Precarious Positions

Native Hawaiians and U.S. Federal Recognition

J. KĒHAULANI KAUA'ANUI

In 1903, following the U.S.-backed illegal overthrow of the Hawaiian Kingdom and the unilateral annexation of the islands in 1898, the U.S. federal government passed legislation acknowledging the indigenous people of Hawai‘i. More than a century later, over 160 federal statutes address the conditions of Native Hawaiians in the areas of health, education, labor, and housing. Some observers have argued, therefore, that the U.S. Congress has already recognized that a “special relationship” exists between the United States and the Native Hawaiian people and that it should be formalized through the process of federal recognition of a Native Hawaiian governing entity. This chapter examines the impetus for the proposal for federal recognition of Native Hawaiians and explores a range of historical and legal issues that shed light on the multiple claims constituting the complex terrain of Hawaiian sovereignty politics. The proposal for federal recognition is extremely controversial for several reasons, including because it was initiated by a U.S. federal representative and because many Hawaiian political organizations oppose it in favor of Hawai‘i’s independence claim under international law. What is the legal basis for U.S. federal recognition of a Native Hawaiian nation within federal Indian law? How has the contemporary context of legal challenges to Native Hawaiian programs and funding by the U.S. government served as a catalyst for broad-based Hawaiian support despite a thriving independence movement? Looking comparatively at assertions of federal plenary power, how do the cases of Indian Country, Native Alaska, and the unincorporated territories in the Pacific Islands shed light on the limits of federal recognition as a model for self-determination?

The conspirators, having actually gained possession of the machinery of government, and the recognition of foreign ministers, refused to surrender their conquest. So it happens that, overawed by the power of the United States to the extent that they can neither themselves throw off
the usurpers, nor obtain assistance from other friendly states, the people of the Islands have no voice in determining their future, but are virtually relegated to the condition of the aborigines of the American continent.

—HRH LILI‘UOKALANI, *Hawaii’s Story by Hawaii’s Queen* (1898)

Queen Lili‘uokalani’s words of anger and frustration at the raw power used by the United States in relation to Native Hawaiian people during the late nineteenth century resonate strongly with twenty-first-century indigenous opposition to attempts by U.S. government officials to limit Native Hawaiians’ political status to that of a federally recognized Indian tribe. A controversial proposal repeatedly introduced in the U.S. Congress for more than a decade would recognize a “Native Hawaiian governing entity” within the confines of U.S. federal policy. Beginning in the 106th U.S. Congress in 2000 and continuing through the present, Senator Daniel Akaka, a Democrat from Hawai‘i, has sponsored this legislation—the Akaka Bill—that proposes to recognize Native Hawaiians as an indigenous people who have a “special relationship” with the United States and thus a right to limited self-determination. Proponents claim that passage of the bill would lay the foundation for a nation-within-a-nation model of self-governance that federally recognized tribes have, yet the proposal does not even offer that. U.S. federal Indian policy has defined tribal sovereigns as “domestic dependent nations” that have a limited right to self-government. Federally recognized tribes have the right to assert jurisdiction over their people and their land bases legally classified as “Indian Country” and held in trust by the U.S. government; define their own tribal membership criteria; create tribal legislation, a measure of law enforcement and court systems; and tax their own citizens.

This chapter examines the impetus for the proposal of federal recognition of Native Hawaiians. It also explores a range of historical and legal issues that shed light on the multiple claims constituting the complex terrain of Hawaiian sovereignty politics. The proposal for federal recognition is extremely controversial for several reasons. For one, it was initiated by a U.S. federal representative, not the Native Hawaiian people, supposedly as a remedy against a battery of lawsuits that sought to threaten U.S. federal funding and programs for Native Hawaiians.1 Second, numerous Hawaiian political organizations oppose what they see as an effort to contain Hawai‘i’s independence claim under international law. I first provide a historical overview of the events that affect the current situation and provide a legal basis for U.S. federal recognition. Then I briefly discuss a
particular set of contemporary conditions that catalyzed widespread support for federal recognition—that is, the implications of the U.S. Supreme Court’s ruling in Rice v. Cayetano (2000) and subsequent legal challenges to Native Hawaiian programs and funding by the U.S. government. I also discuss the broader context for recognizing Native Hawaiians as an indigenous people within the United States, which includes a broader legal history of incorporating Native Hawaiians within the definition of “Native American.” I then highlight some of the difficulties with the promise of federal recognition as a solution to the “Hawaiian problem” by comparatively examining Indian Country, native Alaska, and the Pacific Islands, especially the U.S. unincorporated territories. Finally, I show how the proposed legislation not only does not provide for parity with tribal nations as a consequence of the role afforded by the state but undercuts efforts to restore Hawaiian independence.

A History of Illegality

The history of the Hawaiian Kingdom—recognized as a state by all major global powers throughout the nineteenth century—provides Kanaka Maoli (indigenous Hawaiians) and others with a rare legal claim that shows the current state-driven push for federal recognition to be problematic for outstanding sovereignty claims. A series of critical historical events provide the backdrop for understanding the complex terrain of Hawaiian sovereignty politics. In 1893, U.S. minister of foreign affairs John L. Stevens, with the support of a dozen white settlers, organized a coup d’état and overthrew Queen Lili’uokalani, the monarch of the Hawaiian Kingdom. The queen yielded her authority under protest, as she was confident that the U.S. government and President Benjamin Harrison would endeavor to undo the actions led by a U.S. official. Within months, however, Harrison was out of office and Grover Cleveland became the next U.S. president. After sending an investigator to look into the matter, Cleveland eventually declared the action under Stevens an “act of war” and acknowledged that the overthrow, backed by U.S. Marines, had been unlawful and should be undone. Specifically, he recommended that the provisional government (made up of those who had orchestrated the overthrow) should step down, but they refused. Cleveland did not compel them to do so and thus did not assist in restoring formal recognition to the queen. In the interim, the provisional government established the Republic of Hawai‘i on July 4, 1894, with Sanford Ballard Dole as president. As the de jure government, asserting jurisdiction over
the entire island archipelago, this group seized roughly 1.8 million acres—Hawaiian Kingdom Crown and Government lands.¹

In 1898, when the United States illegally annexed Hawai‘i, the republic ceded these lands on the condition that they be held in trust for the inhabitants of the Hawaiian Islands.² In her pathbreaking research, Noenoe K. Silva has brought to light a powerful resistance history that reveals broad-based Hawaiian opposition to U.S. annexation—opposition so strong that it defeated a proposed treaty of annexation in 1897.³ Hawaiians organized into two key nationalist groups, Hui Aloha ʻĀina (which had men’s and women’s wings) and Hui Kālai‘āina, each of which submitted petitions representing the vast majority of Hawaiian people alive in Hawai‘i at the time. In those petitions, called the Kūʻē Petitions (kūʻē translates as “to oppose, resist, protest”), Hawaiians clearly stated their opposition to becoming part of the United States “in any form or shape.” The U.S. Senate accepted these petitions but found it impossible to secure the two-thirds majority vote required in the Senate for a treaty. Nevertheless, during U.S. president William McKinley’s term, the Republic of Hawai‘i and other proannexationists proposed a joint resolution of Congress, which required only a simple majority in both houses, which passed in 1898.⁴ Thus, the United States did not annex the Hawaiian Islands by treaty, as required under customary international law at the time.

