The Akaka Bill
and Hawaiian self-determination.

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Glossary of Terms

Plenary: complete, absolute, as in plenary powers of a legislative body.

Trust: confidence in a person or thing, also used here to refer to an obligation the United States has to Hawaiians.

Recognition: another word with multiple meanings; when used with regard to Hawaiians, it means they will become visible.

Hawaiian: refers to Hawaiian people, but the legislative process is still debating the political definition.

S. 2899: Akaka Bill No. 1, the only bill Hawaiians have actually testified about.

S. 746: Akaka Bill No. 2, the only bill Senator Daniel Akaka is currently pushing.

S. 1783: Akaka Bill No. 3. There is speculation that this narrowly drafted, ugly cousin of Akaka Bills 1 and 2 may be pulled out, brushed off and pitted against Akaka Bill No. 2.

DOI: the Department of the Interior. This department will be solely responsible for the well-being of Hawaiians in the event of federal recognition.

Markup: this word is used to describe suggested changes to S. 746 (Akaka Bill No. 2) made by staff at DOI. Think of the markup of S. 746 as the DOI's wish list for what Hawaiians should not be given when they are granted federal recognition.

When the U.S. Supreme Court ruled against the state of Hawai'i and the Office of Hawaiian Affairs in *Rice v. Cayetano* two years ago, the reality of how tenuous the flow of federal money is to Native Hawaiian institutional recipients rallied some Hawaiians to push ahead with plans for federal recognition, once and for all. That recognition, the reasoning went, would protect federally funded Hawaiian programs from future lawsuits like *Rice v. Cayetano*. Among the institutions that supported the push were OHA, the Department of Hawaiian Home Lands and any number of nonprofit organizations benefiting Hawaiians.

In the months that followed the Supreme Court ruling, these groups and others met with Hawai'i's congressional delegation and discussed the drafting of a federal-recognition bill. Called Senate Bill

2899 (Akaka Bill No. 1), the legislation was the subject of oral and written testimony from the Hawaiian community at hearings held in Hawai'i in August 2000.

Four months later, Sen. Akaka unveiled another bill. Senate Bill 746 (Akaka Bill No. 2) created lots of division and confusion inside the Hawaiian community. The salient change that differentiated this bill from its predecessor was the removal of economic self-sufficiency language — considered by many to have been a key part of the original bill. The consensus among Hawaiian activists was that S. 746 was a powerful piece of legislation that would perpetuate a semifunctional Hawaiian wardship indefinitely in exchange for federal recognition ... i.e., federal protection.

As if this isn't confusing enough, hold onto your pä'ü because there's more. The discord within the Hawaiian community — and the lack of trust many Hawaiians already felt toward the delegation representing them in Washington — increased threefold with the drafting of yet a *third* bill, S. 1783 or Akaka Bill No. 3.

Tracking the Akaka bills has, at times, been like watching an unevenly matched game, and now, two years into the process, the game is seen increasingly as a threat to Hawaiian self-determination — and to building consensus among Hawaiians for an independence platform.

Where do Hawaiians now stand on the subject of federal recognition and the three Akaka bills? What might they gain — and lose — should any of the bills pass into law?

"Federal recognition is important because it means that America must recognize you," says Mililani Trask, Hawaiian attorney and member of the Akaka Bill Working Group. The first Akaka Bill, Trask points out, was drafted with lots of community input, but S. 746 was drafted in Washington, and, she says, "it just keeps the pork barrel chugging. It says that we can exercise our right to self-determination by taking federal money."

In fact, recognition itself has become a tough sell, a symbol of America's legal double talk to a people who are already acknowledged in over 100 pieces of federal legislation, a people increasingly aware of their history who refer openly to the U.S. presence in Hawai'i as an illegal occupation.

"We've been recognized and apologized to," says Charles Lehuakona Isaacs, Jr. a Hawaiian activist and co-producer of www.stopakaka.org.

"I'd rather use the '93 Apology Resolution (Public Laws 103-150), that apologizes for the U.S. complicity in the illegal overthrow, as a path for looking at potential models of independence," Isaacs says.

