EXAMINING THE IDEA OF NATIONHOOD FOR THE NATIVE HAWAIIAN PEOPLE

JEAN KADOOKA MARDFIN
Researcher

Report No. 6, 1994

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii

FOREWORD

This study on how to identify a sovereign nation was undertaken in response to Senate Resolution No. 209, S.D. 1, adopted during the 1994 legislative session. This report therefore examines the conceptual underpinnings of sovereignty beginning with a discussion of the vocabulary of international law. The report goes on to discuss American Indian tribal sovereignty in the federal context and concludes with a description of the work of the Hawaii Sovereignty Advisory Council. It is hoped that this report will broaden the Legislature's understanding of this complex area.

Samuel B. K. Chang
Director

September 1994

TABLE OF CONTENTS

Chapter 1

INTRODUCTION

How can the state Legislature identify or know that a group of people is a sovereign nation, and what can the state Legislature do to aid or facilitate the sovereignty movement? Senate Resolution No. 209, S.D. 1, a copy of which is included as Appendix A, requested the Legislative Reference Bureau (Bureau) "to study the processes by which the federal government confers sovereignty on native governments and the manner in which states recognize and document such conferrals". To that end this report examines the aspects of sovereignty which confirm the existence of a group of people having a common desire to determine their future and their sovereign status.

Organization of the Report

This chapter, Chapter 1, introduces the report and describes the methodology.

Chapter 2 defines terms such as "sovereignty", "self-determination", "recognition", and the like in order to properly respond to Senate Resolution No. 209, S.D. 1.

Chapter 3 provides a brief summary of the United States government's experience with indigenous nations such as American Indian tribes and the nature of Indian tribal authority within the federal system today. The chapter presents a very brief history of Hawaiian sovereignty and outlines the self-determination elements which its various supporters have concluded exist for purposes of establishing a group of self-governed peoples.

Chapter 4 describes the recent activities of the legislatively mandated Sovereignty Advisory Council including its published reports. By these past legislative acts, the movement towards sovereignty might be presumed to have been anticipated leaving the structure of the Hawaiian "nation" or "state" to the plebiscite and subsequent decisions for the native Hawaiian citizens to determine. However, it is still instructive for purposes of answering S.R. No. 209, S.D. 1, to examine the findings of the Sovereignty Advisory Council and its recommendations to the Legislature.

Chapter 5 presents the Bureau's findings and conclusions.

Methodology

The Bureau's methodology is one of examining writings about sovereignty and how these findings might be applied to the Hawaiian people. In this report the Bureau examines the conceptual underpinnings of sovereignty to explain to the Legislature the reasoning which preceded the Hawaiian sovereignty movement. As earlier stated it is not a question of whether or not sovereignty should or shall occur. By the adoption of Act 200 in 1994 (giving the Hawaiian Sovereignty Elections Council authority to oversee a plebiscite in 1995),[1] Act

---

1. According to Ka Wai Ola O OHA, a newsletter published by OHA, the Hawaiian Sovereignty Elections Council voted on August 16, 1994, to move the date of the plebiscite from 1995 to January 1996 (p. 3, September 1994).

356 in 1993 (acknowledging the unique status of the native Hawaiians and establishing the Sovereignty Advisory Council in the Office of State Planning), and Act 301 in 1991 (creating the Sovereignty Advisory Council in the Office of Hawaiian Affairs), the Legislature indicated that sovereignty is an ongoing accepted fact. A plebiscite in 1995 to be overseen by the Hawaiian Sovereignty Elections Council will more specifically determine the timing, status, and structure of the new nation.[2]

This report does not discuss the legality or illegality of the United States' overthrow of the Hawaiian Kingdom, argue for any group's position on sovereignty (in its global sense), or specify the shape and nature of the Hawaiian political, cultural, or social structure if and when the Hawaiian nation is formed. All of these issues are beyond the scope of this study. The sole purpose of the report is to present to the Legislature a variety of international law writers' and scholars' views on ways to think about sovereignty, self-determination, and similar concepts. Before presenting its findings and conclusions in the last chapter, this report presents the current status of the sovereignty discussions in Hawaii.

It is important to note at the outset that the nature of the subject of sovereignty is at its more scholarly level, highly complex. Many treatises exist ranging from moral philosophy to international law in which even scholars have differing views. Therefore, readers are encouraged to investigate on their own, any and other books suggested from the selected bibliography printed in this report.

2. 1991 Hawaii Sess. Laws, Act 200; House Bill No. 3630, H.D. 3, S.D. 2, C.D. 1, Seventeenth Legislature, 1994, State of Hawaii.

Chapter 2

DEFINITION OF TERMS

This chapter attempts to remedy a situation in which the author's task, the Legislature's request, and the public's perceptions may all be brought together through the use of a common vocabulary, for, as J.C. Gray has been credited for saying: "on no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on international law."[1]

The Meaning of "State"

At the international level, it is a state, not an individual that has a legal personality with attendant rights, duties, and obligations. The word "state" means, in the philosophical sense, "a complete association of free men, joined together for the enjoyment of rights and for their common interest."[2] Crawford, in describing statehood in early international law doctrines, relates the conclusions of several early writers in this field. He wrote: "Pufendorf (1632-1694) defined the State as 'a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.' Victoria (1480-1546), gave a definition of the State much more legal in expression and implication than either Grotius or Pufendorf. . . : 'A perfect State or community. . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates. . . . Such a state, then, or the prince thereof, has authority to declare war, and no one else.' . . .For Vattell (1714-1767), 'Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security. . . .' The basic criterion then is that such nations be "free and independent of one another."[3] Furthermore, "the formation of a new state is. . . matter of fact, and not of law."[4]

In international law terminology, the United States of America, or Canada, or Greece would be a "state". The State of Hawaii, on the other hand, is a political subdivision of the United States.

---

1. Edwin DeWitt Dickinson, The Equality of States in International Law (Cambridge: Harvard University Press, 1920), p. viii.

2. James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), p. 5, citing Grotius.

3. Ibid., pp. 5-7 (citations omitted).

4. Ibid., p. 3, citing Oppenheim (1st ed. 1905), vol. I, 624 (8th ed. 1955), vol. I, 544.

Defining Sovereignty

In addition to being a field in which otherwise everyday words have specific meanings, international law concepts cannot be neatly categorized or reduced into absolute principles. There are inconsistencies and disagreements among scholars and as the field of international law developed and grew so has the complexity of its writings. This conclusion is true not only of the word "state", but also the word "sovereign" and "sovereignty". While the term sovereignty is used loosely in everyday language, it is a term that has been examined and written about for centuries. It might even be said that its final and complete definition has not yet been ascertained because new interpretations are being developed as the law evolves.

The etymology of "sovereign" has been given as follows:[5]

> A sovereign is etymologically someone who is "above" others. (Originally entered the English language in the 13th century.) The word comes via Old French souverin "ruler", a descendant of Vulgar Latin "superanus". This was derived from the Latin preposition super "above". In the 1490s the term was applied to a gold coin worth 22s 6d (1.12 1/2 pounds), a usage which served as a model in 1817 for its application to a gold coin worth one pound.

Sovereignty, like other concepts related to statehood, nationhood, recognition, and self-determination, comes from the field of international law which has its locus in the development of the law of nations and the writings of ancient philosophy. Before discussing the writings of early ethicists and philosophers, it is necessary to appreciate one of the basic teachings of the medieval era, known as the law of nature which came out of ancient Greece and the writings of Plato and Aristotle.[6] We might begin with the early principle of the law of nature which developed in the medieval era. When today's authors say that "sovereignty" is a western concept derived from the sovereigns of Europe who were believed to possess absolute power, one must realize that "[t]he nation of state power superior to all positive law and limited only by the laws of God and nature had its inception in the Middle Ages." [7] Thus, "a king owed his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states before he may carry himself like a king and be regarded as such."[8] In its earliest conception, the law of nature was that of an

---

5. John Ayto, Dictionary of Word Origins (New York: Arcade, 1993).

6. There are many early writers in this field. but we shall refer primarily to Grotius (1583-1645), Bodin (sixteenth century/1576), and Pufendorf (1632-1694).

7. See Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990), and Hurst Hannum, Autonomy, Sovereignty, and Self-determination (Philadelphia: University Pennsylvania Press, 1992).

8. Crawford, p. 10.

unchanging law granted from God to man, supreme and immutable. Over the centuries philosophers developed the natural law into a more "modern" definition.

By the 1600s natural law was defined as: "the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational nature has in it a moral turpitude or moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature."[9]

The law of nations, which is not the same as natural law, but has some natural law characteristics at its basis, has been defined as "the law which regards the relations of several peoples or rulers of peoples, the law which has received its obligatory force from the will of all nations or of many, and which belongs to that society which is established by nations amongst themselves."[10]

Dickinson describes the following early definitions of sovereignty:

From Bodin's De La Republique (1576), sovereignty is defined as "supreme power over citizens and subjects unrestrained by laws. The first and principal function of sovereignty was to give laws to citizens and subjects without the consent of superior, equal, or inferior, a function which vested in that person who, after God, acknowledged no one greater than himself. As for the laws of God and nature, sovereigns and subjects were equally bound by them; but the law of nations could not bind a sovereign any more than his own laws, except in so far as it might be in accord with the laws of God and nature."[11]

In De Jure Belli ac Pacis (1625), Grotius "denounced all notions of universal authority and recognized the existence of a great society of states. Sovereignty was the essential attribute of the state, the bond that holds the state together, the breath of life that so many thousands breathe: That power is called sovereign, whose acts are not subject to the control of another, so that they can be rendered void by the act of any other human will."[12]

From Pufendorf's De Jure Naturae et Gentium (1672, 1704), a "sovereign was supreme but not absolute; he followed Grotius in recognizing that external sovereignty might be diminished by compact, or as a result of conquest, without being extinguished. He derived the idea that states are equal from other sources."[13]

---

9. Dickinson, p. 40, citing Grotius.

10. Ibid., p. 41.

11. Ibid., pp. 56-57.

12. Ibid., pp. 57-58.

13. Ibid., pp. 79-80.

Even more recent authors have written about sovereignty:[14]

> The term "sovereignty" has a long and troubled history, and a variety of meanings. In its most common modern usage, sovereignty is the term for the "totality of international rights and duties recognized by international law" as residing in an independent territorial unit--the State. It is not itself a right, nor is it a criterion for statehood. It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence. . . . It is not to be confused with the constitutional lawyer's problem of supreme competence within a particular State. . . . Nor is it to be confused with the exercise of "sovereign rights": a State may continue to be sovereign even though important governmental functions are carried out, by treaty or otherwise, by another State. In such a case it is said that, provided the local unit in all the circumstances remains "independent", it retains its sovereignty but that in certain respects the exercise of that sovereignty has been entrusted to another entity. And, finally, sovereignty' does not mean actual equality of rights or competences: the actual competence of a State may be restricted by its constitution, or by treaty or custom. The term "sovereignty" accurately refers not to the totality of powers which all States have, but to the totality of powers which States may, under international law, have.

