

The 2016 Na‘i Aupuni Congregation: A brief study in a practice of Indigenous self- determination

by

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Synopsis

This article reviews a broad environment of Hawaiian activities—from a historical and decolonization pattern to a specific recent process in indigenous affairs. It analyzes the process taken, the procedures put into effect, the high and low points of the Na‘i Aupuni gathering held at Maunawili, Kailua, O‘ahu in 2016. This article also evaluates the product of the gathering, comparing it with that of an earlier and different process, the Native Hawaiian Convention. It then compares the product of the 2016 gathering against the final rule of the US Department of Interior and against general principles of international law. The article concludes with lessons learned and suggestions for improvement going forward.

Historical backdrop

Hawaiian sovereignty has been a topic of public and private discussions in Hawai‘i for many years. It is a fundamental part of what some have called the “Hawaiian revolt.” A potential starting point for the revolt is the “Kalama Valley” period of the late 1960s, when Kōkua Hawai‘i stood up to powerful land developers to protest the eviction of Hawaiian residents from the valley. This was followed by the uproar in the wake of the appointment of yet another non-native Hawaiian as trustee of Kamehameha Schools Bishop Estate. On the heels of these events was the “Kaho‘olawe movement,” which questioned the supremacy of the US Navy in Hawai‘i’s political life and sought to elevate the place of native Hawaiian cultural and spiritual values in Hawai‘i.

New musical approaches also came to the fore, challenging prevalent views on Hawaiian history, loyalty, royalty, and patriotism, with names such as Don Ho and Kui Lee leading the pack, bringing a new sense of pride, confusion, and critical debate about “proper” Hawaiian entertainment with the singing of songs such as “Nā Ali‘i” and “Hawai‘i Pono‘ī,” followed by “God Bless America.” Hula hālau multiplied during this period with the graduation of a profusion of kumu hula (hula masters), many tracing their roots to the Margaret Aiu Hula Studio which changed to the Hula Halau O` Maiki and presently the Halua Hula `O Maiki, its name changes from pre 1950’s to 1974 also reflecting growth of awareness of native Hawaiian culture. The Polynesian Voyaging Society also entered the arena with Hōkūle‘a and its journey to the South Pacific. New expressions of Hawaiian culture flourished during these decades.

From the underground, a sweep of Hawaiian pride emerged, somewhat uncertain,

yet firm in challenging the superiority and supremacy of non-Hawaiians, questioning why gambling and other vices in Hawai'i should be controlled by Koreans, Chinese, Japanese, or other immigrants, while Hawaiians and other Polynesians were simply used as "muscle" to keep everybody in line. Hawaiians under the leadership of "Nappy" Pulawa formed a coalition with Samoans organized under Alema Leota and removed the "non-natives" from power controlling Hawai'i's gambling. This "native power" having organized, was now able to put up barriers against the Yakusa invasion from Japan as well as the Mafia from Italian-America, in their attempt to move in on the local market. One popular story is that when the Italian Mafia sent men to Hawai'i to move in on the local underworld, they were packed up in pineapple boxes and sent back to America with the message, "Ono, send some mo!" An infusion of local pride was forming and emerging from this sector of the community, finding its way into increased popularity in canoing, local volleyball, and junior golfing in a wide exhibit of local talents.

The Federal Strike Force was brought into Hawai'i and a concentrated attack against this "native power" was underway. Nappy Pulawa was convicted of Federal tax violations and sent off to Federal Prison for a longer period than the notorious Al Capone, thus removing this charismatic leader for a time.

He was returned for a retrial on State charges of double murder and kidnap (State v. Pulawa, 1975). Having made a major media showing of his criminal organizing activities during his previous years in Hawai'i, the local newspapers, television and radio stations again raised the matter of his criminal activities and of his return for a re-trial, anticipating an outcome of life imprisonment for him.

From the Circuit Courtroom of Ali`i O Lani Hale, that same building from which so many other memorable events occurred, including the proclamation of the end of Queen Lili`uokalani's reign and the formation of the Provisional Government of Hawai`i, and the Guilty jury findings of the Massie Defendants for the murder of Joseph Kahahawai, rang out the Pulawa reply to charges of kidnaps and murders, "I refuse to dignify this court by entering a plea. Instead, I ask, who are you foreigners to come into Hawai`i and charge us by your foreign laws. We are not Americans, we are Hawaiians!"

This modern Hawaiian revolution was thus cast into yet another expression: the "Hawaiian sovereignty movement."

Hawaiian sovereignty movement

The Pulawa trial resulted in a finding of not guilty and was soon followed by other challenges to the jurisdiction of the US courts: Hayden Burgess (Pōkā Laenui), Attorney for Mr. Pulawa in the State charges, declared in Federal District Court before Sr. Judge Samuel King that he was not a US citizen, yet insisted on his right to practice law in all of the courts of Hawai`i; US v. Raymond Kamaka challenged the government's taking his family land at Waikāne Valley also claiming his Hawaiian citizenship and the taking of Hawaiian land; US v. Lorenzo challenged US taxing authority over himself as a Hawaiian citizen; and US v. John Marsh, retired Honolulu police officer, questioned US taxing jurisdiction in Hawai`i and proclaiming his Hawaiian citizenship. In the Hawai`i State Courts, jurisdiction of the US laws often combined with land issues, such as the eviction of Sand Island "squatters," most of whom were native Hawaiians who had

established a fishing village and were arrested and evicted by the State Department of Land and Natural Resources (*State v. Paulo et al., 1980*). Another example is Mākua “beach people” blown off the beaches first by Hurricane Iwa and followed in a one-two punch by the State police arresting them as they tried to return to their homes on the beach (*State v. Pihana, Nae’ole, Alana et al., 1982*). Many others living along the beaches at Kahe Point, Nānākuli, Mā’ili, Kea’au, and Waimānalo were subsequently arrested, and they too raised the same defense of “Hawaiian sovereignty,” challenging US jurisdiction over Hawaiian citizens and Hawaiian lands.

The “movement” expanded into schools, universities, political debates at the Office of Hawaiian Affairs (newly formed in the 1978 Constitutional Convention), and finally into the Hawai’i State Legislature, now impacting questions of the legitimacy of title in the “ceded” lands as well as US jurisdiction over Hawai’i. These questions were also raised at international venues such as the World Council of Indigenous Peoples and the International Indian Treaty Council, reaching the halls of the United Nations in Geneva primarily through the UN Working Group on Indigenous Populations, and receiving attention in New York before the UN General Assembly.

Hawaiian groups, sometimes noted for their individuality, began to take a new approach to the Hawaiian sovereignty question, forming Hui Na’auao, a study group of principally native Hawaiians, to discuss and promote information regarding Hawaiian history, culture, politics, and other matters relating to Hawaiian sovereignty, agreeing, for a time, that this would be their sole purpose, not taking positions on any other matter. One of the major events Hui Na’auao spearheaded in 1993 was the reenactment of the

overthrow of Hawai‘i one hundred years previously. Hawai‘i Public Radio transmitted the program live across Hawai‘i.

Involvement of State legislature

The Sovereignty Advisory Council (SAC) was formed by the state legislature in 1991 (Act 301), appointing a handful of organizational representatives and individuals to “develop a plan to discuss and study the sovereignty issue.” In 1992 this council submitted a report to the state legislature that detailed the events of the overthrow and the remaining issues still unresolved, and made suggestions on the state’s taking further action on the sovereignty issue. A Hawaiian Sovereignty Economic Symposium was held at the William S. Richardson Law School on June 5, 1993, the first in-depth study of the economic consequences of models of Hawaiian nationhood, which was broadcast live by Hawai‘i Public Radio.

Although the legislature refused to continue the work of SAC, it subsequently created the Hawaiian Sovereignty Advisory Council (HSAC) by Act 359 in the 1993 legislative session, to seek counsel from native Hawaiians on:

- Holding a referendum to determine the will of the native Hawaiians to convene a democratically elected convention to achieve a consensus document proposing how native Hawaiians could operate their own government
- Providing a way to democratically convene a convention so native Hawaiians could freely deliberate and decide the form of that government
- Describing the conduct of fair, impartial, and valid elections including a referendum election

This council of twenty-one members, appointed by Governor Waihe‘e, visited communities in Hawai‘i and in America, to obtain opinions on how to proceed with self-

governance. HSAC concluded it could not counsel the legislature on that matter because HSAC was not the representative voice of the native Hawaiian people. Instead, the council suggested that a plebiscite be called, asking the native Hawaiian population whether an election of delegates should be held to propose a form of native Hawaiian governance. The legislature adopted the recommendations and appointed the HSAC commission members to the Native Hawaiian Elections Commission to conduct this native Hawaiian vote.

Native Hawaiians of any citizenship or residence were eligible to register in the “Native Hawaiian Vote.” Current or prior criminal convictions, or incarceration, were no basis for denial from voting. The only limitation was an age requirement of eighteen years by September 2, 1996, the scheduled date for the results to be announced.

In July 1996, 81,598 ballots were sent throughout the world, asking, “Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?” Discounting for returned mail, deceased addressees, and ballots returned by non-Hawaiians, the list was reduced to 81,507. Of that, 30,783 valid, signed ballot envelopes with ballots were returned, constituting 38 percent of the list. Of the resulting list, 2 percent were disqualified because of the failure to affirm their qualification to vote, and 360 ballots were disqualified due to torn stubs or empty secret ballot envelopes. The League of Women Voters did the final tally and reported that 30,423 (37 percent) of the ballots were counted, of which 22,294 (73.28 percent) voted YES, and 8,129 (26.72 percent)

voted NO.

Genesis of the Native Hawaiian Convention

Following the approval of the majority of the ballots counted, an election of delegates was held. Candidates ran for delegate positions from places in which they lived in Hawai`I, divided into areas called moku. Continental U.S.A. also had set aside delegates from that area. The Native Hawaiian Convention (hereafter NHC), also known as the ‘Aha Hawai‘i ‘Ōiwi, was convened on July 1, 1999.



Elected delegates to the Native Hawaiian Convention
on the steps of ‘Iolani Palace
July 31, 1999

These delegates met over the course of one year, studying various models to recommend a form of governance.