To many outsiders today, the history of the illegal overthrow and annexation may seem irrelevant, given the fact that Hawai‘i is currently counted as one of the fifty U.S. states. But as many Hawaiian activists point out, statehood is also contestable. Like many other colonial territories, in 1946 Hawai‘i was inscribed on the United Nations list of non-self-governing territories.⁵ Although Hawai‘i was on that list and therefore was entitled to a process of self-determination to decolonize, the U.S. government predetermined statehood for Hawai‘i by treating its political status as an internal domestic issue. The 1959 ballot in which the people of Hawai‘i voted to become a state included only two options, integration and remaining a U.S. colonial territory.⁶ Among those allowed to take part in the vote, settlers as well as military personnel outnumbered Hawaiians.⁷ By citing the internal territorial vote, the U.S. State Department then misinformed the UN, which in turn considered the people of Hawai‘i to have freely exercised their self-determination and chosen to incorporate within the United States.⁸

By UN criteria established in 1960 and certainly known to the United States at the time, the ballot should have included independence and free association as choices. On December 14 of that year, the UN General
Assembly issued the Declaration on the Granting of Independence to Colonial Countries and Peoples—Resolution 1514 (XV). Also in 1960, the assembly approved resolution 1541 (XV) that defined free association with an independent state, integration into an independent state, and independence as the three legitimate options of full self-government.

UN General Assembly Resolution 1541 refers to territories that are “geographically separate and distinct ethnically and/or culturally” without specifying what “geographically separate” must entail. Nonetheless, this chapter of the resolution has been accepted as applicable mainly to overseas colonization, thereby relegating indigenous peoples to a condition of “internal colonization.” At stake is prohibiting the indigenous claim to the same self-determination granted to “blue water” colonies by Resolution 1514, “which can logically lead to independence.” Hence, the phrase “all peoples have the right of self-determination” has been mainly applied to inhabitants of territories destined for decolonization rather than to indigenous peoples.

The situation changed to some degree with the UN General Assembly’s 2007 passage of the Declaration on the Rights of Indigenous Peoples, but even that document imposes conditions regarding what constitutes “self-determination” encompass them. On the one hand, Article 3 states, “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.” But on the other hand, Article 46 states, “Nothing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”

Shifting Rationales for Federal Recognition

Proponents of the Akaka Bill have continuously advanced two key legal developments for their argument in support of federal recognition for Native Hawaiians: the “Apology Resolution” (Public Law 103-150) regarding the 1893 overthrow, passed by Congress in 1993, which calls for “reconciliation”; and the wave of legal assaults that occurred over the following decade. The Apology Resolution acknowledges U.S. complicity in the overthrow of Queen Lili’uokalani and the constitutional monarchy. In addition to accounting for the events that led to the U.S.-backed coup, the resolution acknowledges that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over
their national lands to the United States, either through their monarchy or through a plebiscite or referendum.” This resolution defines “native Hawaiian” inclusively as “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” Although the apology includes a disclaimer stating that nothing contained in the resolution can be used to settle a case against the United States, it still constitutes a congressional finding of fact.

Supporters also cite the Hawaiian Homes Commission Act of 1920, approved by the U.S. Congress in 1921, which allotted approximately two hundred thousand acres of land, with ninety-nine-year lease provisions, to those who qualified as “native Hawaiians.” In this case, “native Hawaiians” were defined as “descendants with at least one-half blood quantum of individuals inhabiting the Hawaiian Islands prior to 1778.” These allotted lands were formerly part of the Kingdom’s Crown and Government lands. The Hawaiian Homes Commission Act was originally conceived as a rehabilitation project for the Native Hawaiian population, which had been experiencing dramatic declines linked to colonial urbanization. The act has been cited as evidence that the U.S. government has already acknowledged that one class of Hawaiians (those with 50 percent or more blood quantum) has entitlements that parallel those of American Indians. Proponents of the bill argue that the act institutionalized a trust agreement and therefore constitutes a special legal relationship like that between the U.S. government and Indian tribes.

As early as 1903, the U.S. government passed legislation acknowledging the indigenous people of Hawai‘i, and more than 160 federal statutes now address the conditions of Native Hawaiians. Since the 1970s, in the midst of a thriving Hawaiian rights movement, the U.S. Congress has enacted numerous special provisions for the benefit of Native Hawaiians in the areas of health, education, labor, and housing. Thus it could be argued that the U.S. Congress has already recognized that a “special relationship”—that is, a political one, not a racial one—exists between the United States and the Native Hawaiian people. Congress extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Inuit, and Aleut communities in the Native American Programs Act of 1974. This act also includes American Samoan natives and indigenous peoples of Guam, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau—all designated as “Native American Pacific Islanders.” And Native Hawaiians are included in the American Indian Religious Freedom Act,
National Museum of the American Indian Act, Native American Graves Protection and Repatriation Act, National Historic Preservation Act, and Native American Languages Act. In addition, several federal acts specifically target Native Hawaiians, comparable to measures providing for American Indians and Alaska Natives, such as the Native Hawaiian Health Care Act and the Native Hawaiian Education Act. Whether all this legislation qualified Native Hawaiians as politically analogous to American Indians was a key question brought before the U.S. Supreme Court in 1999 and in subsequent challenges to Hawaiian rights to state and federal funding and indigenous-specific institutions, such as the Office of Hawaiian Affairs (OHA) and the Department of Hawaiian Home Lands.