Another author has written:[15]

> . . . the content of the term "sovereignty" is at best murky, whatever its emotional appeal. "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.

Hurst Hannum continued:[16]

> At least part of the difficulty in defining sovereignty lies in the fact that sovereignty traces its historical roots to sovereigns, in whose hands "absolute" spiritual and temporal power rested. . . . "[S]overeignty" in its original sense of "supreme power" is not merely an absurdity but an impossibility in a world of States which pride themselves upon their independence from each other and concede to each other a status of equality before the law.
>
> Many writers essentially equate sovereignty with independence, the fundamental authority of a state to exercise its powers without being subservient to any outside authority. . . . [I]t is important to bear in mind that it is the authority or ability of a state to determine its relationship with outside powers that is significant; the actual delegation of certain powers to others. . . will not detract from the sovereignty of the delegating state. . . .

---

14. Crawford, pp. 26-27 (citations omitted).

15. Hurst Hannum, Autonomy, Sovereignty, and Self-determination (Philadelphia: University of Pennsylvania Press, 1992), citing L.F.E. Oppennheim, 1 International Law (London: Longman, 2 vols. 1905, 1906 at 103), p. 14.

16. Hannum, pp. 15-16 (citations omitted).

> One principle upon which there seems to be universal agreement is that sovereignty is an attribute of statehood, and that only states can be sovereign. The classic definition of a "state" is found in the 1933 Montevideo Convention on Rights and Duties of States, article I of which provides: The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.
>
> The concept of sovereignty. . . is not in terms of its history or in terms of political science a concept which may properly be used to explain--let alone to justify--whatever the state or the political society does or may choose to do. It is a principle which maintains no more than that there must be a supreme authority within the political community if the community is to exist at all.
>
> The old religious mystical concept of sovereignty as being something which is "absolute, sacred and inviolable" already has lost much of whatever relevance it once may have had. . . . The fact of the matter is that sovereignty today. . . is an extraordinarily flexible, manipulative concept. The changing nature of state sovereignty in this context is to be welcomed rather than decried. An increasingly diverse set of "sovereign" state structures will not adversely affect formal sovereign equality at the international level, and such diversity is more likely to respond to the needs of the individuals and groups within each state who are theoretically the repositories of ultimate sovereign authority.

Sovereignty is defined in the third definition in the Random House Dictionary, more straightforwardly as: "supreme and independent power or authority in government as possessed or claimed by a state or a community."[17] Black's Law dictionary defined sovereignty: "the supreme, absolute, and uncontrollable power by which any independent state is governed."[18]

Given its evolving nature, what can we conclude about the question, what is the meaning of sovereignty? We might observe that the condition of being sovereign brings with it a "bundle" of powers such as an independent authority in government structure, certain economic powers, civil powers, territorial possession, and other rights which its citizens feel are important to self-esteem and (international) social status. For the native Hawaiians this condition of being sovereign might evolve in the manner that parallels the tribal sovereignty of American Indians. This means that the native Hawaiians might attain a measure of tribal sovereignty within the federal system. Or, recognition for self-determination may occur through an international organization like the United Nations.

Before discussing recognition as a concept in international law, it is necessary to digress into a discussion of a state "personality". At a theoretical level (in reality many exceptions exist), a state is equal to all other states in the "society of nations". Dickinson has written a textbook on the equality of states and while it is beyond this report's scope to discuss the concept of equality of nations except in its most superficial sense, it is instructive

---

17. Random House Dictionary of the English Language, 2d ed. unabridged (New York: 1987)

18. Black's Law Dictionary 1396 (6th ed. 1990).

to note that the so-called elements of sovereignty, population, territory, and so on are mentioned in Dickinson in his chapter entitled: Internal limitations upon the equality of states. He wrote:[19]

> It has been pointed out that equality among members of the society of nations is a matter of capacity. Limitations upon capacity may be either internal or external; internal as they are the result of the state's organic constitution, and external as they are the consequence of relations with other members of international society.
>
> Internal limitations upon equality are imposed by the fundamental organization of the state. Before it can acquire personality in the law of nations the state must have de facto existence. This existence requires a considerable population, occupying a definite territory, having a separate political organization or government, and capable of entering into relations, by means of its government, with members of the society of nations. The de facto entity thus constituted acquires de jure personality through recognition by members of the international community.
>
> As a juristic person in the society of nations the state can express itself only through its government, which is defined and limited in its organic constitution.
>
> * * *
>
> . . . so far as the law of nations is concerned, the different peoples are free to set up whatever constitution or government they choose. . . .
>
> * * *
>
> In considering the legal capacity of the state as an international person it is important to distinguish capacity for rights and for transactions. A right may be defined as a power in the state of exacting a certain act, forbearance, or assent of the law of nations. A transaction, on the other hand, is an act or manifestation of will on the part of the state, directed to a possible result which is permitted by the law of nations, and the intent and purpose of which is to bring about certain legal consequences. . . .
>
> * * *
>
> Internal limitations upon legal capacity must not be confused with the conception of sovereignty. (Emphasis added.)

Remember that Dickinson's treatise appeared in 1920. Other writers have noted the differences between the internal and external dichotomy of a state's actions and these terms will reappear in the discussion herein under tribal sovereignty.

For purposes of this report, one might think of identifying the personality of the state (in the international law sense) of the Hawaiian people as whatever the group of Hawaiian people decide will constitute its form of government, its membership in the group, its land base, and so on.

---

19. Dickinson, pp. 189-190.

Tribal Sovereignty

The phrase "tribal sovereignty" is a phrase which came out of the law on federal Indian sovereignty (sometimes also referred to as tribal self-governance, tribal self-determination). Tribal sovereignty is ". . . the extent to which a tribe can attend to its own affairs and control its own cultural, societal, and economic development free from outside restraints."[20] Sovereign nations have both the (internal) power to govern their citizens and their territory, and engage in (external) international relations such as declaring war or executing treaties. On the other hand, a tribal sovereign (e.g., Indian nation or tribe) has lost its external sovereignty by virtue of being "conquered" by the United States.[21]

Cohen thus wrote:[22]

> Perhaps the most basic principle of all Indian law, supported by a host of decisions. . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.

He went on:[23]

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g. its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

---

20. James A. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty," 79 Cornell Law Review 404 (1994), p. 407.

21. Felix S. Cohen, Handbook of Federal Indian Law, University of New Mexico Press (1986 reprint of 1942 original), p. 123. Cohen, a foremost writer on Indian tribal law in the United States, has written the definitive book on Indian law and his 1942 publication (reprinted in 1986) is still referred to for describing the development of federal Indian law and the legal status of Indians.

22. Cohen, p. 122.

23. Ibid., p. 123.

Cohen describes the scope of tribal self-government:[24]

> The Indian's right of self-government is a right which has been consistently protected by the courts. . . .
>
> The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression. . . . Indian self-government. . . includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

One Hawaiian group has defined sovereignty in much the same way, that is, the "ability of a people to govern their own affairs." The elements which it included in a definition of sovereignty were: spiritual faith, common culture, land base, governmental structure, and economic base.[25] Here we see some of the elements of a state personality as listed by Dickinson and attributes of statehood from the 1993 Montevideo Convention (i.e., population, territory, political organization).

Tribal sovereignty accepts the idea of co-existence of states where a once sovereign state (in the earliest sense of the term sovereign) has been enveloped by a larger (perhaps more powerful) state. In this context one might hypothesize that a line of demarcation need not be drawn between the two states because both the "sovereignty" of the United States and the "limited sovereignty" of the Hawaiian nation would exist in the same "space", but with certain limitations as exist in the U.S. Constitution, such as powers granted by acts of Congress.

Among Hawaiian sovereignty groups it would likely be agreed that a sovereign native government has the power to:[26]

(1) Determine what form of government best meets the cultural, religious, social needs of its people;

(2) Define membership in the sovereign group;

(3) Legislate in matters of law and order within its territorial boundaries; and

---

24. Ibid., p. 122.

25. Ka Lahui Hawaii, Commonly Asked Questions About Ka Lahui Hawaii (Honolulu: 1993).

26. See generally, Melody K. MacKenzie, ed., Native Hawaiian Rights Handbook, Native Hawaiian Legal Corporation (Honolulu: 1991).

(4) Protect lands of tribal interest, whether trust lands or resources.

Recognition

The term "recognition" has a specific meaning in international law, generally "to indicate the relatively formal diplomatic recognition of States and governments."[27]

Unfortunately, S.R. No. 209, S.D. 1, uses terms such as "recognize", "sovereignty", and the like which have meanings different to the international lawyer and to the average reader. In international law, recognition has certain legal and political effects for a nation and recognition can be of a nation or a government. It has been said of recognition:[28]

> There is no such thing as a uniform type of recognition or non-recognition. The terminology of official communications and declarations is not very consistent. . . . The typical act of recognition has two legal functions. First, the determination of statehood, a question of law; such individual determination may have evidential effect before a tribunal. Secondly, the act is a condition of the establishment of formal, optional, and bilateral relations, including diplomatic relations and the conclusion of treaties. . . . Since states cannot be required by the law (apart from treaty) actually to make a public declaration of recognition, and since they are obviously not required to undertake optional relations, the expression of state "will" involved is political in the sense of being voluntary. . . .

Further:

> . . .the recognition of states may take the form of recognition of a government, [but]. . . they are not necessarily identical.

There are two schools of thought about "recognition". In the declaratory view, a state is a state when it has a national personality, when it has a government, a population, a capacity to make claims for breaches of international law, make treaties and the like. In the second view, the constitutivist view, a state is a state only when another state makes a political decision to recognize the new state.

