

# The 2016 Na‘i Aupuni Congregation: A Brief Study in a Practice of Indigenous Self-Determination

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

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## Historical Backdrop

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

New musical approaches also came to the fore, challenging prevalent views on Hawaiian history, loyalty, royalty, and patriotism, with names such as Don Ho and Kui Lee leading the pack, bringing a new sense of pride, confusion, and critical debate about "proper" Hawaiian entertainment with the singing of songs such as "Nā Ali'i" and "Hawai'i Pono'i," followed by "God Bless America." Hula hālau multiplied during this period with the graduation of a profusion of kumu hula (hula masters), many tracing their roots to the Margaret Aiu Hula Studio, which changed to the Hula Hālau 'O Maiki and is presently the Hālau Hula 'O Maiki—its name changes from pre-1950s to 1974 reflecting growth in awareness of Native Hawaiian culture.<sup>1</sup> The Polynesian Voyaging Society also entered the arena with Hōkūle'a and its journey to the South Pacific. New expressions of Hawaiian culture flourished during these decades.

From the underground, a sweep of Hawaiian pride emerged, somewhat uncertain, yet firm in challenging

the superiority and supremacy of non-Hawaiians, questioning why gambling and other vices in Hawai'i should be controlled by Koreans, Chinese, Japanese, or other immigrants, while Hawaiians and other Polynesians were simply used as "muscle" to keep everybody in line. Hawaiians, under the leadership of "Nappy" Pulawa, formed a coalition with Samoans organized under Alema Leota and removed the "non-natives" who had been controlling Hawai'i's gambling. This "native power," having organized, was now able to put up barriers against the Yakusa invasion from Japan as well as the Mafia from Italian-America, in their attempt to move in on the local market. One popular story is that when the Italian Mafia sent men to Hawai'i to infiltrate the local underworld, the men were packed up in pineapple boxes and sent back to America with the message, "Ono, send some mo!"<sup>2</sup> An infusion of local pride was forming and emerging from this sector of the community, finding its way into increased popularity in canoeing, local volleyball, and junior golfing in a wide exhibit of local talents.

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

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

From the circuit courtroom of Ali'iōlani Hale—that same building from which so many other memorable events occurred, including the proclamation of the end of Queen Lili'uokalani's reign and the formation of the Provisional Government of Hawai'i,<sup>3</sup> and the guilty jury findings of the Massie defendants for the murder of Joseph Kahahawai<sup>4</sup>—rang out the Pulawa reply to charges of kidnaps and murders, "I refuse to dignify this court by entering a plea. Instead, I ask, who are you foreigners to come into Hawai'i and charge us by your foreign laws? We are not Americans, we are Hawaiians!"

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

### **Hawaiian sovereignty movement**

The Pulawa trial resulted in a finding of not guilty and was soon followed by other challenges to the jurisdiction of the US courts: Hayden Burgess (Pōkā Laenui), attorney for Mr. Pulawa in the state charges, declared in Federal District Court before Sr. Judge Samuel King that he was not a US citizen, yet insisted on his right to practice law in all of the courts of Hawai'i; *US v. Raymond Kamaka* challenged the government's taking of Kamaka's family land at Waikāne Valley, also claiming his Hawaiian citizenship and the taking of Hawaiian land; *US v. Lorenzo* challenged US taxing authority over Lorenzo as a Hawaiian citizen; and *US v. John Marsh*, retired Honolulu police officer, questioned US taxing jurisdiction in Hawai'i and proclaimed Marsh's Hawaiian citizenship. In the Hawai'i State Courts, jurisdiction of the US laws often combined with land issues, such as the eviction of Sand Island "squatters," most of whom were Native Hawaiians who had established a fishing village and were arrested and evicted by the State Department of Land and Natural Resources (*State v. Paulo et al.*, 1980). Another example is Mākua "beach

people," blown off the beaches first by Hurricane Iwa and followed in a one-two punch by the state police arresting them as they tried to return to their homes on the beach (*State v. Pihana, Nae'ole, Alana et al.*, 1982). Many others living along the beaches at Kahe Point, Nānākuli, Mā'ili, Kea'au, and Waimānalo were subsequently arrested, and they too raised the same defense of "Hawaiian sovereignty," challenging US jurisdiction over Hawaiian citizens and Hawaiian lands.

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

Hawaiian groups, sometimes noted for their individuality, began to take a new approach to the Hawaiian sovereignty question, forming Hui Na'auao, a study group of principally Native Hawaiians, to discuss and promote information regarding Hawaiian history, culture, politics, and other matters relating to Hawaiian sovereignty, agreeing, for a time, that this would be their sole purpose, not taking positions on any other matter.<sup>5</sup> One of the major events Hui Na'auao spearheaded in 1993 was the reenactment of the overthrow of Hawai'i one hundred years previously. Hawai'i Public Radio transmitted the program live across Hawai'i.



### Involvement of state legislature

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

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

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

This council of twenty-one members, appointed by Governor Waihe‘e, visited communities in Hawai‘i and in America, to obtain opinions on how to proceed with self-governance. HSAC concluded it could not counsel the legislature on that matter because HSAC was not

the representative voice of the Native Hawaiian people. Instead, the council suggested that a plebiscite be called, asking the Native Hawaiian population whether an election of delegates should be held to propose a form of Native Hawaiian governance. The legislature adopted the recommendations and appointed the HSAC commission members to the Native Hawaiian Elections Commission to conduct this Native Hawaiian vote.

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

In July 1996, 81,598 ballots<sup>6</sup> were sent throughout the world, asking, “Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?” Discounting for returned mail, deceased addressees, and ballots returned by non-Hawaiians, the list was reduced to 81,507. Of that, 30,783 valid, signed ballot envelopes with ballots were returned, constituting 38 percent of the list. Of the resulting list, 2 percent were disqualified because of the failure to affirm their qualification to vote, and 360 ballots were disqualified due to torn stubs or empty secret ballot envelopes. The League of Women Voters did the final tally and reported that 30,423 (37 percent) of the ballots were counted, of which 22,294 (73.28 percent) voted YES, and 8,129 (26.72 percent) voted NO.

### Genesis of the Native Hawaiian Convention

Following the approval of the majority of the ballots counted, an election of delegates was held. Candidates ran for delegate positions from places in which they lived in Hawai‘i, divided into areas called moku. The



*Figure 1. Elected delegates to the Native Hawaiian Convention on the steps of Iolani Palace, July 31, 1999.*

continental USA also set aside delegates from that area. The Native Hawaiian Convention (hereafter NHC), also known as the ‘Aha Hawai‘i ‘Ōiwi, was convened on July 1, 1999.

These delegates met over the course of one year, studying various models to recommend a form of governance (fig. 1).

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

Work was done by the delegates to develop these two separate models. Over time, it was obvious that the

integration model was being influenced by versions of the Akaka Bill(s) being introduced into the US Congress, and further development of that model waned in the face of the Akaka Bill’s development.

The independence model, however, took a different lead. There was a strong pull for independence—perhaps stemming from Hawai‘i’s history of its period of independence and its record of advocacy for independence, which has gained momentum over the past thirty years.

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

(1) Who were the citizens of such an independent nation (to be defined racially, ancestrally, culturally, historically, or based on loyalty)? The Hawaiian citizens were to be identified similar to how they were identified under the Hawaiian Kingdom—by place of birth, by years of residence in Hawai‘i and, if not native born, by an oath of loyalty to qualify for nationalization. It would also be required that Hawaiian citizenship not be imposed but would instead be a choice made by any person who qualified.

(2) Given the current makeup of Hawai‘i society, and the fact that Native Hawaiians would be in a minority if all those qualifying under the definition of a Hawaiian citizen were to elect to be such a citizen, what protections would there be for the Hawaiian indigenous people? A separate political body (Kumu Hawai‘i) would be created, autonomous to the general political body of the national government, consisting of only Native Hawaiians, and this body would have exclusive control over certain decisions affecting Hawai‘i, including

population control, land demarcated from the former government, and Crown lands and assets set aside for Kumu Hawai‘i; control over Native Hawaiian education, health, and justice systems; and the right to identify royalty for purposes of interacting with other monarchies should the general body decide that Hawai‘i should also have a monarchy.

The drafting of the independence model has been a work in progress, without any final decision made about the document itself (fig. 2). The document referenced later in this article is currently the most advanced draft but is not considered as final by the full convention.

The state legislature and the Office of Hawaiian Affairs refused to fund this convention to completion. The convention now stands in recess, remaining unfunded, and thus unable to complete its work to be submitted to the Native Hawaiian population. The NHC today is in recess and has not adjourned sine die (without a day to reconvene, essentially closing the assembly). With the NHC in recess, the legislature and the Office of Hawaiian Affairs now started looking in another direction—toward the US Congress and federal recognition—to resolve the matter of Hawaiian self-determination.



Figure 2. Convention debate on self-determination, July 29, 2000

### In pursuit of federal recognition

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

In its 2011 session, the state legislature adopted Act 195, calling for the formation of a Native Hawaiian Roll Commission to create a list of voters to elect delegates to a new convention and to adopt a document to meet the requirements of federal recognition of a Native Hawaiian nation. The state’s Office of Hawaiian Affairs was charged with financing this commission, electing delegates,<sup>1</sup> and funding a convention. Only those of Native Hawaiian blood were to be enrolled on the “roll of qualified Native Hawaiians” permitted to register to vote in the selection of delegates to the convention.<sup>7</sup> In passing Act 195, the state legislature stated: “The State has supported the reorganization of a Native Hawaiian governing entity. It has supported the Sovereignty Advisory Council, the Hawaiian Sovereignty Advisory Commission, the Hawaiian Sovereignty Elections Council, and Native

Hawaiian Vote, and the convening of the 'Aha Hawai'i 'Ōiwi (the Native Hawaiian Convention)."

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

The Office of Hawaiian Affairs launched "Kana'iolowalu" to create the roll. The publication of the roll was to "facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention."<sup>8</sup> Five members appointed by the governor were to serve on the roll commission. Upon completion of the roll, the governor was to dissolve the commission.