The U.S. Supreme Court ruling in the case of Rice v. Cayetano served as the central impetus for the proposal regarding federal recognition of Hawaiians. At stake in Rice were not only restricted elections for OHA trustees but also the office's existence. Prior to the court ruling, participation in OHA elections was restricted to Native Hawaiians, of any Hawaiian ancestry, who resided in Hawai'i. Harold F. Rice, a fourth-generation white resident of Hawai'i, was denied the right to vote because he is not Hawaiian by any statutory definition (he is neither “native Hawaiian” nor “Native Hawaiian”). The OHA, established in 1978, is governed by a nine-member elected board of trustees and holds title to all real or personal property set aside or conveyed to it through the state admission act of 1959 as part of the “ceded” public lands trust. It is also meant to hold the income and proceeds derived from a portion of a trust for “native Hawaiians” as defined in the Hawaiian Homes Commission Act and granted to the State of Hawai'i at the time it was admitted to the United States. As the plaintiff, Rice charged that both the trust managed by the office and the OHA voting provisions were racially discriminatory and violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution, which are meant to provide equal protection and to guarantee that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous condition of servitude. But even though the trust itself is for the benefit of “Native Hawaiians,” the U.S. Supreme Court's majority opinion decreed that the state's electoral restriction enacted race-based voting qualifications and thereby violated the Fifteenth Amendment.

In Rice v. Cayetano, Hawaiians were in a fraught position, with no direct voice in the case, even though it was central to Hawaiian concerns. Governor Benjamin Cayetano, notorious for his anti-Hawaiian veto power, was held accountable for the OHA voting practices because the office is a state
agency. Still, the State of Hawai’i argued that the OHA limitation on the right to vote was based not on race but on the unique status of Hawaiian people in light of the state’s trust obligations. Thus, the limitation on the right to vote for the OHA trustees was based on a legal classification defining those people who are the beneficiaries of the trust. But because neither the U.S. government nor the U.S. Supreme Court recognizes Hawaiians collectively as a sovereign entity, the State of Hawai’i maintained that the voting classification was rationally tied to its requirement to uphold a congressional requirement—in other words, because the United States has a “special relationship” with and obligation to “native Hawaiians” stemming from the Hawaiian Homes Commission Act of 1920.28 Thus, the defense in the Rice case rested on the claim that Congress has the power to enter into special trust relationships with indigenous peoples—a power that is not confined to tribal Indians—and that the state stood in for the United States with regard to land claims and related entitlements.

Although the majority opinion in Rice v. Cayetano did not address the issue of the Fourteenth Amendment and thus did not affect the trust that the OHA manages, the ruling laid the essential groundwork for further assaults on Hawaiian lands and people through a rash of lawsuits throughout the 2000s. These new cases threatened the existence of all Hawaiian-specific funding sources and institutions, including the OHA; all federal funds for Hawaiian health, education, and housing; and the state Department of Hawaiian Home Lands and the lands it manages. Plaintiffs charged that these institutions are racially discriminatory because they violate the Fourteenth Amendment. Within the broader context of these legal assaults, where any indigenous-specific program is deemed racist, many Native Hawaiians and their allies support Senator Akaka’s proposal for federal recognition, especially since he pitched the legislation as a protective measure against such lawsuits because federally recognized tribal nations are immune from Fourteenth Amendment legal challenges. However, even early on, it seemed clear that the bill itself is about something more insidious.

The Akaka Bill: What It Is, What It Is Not

The bill originated in March 2000, just one month after the ruling in Rice, when Hawai’i’s congressional delegation formed the Task Force on Native Hawaiian Issues, chaired by Akaka. As its immediate goal, the task force sought to clarify the political relationship between Hawaiians and the United States through Congress. During the 106th U.S. Congress, the
senator introduced federal legislation that proposes to recognize Hawaiians as indigenous people who have a “special relationship” with the United States and thus a right to self-determination under federal law. The Akaka Bill delineates a process for the formation of a governing entity to be approved by the U.S. government. The entity would be formed by a commission of nine members appointed by the secretary of the interior; their first and foremost duty would be to report to the secretary. The legislation addresses only the recognition of a Native Hawaiian governing entity and not the rights of that entity, which would be subject to later negotiations among the U.S. federal government, the Native Hawaiian entity, and the Hawai‘i state government. This is a prime example of what Jeff Corntassel and Richard C. Witmer II have identified as the era of “forced federalism” in U.S. indigenous policy beginning in 1988. They explain that the forced federalism era differs from the previous era of self-determination because while recognized tribes are locked into a federal relationship, the rapid devolution of federal power to states has undermined tribal sovereignty. This transfer of power means that indigenous nations have “been forced into dangerous political and legal relationships with state governments that challenge their cultures and nationhood status.”

Federal protection was now being sold to Native Hawaiians as a defense against average citizens who challenge the Hawaiian trusts that the United States never upheld in the first place—trusts that are based on the theft of a nation. These political misdeeds continue to go unquestioned and have problematic implications for the future, as can be seen even in the process of drafting and putting forth the proposal. Not only has the proposal’s development involved little Hawaiian participation, but it has also served as a political football, blocked by conservatives. For example, only for the earliest 2000 draft of the bill (S 2899) were hearings held in Hawai‘i, and then only in Honolulu. Moreover, while the video record of that lone hearing shows overwhelming opposition to the bill, the delegation disingenuously reported the opposite to Congress.

Conservatives’ refusal to support the measure became more pronounced when the Bush administration spent eight years opposing the legislation. Although throughout that period, the legislation gained committee approval in both the House and Senate, it remained stalled when it came to a floor debate. Despite multiple revisions and reintroductions of new drafts aimed at satisfying Department of Interior concerns and appeasing Republican critics who called the proposal a plan for “race-based government,” the legislation never progressed to a Senate vote. The ongoing opposition
in the U.S. Senate throughout the 2000s has come from Republicans; how-
ever, their conservative antagonism has, at times, shifted to qualified sup-
port as the bill has been repeatedly revised and watered down to appease 
their concerns.