It has been written that the declaratory view "is now predominant, and. . . [r]ecognition, as a public act of state, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations. . . . Recognition is increasingly intended and taken as an act, if not of political approval, at least of political accommodation."[29]

---

27. Crawford, p. 15, note 52.

28. Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990), pp. 91-93.

29. Crawford, pp. 22-23.

From the foregoing discussion it is evident that not only are the terms used in international law difficult to "fix" with precision, but some critical terms in Senate Resolution 209, S.D. 1, have also been used loosely. For example, the Bureau assumes the term "state" to mean "a stable political community, supporting a legal order, in a certain area" (from Brownlie, p. 73) and not to mean one of the fifty United States which are political subdivisions of the federal union. To Brownlie, "[t]he existence of effective government, with a centralized administrative and legislative organs, is the best evidence of a stable political community." (p. 73)

And for purposes of this report, it is assumed that the Legislature did not inquire about "recognition" in the international law sense, when the Resolution asked the Bureau to study. . . the manner in which states recognize and document such conferrals (federal government conferral of sovereignty). In other words, the term, "recognize" in the Resolution is presumed to mean "how does one know" rather than "how does one draw up a treaty with" a sovereign entity. A treaty is a special document between sovereign nations and the State of Hawaii does not have the authority to execute a treaty for purposes of "recognizing" a native Hawaiian government.[30]

Treaties

A short digression is needed here to explain the general nature of treaties. A treaty has been defined as: "any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appelation), concluded between two of more States or other subjects of international law and governed by international law."[31]

In the United States, the President has the power to make treaties, with the advice and consent of the Senate, provided two-thirds of the Senators present concur.[32] Moneys cannot be appropriated by treaty.[33] Other generalities can be made of treaties: for example, a treaty

---

30. In Worster v. Georgia, 6 Pet, 515, 581, the Supreme Court said: "Under the constitution no state can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians." In art. 1, sec. 8, the Constitution forbids a state from entering "into any treaty, alliance, or federation. . . ."

31. Brownlie, pp. 604-605.

32. U.S. Const., art. 2, sec. 2. cl. 2.

33. Cohen, p. 38, note 66.

may be modified by mutual consent;[34] Congress may pass laws which conflict with a treaty;[35] a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty;[36] and, the end of treaty-making did not mean that treaty enforcement stopped.[37]

For this report, it is sufficient to point out that the Legislature was correct in its understanding that the State of Hawaii cannot confer sovereignty at least with a recognition tantamount to executing a treaty with a Hawaiian sovereign nation.

Self-determination

Self-determination is another term used in the language of sovereignty discussion which requires further description for this report. "Self-determination has been described as the 'counterpart' of sovereignty."[38]

At the risk of oversimplifying another complex concept, it might be useful to understand how the term self-determination developed historically.[39]

> The principle of self-determination by "national" groups developed as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries. . . . With the disintegration of the Austro-Hungarian and Ottoman empires during World War I, territory of the former empires required new sovereigns: the principle of self-determination became the obvious vehicle for the re-division of Europe by the victorious powers. Self-determination was considered only for "nations" which were within the territory of the defeated empires; it was never thought to apply to overseas colonies. . . .
>
> It should be underscored that self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers. With a few exceptions . . . no plebiscites or referenda were held to determine the wishes of the people affected by the Versailles map-making.
>
> This is perhaps best demonstrated by reference to the question of the Aland Islands, with respect to which two expert committees addressed the meaning of

---

34. Ibid., p. 34.

35. Ibid., p. 35.

36. Ibid.

37. Ibid., p. 33.

38. Robert G. McCoy, "The Doctrine of Tribal Sovereignty; Accommodating Tribal, State, and Federal Interests," 13 Harvard Civil Rights-Civil Liberties Law Review 357 (1978), p. 390, note 152.

39. Hannum, pp. 27-33 (citations omitted).

"self-determination" and whether it implied the possibility of secession from an existing state. The first report noted. . .

* * *

Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State from which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.

The second report considered the same issue, after having first determined that Finland (including the Aland Islands) became a fully constituted independent state following its declaration of independence from Russia in 1917. . . . The Commission reached a similar conclusion as to the scope of self-determination--"a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion."

Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.

In addition to its external aspect, self-determination also was felt by President Wilson and others to include an internal aspect, that of democracy. If self determination is "an expression in succinct form of the aspiration to rule one's self and not to be ruled by others," then this self-rule implies meaningful participation in the processes of government.

* * *

The Czech leader Jan Masaryk stated that self-determination does not carry with it an unconditional right to political independence, and the League of Nations scheme for minority protections was in part designed to provide what might be termed cultural self-determination to those groups whose demands for fuller political recognition were denied by the Great Powers. Obviously this did not satisfy the basic quest for the "nation-state" which pervaded the rhetoric of the period surrounding 1919.

. . .in part because of the inconsistent manner in which the principle of self-determination was applied following the First World War, it was not initially recognized as a fundamental right of the United Nations regime established in 1945. There is probably a consensus among scholars that, whatever its political significance, the principle of self-determination did not rise to the level of a rule of international law at the time the UN Charter was drafted.

The "principle" of self-determination is mentioned only twice in the Charter of the United Nations, both times in the context of developing "friendly relations among nations" and in conjunction with the principle of "equal rights. . .of peoples.

* * *

> Before the moral and political imperative of decolonization, however, the vague "principle" of self-determination soon evolved into the "right" to self-determination. This evolution culminated in the adoption by the UN General Assembly in 1960 of the Declaration on the Granting of Independence to colonial Countries and Peoples. . .[proclaiming] the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations and [declaring] that 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.

Hannum went on to describe the provisions in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples by the UN General Assembly, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and General Assembly Resolutions 1514 and 2625 which refer to self-determination and concluded: ". . . in practice the right of self-determination has been limited to colonial situations or, if one prefers, to colonial "peoples."[40]

Self-determination for an indigenous peoples is something less than complete sovereignty as an independent state. Rather, ". . . a right to internal self-determination may be as much as indigenous peoples realistically should expect."[41]

According to Hurst Hannum, "[t]he ultimate political status sought by indigenous groups through self-determination varies tremendously, reflecting the diversity of situations in which indigenous peoples find themselves and the diverse character of indigenous groups themselves. Some groups aspire to complete independence and statehood, while others demand autonomy or self-government only in specific areas, such as full control over land and natural resources."[42]

For indigenous populations within the territorial boundaries of the United States, such as the American Indians and Native Hawaiians it is likely that "[g]iven the physical location of the tribes and the economic and military disparity between the two entities, . . .secession is not a practical option nor even a distinct possibility."[43]

Self-determination has been defined as:

---

40. Ibid., p. 46.

41. Dean B. Suagee, "Self Determination for Indigenous Peoples at the Dawn of the Solar Age," 25 University of Michigan Journal of Law Reform 671 (1992), p. 693.

42. Hannum, "New Developments in Indigenous Rights, 28 Va. J. Inter'l L. 649 (1988), pp. 671-672.

43. James A. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty" 79 Cornell Law Review 404 (1994), p. 430.

(a) "The right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups."[44]

(b) "The freedom of the people of an entity with respect to their own government, to participate in the choice of authority structures and institutions and to share in the values of society."[45]

(c) The collective right "of a people to determine its own political status from a range of options. . . ." "Secession and full statehood are often viewed as the best examples of self-determination."[46]

Further, "[i]t is generally accepted that "the right of self-determination . . . presupposes the existence of two interrelated factors: people and territory." . . .[i]t is also essential that the group asserting the right to self-determination has a collective set of "values, beliefs, and practices."[47]

Self-determination in the United Nations Context

The concept of self-determination for indigenous peoples derives from the process by which oppressed groups turned to the United Nations for protection from national oppression. But while international human rights forums look at the condition of individuals who may be abused for political and other beliefs, the concept of self-determination is an attempt by a culturally distinct group, not individuals, who have been colonized (usually by a Western power) and have lost their sovereign status to correct a perceived injustice.[48] Thus,

---

44. See: Ian Brownlie, Principles of Public International Law 109 (3d ed, 1979), and Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am.J. Int'l L. 46, 52 (1992) "the right of a people organized in an established territory to determine its collective political destiny," as cited in Casey.

45. McCoy, p. 390, note 152.

46. Casey, p. 430.

47. McCoy, p. 391, notes 153, 154, 160, 161 (citations omitted). However, it has been pointed out that not all individuals or collectivities have a right of self-determination on any territory of their choice; only those people who have a legitimate right to a given territory can exercise it on that same territory. The right of self-determination accrues to a given people on a given territory with which they have a legitimate "link" and upon which their future political expectations can be realized. . . . However, a group claiming self-determination need only be identified with some territory, and not necessarily a geographically isolated territory."

48. Suagee, p. 663, note 4.

indigenous peoples, through self-determination, seek to protect their traditional ways, their territories, their environment, their religious beliefs, etc. Suagee has written that:[49]

> It seems to me that the debate about self-determination is not really about the threat that indigenous peoples will choose to become independent states. The argument about independence and the territorial integrity of states looks suspiciously like a straw man. Perhaps the argument is really about who has the right to decide what uses of natural resources will be permitted within the territories of indigenous peoples. The overwhelming concern of indigenous peoples is to preserve the integrity of the natural environments on which their ways of life depend. States, transnational corporations, and others see these natural environments as largely unused, and they seek to exploit natural resources without much regard for the use patterns of indigenous peoples. If a state which claims sovereignty over the territory of an indigenous people either seeks itself to exploit the resources of that territory in ways that threaten the survival of the indigenous people, or permits such exploitation, the indigenous people would be likely to choose independence or association with another state. This suggests that whatever the right to "self-determination" means, it must, at the very least, include the right to reject absolutely the exploitation of natural resources in ways that the indigenous peoples determine for themselves threaten their rights to remain distinct self-governing peoples. Perhaps the real reason that states object to self-determination is the specter of indigenous peoples having such an absolute right to control their territories, territories which the states see as their own.

In the native Hawaiian context, the terms "sovereignty" and "self-determination" often have been used interchangeably. The objectives of the whole movement appear not only to seek redress for past and present perceived and actual wrongs exercised upon the earliest occupants of the islands, but also to present a way for expressing a group's concerns for the future of the islands' unique lifestyle.