Following a failure to register a sufficient number of Native Hawaiians on the Kana'iolowalu roll, an effort was made to cobble together names from other listings—not only those who registered directly with the Kana'iolowalu roll created by the commission, but also those registered with Kau Inoa, Operation 'Ohana, and the Hawaiian Registry through the Office of Hawaiian Affairs. It included persons of all ages, including those under the age of eighteen. Deceased persons also remained on the roll. The Roll Commission had more than 125,000 qualified Native Hawaiians on the list (*Judicial Watch, Inc. v. Namu'o et al.*, 2015). There were no

citizenship or residency requirements, nor did the roll exclude convicted felons or those declared mentally incompetent (Native Hawaiian Roll Commission, 2014).

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

There were 201 individuals nominated to fill forty delegate positions to a convention. Nominees were required to be nominated by ten individuals who were enrolled on the Kana'iolowalu roll. From these nominees, forty delegates were to be elected in an election conducted by mail-in ballots. The election was held, and ballots were mailed in, but the counting of the ballots was held up by an intervening lawsuit, *Akina v. State of Hawai'i*, 2015. That lawsuit challenged the legitimacy of the election, primarily due to its use of state funds and its limitation of voting to only those of the Native Hawaiian race. After losing at the Federal District Court and at the Appeals Court level, the case was taken to the US Supreme Court. A temporary restraining order was issued by the US Supreme Court, preventing the counting of the ballots until the court could consider the matter. Kūhiō Asam, chairman of Na'i Aupuni, Inc., determined that the court could take years in reviewing the issue and announced the commencement of a convention without the counting of the ballots for electing delegates.<sup>9</sup>

Na'i Aupuni, foregoing the counting of the ballots, declared that a gathering in Maunawili, Kailua, O'ahu



would be convened, in which all nominees who confirmed their participation would be seated. On February 1, 2016, 154 delegates were convened at a private venue, the Royal Hawaiian Golf Club, behind secured entrance gates.

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

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

Because the number of delegates had increased dramatically from what was originally planned, Na'i Aupuni reduced the length of the congregation<sup>10</sup> from forty to twenty days and reduced the previously announced per diem to fifty dollars for O'ahu members, two hundred dollars for Neighbor Island members, and two hundred and fifty dollars for members outside of Hawai'i. Members' acceptance of the per diem was optional. Breakfast and lunch for the twenty convention days were provided by Na'i Aupuni. No other

financial assistance (e.g., transportation and lodging) was made available.

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

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

## Evaluation of the Na'i Aupuni Congregation

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

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

Reflecting on the longer-term view, starting with the organization of Hui Na'auao several decades ago, followed by the Sovereignty Advisory Council, the Hawaiian Sovereignty Advisory Commission, the Hawaiian Sovereignty Elections Council, the Native Hawaiian Vote, and the Native Hawaiian Convention, the Na'i Aupuni process was a failure in moving the exercise of self-determination forward. The earlier processes, seen as a progression, had already accomplished a valid roll of Native Hawaiians, held a referendum to determine if the people wanted to adopt this process of calling their Native Hawaiian representatives to a deliberative body, elected that body, held their deliberations, and produced two draft alternatives. If the state legislature and

the Office of Hawaiian Affairs had not failed to fund the NHC to completion, two alternative proposals would have been presented to the Hawaiian constituency, one setting forth a design for integration within the United States of America, and a second for independence from the United States of America.

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

Yet another agenda was at work, although not explicitly declared: The imminent departure of the Obama administration was assumed to close a window of opportunity to achieve a presidential executive order recognizing an organized Native Hawaiian “nation” under requirements of the US DOI. The struggle for recognition dates back to the early days of the rejuvenated Hawaiian sovereignty movement following the Alaska Native Claims Settlement Act (ANCSA) adopted by Congress in 1971. What followed was the Aloha Bill, which attempted to mimic the footsteps of the Alaska experience. Having failed in those early efforts, and seeing the US Congress adopt the 1993 Apology Resolution (Public Law 103-150) confessing the illegal role of the United States in the Hawaiian overthrow,<sup>11</sup> a new attempt by US Senators Inouye and Akaka was made to achieve



recognition of the Native Hawaiian nation (the US House of Representatives having adopted such a bill on numerous occasions). Senate bills were introduced in different forms from 2000 until 2007 but were never successfully adopted, largely due to the manipulation and objections of a small Republican minority in that body.

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

How did the Office of Hawaiian Affairs get into this situation? Trustee Peter Apo explained the following during an Asset and Resource Management meeting of the Office of Hawaiian Affairs:

So here we are negotiating the ceded lands settlement, two hundred million Kaka‘ako, and in the eleventh hour, that bill gets inserted in Act 195. Okay? You either have to agree with Act 195 or we may not give you the two hundred million dollar settlement. That’s how we got into Act 195. We had no control over that unless you wanted to turn down the settlement and so when we move

forward and I don’t know how many millions of dollars we’re into that now. (Apo, January 27, 2015)

There is an answer to Apo’s question about spending that resulted from Act 195: \$4,521,515.37 was spent on the Roll Commission, another \$2,598,000 was granted to Na‘i Aupuni (through a fiscal agent, the Akamai Foundation), and \$82,509.86 was returned to the Office of Hawaiian Affairs when Na‘i Aupuni did not fulfill its grant requirement to ratify any recommendation of the delegates arising out of the ‘Aha. The total: \$7,037,005.51. Additionally, the Office of Hawaiian Affairs spent \$902,955.48 for legal services to defend the case of *Akina v. State of Hawai‘i*, for a grand total of \$7,939,960.99.<sup>12</sup>

### Political crosscurrents

The process that culminated in the Na‘i Aupuni congregation suffered from crosscurrents of political waters in Hawai‘i. One current flows in the direction of democratic participation of Native Hawaiians, the aboriginal people of Hawai‘i, to determine their future. This process of “self-determination,” while under the yoke of colonization since 1893, is aspirational but leaves much to question about whether self-determination can truly be attained within the limitations of the US Constitution and Act 195.

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

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

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

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

The original plan was for a gathering of forty specially chosen (elected) delegates to crew the wa'a, and to take forty days to accomplish its quest. But instead, the election of delegates was scuttled, and the crew ultimately

increased to 156—almost four times its original number. The larger crew did not result in a better voyage, especially given that the wa'a was not large enough and the direction and leadership were not well defined. Additionally, the trip was shortened to twenty days to produce a framework envisioning the future of the Hawaiian nation.

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

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

The wa'a started off in choppy waters and unfavorable, windy conditions with all the sniping, accusations, distrust, and other general suspicion, both in and out of the meeting space. And yet, the wa'a was expected to beach



within twenty days with documents detailing the future course of the Hawaiian nation!

### **Sparks of beauty and color along the journey**

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

The all-or-nothing thinking of choosing between independence or integration (federal recognition) was softened; rather than asserting which position was correct or better, conversations seemed to gravitate toward what would be the best approach to raise the nation rather than divide it. The language of the discourse began to shift. One paper that circulated among participants spoke of changing the conjunction from “independence or integration” to “independence *and* integration.” The paper argued that we should no longer be divided by the minutia of details over Hawaiian sovereignty but united by the vast agreement over historical injustice imposed on Native Hawaiians and the need for unity over things that we could agree upon now.

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

An “aloha economy” was suggested as an alternative model to conceptualize the preferred economy as a

substitute for the formula that revolves around ideas of “gross national product,” “gross domestic product,” capital accumulation, rates of investment and return, and other Western economic concepts. This “aloha economy” would create space in the Hawai‘i economic system for traditional interchange, for new values of environmental protection, for an attitude that in sharing, there is always enough, and for a respect for all our environmental elements, not as resources but as members of our Hawaiian family.

There was discussion of reconstructing a Hawaiian national economy through the eyes of a hungry child rather than through a capitalist lens of ever-expanding markets and resources. Under such an economy, one would approach the development of the national economy with a question—what does a child hunger for?—and build an economy around that question. A child hungers for healthy food, clothing, shelter, family, a pristine environment, education, good health, identity and culture, affection, love and laughter, dreams, goodness, challenge, friendship, safety, and an understanding of continuity from the past to the future. These basic needs should form the building blocks for an economic system.

Another discussion introduced the subject and definition of Hawai‘i’s deep culture, examining the foundations of the culture that permeates the underlying nature of society. One manifestation of the dominant deep culture can be described as DIE (domination, individualism, and exclusion), which runs today’s formal systems in economics, environmental management, education, law, judiciary, health systems, and politics. This deep culture is so pervasive that it can even invade family relationships and one’s home life. A second deep culture that operates predominantly in our informal systems is built around values of OLA (‘olu‘olu, lōkahi, and aloha) and

is present where communities and families reside. It is also sometimes found in churches, civic organizations and associations, and solemn or celebratory gatherings. As Hawai'i unfolds into its future, what should be the primary deep culture upon which we place our formal and informal systems—DIE or OLA?

Another subject was reframing the understanding of the constitutional history of Hawai'i. The general approach has been to understand Hawai'i's constitutional history as beginning with the first written constitution of 1840, followed by a series of new constitutions over the years. However, another view presented was that there is, and has been, only one fundamental constitution, which was defined by the pronouncement of the founder of the modern Hawaiian nation, Kamehameha I, who on his deathbed said, "E na'i wale no 'oukou, i ku'u pono 'a'ole pau."<sup>13</sup> This insistence on pono was later reiterated by his son, Kamehameha III: "Ua mau ke ea o ka 'āina i ka pono."<sup>14</sup> Pono is the constitution; the written documents that followed were merely different expressions of that fundamental constitution, moving from one based deeply in culture, customs, and ancient laws of proper behavior, to a yielding to this new technology of literacy and new concepts of governance, yet still hanging on to the central constitution of pono. Accepting this approach to Hawai'i's constitutional foundation, what are the implications for drafting a constitution that will bring us into the future? Are we obligated to replicate the forms of earlier constitutional drafts, or are we free to design our own expressions and visions of a pono Hawai'i, given our contemporary circumstances and hopes for the future?

These important deliberations occurred in small discussion groups, in lunch circles, or in caucuses. The relationships formed at the congregation have carried

forward among some of the participants and the general public. One example is the Hawai'i National Transitional Authority (HNTA), an unincorporated group of individuals gathering on the internet and in person to unify various positions of Hawaiian self-determination, to continue with discussions on these topics, and to work on specific issues to move Hawai'i forward.