On July 29, 2000, after weeks of meetings, strongly argued positions, intense studies, and hearing various voices, both foreign and domestic, on self-governance, the convention delegates selected two conceptual models to place before the people for their advice and recommendations, one for integration within the United States of America and the second for independence from the U.S.A. While delegates themselves had strong positions toward one or the other model, they generally agreed that it was better to let the people decide between these models. They also agreed that the delegates would work on developing these two models for presentation to the people.

Work was done by the delegates to develop these two separate models. Over time, it was obvious that the integration model was being influenced by versions of the Akaka Bill(s) being introduced into the U.S. Congress and further development of that model waned in the face of the Akaka bill's development.

The independence model, however, took a different lead. There was a strong pull for independence from Hawaii's history of its period of independence and a record of advocacy for independence occurring especially over the past 30 years.

Fundamental questions needed to be addressed which revolved around an independence status. Following were some of these questions and the general direction of their responses:

1: Who were the citizens of such an independent nation (to be defined racially,

ancestrally, culturally, historically, or loyalty)? The Hawaiian citizens were to be identified in a similar way they were identified under the Hawaiian Kingdom by place of birth, by years of residence in Hawaii, and if not native born, by an oath of loyalty in order to qualify for nationalization. It would also be required that a Hawaiian citizenship could not be imposed but would have to be a choice made by any person who qualified.

2: Given the current make-up of the Hawaii society and the fact that the native Hawaiians would be in a minority if all those qualifying under the definition of a Hawaiian citizen was to elect to be such a citizen, what protections would there be for the Hawaiian indiegenous people? A separate political body (Kumu Hawai`i) would be created, autonomous to the general political body of the national government, consisting of only native Hawaiian, and this body would have exclusive control over certain decisions affecting Hawaii, including population control, land demarcated from the former government and crown lands assets and set aside for the Kumu Hawai`i; control over native Hawaiian education, health, and justice systems; and the right to identify a royalty for purposes of interacting with other monarchies should the general body decide that Hawai`i too should have a monarchy.

The drafting of the independence model has been a work in progress without any final decision made on the document itself. What is attached here is currently the most advanced draft but not considered as final by the full convention.

The state legislature and the Office of Hawaiian Affairs refused to fund this convention to completion. The convention now stands in recess, remaining unfunded, and thus unable to complete its work to be submitted to the Native Hawaiian population. The

NHC today is in recess and has not adjourned sine die (without a day to reconvene, essentially closing the assembly). With the NHC in recess, the legislature and the Office of Hawaiian Affairs now started looking in another direction—toward the US Congress and federal recognition, as the resolution of the matter of Hawaiian self-determination.



Convention debate on self-determination
July 29, 2000

In pursuit of federal recognition

On July 20, 2000, in the 106th US Congress, the first Akaka Bill was introduced in both the US House of Representatives and in the Senate. The brainchild from the offices of Senators Daniel Akaka and Daniel Inouye of Hawai‘i, the bill was an attempt to congressionally declare the Native Hawaiian people as a nation within the sovereignty of the United States of America. Once given this federal recognition, it was said that the Native Hawaiian people would have the right for special treatment as an indigenous nation, similar to the treatment given to American Indian or native tribes or nations. From the year 2000, every Congress until the 110th Congress of 2007 received the reintroduction of the Akaka Bill with various amendments. This attempt to formally recognize the Native Hawaiian people as a native, indigenous, or Indian people within the borders of the United States, subject to the superior jurisdiction of the United States, failed to pass the Congress every year.

In its 2011 session, the state legislature adopted Act 195, calling for the formation of a Native Hawaiian Roll Commission to create a list of voters to elect delegates to a new convention and to adopt a document to meet the requirements of federal recognition of a native Hawaiian nation. The state’s Office of Hawaiian Affairs was charged with financing this commission, electing delegates, and funding a convention. Only those of Native Hawaiian blood were to be enrolled on the “roll of qualified native Hawaiians” permitted to register to vote in the selection of delegates to the convention. In passing Act 195, the State legislature stated: “The State has supported

the reorganization of a Native Hawaiian governing entity. It has supported the Sovereignty Advisory Council, the Hawaiian Sovereignty Advisory Commission, the Hawaiian Sovereignty Elections Council, and Native Hawaiian Vote, and the convening of the ‘Aha Hawai‘i ‘Ōiwi (the Native Hawaiian Convention).”

Act 195 proceeded to (1) recognize Native Hawaiian people as the “only indigenous, aboriginal, maoli people of Hawai‘i,” (2) provide for and implement the recognition of Native Hawaiians to self-governance, and (3) create a Native Hawaiian Roll Commission to maintain a roll of qualified Native Hawaiians and to certify their qualifications as Native Hawaiians (e.g., tracing ancestry in Hawai‘i to pre-1778 or being eligible for the Hawaiian Homes program). The roll also required members to be eighteen years of age or older and to have maintained a significant cultural, social, or civic connection to the Native Hawaiian community.

The Office of Hawaiian Affairs launched “Kana‘iolowalu” to create the roll. The publication of the roll was to “facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention.” Five members appointed by the governor were to serve on the roll commission. Upon completion of the roll, the governor was to dissolve the commission.

Following a failure to register a sufficient number of Native Hawaiians on the Kana‘iolowalu roll, an effort was made to cobble together names from other listings—not only those who registered directly with the Kana‘iolowalu roll created by the commission, but also those registered with Kau Inoa, Operation ‘Ohana, and the Hawaiian Registry through the Office of Hawaiian Affairs. It included persons of all

ages, including those under the age of eighteen. Deceased persons also remained on the roll. The Roll Commission had more than 125,000 qualified Native Hawaiians on the list (*Judicial Watch, Inc. v. Namu‘o et al.*, 2015). There were no citizenship or residency requirements, nor did the roll exclude convicted felons or those declared mentally incompetent (Native Hawaiian Roll Commission, 2014).

Following the work of the Roll Commission, in December 2014 there emerged a group called Na‘i Aupuni—five individuals who formed a nonprofit organization to “help establish a path for Hawaiian self-determination” (Na‘i Aupuni, 2015a). Its scope of service for the Office of Hawaiian Affairs called for “an election of delegates, election and referendum monitoring, a governance ‘Aha, and a referendum to ratify any recommendation of the delegates arising out of the ‘Aha.

201 individuals were nominated to fill forty delegate positions to a convention. Nominees were required to be nominated by ten individuals who were enrolled on the Kana`iolowalu roll. From these nominees, 40 delegates were to be elected in an election conducted by mail-in ballots. The election was held, ballots were mailed in but the counting of the ballot was held up by an intervening lawsuit, *Akina v. State of Hawai`i*, 2015. That lawsuit challenged the legitimacy of the election, primarily due to its use of State funds and its limitation of voting to only those of the Native Hawaiian race. After losing at the Federal District Court and the Appeals Court level, the case was taken to the U.S. Supreme Court. A temporary restraining order was issued by the U.S. Supreme Court preventing the counting of the ballots until the Court could consider the matter. Kūhiō Asam, chairman of Na`i Aupuni, Inc., determined that the Court could

take years in reviewing the issue and announced the commencement of a convention without the counting of the ballots for electing delegates.

Na‘i Aupuni, foregoing the counting of the ballots, declared that a gathering in Maunawili, Kailua, O‘ahu would be convened, in which all nominees who confirmed their participation would be seated. On February 1, 2016, 154 delegates were convened at a private venue, the Royal Hawaiian Golf Club, behind secured entrance gates.

Only the confirmed participants were allowed into the meetings. Exceptions included three trained mediators, a support staff, ‘Ōlelo Community Media’s TV crew, guest speakers for the first week of meetings, a security team, a registration team (Commpac) contracted by Na‘i Aupuni, and food staff.

There were no copying machines, printers, or computers for use by the delegates. This required attendees to bring their own devices, making it difficult or nearly impossible to make and distribute handouts for all participants. Delegates were expected to bring their iPads, iPhones, or other similar devices to communicate via a custom-made electronic polling system (training included). This process took a lot of time and left many out of the loop because of the lack of equipment and the inability of the system to handle the load of input. Many participants, usually of the older generation, were not able to use or felt uncomfortable with the electronic media and were thus at a disadvantage for effective engagement in the affairs of the convention.

Because the number of delegates had increased dramatically from what was originally planned, Na‘i Aupuni reduced the length of the congregation from forty to

twenty days and reduced the previously announced per diem to fifty dollars for O‘ahu members, two hundred dollars for Neighbor Island members, and two hundred and fifty dollars for members outside of Hawai‘i. Members’ acceptance of the per diem was optional. Breakfast and lunch for the twenty convention days were provided by Na‘i Aupuni. No other financial assistance (e.g., transportation and lodging) was made available.

There were no State or federal government officials, no trustees of the Office of Hawaiian Affairs in their official capacities, no legislative representatives in their official capacity, and no special guests other than three invited speakers who addressed substantive questions of constitution writing, U.S. and international developments of indigenous rights, and Hawaiian Constitutions. There was some suspicion, given the behavior of at least one individual member, that an agent of a government agency was also on assignment to be among the delegates.

By the conclusion of the congregation, two documents were produced: the Constitution of the Native Hawaiian Nation (attachment 1), and the Declaration of the Sovereignty of the Native Hawaiian Nation: An Offering of the ‘Aha (attachment 2). The following month, on March 16, 2016, Na‘i Aupuni announced it would not be following up on the ratification vote of the Constitution of the Native Hawaiian Nation, leaving the congregation participants to do it themselves. Na‘i Aupuni returned a balance of \$82,509.86 to the Office of Hawaiian Affairs which was to be used for that vote..

Evaluation of the Na‘ i Aupuni congregation

Although a valiant effort was made by the state legislature, the Office of Hawaiian Affairs, members of the Roll Commission, and the five private citizens who formed Na‘i Aupuni and stepped up to undertake the ongoing work of that commission, this attempt to practice self-determination, against the backdrop of many years of colonization, posed many challenges for all, resulting in some movement forward but multiple failures.

This process was intended to create a “qualified Native Hawaiian roll” and from that roll, elect delegates, conduct an ‘Aha, and ratify the results of the ‘Aha, presumably a constitution or a formative document which would meet the U.S. Department of Interior’s administrative rules. The process created a roll of questioned legitimacy, included dead people, and added names of those who never intended to have their names included. It failed to elect delegates to an ‘Aha or convention, and the attendees of the gathering had no legitimate basis to claim a representative voice of a constituency other than, perhaps, the ten names which were used to nominate them. The gathering produced a haphazard document made up of bits and pieces of a governing entity without a consistent theme or even a name for this Hawaiian nation. The congregation adjourned sine die, after which Na‘i Aupuni abandoned the ratification referendum of the congregation. The announced deadline by which a ratification vote was to have taken place (May 2016) has long passed, and the Constitution of the Native Hawaiian Nation now appears irrelevant.