Under the new leadership of Barack Obama, the presidential administra-
tion shifted to firm support for the Akaka Bill. In both of the most recent 
versions before committee, the negotiations that would follow concern 
land, governmental authority, the exercise of criminal and civil jurisdiction, 
and more. None of these powers is guaranteed in the bill. All versions 
of the bill reaffirm the delegation of U.S. government authority to the State of Hawai‘i to address the condition of “native Hawaiians” under the Hawai‘i state admissions act. The legislation specifies that after the Native Hawaiian 
governing entity is created, both the United States and the State of Hawai‘i 
may enter into negotiations with the Native Hawaiian governing entity. This 
sets the bill apart from other forms of federal recognition of native nations, 
which do not typically give state governments any part in negotiations with 
the exception of matters related to Indian gaming. This bill allows the State 
of Hawai‘i to sit at the table to negotiate regarding matters including the 
transfer of lands, natural resources, and other assets and the protection of 
existing rights related to such lands or resources; the exercise of govern-
mental authority over any transferred lands, natural resources, and other 
assets, including land use; the exercise of civil and criminal jurisdiction; the 
delegation of governmental powers and authorities to the Native Hawaiian 
governing entity by the United States and the State of Hawai‘i; any residual 
responsibilities of the United States and the State of Hawai‘i; and griev-
ances regarding assertions of historical wrongs committed against Native 
Hawaiians by the United States or by the State of Hawai‘i. The three parties 
to the negotiation are not placed on equal footing here: All negotiations 
must take place within the framework of U.S. federal law and policy with 
regard to Indian tribes and under U.S. plenary power.

In the last version, section (e) of the bill stated, “Nothing in this Act 
alters the civil or criminal jurisdiction of the United States or the State 
of Hawai‘i over lands and persons within the State of Hawai‘i.” It further 
states, “The status quo of Federal and State jurisdiction can change only 
as a result of further legislation, if any, enacted after the conclusion, in rel-
vent part, of the negotiation process established in section 8(b).” In other 
words, when the representatives of the Native Hawaiian governing entity 
negotiate with the federal and state agents, they cannot negotiate for civil
or criminal jurisdiction over any land. Doing so would require the passage of further legislation.\textsuperscript{34}

\textbf{The Limits of Domestic Sovereignty: Lessons from Other (Is)Lands}

It is not at all clear that the passage of this bill would protect anything, given that it could be found to be unconstitutional if the courts determined that the U.S. Constitution did not consider Native Hawaiians to be an “Indian tribe.” Hawaiians can look to cases from Indian Country and Native Alaska to shed light on the problems and pitfalls of federal recognition.\textsuperscript{35} The proposal for Hawaiians is modeled on similar legal precedents for 566 federally recognized native governing entities. Yet it seems more likely that this limited proposal would pave the way for an arrangement resembling those for the more than 229 Alaska Native villages that have such entities. Those villages hold a somewhat different status than most tribal nations because they are corporate entities subject to state law and do not have land held in trust on which to assert sovereign jurisdiction in a way recognized by the federal government.

Alaskan Natives’ federal recognition status shifted radically between the Clinton and Bush administrations. Under President Bill Clinton, Alaska Natives were listed on the register of federally recognized nations, a status that was challenged under George W. Bush.\textsuperscript{36} Moreover, Alaska Natives’ political status was disputed in \textit{Alaska v. Native Village of Venetie Tribal Government} (1998), when the U.S. Supreme Court ruled that Venetie’s land base did not count as Indian Country in the legal sense.\textsuperscript{37} Indian Country is legally defined to include all dependent Indian communities in the United States, and Venetie did not qualify because its lands are not held in trust by the U.S. federal government. Thus, the village’s tribal government cannot assess taxes, enforce its own laws, or assert jurisdiction over these lands as American Indian governments do on reservations. Moreover, the Alaska Native villages are subjected to Alaska state laws. Therefore, when Senator Akaka asserts that his bill “focuses solely on self-determination within the framework of federal law and seeks to establish equality in the federal policies extended towards American Indians, Alaska Natives and Native Hawaiians,” one has to seriously question his understanding of the concept and measure of parity.\textsuperscript{38} There are exceptions in Indian Country, including the tribal nations located in Maine, which are also subject to state interference.
as spelled out in the contested terms of the Maine Indian Claims Settlement Act of 1980.

At most, the Hawaiian self-governing model proposed through the federal recognition process would allow for a domestic dependent entity under the full and exclusive plenary power of Congress.39 While U.S. policy on Native Americans states that the federal government must consult with tribal governments regarding decisions about tribal lands, resources, and people to honor the government-to-government relationship, Congress has a long history of abusing its plenary power to subordinate tribal governments. Even worse, the Congress most often delegates its power to agencies in the executive branch of the federal government, such as the Bureau of Indian Affairs within the Department of the Interior, which is directed by presidential appointees. To fully recognize Hawaiians as having a political trust relationship with the United States similar to that of American Indians and Alaska Natives undercuts Hawaiian claims, particularly those to independent statehood.

In addition to the cases of American Indians and Alaska Natives, lessons can be learned from other Pacific Islands, including Guam and American Samoa, both of which are unincorporated U.S. territories, organized and unorganized, respectively. Their histories shed light on the political limitations of domestic governing entities within the U.S. nation-state. These two island entities are also subject to U.S. congressional plenary power under the authority of the Territorial Clause of the U.S. Constitution as interpreted by the U.S. Supreme Court. Therefore, legal cases move beyond the federal district courts any time there is a question about their sovereign power. These matters are then adjudicated by the U.S. Supreme Court under territorial case law, which upholds the doctrine that Guam and American Samoa are, along with the U.S. Virgin Islands, “foreign in a domestic sense.”40 Even the Commonwealths of the Northern Mariana Islands and Puerto Rico are subject to exclusive congressional power by the United States.

Cases of successful disentanglement do exist. The only island nations that have managed to extract themselves from the grip of U.S. plenary power besides the Philippines are those of the former UN trust territory of the Pacific Islands: the Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM), and the Republic of Belau. While the legacy of U.S. nuclear testing and military dominance bears on these cases, the process is instructive. For example, after the U.S. government entered into political status negotiations with representatives of the peoples of the FSM and the Marshall Islands, compacts of free association were signed on
October 1, 1982, and June 25, 1983, respectively. In accordance with the trusteeship agreement, the United Nations Charter, and the stated objectives of the trust territory system, the United States promoted the development of self-government and independence according to the freely expressed wishes of the islanders themselves.

The compact was approved by majorities of the peoples of the FSM and the RMI in UN-observed plebiscites conducted on June 21, 1983, and September 7, 1983, respectively. Furthermore, the FSM and RMI governments were formed on-island prior to any negotiation with the United States. The compact of free association was also approved by the FSM and RMI governments in accordance with their constitutional processes. Only after the FSM and RMI plebiscites was the compact approved as a joint resolution (Public Law 99-239) by the U.S. Congress on January 14, 1986.