### **The return from the journey**

Upon returning from the twenty-day journey, a product dressed as a constitution was displayed by Na'i Aupuni as the proposed end result of its travel. A ratification vote was to be taken two months following the close of the gathering.<sup>15</sup> A half month after the close of the gathering, Na'i Aupuni announced it would not pursue the ratification of the document, instead leaving that task to the members to pursue.<sup>16</sup> As of this writing, no ratification vote has been announced.

### **What Is in the Constitution of the Native Hawaiian Nation?**

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

### **The process**

The introductory part of this paper summarized the historical context of the Hawaiian sovereignty movement from various perspectives. The February 2016 'Aha convened by Na'i Aupuni must be understood as part of that broader process of the sovereignty movement. The



procedure followed in “rolling out” this gathering, its methods of operating, its rules of order, and the management of the meeting, are also to be understood in appreciating the product of this gathering.

#### *Media coverage*

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

#### *Rules of Order*

The congregation adopted *Robert’s Rules of Order: Newly Revised, 11th Edition*, and a slate of executive officers were elected. For a time, the inappropriate application of these rules of order discouraged deliberation and debate, resulting in discussions that were shut down once anyone “called the question” from the floor and a mere majority vote was taken to stop such debate. After this practice was protested by an appeal to the decision of the chair, the chair changed his practice to refusing to call for the question unless he saw no one coming to the microphone to engage in debate on a question. He did, however, terminate debate when there were no speakers either on the pro or con side of a question, although there may have been additional speakers still lined up to speak on the opposite side. This had the effect of cutting off debate, without a vote.

On the whole, there was a great divide between those familiar with *Robert’s Rules of Order* and those who were not. This divide allowed some to take advantage of their familiarity or ignorance to such a point that the process could, and at times did, become manipulative and abusive. The “crew training” for this journey was not adequate for the intensely deliberative nature of the congregation.

#### *Mediation*

This congregation was stuck between a gathering for deliberative purposes and one for negotiation, bargaining, and producing a constitutional document within an abbreviated time frame. The three “professional” mediators would have been well suited for a gathering for mediating or settling disputes or oppositional positions, but not for engaging a deliberative assembly. The mediators tried to facilitate a smooth and friendly conversation among the participants. However, they were neither trained nor experienced in bringing about respectful deliberation of important issues, nor, by their own admission, were they trained in *Robert’s Rules of Order*.

There should have been a clear distinction between the nature of deliberation and mediation, with more emphasis on hearing the voices of one another than to take a vote as soon as a popular majority could be obtained, and then move onward. The twenty-day time limit was an inherent obstacle to a deliberative body of this nature.

#### *Caucuses*

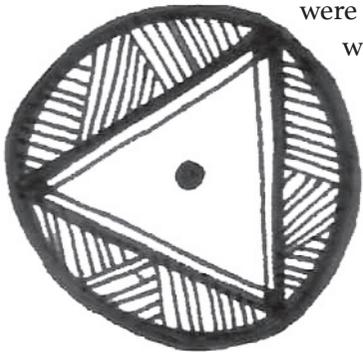
The congregation was divided into various caucuses spread across various rooms, including the dining areas. Each of the caucuses met simultaneously. If participants wanted to participate in more than one caucus, they were free to do so, but they could only be engaged in one caucus at a time. This made continuity of one’s

work impossible. For example, many people were interested in the Preamble caucus, the International caucus, and the Rights of Citizen caucus. All were in operation at the same time, along with all other caucuses. Leaving the Preamble caucus after it appeared that certain agreements and directions had been made, and then attending another caucus, could easily result in the agreements and direction in the Preamble caucus changing dramatically as other members attended and changed earlier agreements and directions. Because of this variability, the earlier deliberations in some caucuses were lost or re-threaded. There was no reliable continuity of a particular caucus, nor was there a matching of themes across caucuses.

The only assured continuity was the chair, who headed each caucus and was able to track the discussions and agreements made by a meeting of a caucus, which could still be changed by new participants dropping in to the next meeting without any understanding of prior discussions and agreements. Each chair was to meet with a drafting group for drafting and coordinating the work produced by the caucuses.

#### *Drafting committee*

When the drafting committee received the caucuses' reports, they were to apply appropriate "wordsmithing" skills appropriate for coordinating the various reports and to fit within a constitutional framework. At times, the drafting committee itself undertook to make substantive changes to the work, arguing that the changes were made because of their consultation with expert legal advice. The source of said legal advice was never revealed. This practice allowed for too much liberty on the part of the drafting committee.



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

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

#### *Attention to previous NHC work*

The congregation gave inadequate attention to the NHC's previous work toward an independence model and integration frameworks. The work of the NHC was a culmination of ten years of gatherings, a ratification referendum to form the convention, and an election of delegates to attend its convention. It held meetings throughout Hawai'i and in various states of the United States. Yet the Na'i Aupuni congregation allowed only a ten-minute presentation of the NHC product, with five minutes for questions and answers.

### Results

At the end of the Na'i Aupuni congregation, two documents were issued. The first was the Constitution of the Native Hawaiian Nation, which was adopted by a majority of the members by roll call (80 in support, 33 opposed, and a number who refused to dignify the process with a response but whose lack of response was added to the majority, making it 88). The second was the Declaration of the Sovereignty of the Native Hawaiian Nation, adopted by voice vote (see attachments 1 and 2).

### The product

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

### The preamble

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

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

*aspirations are set upon the promise of our unity and this Constitution.*

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

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

Comparing the language with that of NHC's July 2000 proposal for an independence constitution, we see a different approach of the constitutional framework (see attachment 3). It opens with an acknowledgment to the Source of all creation, speaks of a foundation of Aloha, invokes the word sovereignty, and proclaims the right to control our destiny. It next speaks of pono, followed by an expansion of partnership among the host people and of all others under an umbrella of human rights and

fundamental freedoms and between the human and the natural elements. It identifies as divine elements of nature, the sun, wind, sky, fresh and salt waters, land, and the people and their representations of life, change, fluidity, stability and humanity. Finally, it speaks of a government of, by, and for the people into the generations yet to come. Intertwined into this preamble are Hawaiian value statements as anchor marks.

Both the Na'i Aupuni congregation constitution and the NHC draft for an independent Hawai'i reflect a common expression of self-determination and a fundamental value of pono.

#### *The people*

The Na'i Aupuni document excludes from the members of this "nation" those people who do not have indigenous Hawaiian blood. As a "continuum" from our overthrown government to the present, this treatment leaves a large hole in our history. In the Hawaiian government, beginning with the reign of Kamehameha I, non-Native Hawaiians were part of the Hawaiian political, cultural, and civic body. Furthermore, one of the fundamental principles of indigenous peoples' rights in developing international standards is the right of self-definition, which includes the right of indigenous peoples to describe, for themselves, who are members of their political group.<sup>17</sup>

In taking a more exclusive approach, the Na'i Aupuni document is a turn away from Hawai'i's history, culture, and the more enlightened view of the rights of the Hawaiian people. It is a concession to the federal recognition standards of US policy, which generally limits the membership of its "recognized" nations to indigenous peoples only. It raises a central question of whether the constitution is written for the people, or to appease the

colonial government at the expense of the historical, political, and cultural integrity of the Hawaiian people.

By contrast, the NHC document addresses the distinction between the "host people and culture of this land," while also recognizing the human rights and fundamental freedoms to be accorded to every person of Hawai'i, in calling for a partnership. This language is more in line with a continuity of the Hawaiian nation.

#### *The name*

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

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

#### *Article 1: Territory and Land*

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

This present-day outlook is a one-dimensional statement of time and lacks a "looking back" claim of the territory of the Hawaiian government. It asserts no claim over Maunakea, Haleakalā, and other land areas of recent controversy. It makes no claim of waters, including the twelve miles beyond the shores of the islands, or the 200-mile exclusive economic zone. All the fisheries are left out, as are the subsurface minerals and the deep



ocean waters used for heat transfer, energy creation, potential for cage culture in the harvesting of fish, etc.

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

*The Native Hawaiian people have never relinquished their claims to their national lands. To the maximum extent possible, the Government shall pursue the repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.*

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

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

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

*The national territory [of Hawai‘i]<sup>18</sup> consists of the Hawaiian archipelago, stretching from Kure Atoll in the North to Hawai‘i in the South and all of those lands, atolls and other territories whose jurisdiction have been assumed by the United States of America previously claimed by Hawai‘i prior to the US 1893 invasion. Those territories previously part of the constitutional Hawaiian monarchy but which have subsequently been declared the territory or possession of a state other than the United States of America may be included within the territorial jurisdiction of Hawai‘i upon concluding negotiation with that claiming state and Hawai‘i.*

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

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

#### *Article 2: Citizenship*

This article deals with two subjects: who are the citizens, and who has the right to vote. It declares a citizen as being “any descendant of the aboriginal and indigenous people who, prior to 1778, occupied and exercised

sovereignty in the Hawaiian Islands and is enrolled in the nation.” Later in the document (Article 9, Section 2) it states, “The Nation has the inherent power to establish the requirements for citizenship in the Nation. The Nation reserves the right to modify or change citizenship requirements solely through a constitutional amendment.”

Section 2 of the document says citizenship in the United States is not to be affected by citizenship in the Native Hawaiian Nation. This is an interesting incursion into the domestic laws of the United States and how it treats its citizenry. It is also a curious statement in terms of what is left out, i.e., citizenship in a place other than the United States. This oddity becomes understandable when one appreciates that the purpose of Section 2 is to act as a “wink” to the reader to alleviate any concern about losing US citizenship—this is all part of a plan to fit within the US framework.

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

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

Citizenship shall consist of three general classes:

- *all Kanaka Maoli throughout the world who elect to be citizens;*
- *descendants of subjects of the Hawaiian Kingdom prior to July 4, 1894 who elect to be citizens; and*
- *all persons born in Hawai'i, and other individuals who have been a resident of Hawai'i for a*

*continuous period of five years prior to this constitution coming into force and effect, and who choose willfully to pledge their allegiance to Hawai'i.*

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

#### *Article 3: National and Official Language*

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

In referencing official languages, the NHC document states:

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

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

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

#### *Article 4: National Right to Self-Determination.*

The Na'i Aupuni congregation document makes a bold statement in declaring, “The Nation has the right to self-determination, including but not limited to, the



right to determine the political status of the Nation and freely pursue economic, social, cultural, and other endeavors.”