Reflecting on the longer-term view, starting with the organization of Hui Na‘auao several decades ago, followed by the Sovereignty Advisory Council, the Hawaiian Sovereignty Advisory Commission, the Hawaiian Sovereignty Elections

Council, the Native Hawaiian Vote, and the Native Hawaiian Convention, the Na`i Aupuni process was a failure in moving the exercise of self-determination forward. The earlier processes, seen as a progression, had already accomplished a valid roll of Native Hawaiians, held a referendum to determine if the people wanted to adopt this process of calling their Native Hawaiian representatives to a deliberative body, elected that body, held their deliberations, and produced two draft alternatives. If the State legislature and the Office of Hawaiian Affairs had not failed to fund the NHC to completion, two alternative proposals would have been presented to the Hawaiian constituency, one setting forth a design for integration within the United States of America, and a second for independence from the United States of America.

The NHC has not adjourned sine die and remains in recess until it is able to complete its mandate. Some have argued that the NHC, which was elected in July 1999, is outdated. That is an uninformed judgment, like any other legitimate organization, the NHC adopted a process that allows it to maintain its viability. The NHC is nearly twenty years old as of this writing, but that age only underlines the need to allow the NHC to complete its work and put before the Hawaiian constituency the proposals for determination. A great amount of earlier work beginning with the Sovereignty Advisory Council in 1991 (Act 301) up through the NHC in 2000, was marginalized by Act 195.

Yet another agenda was at work, although not explicitly declared: The imminent departure of the Obama administration was assumed to close a window of opportunity to achieve a presidential executive order recognizing an organized Native Hawaiian “nation” under requirements of the US Department of the Interior (DOI). The struggle

for recognition dates back to the early days of the rejuvenated Hawaiian sovereignty movement following the Alaska Native Claims Settlement Act (ANCSA) adopted by Congress in 1971. What followed was the Aloha Bill, which attempted to mimic the footsteps of the Alaska experience. Having failed in those early efforts, and seeing the US Congress adopt the 1993 Apology Resolution (Public Law 103-150) confessing the illegal role of the United States in the Hawaiian overthrow, a new attempt by US Senators Inouye and Akaka was made to achieve recognition of the Native Hawaiian nation (the US House of Representatives having adopted such a bill on numerous occasions.) Senate bills were introduced in different forms from 2000 until 2007 but were never successfully adopted, largely due to the manipulation and objections of a small Republican minority in that body.

A presidential executive order could have circumvented the political roadblock in Congress. At the time, the DOI was already in the process of developing its rules, had held contentious hearings in Hawai‘i, and had issued proposed rules during the Roll Commission process. All that was needed was for the DOI to establish final rules—and for the Native Hawaiian people to accept a document through a plebiscite that would meet those minimum requirement of the final rules—and the Native Hawaiian “nation” would have become federally recognized. This would have been pleasing to those who support integration of the Hawaiian nation within the United States but hated by those in support of total independence. The process started by Act 195 failed to meet that objective of achieving Federal Recognition of the Native Hawaiian nation.

How did the Office of Hawaiian Affairs get into this situation? Trustee Peter Apo

explained the following during an Asset and Resource Management meeting of the Office of Hawaiian Affairs:

So here we are negotiating the ceded lands settlement, two hundred million Kaka‘ako, and in the eleventh hour, that bill gets inserted in Act 195. Okay? You either have to agree with Act 195 or we may not give you the two hundred million dollar settlement. That’s how we got into Act 195. We had no control over that unless you wanted to turn down the settlement and so when we move forward and I don’t know how many millions of dollars we’re into that now. (Apo, January 27, 2015)

There is an answer to Apo’s question about spending that resulted from Act 195: \$4,521,515.37 was spent on the Roll Commission, another \$2,598,000 was granted to Na‘i Aupuni (through a fiscal agent, the Akamai Foundation), and \$82,509.86 was returned to the Office of Hawaiian Affairs when Na‘i Aupuni did not fulfill its grant requirement to ratify any recommendation of the delegates arising out of the ‘Aha. The total: \$7,037,005.51. Additionally, the Office of Hawaiian Affairs spent \$902,955.48 for legal services to defend the case of Akina v. State of Hawai‘i, for a grand total of \$7,939,960.99

Political Crosscurrents

The process that culminated in the Na‘i Aupuni congregation suffered from crosscurrents of political waters in Hawai‘i. One current flows in the direction of democratic participation of Native Hawaiians, the aboriginal people of Hawai‘i, to determine their future. This process of “self-determination,” while under the yoke of colonization since 1893, is aspirational but leaves much to question whether self-

determination can truly be attained within the limitations of the US Constitution and Act 195.

A second current calls for historical accuracy, noting that Hawaiians who lost their continuing right of self-determination by US aggression had the genetic makeup of many ethnicities, including Caucasians, Chinese, Japanese, Filipinos, etc. Was this to be a national movement for decolonization, or a US-defined, native people's exercise in limited "sovereignty"? The call for Hawaiian "sovereignty" was used in both attempts, creating a continuing confusion of purpose.

A third current is the resisting colonial US laws. One example is the Voting Rights Act, interpreted as restricting those very Native Hawaiian people who lost their right of self-determination due to the U.S. invasion in 1893, are prohibited from engaging in a democratic process of voting among themselves for their representatives to take the first step to self-determination. A lawsuit attempting to stop an election from taking place among the Native Hawaiian people was defeated at the District Court and the Circuit Court level, finally reaching the US Supreme Court. The Supreme Court issued a temporary restraining order, holding up the count of the ballots, to allow the Supreme Court time to consider if the process violates US law of voter discrimination—in other words, whether all US settlers now residing in Hawai'i should participate in such an election process.

A fourth current is the fear of Native Hawaiians of being victimized in a scam to steal their fundamental human rights, and of being swallowed up by the colonial forces of the United States and its puppet, the state of Hawai'i, and its suspect offshoot, the Office

of Hawaiian Affairs.

Within these crosscurrents, the Na‘i Aupuni ship set on a journey to glimpse a preferred future and to return with a framing document or “constitution”—all within a limited timeframe, limited funds, and a questionable crew of more than 150 people brought together simply by their submitting their names as nominees, having no predetermined or tested leadership.

The original plan was for a gathering of forty specially chosen (elected) delegates to crew the wa‘a, and to take forty days to accomplish its quest. But instead, the election of delegates was scuttled, and the crew ultimately increased to 156—almost four times its original number. The larger crew did not result in a better voyage, especially given that the wa‘a was not large enough and the direction and leadership were not well defined. Additionally, the trip was shortened from to twenty days to produce a framework envisioning the future of the Hawaiian nation.

Provisioning for the vessel was inadequate. The Royal Hawaiian Golf Course Clubhouse on Auloa Road in Kailua, O‘ahu, became the designated meeting place. There was one large gathering room that could adequately seat participants around banquet tables, two side rooms to seat fifteen to twenty people adequately for meeting purposes (but no tables in them), and a dining room of circular tables, serviced by a food-service room for self-service meals. There was limited logistical support: no telephones or copy machines, limited computer communication systems, and no administrative or general office support. There was a new and specially designed electronic polling system, but many participants, especially older members, could not engage in electronic voting and

communication due to their lack of familiarity with the system. Also of concern was the lack of timely response by the system.

The meetings were held in private, causing much controversy at the entrance gate to the golf club. The television coverage was mostly adequate, although still unsatisfactory to those who wanted to be in the meeting room and “in the face” of those purportedly designing the future of the Hawaiian nation.

The wa‘a started off in choppy waters and unfavorable windy conditions with all the sniping, accusations, distrust, and other general suspicion, both in and out of the meeting space. And yet, the wa‘a was expected to beach within twenty days with documents detailing the future course of the Hawaiian nation!

Sparks of beauty and color along the journey

While faced with these challenges, there were beautiful and colorful aspects along the journey. The participants consisted of a wide mixture of Native Hawaiians, from various parts across the world, from various age groups and levels of academic background, each bringing different experiences and perspectives. Some were familiar with the contending issues of Hawaiian self-determination. Others were at the introductory stage of the subject. All participants brought unique viewpoints, and the majority appeared willing to listen to opposing views.

The all-or-nothing thinking of choosing between independence or integration (federal recognition) was softened; rather than asserting which position was correct or better, conversations seemed to gravitate toward what would be the best approach to raise

the nation rather than divide it. The language of the discourse began to shift. One paper that circulated among participants spoke of changing the conjunction from independence or integration to independence *and* integration. The paper argued that we should no longer be divided by the minutia of details over Hawaiian sovereignty but united by the vast agreement over historical injustice imposed on Native Hawaiians and the need for unity over things that we could agree upon now.

Other discussions, while not finding their way into official documentation of the gathering, revolved around building new economic models, examining the nation's deep culture, conceptualizing alternative understandings of constitutional structures and principles.

An "aloha economy" was suggested as an alternative model to conceptualize the preferred economy as a substitute for the formula which revolved around ideas of the "gross national product", "gross domestic product", capital accumulation, rates of investment and return, and other western economic concepts. This "aloha economy" would create space in the Hawai'i economic system for traditional interchange, for new values of environmental protection, for an attitude that in sharing, there is always enough; and for a respect for all our environmental elements not as resources but as members of our Hawaiian family.

A discussion of reconstructing a Hawaiian national economy through the eyes of a hungry child rather than through a capitalist lens of ever-expanding markets and resources. Under such an economy, one would approach the development of the national economy with a question – what does a child hunger for? Build an economy around that

questions. A child hungers for healthy food, clothing, shelter, family, a pristine environment, education, good health, identity and culture, affection, love and laughter, dreams, goodness, challenge, friendship safety, and an understanding of continuity the the past to the future. These basic needs should form the building blocks for an economic system.