Summary

Bearing in mind the difficulty of simplifying the term "sovereignty", for purposes of this report the Bureau has defined sovereignty as the ability of a people to govern their own affairs, and "self-determination" as the right of a people to determine its own political status.

Further, "native Hawaiian" is used to mean any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.[50]

This report next proceeds to a brief history of the United States government's experience with Indian nations and a summary of the Hawaiian sovereignty movement.

---

49. Ibid., p. 694 (citations omitted).

50. Pub. L. No. 103-105, 103rd Cong., 1st Sess., November 23, 1993.

Chapter 3

TRIBAL SOVEREIGNTY

This chapter examines the development of the relationship between the United States government and American Indian nations which are sovereign entities within the borders of the United States. Native Hawaiians have fashioned their sovereignty movement along the lines of tribal government and an understanding of the history of American Indians is provided to help in understanding sovereignty concepts which have been used by Hawaiians.

The reader is cautioned that this chapter is by necessity only a superficial treatment of Indian tribal law, provided only to explain the context in which native Hawaiians may find their status within the United States.

Indian Tribes as Independent Sovereign Nations

This part begins with discussion of American Indian sovereignty and an examination of federal Indian law because the issue of sovereignty for Hawaiians has followed the path of native American Indians. Hawaiians, like native American Indians, occupied lands which were taken over and incorporated into the United States.[1] Thus, "[p]recedents set by other Native Americans have served as a model for restructuring the relationship of Native Hawaiians with the federal government."[2]

In the earliest relationships between Europeans and Indians, American Indians were regarded as equal sovereigns and treaties were drawn up between an Indian tribe and an European representative. This process followed the philosophical theory known as natural law, "which holds that there is a universal normative order that applies to all human societies. . . ."[3] Under this philosophy, American Indians' sovereignty was respected and an Indian nation treated as an independent sovereign government.

Gradually, the need for new lands by settlers led to the territories occupied by Indians being subsumed into the United States because of the westward expansion of the new colonizing power. Over time, through new federal laws and court decisions many of the

---

1. For an informative, concise history of tribal-federal relations, see James A. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty," 79 Cornell Law Review 404 (1994).

2. Melody K. MacKenzie, ed., Native Hawaiian Rights Handbook, Native Hawaiian Legal Corporation (Honolulu: 1991), p. 83.

3. Dean B. Suagee, "Self Determination for Indigenous Peoples at the Dawn of the Solar Age", 25 U. of Michigan Journal of Law Reform 671 (1992), p. 682.

Indian tribes lost not only their territories but also their sovereignty to become instead "domestic dependent nations".[4]

As succinctly summarized by Dean B. Suagee, "[i]n the latter part of the eighteenth century, positivism began to displace natural law as the dominant philosophy of international law, (positivism holds that the norms of international law must be derived from the conduct of states as evidenced by treaties and customs). . . . As positivism became the dominant school of thought in international law, the aspiration of indigenous peoples to be treated as members of the international community were steadfastly rejected, and international law became a legitimizing force for colonization and empire."[5]

The history of Indian tribes in the United States has been outlined as progressing through at least three "eras": the allotment era, termination era, and self-determination era. During the allotment era, the United States' policy was that every effort should be made to assimilate the Indians into the general society. To accomplish this end, a great deal of Indian lands were taken away from Indian tribes and Indians themselves removed from ancestral lands. The statutory vehicle serving this purpose was the Dawes Act, or the Indian General Allotment Act of 1887.[6]

The termination era refers to the period after the Indian Reorganization Act of 1934 (IRA) was rejected as being ineffective for the development of Indian sovereignty. The termination era was accomplished by the passage of House Concurrent Resolution No. 108 which provided generally that ". . . all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, [and the members of other named tribes] should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[7] The termination era refers to the termination of tribal-federal relations, thereby ending tribal sovereignty and bringing the tribes under state jurisdiction.

The termination era was followed in the mid 1970s by the self-determination era. The statute which is usually credited for starting this era is the Indian Self-Determination and Education Assistance Act of 1975.[8] What the self-determination era meant for Indian tribes was:[9]

---

4. Ibid., p. 699.

5. Ibid., pp. 682-683.

6. 24 Stat. 388 (codified as amended at 25 U.S.C. §§331-334, 336, 339, 341-342, 348-349, 381) (1988).

7. H.R. Con. Res. 108, 67 State B132 (1953) from: James A. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty," 79 Cornell Law Review 404 (1994), p. 414.

8. 25 U.S.C. §450 (1988), amended by Pub. L. Nos. 101-644 101st Cong., 1st Sess. (November 29, 1990), 104 Stat. 4665.

9. Suagee, p. 699 (citations omitted).

> As governments, the tribes are distinct from both the federal government and the states, and their sovereignty predates the United States Constitution. . . .
>
> Indian tribes have governmental powers as an aspect of their original or inherent sovereignty, but these powers can be divested by Congress through its "plenary power." Within their reservations, tribes generally retain all powers other than those they gave up in treaties, had taken away by an express act of Congress, or had taken away by implicit divestiture as a result of their dependent status. Accordingly, the tribes have authority over a wide range of subject matter, although the federal government has concurrent authority over much of this range. State governments generally lack jurisdiction over tribes and Indians within reservations, unless expressly granted jurisdiction by the federal government, but states generally do have jurisdiction over non-Indians within reservations, except when preempted by federal law or when the exercise of state authority would infringe upon tribal self-government.

Notwithstanding their loss of some sovereign powers, Indian tribes have inherent sovereignty and authority over several aspects of self-determination. Thus, although an Indian nation may lack the power to declare war or to conclude treaties, an Indian nation can enter into self determination contracts with the Bureau of Indian Affairs to administer programs in education, health, and job-training.[10] An Indian tribe also has jurisdiction over another Indian for crimes committed within its reservation,[11] but not over a non-Indian for the same crime in the same reservation.[12]

In fact, according to one author, ". . . a new federalism has emerged in which many federal agencies administer programs in ways that recognize the separate sovereign status of tribal government. In one area in particular -- environmental protection -- recent changes in federal law provide a model for indigenous autonomy that is promising for indigenous peoples throughout the world. . . . The policy to treat Indian tribes as states under these laws is premised on the principle of inherent tribal sovereignty."[13]

Indian Treaties

In American Indian history, many treaties between various Indian tribes and the United States government were executed including some before the Constitution was ratified. Cohen

---

10. For a list of Congressional programs established to benefit native Hawaiians, see Richard H. Houghton III, "An Argument for Indian States for Native Hawaiians--The Discovery of a Lost Tribe". 14 American Indian Law Review 1 (1989).

11. Act of Oct. 28, 1991, Pub. L., No. 102-137, 105 Stat.646 (codified at 25 U.S.C. §1301(2), (4) (1992)) from Suagee, p. 703, note 138.

12. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), in which the Court held that an Indian tribe does not have criminal jurisdiction over non-Indians who commit crimes on the tribe's reservation.

13. Suagee, pp. 704-705.

describes the scope of treaties from the earliest made in September 1778 (with the Delawares) through 1871 when treaty making with Indians came to an end.[14]

It is through Cohen's description and analysis of case law and statutes concerning Indians and treaties made between American Indians and the federal government over a hundred fifty-year-period that many concepts have entered the language of tribal sovereignty, including the status of Indian tribes as "dependent nations" and the idea of a "trust relationship" between the national government and Indian tribes.

According to Cohen, "[u]ntil the last decade of the treaty-making period, terms familiar to modern international diplomacy were used in the Indian treaties. . . . Many provisions show the international status of the Indian tribes, through clauses relating to war, boundaries, passports, extradition, and foreign relations."[15] However, "[w]hile the national character of Indian tribes has been frequently recognized in treaties and statutes, numerous treaty provisions establish their status as dependent nations." For example, Cohen describes the treaty with the Kaskaskias to protect them "against other Indian tribes and against all other persons." Cohen relates the Supreme Court observation in Eastern Band of Cherokee Indians v. United States, 117 U.S. 288 (1886), that in the treaty of Hopewell, "the Cherokees were subject to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs."[16]

In the literature of Indian tribal sovereignty, the reader will find references to "the Marshall cases" which are credited for establishing the relationship between the United States and the Indian Nations. In Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), the Supreme Court held that the government possessed the only valid title to land claimed by two parties: the plaintiff claimed title through direct purchase from the Piankeshaw and other Indian tribes, while the defendants claimed title through a grant by the United States government.[17]

In M'Intosh, the Supreme Court accepted the rule that "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other

---

14. Felix S. Cohen, Handbook of Federal Indian Law, University of New Mexico Press (1986 reprint of 1942 original), pp. 66-67, describing the language in the Indian appropriation act for the fiscal year 1872 (March 3, 1871) (16 Stat. L. 566) containing the proviso: "Provided, that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; Provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

15. Cohen, p. 39.

16. Ibid., pp. 40-41.

17. James A. Casey, "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty" 79 Cornell Law Review 404 (1994). pp. 409-410.

European governments, which title might be consummated by possession (at 572). Thus, Indian title was extinguished. "All our institutions recognized the absolute title of the crown, subject only to the Indian right to occupancy, and recognized the absolute title of the crown to extinguish that right" (at 591).

The case which is usually referred to as establishing a trust relationship is Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In this case, the Cherokee Nation sought to prevent the enforcement of two acts which would have dissolved the Cherokee Nation, apply state laws over that nation and add the Cherokee Nation's lands to various counties of Georgia.

> In a decision that would shape the contours of future tribal-federal relations, Justice Marshall refused jurisdiction over the case on the ground that the Indian Nations were not foreign nations. He determined that the tribes were "domestic dependent nations" and characterized the tribes' relationship to the United States as resembling "that of a ward to his guardian." Thus Cherokee Nation established the "trust" relationship that would later serve as the basis for the plenary powers of Congress and the permanent subjection of tribal sovereignty to the whim of federal authority.[18]

In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court found unconstitutional an attempt by Georgia to enforce a Georgia state law forbidding whites from residing on Cherokee lands without affirming an oath of allegiance to the state and a license to remain. The Court said, among other things, that the Cherokee nation is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . .[19]

Regarding Indian tribal sovereignty, Cohen said:[20]

> The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department.
>
> Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

---

18. Ibid., p. 410 (citations omitted).

19. 31 U.S. at 559.