This language is aligned with that of international law, found in the “International Covenant on Economic, Social and Cultural Rights”<sup>19</sup> and the “International Covenant on Civil and Political Rights,”<sup>20</sup> where each states in its respective Article 1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

When considering the national context, the DOI final rule stipulates at 50.13(j) that the document “Not contain provisions contrary to Federal law.” Other than that general reference to federal law, the rule points to no specific federal law. It can be argued that the Na‘i Aupuni document’s claim to the right of self-determination is part of the body of federal law by virtue of the US participation in forming the foundational principle of the Charter of the United Nations, with the said charter being subsequently ratified by the United States and thus becoming part of the “law of the land” under Article VI of the US Constitution. It could also be argued that the principle of self-determination is founded on none other than the US Declaration of Independence, which is seen as a sacred document and as part of the unwritten constitution of the United States of America. Finally, it can also be argued that the United States has signed both of the aforementioned International Covenants, and the US Senate ratified the International Civil and Political Rights document in 1992. It has not yet ratified the Economic, Social and Cultural Rights document as of 2017.

The NHC document uses different language but with the same outcome as to proclaim self-determination: “We proclaim *our right to control our destiny*, to nurture

the integrity of our people and culture, and to preserve the quality of life that we desire.”

#### *Article 5: Collective Rights*

This article effectively declares the right of traditional and customary practice, recovery of bones and funerary objects, the protection of rights of Native Hawaiian tenants (thus excluding the rights of non-Native Hawaiians), and a claim for intellectual properties. However, it ignores the claim of self-definition, i.e., the right to determine its membership in the Hawaiian nation. This is a fundamental right fought for and won in the international development of indigenous peoples’ rights<sup>21</sup> and should have been added to the Na‘i Aupuni document.

#### *Article 6: Rights of the Individual*

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

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

Section 14 is an attempt to protect the people’s right to a healthy environment. It states, “All persons have the right to be free from exposure from harmful substances used in warfare, nuclear power plants, and waste materials.” This statement would benefit from a rewriting to be more broad and inclusive.<sup>22</sup>

In comparison, NHC’s proposed independence document has a much more expanded listing of rights, which

delineates such rights over thirty sections in Article 4 (Peoples' Rights and Protections).

*Article 7: Customary Rights*

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

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

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

*Article 9: Reservation of Rights and Privileges*

This article specifically protects the Hawaiian Homes Commission Act from "this Constitution or the laws of the Nation." However, it does not protect the Hawaiian Homes Land Recovery Act,<sup>23</sup> which protection is required by the preliminary and final rule of the DOI. As a result, this article fails to meet the minimum requirement of the final rule.

*Article 10: Kuleana*

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

*Article 14: Sovereign Immunity*

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

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

The concept of sovereign immunity is presently in flux, especially given the formation of the International Criminal Court and the setting aside of sovereign immunity, even to heads of states,<sup>24</sup> for crimes defined under that court's jurisdiction.<sup>25</sup> This author does not seek to clarify the extent of sovereign immunity



declared in the Na‘i Aupuni document and leaves its full meaning in uncertainty.

*Article 16: Oath of Office*

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

*Article 17: Removal from Office*

Members of the judiciary may be impeached when action is initiated by the president, subject to trial and two-thirds majority of the legislative body. The president can be impeached by a trial and a two-thirds majority of the legislative body. No power is given to the impeachment of a member of the legislature. There are no appeals to the lack of due process from any trial and vote. In a highly politicized body, and when no appeal is possible outside of the legislative process, this power of removal can become abusive or a means to remove the president or a member of the judiciary for decisions or actions that are unpopular. This article also omits any question of impeachment of the vice president. In the event of a president’s impeachment, Article 39 requires the vice president to undertake the position of the president. This article, in light of the other powers given the vice president, is a political time bomb. The vice president is given oversight of the Office of Citizenship and Elections (Article 23). The vice president is also charged with addressing the unique needs of the Kahiki citizenry

(Article 34)—those who live outside of Hawai‘i. Given such powers, the vice president is placed in a position of great potential conflict, not only in overseeing his or her own and other’s elections but also in creating a special relationship with the Kahiki citizenry that may, itself, outnumber the rest of the citizenry, or at least be large enough to sway an election or impeachment result. As the vice president would automatically assume the position of president in the event of the impeachment of the president, the conflict of interest would be unavoidable.

*Article 19: Judicial Autonomy*

The judiciary budget is protected from diminishment by the legislature unless it is a government-wide reduction, proportionately applied to the judiciary. Besides budgetary consideration, nothing more is said with regard to judicial autonomy, such as protecting the judicial decisions from political questions, i.e., laws of marriage, divorce, sexual identity, abortion, etc. This idea of budgetary autonomy by the judiciary, or any other agency or branch of government, is an incursion into the legislature’s control over the funds of the government and the executive’s responsibility to oversee the balanced administration of the government. One might ask, at what point does this diminishment of executive powers end? In the Na‘i Aupuni document, an appointed body of the executive now has independent control over its budget. The judiciary should be autonomous over its judicial duties, but it should be subject to the same budgetary policies and controls prescribed for the legislative body.

*Article 23: Elections*

This article discusses how voting lists are created and maintained, including giving procedures for voting—such as residency, age, disqualification, and recall requirements—to an Office of Citizenship and Elections. It would seem more appropriate to have the legislative

body undertake such procedures and criteria rather than placing such powers in the hands of an appointed body under the control of the vice president.

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

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

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

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

#### *Article 30: Legislative Elections*

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

#### *Article 31: Representative Count*

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

Hawai'i – 2  
 Maui – 1  
 Moloka'i – 1  
 Lāna'i – 1  
 Kaho'olawe – 1  
 O'ahu – 6  
 Kaula'i – 1  
 Ni'ihau – 1  
 Kahiki (outside of Hawai'i) – 8

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

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

This approach poses a major challenge to the concept of a representative form of government. The general understanding is that representation should be of people, not space or geography. The reason representation is based on the population is to bring a sense of equality among people who form the citizenry. For example, a citizen who comes from O'ahu would have the equivalent weight of representation as one who comes from Maui. However, the model articulated in the Na'i Aupuni



document disregards this logic. For instance, O‘ahu, with the vast majority of Native Hawaiians, would have a total of ten representatives while Kaho‘olawe, which has zero permanent residents, would have two representatives. This model has no semblance of representation based on population.

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

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

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

No explanation is given for this deviation that would allow a special interest group to have an advantage in representation within the legislative body. Other special interest groups could just as easily argue for their

interest—to represent Maunakea, Maunaloa, kūpuna, mānaleo, “pure” Hawaiians, practitioners of the ancient Hawaiian religions, and so forth. Giving one island special treatment for electoral representation is a violation of the fundamental concept of a representative democracy, an elevation of special interest above the masses, a movement from an egalitarian society to an elitist society, and a contradiction to the direction of the preamble of the first written constitution of Hawai‘i, which declares that all men are equal before the law.

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

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

#### *Article 33: Legislative Calendar*

The legislature shall convene on January 17 of each year and shall establish a calendar in coordination with cultural protocols. The Na‘i Aupuni document does not identify which cultural protocols, whether or not they would include the various phases of the moon and, if so, what moon calendar should be followed. This non-specificity gives rise to certain questions. For example, is an oli in the English language considered cultural protocol? Would an oli or mele in honor of Jesus Christ be appropriate? To call for cultural protocols without

providing clarification leads only to uncertainty. An example of the confusion and disarray that can come about with the call for cultural protocol in the constitution is what happened among the members of the Na'i Aupuni congregation prior to its first meeting. There were very passionate voices for and against “cultural protocols,” the selection of the protocols, the person to lead or guide such protocols, and the religious expression to be contained in such protocols. Even in what appeared to be protocols that come from a particular expression of religion, there was not agreement about which specific entity, deity, or representation would be used. Would it be appropriate to use the leaves and nuts of the kukui tree in the decorations or in the ceremony? Would the Christian members of the legislature agree to such a display of the kinolau of a Native Hawaiian religious deity? Which deity is to be called? Who is to settle the matter?

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

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

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

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

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



constitution to allow the judiciary to consider restorative justice but not make it a primary focus.

#### *Article 51: Ratification*

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

### Summary Critique

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

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

Hawai'i was placed on the list of non-self-governing territories in 1946 (UN General Assembly, 1946).<sup>26</sup> Self-determination, in the context of non-self-governing territories, should afford a people three options: independence, free association, or integration. The present document produced by Na'i Aupuni, styling itself a "constitution," fails to clearly set out a path for any of these options. Instead, it attempts to put these options under a single document. This constitution was supposed to go through a process of ratification, but it is unclear what is to be ratified. The document merely adds to the confusion.

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

But for Hawai'i, such treatment is inappropriate. Hawai'i's case is distinguished by the fact that Hawai'i was recognized as a nation under international law prior to the US takeover in 1893. There is clear evidence of aggression by the United States against that Hawaiian nation, as referenced in the 1993 Apology Resolution, in the 1946 submittal to the United Nations naming

Hawai'i as a non-self-governing territory, and in the December 1893 address to the joint houses of Congress by US President Cleveland.<sup>27</sup> Hawai'i's unique historical and contemporary backdrop cannot be equated to that of only indigenous peoples' rights. Hawai'i's rights include the full panoply of self-determination, without any limitations of US domestic laws or any claims of US exceptionalism from the general rules of international conduct.

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

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

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

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

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

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

Prior to and during the congregation, only the proposed rule adopted by the DOI was available. In that rule, there were eight criteria to be met before the DOI would consider the governing document to have been properly ratified (Office of the Secretary, Department of the Interior, 2015).<sup>28</sup>

Seven and a half months after the Na'i Aupuni congregation adjourned, the DOI's final rule was adopted.<sup>29</sup> The following analysis references the final rule to examine to what extent the Na'i Aupuni document that emerged from the congregation would meet the requirements for federal recognition. All further reference to the "rule" will indicate the final rule unless otherwise noted.

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



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

For a Native Hawaiian government to reestablish a formal government-to-government relationship with the United States, the rule (§50.12) requires that the Native Hawaiian government have a constitution or other governing document ratified both by a majority vote of Native Hawaiians and by a majority vote of those Native Hawaiians who qualify as HHCA Native Hawaiians. "Native Hawaiians" are defined as individuals who are descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawai'i. An "HHCA eligible Native Hawaiian" is a person who meets the definition of "Native Hawaiian" in the Hawaiian Homes Commission Act, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list, or receives benefits under the act.<sup>30</sup> The final rule uses the term HHCA Native Hawaiian as simply

"a Native Hawaiian individual who meets the definition of 'Native Hawaiian' in HHCA sec. 201(a)(7)."<sup>31</sup> To ensure an objective measure so that the vote represents the views of the Native Hawaiian community as a whole, the rule requires a minimum of thirty thousand affirmative votes from Native Hawaiian voters, including a minimum of nine thousand affirmative votes from HHCA Native Hawaiians.