Another discussion introduced the subject and definition of Hawaii's deep culture, examining the foundations of that culture which permeates the underlying nature of the society. One current and the dominating deep culture can be described as DIE (domination, individualism, and exclusion), which runs today's formal systems in economics, environment management, education, law, judiciary, health systems, and politics. This deep culture is so pervasive that it can even invade into family relationships and one's home life if not protected! A second deep culture running predominantly in our informal systems is built around values of OLA ('olu'olu, lōkahi, and aloha), where communities and families reside, also sometimes found in churches, civic organizations and associations, and solumn or celebratory gatherings. As Hawai'i unfolds into its future, what should the primary deep culture upon which we place our formal and informal systems be – D.I.E. or O.L.A?

Another subject was reframing the understanding of the constitutional history of Hawai'i. The general approach is to understand Hawaii's constitutional history as beginning with the first written constitution of 1840, followed by a series of new constitutions over the years. Another view presented was that there is and has only been one fundamental constitution defined by the pronouncement of the founder of the modern

Hawaiian nation, Kamehameha I, who on his deathbed said, “E na‘i wale no ‘oukou, i ku‘u pono `a`ole pau.” A view later reiterated by his son, Kamehameha III: “Ua mau ke ea o ka ‘āina i ka pono.” Pono is the constitution: the written documents that followed were merely different expressions of that fundamental constitution, moving from one based deeply in culture, customs, and ancient laws of proper behavior, to a yielding to this new technology of literacy and new concepts of governance, yet still hanging on to the central constitution of pono. Accepting this approach to Hawaii’s constitutional foundation, what are the implications to drafting a constitution to bring us into the future? Are we obligated to replicate the forms of earlier constitutional drafts or are we free to design our own expressions and visions of a pono Hawai‘i given our contemporary circumstance and hopes for the future?

These important deliberations occurred in small discussion groups, in lunch circles, or in caucuses. The relationships formed at the congregation have carried forward among some of the participants and the general public. One example is the Hawai‘i National Transitional Authority (HNTA), an unincorporated group of individuals gathering on the internet and in person to unify various positions of Hawaiian self-determination continuing, to continue with discussions on these topics and to work on specific issues to move Hawai‘i forward.

The return from the journey

Upon its return from this twenty-day journey, a product dressed as a constitution was displayed as the proposed end result of its travel. A ratification vote was to be taken

2 months following the close of the gathering. A half month after the close of the gathering, Na`I Aupuni announced it would not pursue the ratification of the document, leaving instead that task to the members to pursue. As of this writing, no ratification vote has been announced.

What is in the Constitution of the Native Hawaiian Nation?

The Constitution of the Native Hawaiian Nation is to be distinguished from the other document produced by Na`i Aupuni—the Declaration of the Sovereignty of the Native Hawaiian Nation. The constitution purports to be a continuation of the Hawaiian government following the overthrow in 1893. The document can be discussed as both a process and a product.

The process

The introductory part of this paper summarized the historical context of the Hawaiian sovereignty movement from various perspectives. The February 2016 ‘Aha convened by Na`i Aupuni must be understood as part of that broader process of the sovereignty movement. The procedure followed in “rolling out” this gathering, its methods of operating, its rules of order and the management of the meeting are also to be understood in appreciating the product of this gathering.

The plenary sessions (General Assembly) were recorded and broadcast by ‘Ōlelo Community Media via television. The committee or caucus meetings were not recorded by ‘Ōlelo. Each committee or caucus decided for itself whether to have the TV crew record the proceedings. Individuals were permitted to record, and many people did so, posting such records on a variety of social media. While this congregation was “closed” to the physical presence of the general public, it was also an exceptionally “open”

gathering through the combination of TV live coverage and social media. This provided a historical record of various points of view throughout the gathering.

- The congregation adopted *Robert's Rules of Order: Newly Revised, 11th Edition*, and a slate of executive officers were elected. For a time, the inappropriate application of these rules of order discouraged deliberation and debate, resulting in discussions that were shut down once anyone “called the question” from the floor and a mere majority vote was taken to stop such debate. After this practice was protested by an appeal to the decision of the chair, the chair changed his practice to refusing to call for the question unless he saw no one coming to the microphone to engage in debate on a question. He did, however, terminate debate where there were no speakers either on the pro or con side of a question, although there may have been additional speakers still lined up to speak on the opposite side. This had the effect of cutting off debate, without a vote. On the whole, there was a great divide between those familiar with *Robert's Rules of Order* and those who were not. This divide allowed some to take advantage of their familiarity or ignorance to such a point that the process could, and at times did, become manipulative and abusive. The “crew training” for this journey was not adequate for the intensely deliberative nature of the congregation.
- This congregation was stuck between a gathering for deliberative purposes and one for negotiation, bargaining, and producing a constitutional document within an abbreviated time frame. The three “professional” mediators would have been well suited for a gathering for mediating or settling disputes or oppositional

positions, but not for engaging a deliberative assembly. The mediators tried to facilitate a smooth and friendly conversation among the participants. However, they were neither trained nor experienced in bringing about respectful deliberation of important issues, nor, by their own admission, were they trained in *Robert's Rules of Order*. There should have been a clear distinction between the nature of deliberation and mediation, with more emphasis on hearing the voices of one another than to take a vote as soon as a popular majority could be obtained, and then move onward. The twenty-day time limit was an inherent obstacle to a deliberative body of this nature.

- The congregation was divided into various caucuses spread across various rooms, including the dining areas. Each of the caucuses met simultaneously. If participants wanted to participate in more than one caucus, they were free to do so, but they could only be engaged in one caucus at a time. This made continuity of one's work impossible. For example, many people were interested in the Preamble drafting caucus, the International caucus, and the Rights of Citizen caucus. All were in operation at the same time, along with all other caucuses. Leaving the Preamble caucus after it appeared that certain agreements and directions had been made, and then attending another caucus, could easily result in the agreements and direction in the Preamble caucus changing dramatically as other members attended and changed earlier agreements and directions. Because of this variability, the earlier deliberations in some caucuses were lost or re-threaded. There was no reliable continuity of a particular caucus, nor was there a

matching of themes across caucuses.

The only assured continuity was the chair who remained heads of each caucus who was able to tract the discussions and agreements made by a meeting of a caucus, but which could still be changed by new participants dropping into the next meeting without any understanding of prior discussions and agreement. Each chair was to meet with a drafting group for drafting and coordinating the work product as they were produced by the caucuses. When the drafting committee received the caucuses' reports, they were to apply appropriate "word smithing" skills appropriate for coordinating the various reports and to fit within a constitutional framework. At times, the drafting committee itself undertook to make substantive changes to the work, arguing that the changes were made because of their consultation with expert legal advice. The source of said legal advice was never revealed. This practice allowed for too much liberty on the part of the drafting committee.

The drafting committee's meetings were held at the Richardson School of Law at the University of Hawai'i-Mānoa campus, a separate venue from the gathering of the congregation in Maunawili, after the convention had adjourned for the day. The drafting committee was open to all members to participate. However, members living in Wai'anae or Lā'ie and undergoing long travel times, family responsibilities, or other myriad obligations could not attend such meetings and be back in Maunawili in time for the next day's work.

The timing of the release of the constitution draft was managed badly. When the

initial draft was released, it was one day prior to the scheduled end of the congregation's meeting. The final document was not released until the last day of convening, a few hours before the final vote. Consultation on the whole document in a comprehensive manner, by individuals and among members, became impossible. This compressed process made it impossible to make a comparison with the preliminary rules of the Department of Interior. Debate was limited to a few minutes for each member to respond to this document as a whole. Therefore, it cannot be said that this congregation properly and adequately considered this document.

- The congregation gave inadequate attention to the NHC's previous work toward an independence model and integration frameworks. The work of the NHC was a culmination of ten years of gatherings, a ratification referendum to form the convention, and an election of delegates to attend its convention. It held meetings throughout Hawai'i and in various States of the United States. Yet the Na'i Aupuni congregation allowed only a ten-minute presentation of the NHC product, with five minutes for questions and answers.
- At the end of the Na'i Aupuni congregation, two documents were issued. The first was the Constitution of the Native Hawaiian Nation, which was adopted by a majority of the members by roll call (80 in support, 33 opposed, and a number who refused to dignify the process with a response but whose lack of response was added to the majority, making it 88). The second was the Declaration of the Sovereignty of the Native Hawaiian Nation by voice vote (see attachments 1 and

2).

The product

The Constitution of the Native Hawaiian Nation is fifteen single-spaced pages. It begins with a preamble and includes eight chapters. This article deals only with certain sections and concepts of the constitution. Due to space constraints, it does not address the Declaration of the Sovereignty of the Native Hawaiian Nation. Brief comparisons will also be made, as appropriate, with the NHC's proposal for an independence constitution.

The Preamble

The first paragraph of the preamble refers to ancient history and deep cultural concepts using 'ōlelo Hawai'i to anchor the document in Hawaiian beliefs. In the second paragraph, the narrative moves from the cultural to the political:

Honoring all those who have steadfastly upheld the self-determination of our people against adversity and injustice, we join together to affirm a government of, by, and for Native Hawaiian people to perpetuate a Pono government and promote the well-being of our people and the 'Āina that sustains us. We reaffirm the National Sovereignty of the Nation. We reserve all rights to Sovereignty and Self-determination, including the pursuit of independence. Our highest aspirations are set upon the promise of our unity and this Constitution.

In the initial discussions of the Preamble caucus, there was a strong preference to recite the history of the Hawaiian government being overthrown by US forces and the subsequent removal of culture, language, and historical understanding of our nation. However, the prevailing consideration was that we should not open the document with such a negative history but instead lead with a higher statement of strength that reflects

our common national elements, positive values, and the connectedness of our generations. The preamble reflects that change.

In the closing days of the convention, there was consternation over the inclusion of the terms *self-determination* and *independence*. However, after long discussion and debate, the Preamble caucus was clear in its desire for the preamble to use self-determination and independence as contemplated in the International Bill of Human Rights and other international language. It was so declared in the final floor debate, the Preamble caucus chairperson was specifically asked if those terms were used in the sense used in those international documents and the chairperson responded clearly and positively that it was!