The process of the compact agreement is instructive for Hawaiians in that the order in which the political process unfolded in the FSM and the RMI differs strikingly from the process in which the proposal for federal recognition of Hawaiians has taken place. The compacts were developed via a bilateral process guided by the United Nations. First meetings were held and the people approved the process. Next, prior to any negotiations with the United States, the people formed new governments, and these governing bodies approved the compact proposals in accordance with their own constitutional processes. Only then did the U.S. Congress pass the legislation.

The Marshall Islands compact also delineated a section to protect unadjudicated claims. For example, with regard to the lands on Ejit (a small island in Majuro Atoll), the compact stated that the president of the United States would negotiate an agreement with the government of the Marshall Islands, without prejudice, regarding any claims that have been or may be asserted by any party as to rightful title and ownership. If Hawaiians were to consider demanding a mutual-consent decree to ensure bilateral agreements, a section could also be included to preserve their title to the so-called ceded lands—1.8 million acres of former Crown and Government lands of the Hawaiian Kingdom. A request for a mutual-consent decree would certainly be telling for supporters of federal recognition, since when Chamorro activists in Guam worked for the inclusion of a mutual-consent decree in their draft proposal for commonwealth status, the United States, through the Department of the Interior, entirely rejected the idea. That rejection indicates that the U.S. government will continue to assert its plenary power.
Foreclosing Independence?

Those who support Hawai‘i’s independence from the United States have pointed out problems with the proposal because of the limitations on recognizing Hawaiian sovereignty within the domestic dependent nation model. These groups include those who are part of the Hawaiian Independence Action Alliance: the Pro–Kanaka Maoli Independence Working Group, Ka Pakaikau, Komike Tribunal, HONI (Hui o Na Ike), Ka Lei Maile Ali‘i Hawaiian Civic Club, Koani Foundation, ‘Ohana Koa, NFIP—Hawai‘i, Spiritual Nation of Kū—Hui Ea Council of Sovereigns, Living Nation, Settlers for Hawaiian Independence, MANA (Movement for Aloha No Ka ‘Aina), as well as the Hawai‘i Institute for Human Rights. Also, the group Hui Pu, while not an independence group per se, has been at the center of resistance to the Akaka Bill since the organization’s founding in 2004 with the primary goal of opposing the legislation.

Because of the proposed limits on independent national sovereignty under the federal recognition plan, dozens of Hawaiian sovereignty groups have persistently and consistently rejected the application of U.S. federal Indian law that would recognize a Hawaiian domestic dependent nation—as ward to guardian. Moreover, the exercise of federal plenary power comes not only from the Congress, the president, and the Department of the Interior but also from the U.S. Supreme Court, which has been ruling against tribal power for Indian nations and increasing states’ power over them. The U.S. Supreme Court abusively construes the powers granted by the U.S. Constitution to the Congress through its interpretation of the Constitution’s Indian Commerce Clause. Through a series of precedents set by the rulings in Indian cases, the U.S. Supreme Court has ruled time and time again that the federal government has exclusive power over Indian affairs.

The proposed legislation is a violation of both sovereignty and self-determination claims already acknowledged in the Apology Resolution. Given that Hawaiian Kingdom sovereignty was not lost via conquest, cession, or adjudication, those rights to self-rule remain in place under international law. Hawaiian people lost the ability to be self-determining through unilateral political processes—annexation and imposed statehood—but at no time did that amount to a legal termination of our inherent rights of sovereignty. Moreover, passage of the legislation could be used against Hawaiians and cited to show that claims that exceed the domestic sphere have been forfeited, especially since by then the Hawaiian governing entity
would be subject to U.S. plenary power. This containment of our sovereignty draws attention away from demands for Hawai‘i’s independence and decolonization from the United States based on international law. While the history of the overthrow can justify Hawaiians’ right to federal recognition, that same history complicates any mode of sovereignty that is exclusively aboriginal, especially since citizenship under the Hawaiian Kingdom was not limited to Hawaiians. Leaders of the various Hawaiian independence initiatives argue that those most in support of federal recognition do not represent the Hawaiian people. Instead, those who work for the OHA, the Department of Hawaiian Home Lands, the Native Hawaiian Health Project, and other agencies represent the state, federal, and nonprofit organizations for which they work, the same institutions that receive the funding being challenged in the courts. Therefore, supporting the proposal for federal recognition ensures their continued employment.

Those who support independence oppose federal recognition because at most, it would allow for no more than a domestic dependent entity under the full and exclusive plenary power of Congress. Alternatively, supporters of federal recognition insist that nothing in the Akaka Bill would compromise Hawai‘i’s national claims under international law. But supporters of this position do not attend to the ways in which the United States unilaterally asserts its plenary power to keep indigenous sovereigns subordinated. In 2001, Akaka articulated the line that he would hold for the following decade: “This measure does not preclude Native Hawaiians from seeking alternatives in the international arena” and “Let me be clear—It is not my intention, nor the intention of the delegation, to preclude efforts of Native Hawaiians at the international level. The scope of this bill is limited to federal law.”

Akaka’s assertions that passage of the bill would not preclude Kanaka Maoli from seeking “alternatives in the international arena” have been his standard response to challenges posed by the legislation’s opponents who favor Hawaiian independence—that is, the restoration of a Hawaiian nation under international law. However, Akaka’s response, which has been echoed repeatedly by Hawai‘i’s state and federal officials, speaks only to the rights of indigenous peoples under international law. But because his mentions of “alternatives in the international arena” here and elsewhere are ill defined, he has led many to infer that Kanaka Maoli could pursue full independence in a post-federal-recognition political scenario. Proponents of the Akaka Bill refuse to acknowledge that this strategy differs from the prevalent Hawaiian independence position from the outset.
While many proponents of U.S. federal recognition presume that Kanaka Maoli independence activists merely want continued access to the United Nations as indigenous peoples, the vast majority of pro-independence Native Hawaiians support two entirely different legal strategies under international law, decolonization and deoccupation, neither of which is based on indigeneity. The former is specific to colonized peoples in non-self-governing territories, while the latter pertains to occupied states. Counter to Akaka’s assurances, passage of the bill is likely to foreclose the sovereignty claim for Hawaiian independence under international law. The legislation appears to be a preemptive attempt to squash outstanding sovereignty claims unsuccessfully extinguished by Hawai‘i’s admission as the fiftieth state in the American Union. If the bill passes, the will of the people will seem to have been expressed—as a form of self-determination in support of federal recognition—in a way that would make international intervention much more far-fetched given the likelihood that the world community would see the Hawaiian question as even more of a U.S. domestic issue than is now the case. At any rate, passage of the Akaka Bill would certainly entrench the Hawaiian sovereignty claim further within the U.S. government since the Native Hawaiian governing entity would be subordinate to both the Hawai‘i state government and the U.S. federal government.