Veteran activist Kekuni Blaisdell, coordinator of the Hawaiian sovereignty roundtable, Ka Päkaukau, agrees. "These bills violate our inherent right to self-determination," he says, "and place us under U.S.

federal Indian law, creating a process whereby we have a puppet government that has to be acceptable to the Secretary of the Interior and approved by the state of Hawai'i. It is worse than what we have now.

"This legislation exists for the purposes of having känaka maoli go on record as formally relinquishing our rights to our sovereignty and our lands," Blaisdell says.

'Ikaika Hussey is chair of the subcommittee on process for the Akaka Bill Working Group. He, too, has grown disaffected with the "process."

"I think it's been clear that from the beginning," Hussey says, "that this has been a congressionally driven bill. When powers outside of the Hawaiian community are driving its politics, it's important to maintain a vigilance towards the process."

Hussey cites the subject of identity to demonstrate the divide between Hawaiians and Washington: "We pushed for the broadest definition of 'Native Hawaiian,'" he says, "but that's been compromised in the most recent version, S. 1783." The blood-quantum definition in S. 1783 (No. 3), is a reaffirmation of rules that are rooted in the days of slavery and used in the bill to define who is and isn't a federally recognized Hawaiian.

The timing of S. 1783 also became an issue, because Akaka introduced it on the same day S. 746 (No. 2) was stripped out of a defense appropriations bill at the last minute. Its hefty consequences were obscured there with a one-sentence description: "The provisions of S. 746 of the 107th Congress, as reported to the Senate on September 21, 2001, are hereby enacted into law."

Matters only worsened with the release of the Department of Interior's markup of S.746 (No. 2). Sections had been changed and rewritten. This came out the day before S. 1783 (No. 3).

In a two-day period, then, some very complicated political maneuvering took place in Washington that only a handful of Hawaiians knew about.

Among the dozens of suggested changes from the Interior in its markup was the insertion of the proposition that federal recognition would mean Hawaiians would no longer constitute a "people" in a "trust relationship" to the U.S.; that Hawaiians would no longer possess "inherent rights of self-determination and self-governance."

Needless to say, the markup inflamed an already heated situation.

"I'm not sure how to react to the DOI's markup," says Mahealani Kamau'u, executive director of the Native Hawaiian Legal Corporation and chair of the subcommittee on education for the Akaka Bill Working Group. "It's like a minefield."

Trask explains that major changes have been made in Washington, and that "they have gone forward without proper hearings or input

from the working group and the community in this state," she says.

In response, Paul Cardus, Akaka's press secretary, points out that "four days of hearings in Hawai'i are more than what most legislation gets.

"Different voices have been heard and any change or removal of process reflects what Senator Akaka has heard from the Hawaiian community."

Trask disagrees. "That change in process guarantees an unfair outcome," she says. "When coupled with language in the bill that narrows approval of the governing entity to the state and the DOI, an agenda emerges for those who have an interest in maintaining wardship of the Hawaiian people."

In another complex and important legal wrinkle, S. 1783 (No. 3) explicitly gives plenary power over Hawaiians to the U.S. Congress — which indicates that Congress does not have plenary power over Hawaiians at present. "The plenary power was language inserted into S. 1783," says Kamau'u. "We've been assured that S. 746 is the primary bill for federal recognition, although they haven't withdrawn S. 1783. If they do attempt to pass a final bill with the plenary language in there, I will object."

It's easy to understand why Kamau'u and others who support S. 746 (No. 2) would be inclined to object to the plenary-power language in S. 1783 (No. 3), but Rowena Akana, vice chair of OHA, has a different take. "I like the S. 1783 version," she says, "and I don't believe Congress would have complete control. People who review legislation in the departments of Justice and Interior are ignorant, and when you raise a flag with new language, you raise concern when there need not be any."

Akana goes further, saying, "Plenary power is in every document relating to Native Americans and Native Alaskans.

"Where do Hawaiians get off thinking they have special mana from heaven to dispense documents that will be approved?" she asks. "I think you have to negotiate whatever you can with this government. It stands to reason that Hawaiians should look to settle the ceded lands."

While much of what Akana says might sound harsh to advocates of *true* independence, there is an intense desire to get something settled *now* — a desire that resonates with many. Despite the hundreds of millions of dollars sitting in OHA accounts and billions more in Hawaiian trusts, Hawaiians still have the same problems they had 100 years ago with the added psychological burden of forced assimilation in their homeland. So, exactly what will improve for them with recognition and settlement is unclear — particularly when you consider what happened with one of the groups Akana mentions, the Native Alaskans.