Comparing the language with that of NHC's July 2000 proposal for an independence constitution, we see a different approach of the constitutional framework. (See attachment 3) It opens with an acknowledgment to the Source of all creation, speaks of a foundation of Aloha, invokes the word sovereignty, and proclaims the right to control our destiny. It next speaks of pono, followed by an expansion of partnership among the host people and of all others under an umbrella of human rights and fundamental freedoms and between the human and the natural elements. It identifies as divine elements of nature, the sun, wind, sky, fresh and salt wates, land and the people and their representations of life, change, fluidity, stability and humanity. Finally, it speaks of a government of, by and for the people into the generations yet to come. Intertwined into this preamble are Hawaiian value statements as anchor marks.

Both the Na`i Aupuni congregation constitution and the Native Hawaiian

Convention draft for an independent Hawai`i reflect a common expression of self-determination and a fundamental value of pono.

The People

The Na`i Aupuni document excludes from the members of this “nation” those people who do not have indigenous Hawaiian blood. As a “continuum” from our overthrown government to the present, this treatment leaves a large hole in our history. In the Hawaiian government, beginning with the reign of Kamehameha I, non-native Hawaiians were part of the Hawaiian political, cultural, and civic body. Furthermore, one of the fundamental principles of indigenous peoples’ rights in developing international standards is the right of self-definition, which includes the right of indigenous peoples to describe, for themselves, who are members of their political group

In taking a more exclusive approach, the Na`i Aupuni document is a turn away from Hawai`i’s history, culture, and the more enlightened view of the rights of the Hawaiian people. It is a concession to the federal recognition standards of US policy, which generally limits the membership of its “recognized” nations to indigenous peoples only. It raises a central question of whether the constitution is written for the people, or to appease the colonial government at the expense of the historical, political, and cultural integrity of the Hawaiian people.

By contrast, the NHC document addresses the distinction between the “host people and culture of this land,” while also recognizing the human rights and fundamental freedoms to be accorded every person of Hawai`i, in calling for a

partnership. This language is more in line with a continuity of the Hawaiian nation.

The Name

The Na‘i Aupuni document contains no name for the nation. One of the requirements of the US DOI proposed and final rules is that the constitution, or formative document must have a name for the nation.

The NHC document states simply that Hawai‘i is the name of the nation.

Article 1: Territory and Land

This article follows language that does not clearly set forth whether the subject is one of territorial jurisdiction or of land title. In the first paragraph, it reads as if the subject is territorial jurisdiction, claiming the territory to include “all lands, water, property, airspace, surface and subsurface rights, and other natural resources, belonging to, controlled by, and designated for conveyance to and for the Hawaiian Nation.”

This present-day outlook is a one-dimensional statement of time and lacks a “looking back” claim of the territory of the Hawaiian government. It asserts no claim over Maunakea, Haleakalā, and other land areas of recent controversy. It makes no claim of waters, including the twelve miles beyond the shores of the islands, or the 200-mile exclusive economic zone. All the fisheries are left out, as are the subsurface minerals and the deep ocean waters used for heat transfer, energy creation, potential for cage culture in the harvesting of fish, etc.

The next paragraph in the Na‘i Aupuni document deals with title in the Native Hawaiian people, stating:

The Native Hawaiian people have never relinquished their claims to their national lands. To the maximum extent possible, the Government shall pursue the

repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.

The language here is unclear regarding the claims of the Native Hawaiian people to their national lands. If this is a reference to the pre-overthrow Hawaiian government, it should have stated clearly that the Hawaiian monarchy never relinquished its national lands. The people owned no such lands as a group but only through its government. This paragraph skirts the fact that the monarchy's Government lands and Crown lands were taken and maintains a pretense that there were lands set aside for the native Hawaiian people en masse. In fact, the people owned rights in the land to have access for purposes of traditional, cultural, and sustenance purposes, but these rights were never seen as title to the lands.

Both paragraphs of Article 1 reference a superior entity. The first references "belonging to, controlled by, and designated for conveyance to and for the Hawaiian Nation." The second makes a more oblique reference by stating, "To the maximum extent possible, the government shall pursue the repatriation and return of . . ." Both paragraphs suggest, but refuse to simply state, that the lands and territories belonging to Native Hawaiians are now in the hands of the US government through theft, and all of the lands should be given back.

The language in the NHC document for independence (Article II) is much clearer with regard to territory:

The national territory [of Hawai'i] consists of the Hawaiian archipelago, stretching from Kure Atoll in the North to Hawai'i in the South and all of those lands, atolls and other territories whose jurisdiction have been assumed by the United States of America previously claimed by Hawai'i prior to the US 1893 invasion. Those territories previously part of the constitutional Hawaiian

monarchy but which have subsequently been declared the territory or possession of a state other than the United States of America may be included within the territorial jurisdiction of Hawai‘i upon concluding negotiation with that claiming state and Hawai‘i.

The territorial waters of Hawai‘i shall include the waters twelve (12) miles from the shores of all lands of Hawai‘i. The exclusive economic zone defined by the 1982 Convention on the Law of the Sea is adopted as applying to Hawai‘i.

Casting a wide net, the NHC document takes in all of the Hawaiian territory, including the 200-mile exclusive economic zone, all of the lands including Kalama (Johnston) Atoll, Palmyra Island, Sinkian Island among the Solomon group, and lands to the northernmost island in the Hawaiian Archipelago. It addresses territorial jurisdiction and deals with the return of private lands taken in a separate section regarding post-colonization outstanding claims.

Article 2: Citizenship

This article deals with two subjects: who are the citizens, and who has the right to vote. It declares a citizen as being “any descendant of the aboriginal and indigenous people who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands and is enrolled in the nation.” Later in the document (Article 9, Section 2) it states, “The Nation has the inherent power to establish the requirements for citizenship in the Nation. The Nation reserves the right to modify or change citizenship requirements solely through a constitutional amendment.”

Section 2 of the document says citizenship in the United States is not to be affected by citizenship in the Native Hawaiian Nation. This is an interesting incursion into the domestic laws of the United States and how it treats its citizenry. It is also a

curious statement in terms of what is left out, i.e., citizenship in a place other than the United States. This oddity becomes understandable when one appreciates that the purpose of Section 2 is to act as a “wink” to the reader to alleviate any concern about losing US citizenship—this is all part of a plan to fit within the US framework.

Section 3 declares that all citizens who have attained the age of eighteen years are eligible to vote. This is effective as a protection against laws that deprive citizens from voting because of criminal convictions, declaration of mental status, etc.

The NHC independence document (Article VI) treats Citizenship as follows:

Citizenship shall consist of three general classes:

- *all Kanaka Maoli throughout the world who elect to be citizens;*
- *descendants of subjects of the Hawaiian Kingdom prior to July 4, 1894 who elect to be citizens; and*
- *all persons born in Hawai‘i, and other individuals who have been a resident of Hawai‘i for a continuous period of five years prior to this constitution coming into force and effect, and who choose willfully to pledge their allegiance to Hawai‘i,*

The major difference here is that citizenship is not limited to one’s Native Hawaiian ancestry, but also includes those of other ancestries. To fully appreciate this arrangement, one must understand that the NHC document creates two primary bodies: one restricted to native Hawaiians only, and the second encompassing people of all racial extraction, with agreed-upon separation and limited powers for each body.

Article 3: National and Official Language

‘Ōlelo Hawai‘i is the national language. ‘Ōlelo Hawai‘i, along with English, are official languages. The document does not distinguish between a national and an official language.

In referencing official languages, the NHC document states:

‘Ōlelo Hawai‘i and English shall be the official languages of Hawai‘i in which any and all official proceedings and legal transactions may be conducted.

The Education Department of the General government shall be required to incorporate the teaching of ‘Ōlelo Hawai‘i coextensive with the teaching of English.

Within ten years after the formation of the general government, all public employees shall be proficient in both languages as working languages.

Article 4: National Right to Self-Determination.

The Na‘i Aupuni congregation document makes a bold statement in declaring, “The Nation has the right to self-determination, including but not limited to, the right to determine the political status of the Nation and freely pursue economic, social, cultural, and other endeavors.”

This language is aligned with that of international law, found in the “International Covenant on Economic, Social and Cultural Rights” and the “International Covenant on Civil and Political Rights,” where each states in its respective Article 1: “All 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.”

When questioned on the language of the preamble of the Na‘i Aupuni document, which uses the same term (self-determination), the chair of the Preamble caucus confirmed that the term was indeed a reference to the rights referred to in both international covenants.

When considering the national context, the DOI final rule stipulates at 50.13, (j) that the document “Not contain provisions contrary to Federal law.” Other than that general reference to federal law, the rule points to no specific federal law. It can be argued

that the Na‘i Aupuni document’s claim to the right of self-determination is part of the body of federal law by virtue of the U.S. participating in forming the foundational principle of the Charter of the United Nations, said charter subsequently ratified by the United States and thus becoming part of the “law of the land” under Article VI of the US Constitution. It could also be argued that the principle of self-determination is founded in none other than the U.S. Declaration of Independence seen as a sacred document and as part of the unwritten constitution of the United States of America. Finally, it can also be argued that the United States has signed both of the aforementioned International Covenants, and the US Senate has ratified the International Civil and Political Rights document in 1992. It has not yet ratified the Economic, Social and Cultural Rights document as of 2017.

The NHC document uses different language but with the same outcome as to proclaim self- determination: “We proclaim *our right to control our destiny*, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.”

Article 5: Collective Rights

This article effectively declares the right of traditional and customary practice, recovery of bones and funerary objects, the protection of rights of Native Hawaiian tenants (thus excluding the rights of non-native Hawaiians), and a claim for intellectual properties. However, it ignores the claim of self-definition, i.e., the right to determine its membership in the Hawaiian nation. This is a fundamental right fought for and won in the international development of indigenous peoples’ rights and should be added to the Na‘i Aupuni document.

Article 6: Rights of the Individual

This article is effective in protecting individual rights. However, Section 5 contains serious flaws in stating that the right to counsel is to be paid for at the defendant's own expense.

Another flaw is found in Section 9, where no imprisonment for debt is assured, unless such debt had been incurred as a result of fraud. Section 11 is also problematic; it provides every citizen the right to bear arms, which, as written, would allow children to carry weapons as well as those with history of violent criminal and noncriminal behavior.

Section 14 is an attempt to protect the people's right to a healthy environment. It states, "All persons have the right to be free from exposure from harmful substances used in warfare, nuclear power plants, and waste materials." This statement would benefit from a rewriting to be more broad and inclusive.

In comparison, NHC's proposed independence document has a much more expanded listing of rights, which delineates such rights over thirty sections in Article 4 (Peoples' Rights and Protections).