The ratification provision of the Na'i Aupuni constitution fails to meet the final rule in that it simply calls for a majority vote of eligible citizens ages eighteen and older to adopt the constitution. The final rule does provide that a second vote may be taken once a first vote adopting the document as its constitution has been accomplished. In that second vote, however, separate vote tallies for HHCA Native Hawaiians and for all Native Hawaiian voters must be kept. As of this writing, nothing has happened to advance the document. The second criterion calls for verifying that participants were appropriate Native Hawaiians. DHHL records, or another state commission or agency that verifies descent, could be used for this purpose.

In the DOI's proposed rule, there was a specific requirement that Native Hawaiians, in order to qualify under the federal guideline, must be US citizens (Office of the Secretary, Department of the Interior, 2015).<sup>32</sup> The final rule made a significant revision by excluding that citizenship requirement.<sup>33</sup>

Many advocates for Hawaiian independence have been kept out of Hawai'i's political life because of their insistence that they are not US citizens, claiming instead their Hawaiian nationality. As a result, such advocates are not permitted to vote in US and state elections, including elections for the Office of Hawaiian Affairs.

They cannot hold political office in the state government. These advocates also run into difficulty when applying for employment, not being able or willing to claim US citizenship or to “produce papers” to show they are lawfully in the United States and able to obtain employment. They are not able to meet the driver’s license requirements, as well as the federal security requirement for flying interisland. The change in citizenship requirements in the DOI’s final rule sheds new light on the necessity of US citizenship for Native Hawaiians and may indicate a turn away from this continued marginalization of such Hawaiian nationals from the centers of Hawai’i society.

The third criterion of the final rule, found at §50.13, is not met by the Na’i Aupuni document. Table 1 (pp. 112–13) summarizes how the Na’i Aupuni document aligns with §50.13.

This initial analysis demonstrates that the proposed Constitution of the Native Hawaiian Nation contains significant contradictions to and violations of the DOI final rule. It is therefore fair to conclude that the Na’i Aupuni congregation did not produce a document that would meet the test of the DOI for US federal recognition.

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

## Lessons Learned

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

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



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

REQUIREMENT OF DOI’S FINAL RULE	CRITERION MET?	COMMENTS
State the government’s official name	No	There is no name in the Na‘i Aupuni document for the government.
Prescribe the manner in which the government exercises its sovereign powers	Yes	This concept is explained throughout the document.
Establish the institutions and structure of the government, and of its political subdivisions (if any) that are defined in a fair and reasonable manner	Uncertain	The method of selecting members of the legislative authority may be questioned, and the manner of selecting representatives could be considered unfair and unreasonable. The representative count (per Article 31) is not fair and reasonable in several ways: It fails to meet the one-person, one-vote standard, it allows for representation by land mass, and it makes exception for representation from Kaho‘olawe.
Authorize the government to negotiate with governments of the United States, the State of Hawai‘i, and political subdivisions of the State of Hawai‘i, and with nongovernmental entities	Yes, but introduces other concerns	While this criterion is met under Article 13 of the Na‘i Aupuni document, the article exceeds the requirement with the addition of “other sovereign.” This appears contrary to federal policy, under which only the federal government is entitled to engage with other sovereigns, as in foreign countries.
Provide for periodic elections for government offices identified in the governing document	Partially	This requirement is met by Article 29 for the legislative body and Article 38 for the executive officers, but fails in the design of the judiciary.
Describe the criteria for membership: <ol style="list-style-type: none"> <li>1. Permit HHCA-eligible Native Hawaiians to enroll</li> <li>2. Permit Native Hawaiians who are not HHCA-eligible Native Hawaiians, or some defined subset of that group that is not contrary to Federal law, to enroll</li> <li>3. Exclude persons who are not Native Hawaiians</li> <li>4. Establish that membership is voluntary and may be relinquished voluntarily</li> <li>5. Exclude persons who voluntarily relinquished membership</li> </ol>	Partially	Most criteria are met; however, provisions for (4) are not included in the the Na‘i Aupuni document, and provisions for (5) are not specified.

REQUIREMENT OF DOI'S FINAL RULE	CRITERION MET?	COMMENTS
Protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA (Hawaiian Homes Land Recovery Act)	No	The HHLRA protection is not included in the Na'i Aupuni document.
Protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers	No	The Na'i Aupuni document violates the requirement to provide free counsel for a criminal defendant and permits imprisonment for debt in cases of fraud (Article 6).
Describe the procedures for proposing and ratifying amendments to the governing document	Yes	Criterion is met.
Not contain provisions contrary to federal law	No	The Na'i Aupuni document fails on numerous counts, such as the right to self-determination; imprisonment for debt (fraud cases); engagement in treaties, compacts, and other arrangements with other sovereigns; and violation of the one-person, one-vote standard.



the legislature and ended up financing the process for almost eight million dollars.

Third, a convention of Native Hawaiians should be formed around processes of deliberation, not merely counting votes or trading favors—especially when attempting to resolve long-standing issues such as human rights, fundamental freedoms, historical injustice, future planning, and the choice of remaining part of the United States, taking an independence route, or examining other possibilities of political relationships. Such

deliberation requires adequate time and patience, taking in the voices from both within the convention and from the affected and interested public. Time is the greatest resource that must be made available to the convention process. Twenty days of deliberation for the February 2016 congregation was inadequate and seemed to reflect a rushed and inexperienced agenda and perhaps a predetermined outcome. For a successful convention, there must be liberal opportunities for recess and consultation with the community because it will eventually be the community that will have to approve of the deliberative results.



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

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

## Conclusion

The failure of the Kana‘iolowalu process is an opportunity for us to consider fundamental questions of self-determination: Who is the “self,” and what is the full range of choices that “determination” should represent? Are we

seeking a government of, for, and by the people? Or do we aspire for a government of an elite class of ali‘i, or a monarchical family? Who is the Hawaiian political self?

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

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

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

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

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

Life today is far more complicated than it was 120-plus years ago. Our conditions have changed under years of colonization under the United States. Its military occupation has done major ecological damage to our lands. Its control over our education system has erased fundamental aspects of our national consciousness, our native language, our cultural practices, and our

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

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

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



ATTACHMENT 1

## CONSTITUTION OF THE NATIVE HAWAIIAN NATION

*Proposed constitution, produced by the Naʻi Aupuni gathering, March 2016*

### PREAMBLE

We, the indigenous peoples of Hawaiʻi, descendants of our ancestral lands from time immemorial, share a common national identity, culture, language, traditions, history, and ancestry. We are a people who Aloha Akua, Aloha ʻĀina, and Aloha each other. We mālama all generations, from keiki to kupuna, including those who have passed on and those yet to come. We mālama our ʻĀina and affirm our ancestral rights and Kuleana to all lands, waters, and resources of our islands and surrounding seas. We are united in our desire to cultivate the full expression of our traditions, customs, innovations, and beliefs of our living culture, while fostering the revitalization of ʻŌlelo Hawaiʻi, for we are a Nation that seeks Pono.

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

UA MAU KE EA O KA ʻĀINA I KA PONO.

### CHAPTER I - OF THE NATION

#### Article 1 - Territory and Land

1. The territory of the Native Hawaiian Nation is all lands, water, property, airspace, surface and subsurface rights, and other natural resources, belonging to, controlled by, and designated for conveyance to and for the Hawaiian Nation.
2. The Native Hawaiian people have never relinquished their claims to their national lands. To the maximum extent possible, the Government shall pursue the repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.

### **Article 2 - Citizenship**

1. A citizen of the Native Hawaiian Nation is any descendant of the aboriginal and indigenous people who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands and is enrolled in the nation.
2. Citizenship in the Native Hawaiian Nation shall not affect one's citizenship in the United States.
3. All citizens that have attained the age of eighteen years are eligible to vote.

### **Article 3 - National and Official Languages**

1. 'Ōlelo Hawai'i is the National language.
2. 'Ōlelo Hawai'i and English shall be official languages.
3. The Government shall respect the right of its citizenry to understand the actions and decisions of its Government, and endeavor to communicate effectively with the citizenry while supporting the national language.

## **CHAPTER II - DECLARATION OF RIGHTS**

### **Article 4 - National Right to Self-Determination**

The Nation has the right to self-determination, including but not limited to, the right to determine the political status of the Nation and freely pursue economic, social, cultural, and other endeavors.

### **Article 5 - Collective Rights**

1. The Native Hawaiian people shall have the right to honor our ancestors; maintain, protect, and repatriate iwi kūpuna, funerary, and cultural objects; protect sacred places; and protect the knowledge and wisdom from traditional and customary sources.
2. The rights of Native Hawaiian tenants in the 'Āina (land, water, air, ancestor) and ahupua'a, shall not be abridged.
3. The Native Hawaiian people have the right to maintain, control, protect, and develop



their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions.

**Article 6 - Rights of the Individual**

1. No person shall be deprived of life, liberty, or property without due process of law.
2. All people shall be guaranteed equal protection of the law.
3. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue except upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized.
4. No person shall be twice put in jeopardy for the same offense, nor be compelled to be a witness in a criminal case against himself or herself.
5. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of not less than 12 jurors of his or her peers; to be informed of the nature and cause of the charges against him or her; to be confronted with the witnesses against him or her; to have a compulsory process for obtaining witnesses in his or her favor; to have assistance of counsel for defense at his or her own expense.
6. Every person is presumed innocent until proven guilty by law.
7. Bail shall be set by the judicial authorities and shall be available to all defendants, except where the granting of bail would constitute a danger to the community. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
8. The writ of habeas corpus (of the body) shall be granted without delay and free of cost. The privilege of the writ of habeas corpus shall not be suspended.
9. There shall be no imprisonment for debt, except in cases of fraud.
10. No ex post facto law, nor any law impairing the obligation of contracts, shall be imposed.
11. Every citizen shall have the right to bear arms.
12. Citizens have a right to traditional medicines and to maintain their health practices,

including the conservation of their vital medicinal and cultural plants, animals, and minerals.