20. Cohen, p. 122.

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty. (Emphasis added.)

In the foregoing quotation can be found the re-iterations by subsequent authors about the plenary powers of Congress and the "elements" of sovereignty mentioned in Chapter 2 under tribal sovereignty and self-determination.

Cohen goes on:[21]

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Similarities also may be drawn between American Indian tribal sovereignty principles and the contemporary Hawaiians' situation, based on the above quotation. That is:

(1) Any prospective native Hawaiian nation may be said "to possess all the powers of a sovereign state."

(2) After the kingdom of Hawaii was overthrown, "conquest" rendered Hawaii subject to the legislative power of the United States, terminating its external powers of sovereignty, but did not affect the internal sovereignty--local self-government.

(3) Creation of an organic document, assuming an affirmative vote in the 1995 plebiscite, will express the group's powers of internal sovereignty.

---

21. Ibid., p. 123.

Alaska

The discussion about American Indians raises the issue of the status of Alaskan natives. Cohen discussed this issue in a single chapter, basically concluding that Alaskan natives:[22]

> . . .occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

As to the question of sovereignty for the Alaskan natives,[23] the issue revolved around their use and occupancy of traditional lands.

The impetus for the Alaskan Native Claims Settlement Act (ANCSA) came as a result of the discovery of oil in Prudhoe Bay in 1969 and the need to quiet title to lands before oil companies would develop these resources. In order to protect the Native Alaskans' land claims, Congress passed the Alaska Native Claims Settlement Act in 1971 to give Alaskan natives title to over forty million acres of land plus one billion dollars for the extinguishment of their land claims.[24]

In discussing the sovereignty issue for Alaskan natives, Hirschfield writes:[25]

> Alaska Native experience comprises an unusual chapter in the history of federal-Indian relations. There were never any treaties between the federal government and the Alaskans, and very few reservations were ever established. Unlike the tribal Indians of the lower forty-eight states, whose experiences have shaped federal policy, Native Alaskan society is generally village oriented. Obtaining sovereign status comparable to other Native American groups has been difficult for Alaska Natives, because Alaska Native governments "lack. . . a clearly defined territory subject to their jurisdiction." These factors, together with Alaska's remoteness and no previous pressures toward development, help explain why the federal government was slow to recognize that Alaskan Native villages are independent political communities.

The ANCSA provided for a two-tier corporate structure where the lands are administered by village corporations and monetary benefits are controlled by regional

---

22. Ibid., p. 404.

23. There are many distinct peoples such as Eskimos, Aleuts, and Indians among the Alaskan natives. Here, we are referring to these peoples collectively as Alaskan natives.

24. See Martha Hirschfield, "The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form," 101 The Yale Law Journal, 1331 (1992).

25. Ibid., pp. 1334-1335.

corporations. The use of the corporate form to organize and distribute benefits was unusual. While it is not within the scope of this report to discuss the success or failure of the Alaskan experience, Hirschfield pointed out:[26]

> Twenty years after the enactment of ANCSA, problems abound. Land conveyances have been slow; the one billion dollars in funds has dried up; many village corporations have considered bankruptcy; and several regional corporations are teetering on the edge of insolvency.

Further, Hirschfield said:[27]

> In ANCSA, we see the results of an attempt to shift Native sovereignty out of the realm of political rights entirely and into a privatized form.
>
> We need not conceive of sovereignty in black and white. Indeed, Justice Marshall recognized its relativity with the term "domestic dependent nations." Sovereignty is better understood as an interaction between spheres of more and less limited powers.

Hawaiian Sovereignty History

Discussions by native Hawaiians about Hawaiian sovereignty have been ongoing since about the early 1970s.[28] When the Hawaiian nation was overthrown in 1893,[29] ". . . native Hawaiians lost both the internal and external rights and control that are paramount to a sovereign nation. Hawaiians lost the right to choose a form of government, to make laws, to oversee their domain, and to provide for their common good. They lost the right to stand as an equal in the international community, to make agreements and treaties with other nations, and to exhibit the external manifestations of sovereignty."[30]

MacKenzie outlined the efforts by Hawaiian groups to seek federal redress for the 1893 wrong and described the work of the ALOHA Association, Native Hawaiian Study Commission, and the creation of the Office of Hawaiian Affairs by the State Constitutional Convention in 1978. Over the years, many Hawaiian governance groups have been established, such as Ka Lahui Hawaii, Institute for the Advancement of Hawaiian Affairs, and the Ohana Council of the Hawaiian Kingdom, among others.

---

26. Ibid., p. 1332.

27. Ibid., p. 1335.

28. MacKenzie, ed., pp. 77-104.

29. For a discussion in international law, terms of the illegality of this overthrow and subsequent treaty between the U.S. and the Republic of Hawaii in 1897, see Bradford W. Morse and Kazi A. Hamid, "American Annexation of Hawaii: an Example of the Unequal Treaty Doctrine," 5 Conn. J. of International Law 407 (1990).

30. MacKenzie, ed., p. 78.

The relationship between American Indian nations and the federal government has led to the following conclusion by one Hawaiian sovereignty scholar:[31]

> [T]ribal governments are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . and case law can be found for the principle that the sovereignty of Indian nations is limited only by federal authority. . . and the United States had assumed a protectorate over Indian nations. . .[which] does not extinguish Indian sovereignty, but preserves it and insulates it from state interference.
>
> Consequently, native governments today exercise certain fundamental and inherent powers of self-governance. These include the power to establish a form of government, determine membership, exercise police powers, administer justice, and maintain immunity from suit.

As indicated by MacKenzie:[32]

> Today there are over 400 federally recognized native entities in the United States. No two are exactly alike. However, the typical example of a federal-tribal relationship is one where the tribe is recognized by the federal government, and is thus eligible for protectorate status. The state in which the tribe resides is precluded from interfering in tribal affairs without express congressional consent. The thread common to all of these native entities is the right to internal self-governance.

In much the same way that American Indian tribes have been recognized, MacKenzie wrote: ". . . Native Hawaiians can probably only gain federal recognition for their self-governing rights through direct congressional legislation."[33]

In Senate Resolution No. 209, S.D. 1, the Legislature accepted the fact that the State of Hawaii cannot confer sovereignty. To date, the U.S. Congress has acknowledged and apologized for the overthrow of the Kingdom of Hawaii in 1893. While the same Public Law 103-150 urged the President of the United States to support reconciliation efforts between the Native Hawaiian people and the United States, there was no formal federal "recognition" of a native Hawaiian nation or Hawaiian tribe.[34]

MacKenzie posits the possibility that even if Hawaiians lack national recognition as a sovereign group, the state constitution in its creation of the Office of Hawaiian Affairs began the process of self-determination for the Hawaiians. However imperfect and unsatisfactory the process might be viewed by some, OHA has developed into a spokesperson for many

---

31. Ibid., p. 84 (citations omitted).

32. Ibid., p. 86.

33. Ibid., p. 83.

34. Mackenzie described attempts by the native Hawaiians to be identified as a tribe. One method is foreclosed to Hawaiians because the regulations of the Bureau of Indian Affairs "exclude aboriginal people outside the continental United States." But 25 CFR 83 does list four elements which are similar to the elements of tribal

Footnote 34 continued on next page.

Hawaiians. According to MacKenzie, "OHA's position is that given the appropriate federal legislation, as well as amendments to the state constitution, it would be possible for OHA to evolve into the self-governing entity. OHA recognizes that legislation would have to be drafted to separate OHA from the state and give it federal recognition. In that way, it would be protected from the vagaries of state politics and would be able to deal with the state and federal governments at arms length."[35]

Other writers have said there are several remedial actions for resolving the self-determination question:[36]

> What are the peaceful avenues through which organizations representing the Native Hawaiians can assert their collective right to self-determination? Furthermore, which groups could politically, as well as legally, claim to represent the views and interests of a majority of Native Hawaiians? This latter question is one that the Native Hawaiians must address themselves. Nevertheless, as outsiders, we will intrude to the degree of offering an observation from the sidelines. It would appear that at least two organizations may potentially represent the political interests of Native Hawaiians qua indigeous people, namely the Hawaiian Home (sic) Commission and the Office of Hawaiian Affairs.
>
> * * *
>
> It is further submitted that appropriately represented Hawaiian organizations may resort to the following measures to pursue their legitimate claims within the arena of international concerns. The stages are as follows:
>
> 1. Pursuit of negotiations with the U.S. Federal Government for increased autonomy;
>
> 2. Petitioning the United Nations General Assembly's Committee on Colonialism;

Footnote 34 continued from previous page.

sovereignty mentioned in chapter 1: "(1) a common identification ancestrally and racially as a group of Native Americans; (2) the maintenance of a community distinct from other populations in the area; (3) the continued historical maintenance of tribal political influence or other governmental authority over members of the group; and (4) the status of not being part of a presently recognized tribe." Another Hawaiian attempt to obtain tribal recognition occurred when the Hou Hawaiians filed suit under 28 U.S.C. section 1362 which gave federal district courts jurisdiction of suits arising under federal law brought by any "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." Among other factors, the court found that the Hou Hawaiians did not have historical continuity, longstanding tribal political authority, and was not representative of a substantial portion of the Native Hawaiian community inhabiting a specific area or living in a distinct community. In Montoya v. United States, 180 U.S. 261 (1901), the Supreme Court defined a tribe as a "body of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular or sometimes ill-defined territory." 180 U.S. at 266. See also Richard H. Houghton III, "An Argument for Indian Status for Native Hawaiians--The Discovery of a Lost Tribe", 14 American Indian Law Review 1 (1989).

35. MacKenzie, ed., p. 92 (citations omitted).

36. Bradford W. Morse and Kazi A. Hamid, "American Annexation of Hawaii: an Example of the Unequal Treaty Doctrine," 5 Conn. J. of International Law 407 (1990), pp. 450-456.