Article 7: Customary Rights

Article 7 of the Na'i Aupuni document addresses four specific customary rights: to protect subsistence, cultural, medicinal, and religious purposes; to manifest, practice, develop and teach spiritual and religious traditions, customs, and ceremonies; to be stewards of water under its jurisdiction; and to sustain the 'āina.

These are important rights that should be specifically set forth. However, there may be some confusion in the wording, as the Native Hawaiian people have the first three rights, but the Nation has the fourth right (to sustain the 'āina), leaving the reader to

question why this distinction exists.

Also important is what is omitted from these rights for Native Hawaiians. If one speaks of self-determination, it is necessary to set forth control or participation over population expansion and transfers, foreign investments and trade, visa for foreign travels into Hawaii, domestic taxing authority and tariff levies, Hawai'i national security and defense, and control over foreign and domestic military use of Hawaiian territories.

Article 9: Reservation of Rights and Privileges

This article specifically protects the Hawaiian Homes Commission Act from “this Constitution or the laws of the Nation.” However, it does not protect the Hawaiian Homes Land Recovery Act, which protection is required by the preliminary and final rule of the DOI. As a result, this article fails to meet the minimum requirement of the final rule.

Article 10: Kuleana

This article seems to restate and expand the first paragraph of the preamble—dedicating the government to prioritize Hawaiian culture, to steward Hawai'i's environment, to protect the rights of its citizens, to support home rule, to provide for the general welfare, to pursue repatriation of national lands, to ensure reasonable traditional and customary access to water on national lands, etc. With nineteen specific items, it seems to be the “catchall” article—perhaps a listing of favorite projects for participants not patient enough to await a legislative assembly to work out these projects and directions—that appears out of place in a constitutive document that sets forth the broad principles of a nation and its general operation.

Article 14: Sovereign Immunity

Article 14 declares, “The Nation and its Government possess sovereign immunity, which can only be waived in accordance with the law.”

This statement may have various readings. It may be considered a position of independence from the United States, and that in having sovereign immunity, its citizens and territories may be beyond the jurisdiction of the United States, including its powers of taxation, judicial authority, police, etc. The statement could also be interpreted as having a subservient sovereign immunity, which becomes a concoction of US demotion of such terms under the authority of the United States.

The concept of sovereign immunity is presently in flux, especially given the formation of the International Criminal Court and the setting aside of sovereign immunity, even to heads of states, for crimes defined under that court’s jurisdiction. This author does not seek to clarify the extent of sovereign immunity declared in the Na‘i Aupuni document and leaves its full meaning in uncertainty.

Article 16: Oath of Office

This article describes that public officials must take an oath to support and defend the “Constitution of the Nation.” However, “no person shall be compelled to take an oath or make an affirmation that is contrary to their religion or belief.” This language raises the question of what a belief may consist of such that the oath need not be taken. The exemption for taking an oath of office undermines the call for the taking of an oath. It may have been better to say, “Every public official must carry out the duties of the office faithfully and in compliance with the constitution and laws of the nation.”

Article 17: Removal from Office

Members of the judiciary may be impeached when action is initiated by the

president, subject to trial and two-thirds majority of the legislative body. The president can be impeached by a trial and a two-thirds majority of the legislative body. No power is given to the impeachment of a member of the legislature. There are no appeals to the lack of due process from any trial and vote. In a highly politicized body, and when no appeal is possible outside of the legislative process, this power of removal can become abusive or a means to remove the president or a member of the judiciary for decisions or actions that are unpopular. This article also omits any question of impeachment of the vice president. In the event of a president's impeachment, Article 39 requires the vice president to undertake the position of the president. This article in light of the other powers given the vice-president is a political time bomb. The vice-president is given oversight of the Office of Citizenship and Elections (Article 23). He is also charged with addressing the unique needs of the Kahiki citizenry (Article 34), those who live outside of Hawai'i. Given such powers, the vice-president is placed in a position of great potential conflict, not only in overseeing his own and other's elections but in creating a special relationship with the Kahiki citizenry which may, itself, outnumber the rest of the citizenry, or at least large enough to sway an election or impeachment result. As the person to automatically assume the position of the president in the event of the impeachment of the president, the conflict of interest is unavoidable.

Article 19: Judicial Autonomy

The judiciary budget is protected from diminishment by the legislature unless it is a government-wide reduction, proportionately applied to the judiciary. Besides budgetary consideration, nothing more is said with regard to judicial autonomy, such as protecting

the judicial decisions from political questions, i.e., laws of marriage, divorce, sexual identity, abortion, etc. This idea of budgetary autonomy by the judiciary, or any other agency or branch of government, is an incursion into the legislature’s control over the funds of the government and the executive’s responsibility to oversee the balanced administration of the government. One might ask, at what point does this diminishment of executive powers end? In the Na‘i Aupuni document, an appointed body of the executive now has independent control over its budget. The judiciary should be autonomous over its judicial duties, but it should be subject to the same budgetary policies and controls prescribed for the legislative body.

Article 23: Elections

This article discusses how voting lists are created and maintained, including giving procedures for voting—such as residency, age, disqualification, and recall requirements—to an Office of Citizenship and Elections. It would seem more appropriate to have the legislative body undertake such procedures and criteria rather than placing such powers in the hands of an appointed body under the control of the vice president.

Article 23 also allows for disqualification for voting but does not give any guidelines or identify the body that may determine disqualification, leaving this matter to the vagary of “unless disqualified by law.”

The article attempts to account for controlling campaign financing through the legislature, permitting ceiling limits on public funding by “political” entities, public disclosure of contributions, contribution limits, corporate donation prohibitions, and

expenditure limits.

Overall, this article should be reviewed for its delegation of authority. The decision to allow so much power over elections to be placed in the hands of a political officer, the vice president, should be reconsidered for its potential for conflicts of interest. If the vice president should become a candidate for the presidency, that person would oversee his own election race and may have the opportunity to disqualify his opponent or manipulate the voting rolls to make it difficult to allow voting by a constituency in favor of the opposition.

The earlier experience in Hawai'i regarding the placement of state elections in the office of the lieutenant governor, a political office itself subject to election, was proven unwise and was subsequently removed.

Article 30: Legislative Elections

Voters in the respective districts may vote for representatives. This seems clear. However, problems in applying this provision arise when considering the representative count (below).

Article 31: Representative Count

This article provides for forty-three representatives, twenty-two of whom are to be elected based on population and distributed as follows:

Hawai'i – 2
Maui -1
Moloka'i – 1
Lāna'i – 1
Kaho'olawe – 1
O'ahu – 6
Kaua'i – 1
Ni'ihau – 1

Kahiki (outside of Hawai‘i) – 8

Another twenty-one representatives are to be elected based on the land of each district, as follows:

Hawai‘i – 4
Maui – 4
Moloka‘i – 2
Lāna‘i – 1
Kaho‘olawe – 1
O‘ahu – 4
Kaua‘i – 4
Ni‘ihau – 1
Kahiki – 0

This approach poses a major challenge to the concept of a representative form of government. The general understanding is that representation should be of people, not space or geography. The reason representation is based on the population is to bring a sense of equality among people who form the citizenry. For example, a citizen who comes from O‘ahu would have the equivalent weight of representation as one who comes from Maui. However, the model articulated in the Na‘i Aupuni document disregards this logic. For instance, O‘ahu, with the vast majority of native Hawaiians, would have a total of ten representatives while Kaho‘olawe, which has zero permanent residents, would have two representatives. This model has no semblance to representation based on population.

If the argument is that the land needs a voice, then send a pōhaku from each of these islands to be represented in the legislative sessions, but to pretend that the land has elected individuals is specious. Following this train of thought, would the vast waters that surround our islands also be represented? And the sky, the air, the clouds, the feathered

beings, and the creatures that inhabit this space?

Finally, this article violates the prior article, which requires that representatives be elected by those who are residing in the districts. Where will one find residents on Kaho‘olawe to vote for other residents of Kaho‘olawe?

Article 23 makes a special exemption regarding elections for the island of Kaho‘olawe, declaring that for Kaho‘olawe, residency may be established by demonstrating at least four consecutive years of stewardship to the island. It does not define what kind of stewardship, who maintains the record of stewardship, or why this special compensation is being given to Kaho‘olawe. Nor does it address the possibility that a person who has dedicated herself to the protection to the islands for four consecutive years, for example from 1990 to 1993, can now vote twice for representatives: once for Kaho‘olawe and once for the island she resides on!

No explanation is given for this deviation that would allow a special interest group to have an advantage in representation within the legislative body. Other special interest groups could just as easily argue for their interest—to represent Maunakea, Maunaloa, kūpuna, mānaleo, “pure” Hawaiians, practitioners of the ancient Hawaiian religions, and so forth. Giving one island special treatment for electoral representation is a violation of the fundamental concept of a representative democracy, an elevation of special interest above the masses, a movement from an egalitarian society to an elitist society, and a contradiction to the direction of the preamble of the first written constitution of Hawai‘i which declares that all men are equal before the law.

The idea that land masses should have a separate category of representatives

should be removed from the document. The representation of Kaho‘olawe should be taken out until the situation changes and the island has a population of Native Hawaiians residing there over a reasonable period of time. The representative legislature should be properly apportioned to the population of the people it represents within a reasonable deviation of 1 to 1.25 points.

The current proposal for twenty-two representatives elected by the human population and twenty-one representatives based on island geography runs counter to representative democracy.

Article 33: Legislative Calendar

The legislature shall convene on January 17 of each year and shall establish a calendar in coordination with cultural protocols. The Na‘i Aupuni document does not identify which cultural protocols, whether or not they would include the various phases of the moon and, if so, what moon calendar should be followed. This nonspecificity gives rise to certain questions. For example, is an oli in the English language considered cultural protocol? Would an oli or mele in honor of Jesus Christ be appropriate? To call for cultural protocols without providing clarification leads only to uncertainty. A clear example of the confusion and disarray which can come about with the call for a cultural protocol in the constitution is what happened among the members of the congregation prior to its first meeting. There were very passionate voices for and against “cultural protocols,” the selection of the protocols, the person to lead or guide such protocols, the religious expression to be contained in such protocols and even in what appears to be protocols which come from a particular expression of religion, which specific entity,

diety, or representation would be used. Would it be appropriate to use the leaves and nuts of the kukui tree in the decorations or in the ceremony? Would the Christian members of the legislature agree to such a display of the kinolau of a native Hawaiian religious diety? Which diety is to be called? Who is to settle the matter?