13. Every child citizen has the right to parental care, or to family or appropriate alternative care, when removed from the family environment; to basic nutrition, shelter, basic health care services, and social services; and, to be protected from maltreatment, neglect, abuse, or degradation.
14. All persons have the right to be free from exposure from harmful substances used in warfare, nuclear power plants, and waste materials.

#### **Article 7 - Customary Rights**

1. The Native Hawaiian people reserve all rights and responsibilities customarily and traditionally exercised for subsistence, cultural, medicinal, and religious purposes.
2. The Native Hawaiian people have the right to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies.
3. Ola i ka wai, water is life; and the Native Hawaiian people shall exercise traditional and customary stewardship of water. The Nation shall protect, control, and regulate the use of water resources under its jurisdiction for the benefit of its people.
4. The Nation has a right, duty, and kuleana, both individually and collectively, to sustain the 'Āina (land, kai, wai, air) as an ancestor, source of mana, and source of life and well-being for present and future generations.

#### **Article 8 - Government Prohibitions**

The Government shall not:

1. Pass any law that abridges a citizen's right to make end of life decisions, be treated with dignity, and a humane death;
2. Take private property for public use without just compensation;
3. Make any law respecting the establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people to peaceably assemble; or



4. Make any law with the intent to suppress traditional Native Hawaiian religion or beliefs.

**Article 9 - Reservation of Rights & Privileges**

1. All rights, privileges, and powers not articulated in or pursuant to this Constitution shall be reserved in common to the citizens.
2. The Nation has the inherent power to establish the requirements for citizenship in the Nation. The Nation reserves the right to modify or change citizenship requirements solely through a constitutional amendment.
3. Any benefits accorded to the citizenry, by virtue of their status as citizens of the United States, shall not be diminished or impaired by the provisions of this Constitution or the laws of the Nation.
4. The rights of beneficiaries of private and other trusts, programs, or services shall not be diminished or impaired by the provisions of this Constitution or the laws of the Nation.
5. The rights of beneficiaries of the Hawaiian Homes Commission Act, 1920, as amended, shall not be diminished or impaired by the provisions of this Constitution or the laws of the Nation. The kuleana toward these beneficiaries is affirmed.

**CHAPTER III - PURPOSE AND PRINCIPLES OF GOVERNMENT**

**Article 10 - Kuleana**

1. The kuleana (right; responsibility; jurisdiction) of Government is to ‘Āina (land; water; air; ancestor); citizens; and Ke Ao Hawai‘i (All things Hawaiian).
2. The Government shall provide for the prudent stewardship of the ‘Āina as the source of life and well-being, as expressed through the values reflected in the ‘Ōlelo No‘eau: He ali‘i ka ‘Āina, he kauā ke kanaka.
3. The Government shall provide for the prudent stewardship of water resources, as expressed through the values reflected in the ‘Ōlelo No‘eau: Ola i ka wai.
4. The primary purpose of Government is to meet the needs and priorities of its citizens, protect their rights, and care for the ‘Āina.

5. The Government shall ensure the liberty of the citizens and groups of citizens to mālama kuleana and pursue happiness.
6. The National Government shall empower kuleana-based governance, and support home rule and local governance.
7. The Government shall provide support to the citizens for housing, healthcare, food, and education.
8. The Government shall prioritize Hawaiian culture, history, language, traditions, customs, knowledge, and ancestral wisdom.
9. The Government shall pursue the repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.
10. The Government shall ensure reasonable traditional and customary access to water on National lands.
11. The Government shall manage the Nation's assets in a fiscally responsible manner, balancing the needs of today with the needs of future generations.
12. The Government shall enact laws, create policies, and act in such a way that is resonant with and honors the traditions, customs, usage, and practices of the nation.
13. The Government shall protect and seek repatriation of iwi kūpuna, cultural objects, sacred places, and knowledge and wisdom from traditional and customary sources.
14. The Government shall seek repatriation of iwi kūpuna and cultural objects.
15. National Government shall advocate for Native Hawaiian rights, services, trusts, and programs with other sovereigns, institutions, and organizations.
16. The Government shall focus on restorative justice principles that follow on the traditions of pu'uhonua, mālama, and ho'oponopono.
17. The Government recognizes the rights of traditional and customary units of Native Hawaiian society, especially that of 'ohana.
18. The Government shall provide for a certification process to enable a group of citizens to assert their collective kuleana in service of the nation.



19. Consistent with the first right articulated by Ka Mō‘ī Kamehameha in the Kānāwai Māmalahoe, the Government shall promote the safety and security of all citizens and the Nation.

**Kānāwai Māmalahoe - The Law of the Splintered Paddle:**

E nā kānaka,  
*To my people,*

E mālama ‘oukou i ke akua  
*honor the divine*

A e mālama ho‘i ke kanaka nui a me kanaka iki;  
*And respect all people, great and humble*

E hele ka ‘elemakule, ka luahine, a me ke kama a moe i ke ala  
*Let the elderly and the child lie down by the roadside*

‘Aohe mea nāna e ho‘opilikia.  
*And let no one cause them harm.*

**Article 11 - Seat of Government**

The Seat of Government shall be located in the Hawaiian Islands.

**Article 12 - Rule of Law**

The Government shall be bound by the Constitution, laws of the Nation, the customs of the Native Hawaiian people, and the rule of law.

**Article 13 - Foreign Relations**

1. The President shall have the power to conduct negotiations and enter into treaties, compacts, and other agreements with other sovereigns, political sub-divisions of such sovereigns, or other organizations and entities for the benefit of the Nation.

2. Treaties and compacts shall be subject to a two-thirds ratification by the Legislative Authority.

#### **Article 14 - Sovereign Immunity**

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

#### **Article 15 - Appointments**

1. Judicial Authority appointments by the President are subject to confirmation by simple majority of the Legislative Authority.
2. The President may appoint members of the Legislative Authority in the event of a vacancy; except that where more than two (2) years remain in the term, an election shall be held to fill the vacant seat.

#### **Article 16 - Oath of Office**

1. Every public official, before entering upon the kuleana of their respective office, shall take and subscribe to the following oath in either 'Ōlelo Hawai'i or English language: I do solemnly swear that I will faithfully support and defend the Constitution of the Nation, and conscientiously and impartially discharge my duties as \_\_\_\_\_ to the best of my abilities.
2. No person shall be compelled to take an oath or make an affirmation that is contrary to their religion or belief.

#### **Article 17 - Removal From Office**

1. Impeachment proceedings and removal of judicial appointments may be initiated by the President subject to a trial conducted by the Legislative Authority and two-thirds majority vote of the body.
2. The Legislative Authority may, following a trial to determine cause, impeach the President through two-thirds majority vote of the body.



**Article 18 - Office Limitation**

1. Public officials may not hold any other position within any branch of the Government, or within any other government, while holding an elected office.

**Article 19 - Judicial Autonomy**

Legislative Authority may not diminish the Judicial budget, without the consent of the Judicial Authority, except where proportionate government-wide reductions are in effect.

**Article 20 - Special Session**

The President may call a special session of the Legislative Authority.

**Article 21 - Moku Council**

1. Within four (4) years of ratification of the Constitution, there shall be established within the Office of the President, a Moku Council with no less than nine (9) members.
2. The Moku Council shall advise the President on the needs of its respective districts, the delivery of relevant services to its districts, and on other decision-making that would benefit from the Moku Council's place-based expertise.
3. The President shall appoint one (1) representative from each district, until such time as the Moku Council shall recommend a statutory process of determining council membership.
4. The Moku Council shall elect, from among its members, a representative to serve in the Executive Cabinet.

**Article 22 - Local Government**

1. The Legislative Authority may create political subdivisions within the Nation and provide for the government thereof.
2. Each political subdivision shall have and exercise such powers as conferred under general laws.

3. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law.

#### **Article 23 - Elections**

1. The Vice President shall establish an Office of Citizenship and Elections whose responsibilities shall include, but are not limited to, the following: (1) Enroll, manage, and maintain the list of citizens of the Hawaiian Nation; and (2) establish procedures for voting that includes residency, age, disqualification, and recall requirements.
2. The Office will establish and execute a process to enroll, create, and maintain a list of Nation citizens.
3. Office will administer elections for the Legislative Authority and President and Vice President, including procedures to demonstrate residency.
4. All citizens who have attained the age of eighteen (18) shall be allowed to vote for the seats associated with their permanent residency, where citizens may provide only one permanent residency. Kaho'olawe residency may be established by demonstrating at least four (4) consecutive years of stewardship to the island.
5. Citizens shall be automatically registered to vote upon reaching the age of eighteen (18), unless disqualified by law.
6. The Legislative Authority shall enact campaign finance laws on the financing of political candidates seeking public office. These laws shall include, but are not limited to: (1) ceiling limits on public funding by political entities; (2) public disclosure of contributions; (3) contribution limits; (4) corporate donation prohibitions; and (5) expenditure limits.

#### **Article 24 - Recall of Elected Officials**

All elected officials are subject to recall for cause, which may be initiated by signature of twenty-five (25) percent of the votes cast in the last election for that office. Any recall is subject to the majority vote of eligible votes cast for the respective office.



**Article 25 - Statutory Initiative and Referendum**

1. The Legislature may vote by two-thirds of the body to send questions directly to the citizenry through a ballot referendum.
2. The citizenry may, by petition signed by at least ten (10) percent of the number of voters in the last Executive election, place a statutory amendment on the ballot for direct vote.

**Article 26 - Law Enactment**

Bills passed by the Legislative Authority are subject to the veto of the President. In the case of a veto, the Legislative Authority may override the veto with two-thirds vote of the body.

**CHAPTER IV - LEGISLATIVE AUTHORITY KULEANA**

**Article 27 - Legislative Power**

1. The legislative power shall be vested in the Legislative Authority, which shall be unicameral and consist of Representatives.
2. Legislative Authority shall have the power to pass legislation with regard to any matter.

**Article 28 - Legislative Qualifications**

1. Any person who is a citizen and has reached the age of eighteen (18) may be elected.
2. Representatives shall be citizens, eighteen (18) years of age, and reside in the district at the time of election, and for the duration of their time in office.

**Article 29 - Term of Office for Representatives**

Representatives shall be elected for four years; no Representative shall serve more than a total of twelve (12) years.