Most immediately, federal recognition would set up a process for extinguishing most claims to land title—except for whatever the state of Hawai‘i and the federal government may be willing to relinquish in exchange for that recognition—and even then, the U.S. federal government would hold the land in trust. At stake here is the 1.8 million acres of former kingdom Crown and Government lands and the obliteration of the Hawaiian nation’s title to them. As the 2009 U.S. Supreme Court case regarding these lands shows, there is absolutely no guarantee that any future Native Hawaiian governing entity would hold any of these lands.25

Conclusion

The historical harm the United States first committed in Hawai‘i in 1893 brought down not a Native Hawaiian government but the independent Hawaiian Kingdom composed of Kanaka Maoli as well as non–Kanaka Maoli subjects. The Hawaiian people and other Hawaiian Kingdom heirs have subsequently accumulated fundamental political and other claims under international law that the United States must recognize rather than hope to dispel via the enactment of the Akaka Bill. Moreover, a possible
tension between Hawaiian self-determination and kingdom heirs’ right to sovereignty needs further exploration. Nonetheless, in the eyes of many observers, passage of this bill would constitute nothing less than a second illegal denial of the Hawaiian people’s right to self-determination and the kingdom heirs’ right to sovereignty.

On April 13, 2009, a self-selected group of Kanaka Maoli, kupuna (elders), kumu (educators), and representatives wrote an “Urgent Open Letter to Barack Obama” on behalf of the Kanaka Maoli people as well as other Hawaiian Kingdom heirs. A number of our kako'o (supporters) also added their names to the letter. The letter’s primary purpose was to inform the president of the signatories’ categorical opposition to the proposed legislation. It also proposed an alternative bilateral approach to addressing the complex legacy of Hawai’i’s history with the United States in a way that promotes restorative justice. According to the letter,

The Bill arrogantly attempts to unilaterally characterize the historical transgressions of the United States against our people and kingdom, and to unilaterally specify their remedy. We insist otherwise. U.S. crimes against our Kanaka Maoli people and other Kingdom heirs from 1893 on require, for their redress, that a mechanism composed of U.S. agents and wholly independent representatives of Kanaka Maoli and Kingdom heirs be bilaterally set up by your Administration and us to make findings of fact and conclusions of international law that could serve as a road-map for the resolution of the political and legal issues now outstanding between our two parties.

The legislation limits Hawaiian self-determination as a consequence of the fundamental legal distinction between “Indian tribes” and “foreign nations” under the U.S. Constitution.

The legislation’s name alone represents what is problematic for Hawaiian sovereignty and nationhood under international law. Embedded in its title, the Native Hawaiian Government Reorganization Act of 2009, is a fundamental historical lie: there can be no attempt to reorganize a Native Hawaiian government, because the Hawaiian Kingdom was an internationally recognized state that in the nineteenth century afforded citizenship status to more than just the indigenous Hawaiian people. The Akaka Bill’s formal name misconstrues the nature of the government-to-government relationship between the United States and the Hawaiian Kingdom. A more accurate name would be the Native Hawaiian Government Organization Act.
By July 2010, when the Akaka Bill seemed dead, the OHA trustees moved to work with Abercrombie to select state legislators to push for a law that would offer state recognition of a Native Hawaiian governing entity. On July 6, 2011, Abercrombie signed into law the First Nation Government Bill. Although the state version is modeled after the Akaka Bill, it does not authorize a government-to-government relationship between the U.S. federal government and a Native Hawaiian governing entity. Instead, it authorizes a First Nation-to-fiftieth state relationship. But just like the Akaka Bill, this legislation is structurally problematic. The new law sets up a commission to produce a “Native Hawaiian roll,” where Kanaka Maoli sign on to take part in the formation of the First Nation within the state process—the first time there would be documented evidence of acquiescence to the U.S. government or its subsidiaries. With the formation of a state-recognized Hawaiian First Nation, advocates of the Akaka Bill have vowed to press on and mobilize for federal recognition through that new governing entity. So, it seems, the federal legislation may ultimately be revived.

Now more than ever, Hawaiians and others wishing to protect Hawaiʻi’s national claims under international law must voice a resounding statement of refusal to consent. Advocates of independence are divided between two central legal strategies: decolonization from the United States through UN protocols, and U.S. deoccupation through protocols mandated by the laws of occupation. In the case of unifying for the purposes of stopping federal recognition, the legacy of the 1897 Kūʻē Petitions is instructive. As mentioned earlier, two different Hawaiian nationalist groups, Hui Aloha ʻĀina and Hui Kālaiʻaina, opposed annexation. Hui Aloha ʻĀina’s petition unequivocally stated its resistance to U.S. incorporation. The petition by Hui Kālaiʻaina went a step further, not only articulating the group’s refusal of incorporation but also demanding the restoration of the kingdom. Although the two groups’ goals differed, together they defeated the 1897 Treaty of Annexation by demonstrating their lack of consent to becoming part of the United States.

Notes


1. In 1987, the Hawaiian people organized into a sovereignty group, Ka Lāhui Hawaiʻi, with a membership roll of more than twenty thousand citizens, and initiated a proposal for federal recognition. But the Hawaiʻi congressional delegation,
including Senators Akaka and Daniel Inouye, opposed the plan, which leads people to wonder why they are so forcefully supporting it now.

2. The United States and members of the international community also recognized the kingdom’s independence through treaty relations with the major powers of the world, including not only with the United States (1870, 1875, 1883, and 1884), but also Austria-Hungary (1875), Belgium (1862), Denmark (1846), France (1845 and 1857), Germany (1879), Great Britain (1836, 1846, and 1851), Italy (1863), Japan (1871 and 1886), the Netherlands (1862), Portugal (1882), Russia (1869), Samoa (1887), Spain (1863), the Swiss Confederation (1864), and Sweden and Norway (1852).


8. Trask, From a Native Daughter.

9. Ibid., 68–87.

10. After a massive increase in American migration to Hawai‘i, statehood emerged as a real prospect. As early as 1950, two special elections were held to choose sixty-three delegates who would draft a state constitution. In addition, among those who were allowed to take part in the vote were settlers as well as military personnel, who together outnumbered Hawaiians. See Mililani Trask, “The Politics of Oppression,” in Hawai‘i Return to Nationhood, IWGIA-Document 75, ed. Ulla Hasager and Jonathan Friedman (Copenhagen: IWGIA, 1994), 68–87.