The document should say nothing about the protocols in opening the legislature.

Article 44 (Judicial Power) to Article 48 (Term of Office for Justices and Judges)

A judicial branch is to be established consisting of a chief justice, three justices with lifetime appointments, and judges who shall serve no less than ten-year terms. Article 15 calls for appointment of the judiciary by the president, subject to the approval of the legislature's simple majority. The chief justice is elected by a majority of the justices. The chief justice presides over the courts, may establish courts, tribunals, offices, and forums of general or exclusive jurisdiction as prescribed by law, and "may account for customary practices of the Native Hawaiian people." Although the meaning of that last phrase is not explained, it is an appropriate addition that liberates rather than restricts the judiciary.

On the whole, the judicial authority kuleana in Chapter 6 does not adequately describe the scope of jurisdiction of the courts. It calls for its judicial powers over all cases arising under this "constitution, the laws of the Nation, treaties, compacts, and agreements made, or which shall be made, under the Nation's authority." Where does this leave cases regarding the ali'i trusts, the Department of Hawaiian Homes Lands, non-citizens' violation of law upon territories under the jurisdiction of the nation, contract disputes between citizens or between citizens and non-citizens, land disputes between

citizens over lands outside of the territorial boundaries of the nation, disputes over Hawaiian customs and traditions between Hawaiian and non-Hawaiian citizens, child welfare disputes, etc.?

Article 46 states that the judiciary’s primary focus is restorative justice. It gives no guidelines or explanation of what is meant by restorative justice. In the current practice of law, “restorative justice” applies generally to criminal cases in which justice should focus on repairing the harm, allowing the people most affected by the crime the ability to participate in the resolution of the crime while the government tries to maintain order and keep the peace. While this practice has its merits, it cannot be applied unilaterally. For example, a woman habitually abused by a family member, who finally brings a complaint to the courts, may not want to participate in “repairing the harm”—other than distancing herself from her abuser. In this example, it is uncertain to what extent the judiciary would call upon the abused woman to participate in counseling sessions or mediation to achieve “restorative justice.” Yet, restorative justice is a constitutional priority per the Na‘i Aupuni document. By creating such a priority, the judiciary is mandated to operate in this way to follow the constitution. A better approach would be for the constitution to allow the judiciary to consider restorative justice but not make it a primary focus.

Article 51: Ratification

This constitution is subject to a ratification vote, and a ratification election is to be held. The constitution becomes effective upon approval of a majority vote of individuals who are eligible to be citizens, have attained the age of eighteen, and have cast a ballot in

the ratification election.

Summary Critique

How do this process and the Na'i Aupuni document measure up to international law standards of self-determination?

Both the process and the constitutional document produced by Na'i Aupuni fail to meet the requirements of self-determination. The question of who is entitled to the right to self-determination should not be determined by the colonial government. In the case of Hawai'i, all people who lost the continuing right to exercise self-determination following the aggression of the United States, depriving them of their right to determine their futures, should continue to possess that right. The US government's redefining of Hawaiian nationals as only those with Native Hawaiian blood is not consonant with Hawaiian law, Hawaiian history, the UN Charter respecting non-self-governing territories, or the general laws of nations. Those who identified as Hawaiian nationals prior to the US government's aggression in 1893 were of many different racial ancestries. To follow that aggressive government's redefinition of the nationals of the nation they attacked is tantamount to foolishness.

Hawai'i was placed on the list of non-self-governing territories in 1946 (UN General Assembly, 1946). Self-determination, in the context of non-self-governing territories, should afford a people three options: independence, free association, or integration. The present document produced by Na'i Aupuni, styling itself a "constitution," fails to clearly set out a path for any of these options. Instead, it attempts to put these options under a single document. This constitution was supposed to go

through a process of ratification, but it is unclear what is to be ratified. The document merely adds to the confusion.

As we watch the events occurring at the United Nations regarding the Indigenous Peoples' Forum and the application of the Declaration of Rights of Indigenous Peoples, we are seeing member states of the U.N. attempting to transition the right of self-determination for indigenous peoples to the domestic jurisdictions of the states, thereby avoiding the scrutiny of the international community. The U.S. has followed this tact from the early meetings of the U.N. Working Group on Indigenous Populations meetings in Geneva Switzerland as well as the Indigenous People's Forum at the U.N. office in New York. Considerations of indigenous peoples' rights across the world are multifaceted, and there may indeed be cases where it may be appropriate for states to treat these rights as internal or domestic matters.

But for Hawai'i, such treatment is inappropriate. Hawai'i's case is distinguished by the fact that Hawai'i was recognized as a nation under international law prior to the US takeover in 1893. There is clear evidence of aggression by the United States against that Hawaiian nation, as referenced in the 1993 Apology Resolution, in the 1946 submittal to the United Nations naming Hawai'i as a non-self-governing territory, and in the December 1893 address to the joint houses of Congress by US President Cleveland. Hawai'i's unique historical and contemporary backdrop cannot be equated to that of only indigenous peoples' rights. Hawai'i's rights include the full panoply of self-determination without any limitations of US domestic laws or any claims of US exceptionalism from the general rules of international conduct.

The United Nations, dissatisfied with the poor record of decolonization of its member states, adopted its Declaration on the Granting of Independence to Colonial Countries and Peoples. In it, the UN General Assembly (1960) declared:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. . .

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.

That 1960 declaration is directly applicable to Hawai‘i. As a non-self-governing territory, we have not yet attained independence and are entitled to those immediate steps to transfer all powers to the people of Hawai‘i without any conditions or reservations, to enable us to enjoy complete independence and freedom.

The twisting of the use of the term Native Hawaiians—thus limiting the exercise of self-determination to only a limited group of people, while still denying a wider body who can be called Hawaiian nationals, or those entitled to claim such nationality—should not be allowed as an escape from its international obligation to accord self-determination to such nationals by the US colonial government. The question of Hawaiian self-determination is indeed a right of the native Hawaiian people. But it is far more than that. Hawai‘i’s rights of self-determination encompass a far larger expanse of people beyond one’s native blood!

How do the process and the Na‘i Aupuni document measure up to the US DOI final rule for federal recognition?

Prior to and during the congregation, only the proposed rule adopted by the DOI

was available. In that rule, there were eight criteria to be met before the DOI would consider the governing document to have been properly ratified (Office of the Secretary, Department of the Interior, 2015).

Seven and a half months after the Na‘i Aupuni congregation adjourned, the DOI’s final rule was adopted. The following analysis references the final rule to examine to what extent the Na‘i Aupuni document that emerged from the congregation would meet the requirements for federal recognition. All further reference to the “rule” will indicate the final rule unless otherwise noted.

The rule’s first criterion (§50.11) calls for a narrative with supporting documentation describing how the Native Hawaiian community drafted the document, including how the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the community.

Whether the document reflects the will of the community could be assessed if the document were to be ratified. Whether those who drafted the Na‘i Aupuni document were “representative segments” of the Native Hawaiian community may be questioned. The fact that there were 156 participants at the congregation from all parts of the world could be used to indicate the representative segments. The fact that the drafters were not elected may be excused by the fact that the Supreme Court ordered in a temporary restraining order not to count the votes and announce the result. However, that excuse remains merely an excuse and will not adequately substitute as support for the representativeness of the members of the congregation. Whatever the reason for the selection of these participants, the fact that they were nominated by a minimum of ten

others does not seem to be an adequate foundation to the claim that this was a representative segment of the community. On this criterion the Na‘i Aupuni congregation’s document fails.

For a Native Hawaiian government to reestablish a formal government-to-government relationship with the United States, the rule (§50.12) requires that the Native Hawaiian government have a constitution or other governing document ratified both by a majority vote of Native Hawaiians and by a majority vote of those Native Hawaiians who qualify as HHCA Native Hawaiians. “Native Hawaiians” are defined as individuals who are descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawai‘i. An “HHCA eligible Native Hawaiian” is a person who meets the definition of “native Hawaiian” in the Hawaiian Homes Commission Act, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on wait list, or receives benefits under the act. The Final Rule uses the term HHCA Native Hawaiian as simply “a Native Hawaiian individual who meets the definition of “native Hawaiian” in HHCA sec. 201(a)(7).” To ensure an objective measure so that the vote represents the views of the Native Hawaiian community as a whole, the rule requires a minimum of thirty thousand affirmative votes from Native Hawaiian voters, including a minimum of nine thousand affirmative votes from HHCA Native Hawaiians.

The ratification provision of the Na‘i Aupuni constitution fails to meet the final rule in that it simply calls for a majority vote of eligible citizens ages eighteen and older to adopt the constitution. The final rule does provide that a second vote may be taken

once a first vote adopting the document as its constitution has been accomplished. In that second vote, however, separate vote tallies for HHCA Native Hawaiians and for all Native Hawaiian voters must be kept. As of this writing, nothing has happened to advance the document. The second criterion calls for verifying that participants were appropriate Native Hawaiians. DHHL records, or another state commission or agency that verifies descent, could be used for this purpose.

In the DOI's proposed rule, there was a specific requirement that Native Hawaiians, in order to qualify under the federal guideline, must be US citizens (Office of the Secretary, Department of the Interior, 2015). The final rule made a significant revision by excluding that citizenship requirement.

Many advocates for Hawaiian independence have been kept out of Hawai'i's political life because of their insistence that they are not US citizens, claiming instead their Hawaiian nationality. As a result, such advocates are not permitted to vote in US and State elections, including elections for the Office of Hawaiian Affairs. They cannot hold political office in the State government. These advocates also run into difficulty when applying for employment, not being able or willing to claim US citizenship or to "produce papers" to show they are lawfully in the United States and able to obtain employment. They are not able to meet the driver's license requirements, as well as the federal security requirement for flying interisland. The change in citizenship requirements in the DOI's final rule sheds new light on the necessity of US citizenship for Native Hawaiians and may indicate a turn away from this continued marginalization of such Hawaiian nationals from the centers of the Hawai'i society.

The third criterion of the final rule, found at §50.13, is not met by the Na‘i Aupuni document. The table below summarizes how the Na‘i Aupuni document aligns with §50.13.