### **Article 30 - Legislative Elections**

Representatives shall be elected by voters who have established residency in the respective district.

### **Article 31 - Representatives Count**

1. The initial Legislative Authority shall be comprised of forty-three (43) land-based and population-based Representatives to be elected at-large from the legislative districts.
2. Following the first election, the individual districts shall create sub-districts for their district seats and stagger the terms of office.
3. Reapportionment may be done through constitutional amendment or convention.
4. Each Legislative district shall have the following number of Representatives based on the population of each district:

Hawai'i - 2;  
Maui - 1;  
Molokai - 1;  
Lāna'i - 1;  
Kaho'olawe - 1;  
O'ahu - 6;  
Kaua'i 1;  
Ni'ihau - 1;  
Kahiki - 8.

5. Each legislative district shall also have the following number of Representatives based on the land for each district:

Hawai'i - 4;  
Maui - 4;  
Molokai - 2;  
Lāna'i - 1;  
Kaho'olawe - 1;  
O'ahu - 4;  
Kaua'i - 4;  
Ni'ihau - 1;  
Kahiki - 0.



**Article 32 - Representative Privilege**

Members of the Legislative Authority shall be privileged from suit for any speech or debate spoken during assembly or in execution of their duties.

**Article 33 - Legislative Calendar**

The Legislative Authority shall establish a calendar in coordination with cultural protocols, which shall convene on January 17 of each year.

**CHAPTER V - EXECUTIVE AUTHORITY KULEANA**

**Article 34 - Executive Power**

1. The executive power shall be vested in the President, who shall execute the laws of the Nation.
2. The President may: Issue executive orders; prepare the national budget; receive resources, assets, or gifts on behalf of the Nation; recommend legislation; grant reprieves and pardons, except in cases of impeachment; and contract to effectuate the law.
3. The President shall have the authority to appoint all executive officials of the Nation, except elected officials or as otherwise provided by law.
4. The President shall pursue the acquisition of lands for the Nation to meet the needs and aspirations of the citizenry.
5. The President may establish Executive Departments that meet the needs of the Nation, with the priority to deliver services addressing disparate needs in the community.

**Article 35 - Executive Elections**

The President and Vice-President shall be elected in an election.

**Article 36 - Qualifications of Executives**

No person shall be eligible to hold the office of the President and Vice-President unless they have attained the age of thirty (30) years and have resided in the Hawaiian Islands for not less than ten (10) years immediately preceding the election.

**Article 37 - Responsibility of the Vice-President**

There shall be a Vice-President to serve in the Executive Cabinet who shall have the kuleana for the unique needs of the Kahiki citizenry and other responsibilities as assigned by the President.

**Article 38 - Term of Office for Executives**

The President and Vice-President shall be elected for a term of four years.

**Article 39 - Line of Succession**

In the event of vacancy, impeachment, death, resignation, or the absence of the President from the Nation, the Vice President will assume office of the President followed by other officials as prescribed by law.

**Article 40 - Continuity of Governance**

The President will maintain the immediate past President as a counselor to ensure continuity of governance.

**Article 41 - The Executive Cabinet**

1. The President shall convene an Executive Cabinet comprised of the Vice-President, one (1) representative from the [Cultural, Spiritual Hui], one (1) representative from the [Hui of the Royal Organizations], one (1) representative from the Moku Council, and the Heads of Executive Departments.
2. Heads of Executive Departments shall be nominated by the President, then presented to the Legislative Authority for confirmation or rejection by a simple majority.

**Article 42 - The [Cultural, Spiritual Hui]**

There shall be a [Cultural, Spiritual Hui], which shall elect within ninety (90) days of the election of a new President, by its own internal processes, a representative to serve in the Executive Cabinet.



**Article 43 - The [Hui of Royal Organizations]**

There shall be a [Hui of the Royal Organizations], which shall elect within ninety (90) days of the election of a new President, by its own internal processes, a representative to serve in the Executive Cabinet.

**CHAPTER VI - JUDICIAL AUTHORITY KULEANA**

**Article 44 - Judicial Power**

The judicial power shall be vested in the Judicial Authority.

**Article 45 - Judicial Authority Qualifications**

The President shall establish qualifications with the consent of the Legislative Authority for Justices and Judges.

**Article 46 - Judicial Authority Primary Focus**

The primary focus of the Judicial Authority shall be restorative justice.

**Article 47 - Judicial Authority Structure**

1. The Chief Justice is the head of the Judicial Authority and presides over the courts. The Chief Justice may establish courts, tribunals, offices, and forums of general or exclusive jurisdiction as prescribed by law, and may account for customary practices of the Native Hawaiian people.
2. The scope of judicial power shall encompass all cases, in law and equity, arising under this Constitution, the laws of the Nation, treaties, compacts, and agreements made, or which shall be made, under the Nation's authority.

**Article 48 - Term of Office for Justices and Judges**

1. The Judicial Authority shall consist of:
  - a. Not less than three (3) Justices with life-time appointments; and

- b. Judges serving a term of no less than ten (10) years.
2. The Chief Justice is elected by an absolute majority of Justices.

## CHAPTER VII - AMENDMENTS AND CONSTITUTIONAL CONVENTION

### Article 49 - Amendments

1. Proposed amendments to this Constitution may be initiated by any of the following methods:
  - a. A resolution of the Legislative Authority adopted by two-thirds affirmative votes;
  - b. A valid petition submitted to the Legislative Authority signed by not less than fifteen (15) percent of the registered voters of the Nation in the last executive election; or
  - c. A constitutional convention.
2. The Legislative Authority shall establish the format and rules for adopting amendments.

### Article 50 - Constitutional Convention

1. A Constitutional Convention shall be held within four (4) years of the establishment of the Moku Council and appear as a ballot question for citizenry at least every ten (10) years after the Government's formation. The citizenry may, through a constitutional initiative, call for such a convention earlier.
2. The Legislative Authority shall establish the format and rules for convention participation with elected delegates from each legislative district.

## CHAPTER VIII - RATIFICATION

### Article 51 - Ratification

The present Constitution is subject to a ratification vote.

1. A ratification election shall be held for the purpose of ratifying this Constitution.
2. The Constitution shall become effective upon approval by a majority vote of individuals who are eligible to be citizens, have attained the age of eighteen (18), and cast a ballot in the ratification election.



ATTACHMENT 2

## **Declaration of the Sovereignty of the Native Hawaiian Nation An Offering of the ‘Aha**

*Proposed declaration, produced by the Na‘i Aupuni gathering, March 2016*

Mai ka pō a ke ao (from the darkness to the dawn), the origin of all life, our ancestral lines emerged from this ‘āina. Our genealogical cosmology intertwined our very existence to the symbiotic kinship of our people and this ‘āina. The ancients rooted themselves here in comprehensive communal family systems inseparable from this ‘āina. The skillfully navigated migrations of subsequent ancestral lines brought forth the complex kapu system of divine ali‘i (lineal chiefs) to enforce the structure and kuleana (responsibility) of our population to cultivate and maintain the health and bounty of this ‘āina.

Our society evolved into three kuleana: nā ali‘i (chiefs) led and protected our lāhui (nation); nā maka‘āinana (common people) nurtured and fed our lāhui; and nā kaula and kāhuna (experts) maintained and perpetuated our ‘ike (wisdom). While the traditional structure has shifted over time, these three essential kuleana continue to exist today.

As we find our way forward as a lāhui, we will forever aloha our ali‘i of old for their example and dedication to purpose and to our people. Their resilience and adaptability in a changing world enabled them to mālama (care for) their kuleana to protect our people’s ability to mālama their kuleana to nurture, feed and perpetuate our ‘ike in accordance with our traditions and our ‘āina.

In the spirit of pono and aloha, we the ‘Aha gathered in February 2016, bring forward the following Historical Facts as some of the basis of the enduring Sovereignty of our nation, and our dedication to the present and future needs of our lāhui.

The arrival of the first Westerners brought the realities of a larger foreign world beyond to our shores. As King Kamehameha I unified the Hawaiian archipelago under one rule in the Kingdom of Hawai‘i, the ali‘i became increasingly aware of a threat to our ‘āina, our lāhui, and way of life.

King Kamehameha III, Kauikeaouli, established the Kingdom of Hawai‘i as a constitutional monarchy, as a strategy to protect our lāhui from efforts to colonize our beloved ‘āina under the disastrous policies of Imperialism and Manifest Destiny. Kamehameha III fulfilled his kuleana to the lāhui and secured recognition in the world of the Kingdom of Hawai‘i, as an independent,

legitimate and Sovereign State. The treaties of our Kingdom are a testament to how the world, including the United States, viewed us as an equal sovereign in the family of nation-states.

Under the leadership of King Kamehameha III, our people flourished in education and achieved an unparalleled literacy rate. Kamehameha IV, and his Queen Emma, dedicated themselves to advancing education and providing for the expanding health needs of the lāhui, as leprosy and other foreign diseases decimated our population. Kamehameha V began a revival of traditional practices, and repealed laws banning the kāhuna. During his reign, he facilitated the recognition and use of la'au lapa'au.

King Lunalilo led our lāhui to more democratic institutions, and was the first ali'i to be elected King. King Kalākaua led us to further affirm our place in the world by joining the Universal Postal Union in 1885, and building our first royal palace. Our beloved Queen Lili'uokalani will forever be revered for her personal sacrifice and dedication to protecting the rights of our lāhui.

In our efforts to move forward as one lāhui, and recognizing our long and glorious history in Hawai'i since time immemorial, our lāhui continues to struggle to reconcile our present from a past where our Kingdom of Hawai'i was illegally overthrown. We endeavor to share our true history so the world may know and come to understand our cause towards self-determination through self-governance.

As foreigners came to our shores, a group representing business interests came to be known as the Hawaiian League. They organized to gain control of our lands for commercial purposes, and sought annexation of our islands to the United States.

In 1887, members of the Hawaiian League, backed by the Honolulu Rifles forced King Kalākaua to sign a new constitution, known as The Bayonet Constitution, stripping executive authority and imposing property and income requirements that reduced the electoral power of the native population while extending suffrage to European and American foreigners.

In 1893, Queen Lili'uokalani sought to restore what was lost to our lāhui through the promulgation of a new constitution. An agent of the United States conspired with local insurgents to the overthrow the lawful government of our Kingdom.