11. Ibid., 80.

13. In 1962, the assembly established a special committee, now known as the Special Committee of 24 on Decolonization, to examine the application of the declaration and to make recommendations on its implementation. See United Nations, Declaration on the Granting of Independence.


15. Ibid.


17. Ibid., 93.


19. Captain Cook first arrived in the island archipelago in 1778; thus, that year marks a time prior to which it is assumed that no one other than Hawaiians was present there. The apology was not extended to non-Hawaiians who also endured the legacy of the overthrow—that is, those nonindigenous descendants of citizens of the Hawaiian Kingdom. Silva, Aloha Betrayed, 18, questions whether Cook was the first European to land in Hawai‘i. United States Public Law 103-150, 1993 Joint Resolution of Congress, “To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii,” 103rd Cong., 1st sess. (107 Stat. 1510).


23. However, data for Native Hawaiians, Samoans, and other Pacific Islanders have historically been subsumed within the panethnic racial rubrics of “Asian
and Pacific Islanders.” This administrative practice has meant that all U.S. data for Native Pacific Islanders have been disaggregated and lumped with those of Asian Americans. It also obscures both the differences between the Asian and the Native Pacific Islander subpopulations and the similarities in outcomes for native Pacific Islanders, American Indians, and Alaska Natives. Hopefully, the “Hawaiian and Other Pacific Islander” classification option provided in the 2000 U.S. census will inspire the U.S. Office of Management and Budget to direct agencies to collect meaningful racial data accordingly.

24. In all of these acts, Hawaiians are defined by the most inclusive definition: “Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i.”


26. Melody Kapilialoha MacKenzie, Native Hawaiian Rights Handbook (Hono-

27. Some Hawaiian groups, including those pressing for federal recognition of a native governing entity, submitted amicus curiae (friend of the court) briefs on behalf of the respondent. The State Council of Hawaiian Homestead Associations, Hui Kāko‘o ʻĀina Hoʻopulapula, Kalamaʻula Homestead Association, and the Hawaiian Homes Commission collectively submitted a brief. Another was collectively submitted by the Office of Hawaiian Affairs, Ka Lāhui, the Association of Hawaiian Civic Clubs, the Council of Hawaiian Organizations, the Native Hawaiian Convention, the Native Hawaiian Bar Association, the Native Hawaiian Legal Corporation, the Native Hawaiian Advisory Council, Hā Hawai‘i, Hui Kālaʻaiaina, Alu Like Inc., and Papa Ola Lōkahi. The Kamehameha Schools Bishop Estate Trust also offered amici curiae, as did the Hawai‘i congressional delegation and the National Congress of American Indians.

28. The court determined that it would subject the legislation in question to rational basis analysis rather than to strict scrutiny, dictating all other cases understood as race-based. In Adarand Constructors Inc. v. Pena (515 U.S. 200 [1995]), the Supreme Court ruled that “a group classification such as one based on race is ordinarily subjected to detailed judicial scrutiny to ensure that the personal right to equal protection of laws has not been infringed. Under this reasoning, even supposedly benign racial classifications must be subject to strict scrutiny.”

29. This process of appointments already set the proposal apart from the Indian Reorganization Act of 1934.


32. For a critical analysis of the neoconservative forces on-island that organized against the legislation because they regarded it as a proposal for race-based government, see Kauanui, Hawaiian Blood. U.S. senator Daniel Inouye of Hawai‘i (also a Democrat) explained the delay in passing the federal recognition legislation by pointing to the Senate being overwhelmed by appropriation bills, which are no doubt linked to the U.S. imperial presence in Iraq. Furthermore, Inouye said it was his intent to push the bill through before the end of session in 2004. He also noted that political unity in Hawai‘i—which includes support from Governor Linda Lingle, all of the state’s mayors, county and state lawmakers, and the entire U.S. congressional delegation—should go a long way in helping to secure Republican support in the Senate. Lingle declared before the U.S. Senate Committee on Indian Affairs that passage of the proposal was “vital to the continued character of our state, and it is vital to providing parity and consistency in federal policy for all native peoples in America.” See Vicki Viotti, “Inouye: Maybe 2004 for Akaka Bill,” Honolulu Advertiser, August 30, 2003; Richard Borreca, “Akaka Bill Gets Week of Lobbying,” Honolulu Star-Bulletin, February 23, 2003; Richard Borreca, “Akaka Bill Gets Additional Support,” Honolulu Star-Bulletin, December 10, 2003.

33. Since the start of the 111th Congress (January 3, 2009), three sets of proposals that made their way to the table, all titled the Native Hawaiian Government Reorganization Act of 2009: S 381 and HR 862 introduced on February 4, 2009; S 708 and HR 1711 introduced on March 25, 2009; and S 1011 and HR 2314 introduced on May 7, 2009. The third set of bills saw the most political activity. For information on these bills and their predecessors, see http://www.govtrack.us/congress /bills/111/hr1711/text.

S 1011 received a hearing before the U.S. Senate Committee on Indian Affairs on August 6, 2009, and HR 2314 received a hearing before the U.S. House Committee
on Natural Resources on December 16, 2009. Little further activity took place on either measure until December 17, when the Senate committee passed a newly amended version with changes developed by the Department of Justice in conjunction with the OHA, the Council for Native Hawaiian Advancement, and the Native Hawaiian Bar Association. A day earlier, U.S. representative Neil Abercrombie had tried to pass the same heavily amended version of HR 2314 in the House Committee on Natural Resources, but last-minute letters of opposition from Lingle prompted him to set aside the proposed revisions and the committee passed the unamended version. This development was no surprise, since Abercrombie had already announced plans to resign his seat and run for governor. On February 23, 2010, Abercrombie succeeded in getting the House committee to pass the Senate version of the bill.