3. Seeking the creation of an international awareness of regarding the historic and continuing violation of their rights;

4. Exploring non-violent and peaceful movements inside Hawaii to create internal pressure on the government;

5. Boycotting or neglecting American merchandise and goods; and

6. Denying the legitimacy of American governmental authority.

* * *

Furthermore, the original Hawaiians will need to develop their proposals for a different future and articulate them with greater clarity. What form of government would be instituted if the right of self-determination were to be recognized? Would it involve a restoration of the monarchy, whether in its earlier absolute form or in its latter stages as a variation of a constitutional monarchy? How could democratic values be reflected in a governmental system when the Native Hawaiian population represents only a minority of the voters? To what degree would traditional laws, customs and land use patterns be resurrected to full strength?

These and many other similar questions will need to be debated exhaustively and decided within the Native Hawaiian community before their campaign is likely to meet with great success. The general population, even including those who are sympathetic, will want to know the answers. The local non-Native population will also assert rights of their own and demand to participate in this debate. There are many challenges yet to confront on this uncertain road leading over the horizon, however, one can be assured of an interesting journey.

Summary

It is generally agreed by Hawaiian sovereignty scholars that the powers inherent in the condition called "sovereign" exist for Hawaiians, but the full and complete (plenary) power of the Congress can limit the authority of a sovereign Hawaiian nation. Based on the elements or criteria of a tribal sovereign group, the Hawaiians must at a minimum:

(1) Identify the members of the specific population group, perhaps ancestrally or racially;

(2) Establish a government structure, perhaps like the Hawaiian Homes Commission, or Office of Hawaiian Affairs, or some other structure to be determined after the 1995 plebiscite; and

(3) Possess an economic base, perhaps the trust lands or Hawaiian Home lands.

Given the nature of the relationship between the federal government and the American Indian tribes, native Hawaiian nationhood could probably co-exist in a similar country-within-a-country framework. Above all, the principle of self-determination requires the native Hawaiians themselves to make these choices and decisions. The Legislature at most might facilitate the process by expressing support through concurrent resolutions to the national

government on various issues deemed important by the native Hawaiians and by adopting laws which would make possible the options which may be chosen by the native Hawaiians.

It is unclear whether the term "recognition" in S.R. No. 209, S.D. 1, is being used in the international law or lay person's sense, but federal recognition of native Hawaiians as a tribe, nation, or group has not yet occurred. As some writers have indicated, formal recognition is an optional act. An agreement tantamount to a treaty, however, is possible only by the federal government, not the State of Hawaii. Nonetheless, the idea of sovereignty for the Hawaiians continues to move ahead based on provisions of Acts adopted by the state legislature since 1991. The next chapter discusses these Acts.

Chapter 4

HAWAIIAN SOVEREIGNTY PREPARATIONS

This chapter reviews the provisions of the law which established the Hawaiian Sovereignty Advisory Commission (HSAC) and summarizes the reports issued pursuant to its mandate.

Act 301, Session Laws of Hawaii 1991

The 1991 Legislature created the Sovereignty Advisory Council (SAC) in the Office of Hawaiian Affairs budget by providing for $25,000 in general funds and $25,000 in special funds for fiscal year 1991-1992 to be used by a sovereignty advisory council, made up of representatives from twelve Hawaiian groups. The council was charged with developing a plan to discuss and study the sovereignty issue.[1] Section 12 of the same Act provided $75,000 in general funds and $75,000 in special funds be expended by the SAC provided that the funds were matched on a dollar-for dollar basis with federal funds.[2]

A Preliminary Report of the SAC was submitted to the Sixteenth Legislature in January 1992. In its historical review of Hawaii's past, the Preliminary Report indicated that the Kingdom of Hawaii had functioned as a sovereign nation in many ways including signing treaties with many European nations in the late 1800s,[3] establishing consular posts in foreign countries, and having some prominent residents renounce their original citizenship for a Hawaiian one.[4]

The Hawaiian nation became a domestic dependent nation (like the Indian tribes on the mainland) upon the 1893 overthrow of the Hawaiian kingdom, changed to territorial status in 1898, and achieved statehood in 1959. Hawaiian, which at one time indicated nationality, now refers to ethnicity. Further, the description "native Hawaiian" has a special meaning of an ethnic Hawaiian with at least fifty percent aboriginal blood in the case of beneficiaries of the Hawaiian Home Lands Commission Act of 1921. Sovereignty for native Hawaiians has been examined and a nationhood consciousness has been raised within this backdrop.

---

1. 1991 Hawaii Sess. Laws, Act 301, sec. 11.

2. Ibid., sec. 12.

3. For a discussion of treaties between the United States and the Hawaiian nation, see Richard H. Houghton III, "An Argument for Indian Status for Native Hawaiians--The Discovery of a Lost Tribe," 14 American Indian Law Review 1 (1989).

4. Sovereignty Advisory Council of the State of Hawaii, Preliminary Report to the Sixteenth Legislature (Honolulu: Jan. 1993), pp. iii-iv.

The Preliminary Report provides a background on the work that has occurred in the early 1990s regarding sovereignty. These include:

(1) The creation of Hui Na'auao in 1991, an organization made up of more than forty Hawaiian groups which has as its goal, to educate the community about sovereignty and self-determination;

(2) The participation of native Hawaiians in the international arena to discuss and present self-determination proposals for indigenous populations; and

(3) The exchange of maritime, political, and social information, with many Pacific island countries which have gained independence from colonial overseers.[5]

The Preliminary Report provided a glimpse into the kinds of questions the council members addressed as their interaction with the Hawaiian community progressed. In its visions for the future, the Preliminary Report said that participants may see two kinds of sovereignty relationships developing over time. The first is the nation within a nation vision:[6]

> Under such a vision, the relationship between the State of Hawaii, the United States of America and the Hawaiian nation, along with the accompanying land base, would have to be worked out. One scenario would be the transfer of the assets and administration of the Hawaiian Homes program to the nation, giving that nation expanded powers including exclusive taxing authority, revenue raising opportunities, police and judicial powers, etc. A second scenario would be recognition by the U.S. Government and the State of Hawaii. A third scenario would be that this nation would be exclusively under the United States of America with the State completely out of the picture.
>
> The land base for this nation within a nation may include one or all of the following: DHHL lands, portions of the ceded lands transferred to OHA, portions or all of the ceded lands, certain ahupuaa or districts of Hawaii, or certain islands of Hawaii.

The other vision is the emergence of "Hawaii, an independent nation, having full control over immigration, foreign commerce, economic and social development, military relations, definition of its population, environmental integrity, ..."

Some of the possible scenarios include:[7]

> 1) A weighted voting system within an electoral process for public officials such that the native vote in total would note (sic) be less than 50% of the total votes cast;

---

5. Ibid., pp. xviii-xix.

6. Ibid., p. xx.

7. Ibid., p. xxi.

2) A bicameral legislative body in which the native Hawaiian voters would have exclusive rights to select the members of one body;

3) The creation of a Council of Customs, Protocol and 'Aina controlled by the native Hawaiians in which certain matters are fully within the control of this council.

The land base might be the lands taken following the overthrow, including Johnston island and the areas included in the two hundred-mile exclusive economic zone. Other views could be the ceded lands or a few islands.[8]

There were five recommendations to the 1992 Legislature in the Preliminary Report:

PART III

RECOMMENDATIONS TO THE STATE LEGISLATURE

The SAC will submit a final plan to discuss and study the sovereignty and self-determination issue to the 1993 Legislative session.

It is recommended that 1992 State Legislature :

---DESIGNATE AND STATUTORILY RECOGNIZE SAC AS THE APPROPRIATE ENTITY TO COORDINATE THE PLAN TO DISCUSS AND STUDY THE SOVEREIGNTY ISSUE

---RECOGNIZE SAC AS AN INDEPENDENT ENTITY ADVISORY TO THE STATE LEGISLATURE AND DESIGNATE THE SAC TO REPORT TO THE STATE LEGISLATURE 20 DAYS PRIOR TO THE 1993 SESSION.

---REMOVE THE FEDERAL PROVISO OUTLINED IN SEC 12, ACT 301, SLH 1991 OF MATCHING FEDERAL MONIES.

---DESIGNATE MONIES FOR THE SAC TO BE EXPENDED BY OHA FOR THE SUPPORT OF THE SAC.

---PROVIDE THE ADDITIONAL FUNDING REQUIRED FOR FY 1992-1993 TO COMPLETE THE ELEMENTS OF THE PLAN.

Source: Sovereignty Advisory Council of the State of Hawaii, Preliminary Report to the Sixteenth Legislature (Honolulu: Jan. 1993), p. 10.

---

8. Ibid., p. xxi.

It appears that no law specifically relating to Hawaiian sovereignty was adopted by the 1992 Legislature.[9]

Act 359, Session Laws of Hawaii 1993

In 1993, the Legislature adopted Act 359 the purpose of which was "to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[10] Act 359 established the Hawaiian Sovereignty Advisory Commission to advise the Legislature on special elections to elect delegates, including apportioning voting districts, establishing eligibility of convention delegates, and establishing dates for the special election. It also required the commission to submit a plan on the qualifications of voters and the conduct of the special elections to the 1994 Legislature.

Nineteen individuals served on the Commission. Its Final Report was issued on February 18, 1994.[11]

The Final Report indicated that the HSAC convened in August 1993 and met about once every two weeks. There were five standing committees: Education, Apportionment, Elections, Convention, and Visioning Beyond the Legislative Mandate. Between October 12 and 21, 1993, the Commission held sixteen public information meetings on each island and one with Hawaiians living in America (U.S. mainland). Between January 1994 and February 1994, the Commission held twenty public meetings to discuss the Legislative proposals which had been developed following the earlier community meetings.[12] The concerns raised by the communities fell into four areas:[13]

(1) More information and education on sovereignty;

(2) Hawaiian groups need to work together and provide leadership;

---

9. 1992 Hawaii Sess. Laws.

10. 1993 Hawaii Sess. Laws. Act 359. sec. 2.

11. A report entitled "Another View on the Subject of Hawaiian Sovereignty & Self-determination" was issued by Poka Laenui in March 1994. This report differed with the Final Report on the limited timeframe for the process, nature of representation on the election board, and the rights of the non-native Hawaiians in the sovereignty issue, among other things.

12. Hawaiian Sovereignty Advisory Commission, Final Report (Honolulu: Feb. 18, 1994), pp. 16-18.

13. Ibid., p. 19.

(3) A process should be independent of the State; and

(4) Stop the decrease or misuse of Hawaiian trust lands, including Hawaiian home lands and ceded lands.

