal objection to such an amendment. However, the same result could be obtained by restoring the definition of the term "continental United States" which was deleted as surplusage by the revisers of Title 28 (see Appendix, H. Rept. 308, 80th

Cong., 1st sess.; 28 U.S.C. (1946 ed.) 540).[3] Whether federal judges in Hawaii should participate in the judicial conferences is again a question of legislative policy.

After referring to certain sections of Title 28 which differentiate in various respects between Federal judicial officers who reside in Hawaii and those who reside in the States, Mr. Ackerman asks whether such distinctions should be eliminated upon the admission of Hawaii as a State.

Section 133 of Title 28 provides that only citizens of the Territory of Hawaii who have resided therein for at least three years next preceding shall be eligible for appointment as district judges for the district of Hawaii. Similar citizenship and residence requirements must be observed in the appointment of the United States Attorney and the United States Marshal (28 U.S.C. 501, 541(d)).[4] This Department should probably, as a matter of policy, oppose such restrictions upon the President's appointive power when Hawaii becomes a state. No such restrictions are contained in the statute providing for appointments to similar positions in the States, and since Hawaii wishes to join the Union on an equal footing with other States, I see no reason why such differences should be perpetuated.

In addition, I see no reason why the differences in the terms of

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3/ 28 U.S.C. (1946 ed.) 540, provided: "The term 'continental United States' as used in this chapter means the States of the Union and the District of Columbia."

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4/ These requirements were added to the Hawaiian Organic Act by the act of July 9, 1921 (42 Stat. 119), and were apparently based upon requests contained in a series of concurrent resolutions passed by the Hawaiian Legislature during the sessions of 1919 and 1921 (see H. Rept. 236 and S. Rept. 123, 67th Cong., 1st sess.).

the offices of United States Attorney and United States Marshal should be continued. The terms of office should in each case be reduced from six to four years to conform to the practice which prevails in the States. The proposed draft (Exhibit "B") is intended to accomplish this, among other things, by providing that Title 28 shall "be deemed amended by deleting any and all provisions therefrom which except or include said court [federal territorial district court] by reason of its not having had judicial power stemming directly from Article III, Sec. 1 of the Constitution." It is difficult to readily ascertain the precise effect of such a general provision. More important, however, is the fact that it would not accomplish the purpose intended. For example, provisions affecting the United States Attorney and the United States Marshal are not provisions "which except or include said court"; nor for that matter are provisions which affect the federal district judges in Hawaii. Such changes as appear necessary should be made by amending specific sections of Title 28. For example if it is intended that United States Marshals in Hawaii have the same term of office as all other United States Marshals, section 541 (c) of Title 28 should be specifically amended by deleting therefrom the words "except in the district of Hawaii where the term shall be six years".

4. A matter not touched upon in the enclosed drafts but which I believe should be included with other amendments of the new Title 28, to take effect on admission of Hawaii as a state, is indicated by the following proposed provision:

"Effective upon the admission of Hawaii as a state of the Union, but subject, however, to the provisions of any act saving rights of appeal in cases then pending or theretofore decided," sections 1252, 1293, and

1294 of Title 28 of the United States Code are hereby amended so as not to apply to any court of the State of Hawaii or to any appeal therefrom."

10/7 The clause marked with an asterisk has reference to provisions of the Hawaii Statehood Bill, such as section 13.

4/ Section 1252 of Title 28 provides, among other things, for direct appeals to the Supreme Court of the United States from decisions of any court of record in Hawaii invalidating an Act of Congress in any action to which the United States is a party. Section 1293 provides for appeals from the Supreme Court of Hawaii to the United States Court of Appeals for the Ninth Circuit in cases involving the Constitution, laws or treaties of the United States, in habeas corpus proceedings, and in civil cases where the amount in controversy exceeds $5,000. Section 1294 provides for appeals from reviewable decisions of the Supreme Court of Hawaii to the Court of Appeals for the Ninth Circuit.

The suggested changes have been made by amendment of H. R. 49 made by the House Committee on Public Lands (see H. Rept. 254, 81st Cong., 1st sess., p. 1).

The last numbered paragraph of Mr. Ackerman's letter raises a question which, as he points out, is unrelated to the subject matter of his letter. It relates to Public Law 505 of the 80th Congress, approved April 29, 1948, which extended the jurisdiction of the district court to Canton and Enderbury Islands--islands having a special status defined in an Agreement of April 6, 1939, between the United States and the United Kingdom. This change is not reflected in section 91 of Title 28 enumerating the islands included in the district of Hawaii.

For your information, I understand that the Attorney General of Hawaii is quite anxious to obtain the Department's view concerning the questions discussed in his letter, and has advised the Department of the Interior that the questions have been submitted. The individual in the Department of the Interior who is familiar with the matter is Mrs. Shirley Boskey (Ext. 662).