But in July 2010, Governor Lingle moved to pressure Hawai‘i’s congressional delegates to amend S 1011 to protect the state’s regulatory power. They revised the bill in an attempt to overcome Republican opposition, making the new S 1011 look like the old HR 2314. Although other distinctions exist between the two bills, both allow the Hawai‘i state government a seat at the negotiating table with the federal government and the Native Hawaiian governing entity, thereby setting this legislation apart from the dominant model of federal recognition legislation and processes. The Senate version potentially gives the Native Hawaiian governing entity more power than the House version. In HR 2314, Section 9, “Applicability of Certain Federal Laws,” clarifies that certain laws pertaining to federally recognized Indian tribes would not apply to the Native Hawaiian governing entity, and those laws greatly benefit tribal nations. The Native Hawaiian governing entity would not be allowed to claim rights under Indian Gaming Regulatory Act or to have the secretary of the interior take land into trust on the entity’s behalf. This provision is important because only land held in trust by the federal government on behalf of native nations is allowed to be used by Indian tribes as part of their sovereign land base where they can assert jurisdiction. The Native Hawaiian governing entity would not be allowed to rely on the Indian Trade and Intercourse Act to challenge how the state acquired the Hawaiian Kingdom Crown and Government lands. No other Native Hawaiian group would be eligible for recognition under the federal acknowledgment process. The Native Hawaiian governing entity would not be eligible for Indian programs and services.

Most notably, this section of the bill also states that “nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii.” The Senate version does not make the same stipulation. S 1011 states that the Native Hawaiian governing entity, the federal government, and the state “may enter into negotiations” that are “designed...
to lead to an agreement” addressing land, governmental authority, and the exercise of criminal and civil jurisdiction. This legislation did not pass, and by the end of this session, the Akaka Bill looked like it had finally died, but it has recently reemerged in a different form. See J. Kēhaulani Kauanui, “Understanding Both Versions of the Akaka Bill,” Indian Country Today, January 15, 2010, http://www.indiancountrytoday.com/opinion/8169482.html.

34. This section of the bill also includes a disclaimer: Nothing in the act can create a cause of action against the United States or any other entity or person or alter “existing law, including existing case law, regarding obligations on the part of the United States or the State of Hawai‘i with regard to Native Hawaiians or any Native Hawaiian entity.” Moreover, nothing in the bill can create any new obligation to Native Hawaiians under federal law, and the measure specifically outlines and protects the federal government through sovereign immunity against lawsuits for breach of trust, land claims, resource-protection or resource-management claims, or similar types of claims brought by or on behalf of Native Hawaiians or the Native Hawaiian governing entity. The legislation also asserts that the state of Hawai‘i “retains its sovereign immunity, unless waived in accord with State law, to any claim, established under any source of law, regarding Native Hawaiians, that existed prior to the enactment of this Act.” This section, among others, especially raised concerns within the Native Hawaiian Bar Association. On June 11, 2009, the association sent in testimony to the House Committee on Natural Resources regarding the House version of the Akaka Bill (HR 2314). Although the bar association expressed its support for the bill, its testimony outlined some major concerns. The first is the role of the U.S. Department of Defense (as it relates to the Office for Native Hawaiian Relations and the Native Hawaiian Interagency). The second is the role of the U.S. Department of Justice, because unlike earlier versions of the bill, the current legislation does not include a provision authorizing the designation of a department representative to assist in the implementation and protection of the rights of Native Hawaiians and their political, legal, and trust relationship with the United States. The third concern was the section of the bill relating to “claims and sovereignty immunity.” The Native Hawaiian Bar Association noted, “We believe it is unnecessary and premature to include provisions on claims and sovereign immunity prior to federal recognition of a Native Hawaiian Government and recommend that these provisions under section 8(c) be taken out of the bill.” In response, Representative Abercrombie suggested that the legislation be revisited to assess whether another revision was needed. Some within the Native Hawaiian community have speculated that Abercrombie’s responsiveness to the bar association’s concerns may have been linked to his ultimately successful 2010 campaign for the Hawai‘i governorship.

36. On October 15, 1993, the secretary of the interior published a list of federally recognized tribes that included Alaska Native villages as tribal entities. The preamble read, “The villages and regional tribes [are] listed as distinctly Native communities and have the same status as tribes in the contiguous 48 states.” But there is currently a debate over Alaska Natives’ legal status, as evinced in former Republican senator Ted Stevens’s push to consolidate governmental funding for these entities into regional organizations, and in attorney and historian Don Mitchell’s assertion that the Department of the Interior acted unlawfully when it put the villages on the federal list. See Native American Rights Fund, “A Move toward Sovereignty: Interior Publishes Alaska Tribe List,” NARF Legal Review 19, 1 (1994): 1; “Alaska Natives Confront Debates over Legal Status,” October 21, 2003, http://www.indianz.com/News/archives/002107.asp.


41. Wilkins, American Indian Sovereignty.

42. Ibid.


45. On March 31, 2009, the U.S. Supreme Court issued its ruling in the case of State of Hawaii v. Office of Hawaiian Affairs et al. (No. 07-1372, 117 Haw. 174, 177 P. 3d 884, reversed and remanded). The state of Hawai’i asked the high court whether the state has the authority to sell, exchange, or transfer 1.2 million acres of land formerly held by the Hawaiian monarchy as Crown and Government lands. Prior to the state’s appeal to the Court, the Hawai’i Supreme Court unanimously ruled that the state should keep the land trust intact until Kanaka Maoli claims to these lands are settled, prohibiting the state from selling or otherwise disposing of the properties to private parties. The Hawaiian court issued its ruling based on the...
1993 Apology Resolution. The U.S. Supreme Court reversed the judgment of the Hawai‘i Supreme Court and remanded the case for further proceedings with the stipulation that the outcome not be inconsistent with the U.S. Supreme Court’s opinion. The contested land base constitutes 29 percent of the state’s total land area and almost all the territory Hawai‘i claims as “public lands.” These lands were unilaterally claimed by the U.S. federal government when it annexed the Hawaiian Islands. The Court insists that the apology does not change the legal landscape or restructure the state’s rights and obligations. Once the case was remanded back to the state, the Hawai‘i Supreme Court threw it out after some of the original plaintiffs brokered a deal with the governor and attorney general to have the case dismissed because of new state legislation to provide for the piecemeal sale of these lands through resolutions. Although one lone plaintiff refused to take part in the sellout, the Supreme Court dismissed the case by saying it was no longer “ripe for adjudication.”


47. Ibid.

48. The political term “First Nation” itself is curious in this context given that the term is typically used to refer to the indigenous peoples of the Americas located in what is now Canada, except for the Arctic-situated Inuit, and the Métis. For the text of the bill, see: Hawai‘i State Senate, S.B. 1520, 26th Legislature, 2011, http://www.capitol.hawaii.gov/session2011/bills/SB1520_CD1_.htm. For a legislative history of the bill, see Hawai‘i State Legislature, “SB1520 Archive Measure Status,” http://capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=1520&year=2011.