The Final Report's recommendations are replicated here as Appendix B. Two of the HSAC's recommendations were adopted by the Legislature in 1994. Act 200, Session Laws of Hawaii 1994, renamed the HSAC the Hawaiian Sovereignty Elections Council and gave it the authority to oversee a plebiscite in 1995[14] on self-determination and upon approval of the plebiscite, to provide for a fair and impartial process to resolve issues relating to the form, structure, and status of a Hawaiian nation. The Act is repealed by operation of law on December 31, 1997.[15] The HSAC recommendation that there be a moratorium on the sales and exchanges of ceded lands and Hawaiian Home lands (S.B. No. 3300/H.B. No. 3629) was not enacted during the 1994 session.

Movement Toward Self-determination

a. Public Law 103-150 (Nov. 23, 1993)

The acknowledgment by the United States of the January 17, 1893 overthrow of the Kingdom of Hawaii and an apology for that overthrow was signed by President Clinton on November 23, 1993. In this Joint Resolution the United States Congress also expressed its commitment to acknowledge the ramifications of the overthrow to provide a proper foundation for reconciliation between the United States and the native Hawaiian people. The Joint Resolution defines "native Hawaiian" as any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

b. Return of Kahoolawe

On May 7, 1994, the island of Kahoolawe was officially returned by the United States to the State of Hawaii.[16] To be administered by the seven-member Kahoolawe Island Reserve Commission, this island is now a part of the public land trust. Eventually the island will be

---

14. According to Ka Wai Ola O OHA, a newsletter published by OHA, the Hawaiian Sovereignty Elections Council voted on August 16, 1994, to move the date of the plebiscite from 1995 to January 1996 (p. 3, September 1994).

15. As of July 10, 1994, the Elections Council has not received the $1,800,000 funding appropriated to continue its work because the $900,000 from the Office of Hawaiian Affairs to match legislative appropriations has not been approved by the Office of Hawaiian Affairs.

16. Hawaii Rev. Stat., chap. 6K.

turned over to a sovereign Hawaiian entity. The United States Navy will spend $400,000,000 over the next ten years to clear the land and waters of unexploded military bombs.[17]

c. Future Plebiscite

Assuming that the plebiscite in 1995 is approved, the elements of sovereignty, such as the definition of its members, the form of its governmental structure, method of representation, and so on will be determined by the native Hawaiian people.

Implications of the State's Actions Since 1991

What do these preparations and anticipatory actions mean for the sovereignty movement in Hawaii? In view of the historical precedents established for the American Indian and Alaskan Natives, the plenary power of Congress will likely prevail for the Hawaiians as it has for other native groups. Rather than being a "sovereign" in the sense used by the writers in the fifteenth, sixteenth, seventeenth, or eighteenth centuries, "sovereignty" might be closer to the meaning created by Cohen's tribal self-government or self-determination. That is, the native Hawaiian state would have limited sovereignty for internal governance, with the right to control its own cultural, societal, economic development free from outside restraints, but without the power to engage in external international relations, to make treaties and declare war.

By adopting the various Acts in 1991, 1993, and 1994 pertaining to the sovereignty commission/council, the Hawaii Legislature facilitated discussion on the question to be put before the native Hawaiian people whether to establish a separate Hawaiian government. Whether or not these actions constitute "protocols and provide documentation" (to use the language from S.R. No. 209, S.D. 1) may be irrelevant given the inability of a single state of the United States to recognize any nation.

---

17. "A vision for Kahoolawe," Honolulu Advertiser, May 20, 1994.

Chapter 5

FINDINGS

From the foregoing chapters, it is evident that considerable thought has already been given to the idea and reality of sovereignty and its elements. The mandates of Act 301, Session Laws of Hawaii 1991, as updated by Act 359, Session Laws of Hawaii 1993, which was then amended by Act 200, Session Laws of Hawaii 1994, have produced reports, recommendations, and conclusions. The Legislature has appropriated funds and lent its support to bills which were framed to facilitate the study of sovereignty and help it proceed to fruition.

In view of these past and ongoing activities, the Bureau's assignment as mandated by S.R. No. 209, S.D. 1, to study processes by which entities are recognized as being sovereign might serve as a review for legislators. It would be fair to ask whether for the present, at least, legislative action has preceded legislative reflection/deliberation. For several years now the affected group, a fair portion of the native Hawaiian citizenry, has been behaving as a people seeking self-determination: studying the choices of governmental structures available to them, and coming to an understanding what has happened to other colonized groups which have achieved independence, commonwealth status, among other actions. Native Hawaiians expect to determine and are in fact determining their own future. The options available within the tribal sovereignty concept--its electoral process, membership in the group, legislative structure, judicial method, and land base, will be determined in 1995 and thereafter.

To what extent then has the Hawaii State Legislature conferred a special status (some might describe it as informal "recognition") upon the native Hawaiian population's movement towards sovereignty or self-determination? At the very least, one would conclude that despite the fact that official or formal recognition of Hawaiian sovereignty has not yet been conferred by the federal government, the actions of the state Legislature since 1991 indicate an expectation that some kind of native Hawaiian government will exist along with the government of the State of Hawaii within the federal government. For example, in the case of the return of Kahoolawe to the State of Hawaii, the language of section 6K-9, *Hawaii Revised Statutes*, reads:

> **[§6K-9] Transfer.** Upon its return to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.
>
> All terms, conditions, agreements, and laws affecting the island, including any ongoing obligations relating to the clean-up of the island and its waters, shall remain in effect unless expressly terminated. (Emphasis added.)

Thus, the Bureau finds that progress towards native Hawaiian self-determination is already occurring despite any lack of formal action by the federal government. Secondly, assuming the plebiscite is approved in 1996 by the Hawaiian people, other aspects of the so-called attributes of a sovereign group will be developed, such as definition of a "Hawaiian" or "native Hawaiian", as the case may be, to determine membership in the group. A form of government will be selected with representation drawn from the defined group members and so on. When these and other elements have been sufficiently fleshed out, then the "government" of the Hawaiian nation might be said to exist. It is arguable whether the "nation" and the "government" are interchangeable here, but as previously described, one or the other, or both, might be formally recognized by other foreign nations or by an international body like the United Nations.

Of course there are a number of aspects beyond the scope of discussion in this report which might have to occur along with the creation of the "elements" of sovereignty. For example, legislative action will be required to accomplish some ends, such as the moratorium on the sale and exchange of ceded lands. For purposes of this report, it can be concluded that the question of how to go about recognizing and documenting the conferral of sovereignty has already been anticipated by the Legislature through its recent actions.

THE SENATE
SEVENTEENTH LEGISLATURE, 1994
STATE OF HAWAII

S.R. NO. 209 S.D. 1

SENATE RESOLUTION

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO STUDY THE PROCESSES BY WHICH ENTITIES ARE RECOGNIZED AS BEING SOVEREIGN BY THE FEDERAL GOVERNMENT.

WHEREAS, the State of Hawai'i is a sovereign unit of the government of the United States of America; and

WHEREAS, the State of Hawai'i seeks to correct the wrongs done to the native people of these islands with the illegal taking of the Hawaiian Kingdom in 1893; and

WHEREAS, the State of Hawai'i encourages a process by which indigenous Hawaiian people could achieve self-determination and self-governance in a manner which the Hawaiian people deem appropriate; and

WHEREAS, throughout the United States, native governments and states govern side-by-side, but too often these native governments were imposed upon the states by the federal government, causing years of mistrust and separation; and

WHEREAS, the Legislature finds it appropriate to address the issue of sovereignty on the federal level in light of the passage of the Joint Resolution of Congress, Public Law 103-150, which acknowledges and apologizes for the illegal overthrow of the Kingdom of Hawai'i, and urges a reconciliation between the United States of America and the indigenous people of Hawai'i; and

WHEREAS, the Legislature understands that the State of Hawai'i cannot confer sovereignty, and can best support the process of self-determination if it follows the protocols and provides the documentation recognized by the international community; now, therefore,

BE IT RESOLVED by the Senate of the Seventeenth Legislature of the State of Hawai'i, Regular Session of 1994, that the Legislative Reference Bureau is requested to study the processes by which the federal government confers sovereignty on native governments and the manner in which states recognize and document such conferrals; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau submit its findings and recommendations to the Legislature no later than twenty days prior to the convening of the Regular Session of 1995; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the Legislative Reference Bureau.

APPENDIX B

RECOMMENDATIONS TO THE HAWAI'I STATE LEGISLATURE

1. Establish an independent Hawaiian Sovereignty Elections Board to conduct a Hawaiian sovereignty plebiscite and should the plebiscite be approved by a majority of qualified voters, provide for a fair, impartial, and valid process to formalize the form, structure, and status of a Hawaiian nation.

A. Composition of the Hawaiian Sovereignty Elections Board

17 Members including two members each from Hawai'i, Maui, Lana'i, Moloka'i, O'ahu, Ni'ihau, and Kaua'i; two members representing non-resident Hawaiians; and one ex-officio member representing Kaho'olawe.

B. Selection Process For Sovereignty Elections Board

The members shall be nominated by Hawaiian organizations and selected by Hawaiian organizations. The Hawaiian Sovereignty Advisory Commission has already convened representatives of 189 organizations. These and other interested Hawaiian organizations and 'ohana will be asked to nominate persons to serve on the Sovereignty Elections Board. The names and resumes of those nominated will be circulated with a ballot. Hawaiian organizations will be asked to select the members of the Elections Board. The process and method of selection will be worked out by the Commission in dialogue with Hawaiian organizations and 'ohana on each island.

C. Responsibility and Authority of Hawaiian Sovereignty Elections Board:

1. Conduct a 1995 special mail-out election on the plebiscite question:
"E ho'omaka 'anei kākou e ho'okō i na kuleana o ka ho'iho'i ea o kō Hawai'i aupuni?"
"Shall a process begin to restore the sovereign Hawaiian nation?"

2. Conduct educational activities for Hawaiian voters, a voter registration drive, and research activities in preparation for the convening of delegates.

