



# University of Hawaii at Manoa

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Proposal 341  
RELATING TO THE RETURN OF KAHOOLAWE

Statement for  
Con Con Committee on  
Hawaiian Affairs  
Public Hearing 16 August 1978

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Proposal 341 would amend Article XIII by adding a new section relating to the island of Kahoolawe. This statement on the proposal does not reflect an institutional position of the University of Hawaii.

The title of the proposed new Constitutional section refers to the "return and use" of Kahoolawe. Its provisions would declare a common right to access and use of the island, and establish a preservation status for it.

We wish to suggest a revision of the title of the proposed article, and possibly of its provisions, and we call attention to a question concerning the wisdom of its placement in the Constitution. As a basis for the suggestions and the question we wish first to summarize the current status of the island as we understand it.

The people of Hawaii have rarely, if ever, had an effective right in common to the use of the entire island of Kahoolawe. Before unification of Hawaiian kingdom under Kamehameha I, and even under the subsequent absolute monarchies, the rights of the common people to access to parts of some heiaus, at least, may well have been restricted by religious kapus. During the period of constitutional monarchies, Kahoolawe was for a time a penal colony, to which access was restricted, although perhaps not very effectively. At other times, the island was placed under private control. Under the Territory of Hawaii the island was leased to a private owner as a ranch, and its control passed from the rancher to the federal military. Without question, the U.S. Navy now exercises de facto control of the island.

The legality and extent of the Navy's control are questionable, because in the actions purporting to establish the control there appears to have been a failure of follow all of the provisions prescribed in the U.S. Constitution relating to the establishment

of a military reservation. In any case, the agreements between the Territory and the United States that granted the military the rights of control included provisions calling for the ultimate return of control to the Territory, now the State, and a recent memorandum jointly signed on behalf of the Navy and the State, indicates that the State has a legitimate and substantial concern in the administration of the island.

There is no question, or should be none, concerning the State's sovereignty over the island. The geographic extent of the State's sovereignty is recognized in the Constitution by reference to the Admission Act, which defined this extent by reference to the extent of the Territory of Hawaii as recognized in the organic Act, which in turn defined it by reference to the 1898 Congressional resolution of annexation. This resolution explicitly included Kahoolawe. Although certain parts of the Territory were not made part of the State, and although the status of certain minor islands is in question, the status with respect to Kahoolawe is unquestionable.

The legislature has placed Kahoolawe in the County of Maui (HRS 61-1). Under the Constitutional provisions of Article VII, Section 1 and of Article XIII, Section 1. The latter section recognizes that without question, Kahoolawe is a part of the State of Hawaii.

The provision in the proposed new constitutional section that the common right of access and use of the island of Kahoolawe "shall be recognized" is appropriate, at least if there is no intent to limit the right of access as under the religious kapu's of the past. However, because the right of access to the entire island of Kahoolawe has rarely, in actuality, been held by the people in common, it seems unwise to refer in the title of the proposed new section "to the return of Kahoolawe" if the word return is intended to refer to the right.

The use of the word "return" might be taken to relate to the sovereignty over the island. There should, however, be no implication that the sovereignty should be returned to the State, because the State's sovereignty should not be questioned.

Alternatively, the use of the word "return" may be taken to refer to the actual managerial powers of the State. We suggest, however, that if this is the intent, it would be met better by revision of the provision for preservation to read that the State has the duty and power to preserve the island for its historic, religious, and cultural significance, or to preserve the historic, religious, and cultural sites of the island.

In any case, for consistency with the provision of the proposed section, we suggest that its title be revised to replace the words "return and use" with the words "use and preservation".

There is a question whether the proposed new section should be placed in the Constitution. Its provisions, in general, should be applicable not only to Kahoolawe but to all lands in which preservation is important for the combination of historical, cultural, and religious reasons. Provisions for such preservation is already incorporated in a general way under Article X. Emphasis of their applicability to Kahoolawe is especially timely. However, provisions placed in the Constitution should generally be restricted to those considered appropriate without limit in time (except as some provisions relating to the date on which the Constitution was to take effect were necessarily placed in the Constitution). The Constitution does recognize the desirability of its revision periodically, and provide for such consideration. We disagree among ourselves, however, as to the extent to which this provision implies that issues of time-limited importance should be dealt with in Constitutional amendments. The judgement involved in this question is so subjective that the Environmental Center should not express an opinion on it.