December 2001 was the 30th anniversary of the "Alaska Native

Claims Settlement Act," the largest land and cash settlement given to indigenous people in the history of the U.S. How did the natives actually fare with the settlement? They received 44 million acres (no mules) and $962 million. Native corporations were formed and much has changed, but none of this has stemmed the tide of social and economic problems for the natives who still rely on the government for employment, have high rates of alcoholism and depression and the highest rates of suicide in the state. What did the U.S. government get out of that deal? Access to billions of dollars worth of oil in Prudhoe Bay.

Making a correlation to Indian nations and the Native Alaskan experience is important because one assumption that lines the Akaka Bill highway is that once the bill is passed it will be simple to make Hawaiian-friendly amendments. But, as Boston-based Hawaiian activist Lehua Yim points out, there are no guarantees in wardship politics between native peoples and the federal government.

"The Clinton administration recognized the Nipmuc Tribe of central Massachusetts, and then the recognition was reversed by Bush," Yim says. "So here's a case of those who got and then were later denied federal recognition. It's important that we analyze the costs as well as the benefits of the Akaka Bill."

"The position of the delegation is that there is no risk within the federal context," says Akaka press secretary Cardus. He insists that S. 1783 (No. 3) was a "strategic move" and that S. 746 (No. 2) remains the legislation. "There are no details that have been withheld," he says.

As to how this bill will address broader concerns Hawaiians have regarding discussions about native claims to 1.8 million acres of ceded land, Cardus is emphatic. "This bill explicitly has nothing to do with land settlements," he says.

The absence of settlement language, however, appears to signify the order in which things occur, not a lack of intent.

"It's true that S. 746 says that it isn't a settlement of any claims," says Isaacs. "But Sec. 8 paragraph B says this bill 'authorizes the U.S. to negotiate and enter into an agreement with the state of Hawai'i and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use.'

"The Akaka Bill itself embodies no land settlements, but clearly they are setting up the framework. It follows that if you agree to all of this, then you've opened up the door for part two."

Yim suggests Hawaiians consider the experience of other peoples before agreeing to any legislation. "We have the benefit of hindsight if we listen to tribes of the northeastern United States," she says. The Narragansett of Rhode Island now find themselves fighting the state for resources; and the Huuinnah of Martha's Vineyard are dealing with splits in their community because they conceded gathering rights. It

isn't just politically or economically critical for Hawaiians to work this out together, it's socially and ethically necessary."

Trask agrees with Yim. "We need to stop the process now, and have more hearings. The Alaskan Native Claims Settlement Act enabled the federal government to push through legislation for other native peoples — and 30 years later Alaskans still don't have their fishing rights."

Whichever way this legislation ends up, when it's all said and done, the political system of the wealthiest, most militarized country in the world will have gone to a lot of trouble to simultaneously address and cover up the fact that Hawaiians never wanted America here in the first place.

Will the Akaka Bill (and the federal wardship it promises) shut down the ongoing independence dialogues among Hawaiians before they have had the necessary time to forge a platform on which to build a sovereign nation? How an Akaka Bill, if enacted, will impact issues important to Hawaiians — their spiritual, genealogical and cultural connection to Hawai'i Nei and their economic and mental anguish at being occupied and colonized — remains to be seen.

Taking the Apology Seriously

By J. Kehaulani Kauanui

There is one very good reason why Hawaiians and their allies should oppose Senator Daniel Akaka's bills for federal recognition of a Hawaiian governing entity: Both versions of the proposal (S. 746 and S. 1783) undercut what the 1993 Apology Resolution acknowledges. In the Apology Resolution — Public Law (103-150), S. J. Res. 19 — the United States government admitted guilt to the Hawaiian people for its role in the illegal and armed overthrow of Queen Lili'uokalani and the Kingdom of Hawai'i in 1893. But the Apology is more than a sorry excuse for those events; *it is a finding of fact*. Perhaps most importantly, it maintains that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."