Table 1. Alignment of Na‘i Aupuni document with §50.13 of the DOI’s final rule on governing documents

Requirement of DOI’s final rule	Criterion met?	Comments
State the government’s official name	No	There is no name in the Na‘i Aupuni document for the government.
Prescribe the manner in which the government exercises its sovereign powers	Yes	This concept is explained throughout the document.
Establish the institutions and structure of the government, and of its political subdivisions (if any) that are defined in a fair and reasonable manner	Uncertain	The method of selecting members of the legislative authority may be questioned, and the manner of selecting representatives could be considered unfair and unreasonable. The representative count (per Article 31) is not fair and reasonable in several ways: It fails to meet the one-person, one-vote standard, it allows for representation by land mass, and it makes exception for representation from Kaho‘olawe.
Authorize the government to negotiate with governments of the United States, the State of Hawai‘i, and political subdivisions of the State of Hawai‘i, and with nongovernmental entities	Yes, but introduces other concerns	While this criterion is met under Article 13 of the Na‘i Aupuni document, the article exceeds the requirement with the addition of “other sovereign.” This appears contrary to federal policy, under which only the federal government is entitled to engage with other sovereigns, as in foreign countries.
Provide for periodic elections for government offices identified in the governing document	Partially	This requirement is met by Article 29 for the legislative body and Article 38 for the executive officers, but fails in the design of the judiciary.

<p>Describe the criteria for membership:</p> <ul style="list-style-type: none"> • Permit HHCA-eligible Native Hawaiians to enroll • Permit Native Hawaiians who are not HHCA-eligible Native Hawaiians, or some defined subset of that group that is not contrary to Federal law, to enroll • Exclude persons who are not Native Hawaiians • Establish that membership is voluntary and may be relinquished voluntarily • Exclude persons who voluntarily relinquished membership 	Partially	Most criteria are met; however, provisions for (4) are not included in the the Na'i Aupuni document, and provisions for (5) are not specified.
Protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA (Hawaiian Homes Land Recovery Act)	No	The HHLRA protection is not included in the Na'i Aupuni document.
Protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers	No	The Na'i Aupuni document violates the requirement to provide free counsel for a criminal defendant and permits imprisonment for debt in cases of fraud (Article 6).
Describe the procedures for proposing and ratifying amendments to the governing document	Yes	Criterion is met.
Not contain provisions contrary to federal law	No	The Na'i Aupuni document fails on numerous counts, such as the right to self-determination; imprisonment for debt (fraud cases); engagement in treaties, compacts, and other arrangements with other sovereigns; and violation of the one-person, one-vote standard.

This initial analysis demonstrates that the proposed Constitution of the Native Hawaiian Nation contains significant contradictions and violations to the DOI final rule.

It is therefore fair to conclude that the Na‘i Aupuni congregation did not produce a document that would meet the test of the DOI for US federal recognition.

Not only did the Constitution of the Native Hawaiian Nation fail to meet the final rule of the DOI for federal recognition, it also failed to meet the standards under international law for self-determination. In short, the Act 195 process—which was passed by the State legislature and financed by the Office of Hawaiian Affairs for almost eight million dollars—has failed to bring the Native Hawaiian people closer to federal recognition by the US government.

Lessons learned

The Act 195 experience can teach us a number of lessons. First, one should not try to rush to a preferred solution for the sake of political expediency, especially when the problem is so deep and has persisted over such a long period of time. The fact that there was a president in the White House who appeared to be supportive of federal recognition of a Hawaiian nation, and whose term of office was soon to expire, was a poor rationale for pushing aside the prior work taken to bring the Hawaiian community together in a deliberate process of consulting, elections, and preparing a broad-based plan for a comprehensive solution. The process previously taken—which was recognized by the legislature and included the Sovereignty Advisory Council, the Hawaiian Sovereignty Advisory Commission, the Hawaiian Sovereignty Elections Council, the plebiscite by which an election of leaders from the Hawaiian community would meet in a convention to propose suggestions for a Hawaiian form of government, a subsequent election of such leaders, and the convening of the Native Hawaiian Convention—was a deliberate process that should be honored and allowed to reach its conclusion. Starting up a separate process

to favor federal recognition via the Office of Hawaiian Affairs was a mistake.

Second, the trustees of the Office of Hawaiian Affairs should never again breach their trustee obligation and bend to the legislature's will, thus taking the Hawaiian community through a wasteful and painful experience. The Kana'iolowalu efforts came out of Act 195 of the 2011 State legislature as part of a process for resolving a Native Hawaiian matter of federal recognition. That legislature ransomed a real property transfer of Kaka'ako and other lands to finance Kana'iolowalu. The Office of Hawaiian Affairs was willing to be manipulated by the legislature and ended up financing the process for almost eight million dollars.

Third, a convention of Native Hawaiians should be formed around processes of deliberation, not merely counting votes or trading favors—especially when attempting to resolve such longstanding issues such as human rights, fundamental freedoms, historical injustice, future planning, and the choice of remaining part of the United States, taking an independence route, or examining other possibilities of political relationships. Such deliberation requires adequate time and patience, taking in the voices from both within the convention and from the affected and interested public. Time is the greatest resource that must be made available to the convention process. Twenty days of deliberation for the February 2016 congregation was inadequate and seemed to reflect a rushed and inexperienced agenda and perhaps a predetermined outcome. For a successful convention, there must be liberal opportunities for recess and consultation with the community because it will eventually be the community that will have to approve of the deliberative results.

Fourth, any future convention must provide participants with appropriate staffing resources, necessary equipment for communication (among the convention members and with the public), adequate space, and the ability to coordinate various caucuses so that the discussion and final document will cover all matters consistently and effectively. All members—representing a range of backgrounds, sophistication, ages, and experience—must be given adequate time for input and for deliberation. Technologies must be appropriately adapted for this purpose.

Fifth, prior work products and processes, including the Kanaʻiolowalu experience, must be given due consideration, as representative of past voices and experiences. Furthermore, a deliberate effort must be made to include perspectives from the wider community. Presently, favor seems to be shown to elites from professions such as academia, law, politics, and business to serve in such conventions. A more egalitarian approach must be undertaken so that kuaʻāina views will also be represented. The challenge remains for such representation; there are no secret formulae to encourage a broader base of people to serve. And when such representation is achieved within a convention, special efforts must be made to include full opportunity and active participation by that representation. The rules of procedure, the use of technology, and the meeting places and times must be taken into consideration for the purpose of inclusiveness and participation, not just for expediency.

Conclusion

The failure of the Kanaʻiolowalu process is an opportunity for us to consider fundamental questions of self-determination: Who is the “self,” and what is the full range

of choices that “determination” should represent? Are we seeking a government of, for, and by the people? Or do we aspire for a government of an elite class of ali‘i, or a monarchical family? Who is the Hawaiian political self?

Should the self be able to trace ancestry to Hawaiian nationals of any racial extraction who descend from those of the Hawaiian nation pre-US aggression in 1893? Should the self include all persons who have lived in Hawai‘i pre-“statehood” and have continued to maintain a constant contact with Hawai‘i? Should the measure of a Hawaiian self be only those who have maintained a Hawaiian political, cultural, spiritual, and language lifestyle? Should the self exclude those who identify as US citizens? Should the self include only those who affirm that they would select a Hawaiian citizenship rather than a US citizenship when the opportunity to do so arises?

If we are to be inclusively defined in the Hawaiian state, should we encourage special treatment for the Native Hawaiians? Should the question of indigenous people’s rights have particular regard for our indigenous peoples? How can we be explicit in a formative document to protect indigenous Hawaiians while protecting the human rights and fundamental freedoms of all in Hawai‘i?

Of the question of “determination,” there must be a broad, public discussion of the full range of choices along the spectrum of determination. The usual choices are independence or integration, including “Statehood” and federal recognition of the Native Hawaiian people. A third option of free association, such as a “commonwealth” status, has not been talked about much in discussions of Hawaiian determination. The question of independence or integration is usually treated as an immediate and final decision.

However, new voices are questioning the use of the *or* conjunction, arguing that *and* is just as viable. For example, why can't the decision be made to select both independence in the eventual future *and* the interim status of integration—and, especially for the Native Hawaiians, a degree of federal recognition? For the sake of national unity, can we agree to aspire to both approaches, unify the national body first, and resolve to answer the and/or question as we work toward both goals through an inclusive approach?

A consideration of the future status of Hawai'i, including independence, must account for a wide assortment of issues usually left out of public discussions because of what may appear to be an anti-United States policy. But discussing such issues is crucial for a fair review of the options. What are the positive and the negative aspects of Hawaiian independence for the Hawaiian nation? That question must be opened particularly wide, without shying away from the limitations that appear to be imposed upon us by US constitutional, congressional, or presidential mandate. Rather, we should be mindful of historical injustices and remember the voice of Lili'uokalani as contained in her "pule" (Queen's Prayer) of forgiveness. We should also be cognizant of the resounding call for pono as the foundation of "ke ea o ka 'āina," of international law, and of the propensity toward independence in recent decades, given that a majority of the world's independent countries far outnumber those that had existed before the 1945 formation of the United Nations.

Life today is far more complicated than it was 120-plus years ago. Our conditions have changed under years of colonization under the United States. Its military occupation has done major ecological damage to our lands. Its control over our education system has

erased fundamental aspects of our national consciousness, our native language, our cultural practices, and our intellectual treasures. Its monetary system has changed our economic, social, and business climate and has had a profound effect on the foundations of our deep culture. Its policy of population transmigration has changed much of the face of these islands' people, resulting in many of our native peoples being strangers and homeless in our own homelands.

The constitutional document that emerges from these discussions must meet the high principle of pono. It must be realistic and address the needs of the people of Hawai'i. The constitution need not replicate one of the earlier amendments in our history. Hawai'i's history should not be a chain that pulls us back to replicate the past, but rather a springboard propelling us into our future.

These are all matters that should be part of the grand discourses in Hawai'i before we attempt to craft a document that defines the constitution of our Hawaiian nation. Let us raise the nation—but not from a checklist given to us by the US colonial administrator intending to maintain its control over us, and not even from the lofty perspective of the principles and processes of international law. Instead, let us turn to our own examination of pono in all of its meanings for Hawai'i nei, and let this be the guiding principle we live by and take into our future, following the path of aloha.

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