3. Provide for a fair, impartial, and valid process to formalize the form, structure, and status of a Hawaiian nation. This will include:

a. Conducting special elections
b. Providing for an apportionment plan
c. Establishing the eligibility of delegates
d. Establishing the size and composition of delegations
e. Establish the dates for special elections
f. Conducting ratification of the work of the delegations
g. Other responsibilities for the conduct of elections and the convening of delegates
h. Establishing task forces and committees as deemed necessary

D. Timeframe

1. July 1, 1994 - August 1, 1994

Hawaiian organizations select Hawaiian Sovereignty Elections Board members

2. August 31, 1994

The Hawaiian Sovereignty Advisory Commission dissolves.

Hawaiian Sovereignty Elections Board convenes and develops a process and timetable to formalize the form, structure, and status of a Hawaiian nation.

2. Provide For A Hawaiian Sovereignty Plebiscite In 1995.

A. The plebiscite question will be posed in both English and Hawaiian on the ballot. The question shall be:

"Shall A Process Begin To Restore The Sovereign Hawaiian Nation?"

"E Ho'omaka 'Anei Kākou E Ho'okō I Na Kuleana O Ka Ho'iho'i Ea O Kō Hawai'i Aupuni?"

The ballot shall be accompanied by an explanation that a "yes" vote means there will be an election of delegates who will be convened to formalize the structure and status of a Hawaiian nation, and that a "no" vote means there will be no such process funded by the legislature at this time.

B. Eligibility To Vote In The Plebiscite

All Hawaiians, at least 16 years of age, resident and non-resident, U.S. citizens and non-U.S. citizens, including those still serving prison sentences.

Hawaiians

This is a process for the indigenous people of Hawai'i, the Native Hawaiians. This includes any descendant of the races inhabiting the Hawaiian islands prior to 1778. The Commission, in its deliberations, acknowledged that there are two tracts of sovereignty and self-determination in Hawai'i. Along the first tract of human rights, that of the rights of indigenous people, clearly, the rights of the Native Hawaiian people must be secured. They must be afforded an opportunity to choose for themselves the form of their own self-governance and exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, language, and religions. This would be necessary if Hawai'i remains a part of the United States or if Hawai'i chooses to be independent of the United States. There is an immediate need for the indigenous Hawaiian people to formalize the structure and status of a Native Hawaiian government. Along the second tract, that of the rights of indigenous and non-indigenous people who have become 'keiki o ka aina" and whose allegiance attaches to Hawai'i, the process of decolonization must begin. The people of Hawai'i must be given the choice of determination ranging from integration within the United States of America to emerging as an independent nation.

The Commission, after discussing these issues at length, receiving the advice of attorneys of international law, and hearing the input of the community, determined that the process for a plebiscite and for the convening of delegates at this point is for the indigenous Hawaiians. When the delegates convene they may, in addition to formalizing the structure and status of a Native Hawaiian government, lay the foundation for organizing with non-indigenous people in Hawai'i the process for the decolonization of Hawai'i. That is for the elected delegates to decide.

Hawaiians At Least 16 Years Of Age

Among Hawaiians, 75.8 percent are below the age of 35. It is truly the upcoming generations of Hawaiians who will be the leaders of the Hawaiian nation. Allowing our youth who are 16 years and older to vote will provide them with the incentive to become educated and involved in the process of nation building. It will also set them apart from their peers in high school with special rights and responsibilities.

Resident And Non-Resident Hawaiians

The plebiscite is an issue for indigenous Hawaiians to vote in, wherever they may now reside. One of the impacts of colonization is migration to the colonizing country. There are 70,551 Hawaiians living in continental United States. Including interested Hawaiians living outside of Hawai'i to participate in the process will allow them to give support to Hawaiians living in Hawai'i. Many Hawaiians living outside of Hawai'i have maintained close family ties and frequently visit home. A growing number of Hawaiians living away have returned home to retire. Among independent Pacific island nations, such as the Cook Islands, Western Samoa, and Belau, there are provisions for those living overseas to participate in parliamentary elections and to be represented in parliament.

Hawaiians Who Are U.S. Citizens And Who Are Not U.S. Citizens

This would include Hawaiians who may have been born outside of the United States as well as Hawaiians who do not consider themselves to be U.S. citizens, but only citizens of Hawai'i. Some of our Hawaiian people no longer identify as U.S. citizens because of the role of the U.S. in colonizing Hawai'i and depriving Hawaiians of human and civil rights. They no longer choose to associate themselves with the colonizer which is responsible for the destitute conditions of many Hawaiians today.

Hawaiians Who May Still Be Serving Prison Sentences

Hawaiians comprise 35 percent of the adult inmate population, although Hawaiians make up only 20 percent of the population of Hawai'i. Statistics indicate that Hawaiians do not have higher arrest rates than other ethnic groups, they have higher conviction and longer incarceration rates for the crimes for which they are arrested. This is indicative of the problem that Hawaiians do not have equal access to representation under the criminal justice system. Historically and at present most of the crimes committed by Hawaiians are against property, not people. This is indicative of their inability or unwillingness to accept and adapt to Western culture. Many Hawaiians in prison can be considered to be victims of colonization and, essentially, political prisoners. Outreach and education will also be conducted in the prisons to prepare those who are interested to participate in the plebiscite.

C. Process

Mailout ballot.

D. Timeframe

The plebiscite shall be held in 1995. While the final timetable should be determined by the Hawaiian Sovereignty Elections Board, the Hawaiian Sovereignty Advisory Commission recommends the following:

July 1, 1994 through March 26, 1995

Register to vote.

May 1, 1995

Ballots will be mailed out.

June 11, 1995

All ballots must be received back in the mail.

3. Moratorium

The Hawaiian community on each island has almost unanimously called for a measure to ensure that Hawaiian national trust lands, the Hawaiian Homelands and the ceded public trust lands, will not be decreased or misused. The community does not want to get involved with a lengthy process to restore formal recognition of a Hawaiian sovereign nation and end up without a land base. The community seeks a good faith gesture from the state government to protect the primary land base of the Hawaiian nation - the ceded public lands trust and the Hawaiian Homelands. While there is no consensus on the Commission on how to address this concern, there is general agreement that it has to be addressed.

The Commission is asking the Hawai'i State Legislature to pass a measure to place a moratorium on the sales and exchanges of all lands ceded to the United States by the Republic of Hawai'i or acquired in exchange for lands so ceded, and returned to the State of Hawai'i by virtue of section 5(b) of the Admissions Act, excluding the Hawaiian Homelands, until a sovereign Hawaiian entity is established and recognized. This would not prohibit the state from leasing the lands to third parties or state agencies. It does not prohibit transfers of these lands to the Office of Hawaiian Affairs or the Department of Hawaiian Homelands, or land exchanges between those Hawaiian agencies and other state agencies as long as the combined land holdings of the public land trust and the Hawaiian Homeland trust are not reduced.

4. Education

The clearest mandate from the Hawaiian community is to conduct more education on sovereignty before the sovereignty plebiscite is held. The Commission is coordinating education efforts with other Hawaiian organizations, particularly with Hui Na'auao. The Commission will also approach the Department of Education and private schools to assist in sovereignty education at all levels.

The Commission has sponsored Russell Barsh to speak on Indigenous Rights and Francis Boyle to speak on independence. The Commission will sponsor guest speakers on various models of sovereignty. A 30 minute video on indigenous rights and examples of nation-within-nation Native American nations will be produced from the guest lecture presentations. A 30 minute video on independence and on models of independent nations in the Pacific will be produced from the guest lecture presentations. The videos will be aired on public access channels and be made available in schools and libraries.

The Commission will conduct a poll in Spring 1994 to better assess the support in the Hawaiian community for sovereignty and to develop a multi-media educational program to reach out to all levels of the community. A program of television, radio, and newspaper advertising will be developed to begin to educate the Hawaiian community about the Hawaiian sovereignty plebiscite. The Commission will hold a round of public education workshops before dissolving in August, 1994.

5. Funding

Funding is requested for:

Personnel Services

Legal Services

Education and Research

Elections Administration

Voter Services

Operations

The total request is $1, 991,156.00

SELECTED BIBLIOGRAPHY

Brownlie, Ian. Principles of Public International Law. 4th ed. Oxford: Clarendon Press, 1990.

Casey, James A. "Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty." Cornell Law Review 79 (1994): 404.

Cohen, Felix S. Handbook of Federal Indian Law. University of New Mexico Press, 1986 reprint of 1942 original.

Crawford, James. The Creation of States in International Law. Oxford: Clarendon Press, 1979.

Dickinson, Edwin DeWitt, The Equality of States in International Law. Cambridge: Harvard University Press, 1920.

Franck, Thomas M. "The Emerging Right to Democratic Governance." Am.J. Int'l L. 86 (1992): 46.

Hannum, Hurst. Autonomy, Sovereignty, and Self-determination. Philadelphia: University Pensylvania Press, 1992.

Hawaiian Sovereignty Advisory Commission. Final Report. Honolulu: Feb. 18, 1994.

Hirschfield, Martha. "The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form." The Yale Law Journal. 101 (1992): 1331.

Houghton III, Richard H. "An Argument for Indian Status for Native Hawaiians--The Discovery of a Lost Tribe." American Law Review 14 (1989): 1.

KaLahui Hawaii. Commonly Asked Questions About Ka Lahui Hawaii. Honolulu: 1993.

MacKenzie, Melody K. "1893-1993: Overthrow, Annexation and Sovereignty." Hawaii Bar Journal 8, Jan. 1993.

MacKenzie, Melody K. (ed.). Native Hawaiian Rights Handbook Native Hawaiian Legal Corporation. Honolulu: Native Hawaiian Legal Corporation, 1991.

McCoy, Robert G. "The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests." Harvard Civil Rights-Civil Liberties Law Review 13 (1978): 359.

Morse, Bradford W. and Kazi A. Hamid. "American Annexation of Hawaii: an Example of the Unequal Treaty Doctrine." Conn. J. of International Law 5 (No. 2, Spring 1990): 407.

Sovereignty Advisory Council of the State of Hawaii. Preliminary Report to the Sixteenth Legislature. Honolulu: Jan. 1993.

Suagee, Dean B. "Self Determination for Indigenous Peoples at the Dawn of the Solar Age." 25 U. of Michigan Journal of Law Reform 25 (1992): 671.

Williams, Jr., Robert A. "Encounters on the Frontiers of International Human Rights Law." Duke L J 660 (1990).