Moreover, because the Apology did not limit its treatment of Hawaiians (by using any blood-quantum definitions or state-residency requirements), it implicates *all Hawaiians*, recognizing our collective sovereignty. Specifically, the Apology defined "native Hawaiian" as "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii."

Besides defining Hawaiians on a blood-quantum basis, the proposals for federal recognition now before us refuse to acknowledge our inherent sovereignty as a people over our national lands. At the

very least, these lands are the Kingdom Crown and Government Lands (now unfortunately better known as the so-called "ceded" lands), amounting to 1.8 million acres of 'äina. The legislation proposes to recognize Hawaiians as an indigenous people who have a "special trust relationship" with the United States and, hence, a right to self-determination under U.S. federal law. But we don't need these bills to know that. We already know we are indigenous people. We also know that we cannot and should not depend on any trust relationship with the United States. (Isn't what we have with the state of Hawai'i bad enough?) And we already know we have a right to self-determination under U.S. federal law, given our history under U.S. colonialism and our indigenity. We don't need federal recognition to tell us these things.

Some people think we need this legislation to protect Hawaiian entitlements from future lawsuits like what we saw in *Rice v. Cayetano*. However, there is *no* guarantee whatsoever that federal recognition provides that protection. And it *is guaranteed* that the *federal recognition will not provide for our claims under international law*. Supporting Sen. Akaka's proposal severely limits assertions of Hawaiian sovereign self-determination by containing them within a U.S. federal framework.

The passage of either bill would lay the foundation for a nation-within-a-nation model of self-governance, like that of over 300 federally recognized American-Indian tribal nations — as a *domestic dependent nation*. But this itself eats away at the most important aspects of the Apology Resolution. It does this in a number of ways, the most striking being that it asserts plenary power over Hawaiians: U.S. federal recognition only allows for Hawaiian assertions of *self-determination under the full and exclusive power of the U.S. Congress*. Indeed, the very first section in both bills states: "The Constitution vests Congress with plenary authority to address the conditions of the indigenous, native peoples of the United States." If this is not explicit enough for well-intentioned supporters of the bill who do not seem bothered, we need only turn to the recent redraft offered by the Department of the Interior when they rephrased the above sentence in S. 746 so it reads: "Congress has plenary power over Native Hawaiians under the commerce clause of the Constitution."

Sen. Akaka's proposal minimizes the political and legal spheres inherent in the sovereign expression of native self-determination and does not account for the need and application of United Nations and international law in the domestic arena. This bill is an affront to our collective sovereign rights and full decolonization. Not only would it put the power of approval or disapproval of a Hawaiian governing entity in the hands of the U.S. Secretary of the Interior, it would subject that entity to the full and final plenary power of the Congress. Hence, it inherently prohibits our collective claims that fall outside of domestic

policy — *claims already acknowledged in the Apology Resolution*.

This bill is really only a transfer plan of wardship status in the name of the "trust relationship." In other words, instead of being wards of the state, our people would be considered wards of the federal government. But even this is not assured because there is no guarantee that the United States government will support the protection of the trust. This was made crystal clear when the Department of the Interior and other governmental agencies recently recommended that any and all reference to the trust relationship be taken out of the bill. Specifically, they ordered: "Delete the word 'trust' throughout the bill when associated with 'special trust responsibility' or 'special trust relationship' or 'trust responsibility.'"

The recommendation to delete references to the trust relationship was applied to S.1783 introduced by Sen. Akaka in mid-December, 2001. Why would the DOI suggest that references to the trust relationship be deleted from the bill if federal recognition was meant to help Hawaiians by protecting our entitlements? For those who think any legislation for Hawaiians can get by without input from the Interior, please don't forget that *any and all* "organic documents" created for a Hawaiian governing entity under this federal framework will always need to be approved by that department.

Sen. Akaka has claimed, "We must not let this window of opportunity close." But our sovereignty cannot fit through any old window. While some scramble to keep a window open, the federal government could forever close its doors to an independent nation. This is why the voice of Hawaiians-at-large (both on-island and off-island) rings a resounding "No consent!" Hawaiian sovereignty and self-determination are inherent — as acknowledged in the U.S. Apology Resolution — and, therefore, cannot be legislated by the United States. The bill problematically pushes for a predetermined political status. Overwhelmingly, Hawaiians want self-determination, not predetermination!

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