In 1893, the United States government played a fundamental role in our loss of control in our islands, when 162 troops from the U.S.S. Boston marched on 'Iolani Palace in support of the overthrow of the Hawaiian Kingdom government. It also subsequently recognized the dominion of the provisional government.



Upon investigation by his special commissioner, Senator James Blount, on December 18, 1893, U.S. President Grover Cleveland, condemned the overthrow of the Hawaiian Kingdom as “an Act of War” and recommended restoration of Queen Lili‘uokalani to the U.S. Congress.

On July 4, 1894, the Republic of Hawai‘i was proclaimed, over the objections of Queen Lili‘uokalani and the Native Hawaiian people. Soon after, foreign powers that once recognized the Kingdom of Hawai‘i, recognized the legitimacy of the Republic.

On June 16, 1897, with Secretary of State John Sherman, the Hawaiian Annexation Commissioners of the Republic of Hawai‘i signed a Treaty for Annexation with the United States. Led by the Hui Aloha ‘Āina and Hui Kalai‘āina, our people rallied against ratification of the Treaty and restoration of our Queen by signing the Kū‘e petitions. Because of that effort, the Treaty of Annexation failed to be ratified by the U.S. Senate.

In 1898, Hawai‘i was unilaterally annexed to the United States without a Treaty, and against the expressed will of the Native Hawaiian people and others, through a Joint-Resolution. In 1900, the United States passed the Organic Act, creating the territorial government, and restoring to the lāhui the power to vote in the elections of local offices. Our lāhui was kanalua (of two minds) on whether to exercise that right to vote. True to our culture, we once again looked to our Queen Lili‘uokalani for guidance. On June 9, 1900, she said,

“Aloha to all of you: I did not think that you, the lāhui, were still remembering me, since ten years has passed since I became a Mother for you, the lāhui, and now the United States sits in power over me and over you, my dear nation. What has befallen you is very painful to me but it could not be prevented. My mind has been opened (ho‘ohamama ia) because of what the United States has now given to the lāhui Hawaii.

Here is what I advise - that the people should look to the nation’s leaders, Mr Kaulia and Mr Kalauokalani. A great responsibility has fallen upon them to look out for the welfare of the lāhui in accordance with the laws that the United States has handed down, to ensure that the people will receive rights and benefits for our and future generations, and I will also derive that one benefit (ie, the welfare of the people). We have no other direction left, except this unrestricted right (to vote), given by the United States to you the people.

Grasp it and hold on to it; it is up to you to make things right for all of us in the future.” (as reported in the Ke Aloha ‘Āina newspaper, and translated and printed in the Oiwi Journal Vol. 2, page 127.)

Our lāhui followed our beloved Queen's words, and controlled territorial politics for the first 30 years. We elected Robert Wilcox and Prince Jonah Kūhio Kalaniana'ole to serve as our first and second elected delegates to represent Hawaii in the United States Congress. Prince Kūhio sponsored the first bill for statehood in the Congress in 1919.

Over time, the United States supported a mass in-migration of American settlers to our island home, primarily through the expansion of a military presence in Hawaii.

In 1946, Hawai'i was included on the UN's list of non-self-governing territories scheduled for decolonization. In 1959, Congress enacted the Hawai'i Admissions Act, and allowed all voters, including military personnel, to consider the question of statehood. The State of Hawai'i was ratified, and Hawai'i was removed from the UN list. The next year, the UN adopted the Declaration on Decolonization, requiring that full independence be an option for peoples to consider.

The United States military's actions have caused irreparable harms to our natural and social environment including: 49 years of bombing runs on our island of Kaho'olawe; ongoing use of vast areas of our limited land for military purposes, including Mākua Valley and Pōhakuloa; ongoing devastation to our marine ecosystems from biennial RIMPAC exercises in our Hawaiian waters; and ongoing economic and social impacts of United States and government subsidized housing, for nearly 49,000 United States military personnel in Hawai'i.

On Nov. 3, 1993, the United States Congress officially apologized for its role in the overthrow of the Kingdom of Hawai'i, and committed to a process of reconciliation with the Native Hawaiian people. Public Law 103-150 was signed into law by President William Clinton.

We declare that these are but a few of the truths about the injustices our people and lands have endured, including the banning of our Native tongue, since foreigners came to our islands. Yet, in the triumph of our resilience, we have pressed for justice through more than a century of nonviolent resistance to oppression, guided by the example of our great Queen Lili'uokalani who, faced with the overthrow of her government, chose the path of non-violence "to avoid bloodshed."

Today, we welcome the unfolding of time, the recovery of our language, and with it, the uncovering of our true history and cultural roots. We press forward to bring the 'ike of our ancestors to mālama 'āina and mālama kuleana. We welcome our renewed commitment to one another, and to our national sovereignty as a capable nation pressing forward for social, cultural and economic independence and self-sufficiency in Hawai'i.



We recognize that under federal and international law, all indigenous peoples have the right to self-determination; and by virtue of that right, are free to determine our political status and pursue our economic, social and cultural development.

As the world moves toward justice, equality and self-determination for indigenous peoples, we acknowledge the unconquerable forces of pono and aloha, and stand for justice for ourselves as a collective, as a people, as a nation, as Hawai‘i. We reaffirm our commitment and understanding that in order to form our government, all Kānaka Maoli (indigenous Native Hawaiians) are free to choose whether to exercise their right to vote in a future ratification and election.

We support the development and implementation of educational and outreach plan to support the lahui’s ability to make an informed decision regarding any adopted documents, and the decisions we made together.

**We mahalo our lahui for allowing us to ‘auamo kuleana to work together. In the immortal words of our great warrior King Kamehameha I, “Imua e nā poki‘i a inu i ka wai ‘awa‘awa, ‘a‘ohe hope e ho‘i mai ai.”** [*Translation: Forward my young brothers (and sisters) and drink of the bitter waters (of battle), there is no turning back (until victory is secured).*]



### ATTACHMENT 3

## **Constitution of Hawai‘i**

*Proposed constitution (updated), produced by the Native Hawaiian Convention, 2000*

*The following is the updated proposed constitution for independence from the Native Hawaiian Convention. It is the latest document from the convention and has not been formally ratified by the convention. The refusal of the State Legislature and the Office of Hawaiian Affairs to continue the funding of the convention to completion has prevented the further consideration by the convention. The underlined portions of this document, except for headings, are added materials which have been part of the process of the continued update and review of the document. The rest of the document had been approved by the convention for distribution and feedback from the Hawaiian population. Pōkā Laenui, Chairperson, Native Hawaiian Convention*

## Constitution of Hawai‘i (Independence)

### Preamble

Hawai‘i, bequeathed to us from the Source of all creation since time immemorial, nurtures our bodies, minds and spirits upon a foundation of Aloha.

We rise in a unified cry to our devotion for Hawaiian sovereignty. We proclaim our right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

We recognize that wisdom from the past forms the spring board into our future. Ua mau ke ea o ka ‘āina i ka pono. Only in Pono are we able to build a society worthy of the dignity of our past and the hope for our future. Thus, Pono forms the guiding principle upon which Hawai‘i today must stand. In Pono we have partnership, mutual respect and cooperation with all that abounds and surrounds us.

We build this government upon partnership, recognizing the integrity of the distinct host people and culture of this land and the special place to be established within the government for their protection and perpetuation. We recognize equally the human rights and fundamental freedoms to be accorded every person of Hawai‘i and commit to the protection and perpetuation of such rights and freedoms within the governmental framework. All people are free and equal, and endowed with inalienable rights and the responsible vigil of freedom. He pono kēia.

We recognize all the Divine elements of Hawai‘i – of life, of change, of fluidity, of stability, of humanity, and all of the nature elements which give physical representation to those elemental forces – the sun, the wind, the sky; the fresh water, the salt water, the land, including the mountains and the forests, and the people who populate Hawai‘i. He pono kēia.

We reaffirm our belief in a government of the people and by the people; for the generations who were, are and is yet to come. We understand our relationship to the land, the kinship responsibility that unites us as a people with those around the globe. We recognize the harm caused by our past abrogation of this kinship responsibility and avow to vigilantly guard against such a wrong again. We acknowledge our commitment to each other and to the land; to our kūpuna and to our mo‘opuna yet to come. He ali‘i ka ‘āina; he kaua ke kanaka.

E mau ke ea o ka ‘āina i ka pono.



### Article I, Name

Hawai'i.

### Article II, Territory

The national territory consists of the Hawaiian archipelago, stretching from Kure Atoll in the North to Hawai'i in the South and all of those lands, atolls and other territories whose jurisdiction have been assumed by the United States of America previously claimed by Hawai'i prior to the US 1893 invasion. Those territories previously part of the constitutional Hawaiian monarchy but which have subsequently been declared the territory or possession of a state other than the United States of America may be included within the territorial jurisdiction of Hawai'i upon concluding negotiation with that claiming state and Hawai'i.

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

### Article III, Supremacy

This Constitution shall be the supreme authority of the government of Hawai'i.

### Article IV, Peoples Rights & Protections

#### Principle I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of Aloha.

#### Principle 2

The fundamental rights and freedoms set forth to all citizens are to apply without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Principle 3

Everyone has the right to life, liberty and security of person.

Principle 4

No one shall be held in slavery or servitude.

Principle 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Principle 6

Everyone has the right to recognition everywhere as a person before the law.

Principle 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any prohibited discrimination and against any incitement to such discrimination.

Principle 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by this constitution or by law.

Principle 9

No one shall be subjected to arbitrary arrest, detention or exile.

Principle 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Principle 11

1. Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Principle 12

No one shall be subjected to arbitrary interference with his privacy, family, home or



correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Principle 13

1.All citizens have the right to freedom of movement and residence within the borders of Hawai'i consistent with this constitution, and the laws established by the national congress.

2.All citizens have the right to leave the country, and to return to the country.

Principle 14

1.Everyone meeting the requirements of this constitution and of law has the right to a nationality.

2.No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Principle 15

1.Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2.Marriage shall be entered into only with the free and full consent of the intending spouses.

3.The family is the natural and fundamental group unit of society and is entitled to protection by society and subject to regulation by the State.

Principle 16

1.All citizens have the right to own property alone as well as in association with others. The State shall have the right to regulate and register ownership of all property.

2.No one shall be arbitrarily deprived of his property.

Principle 17

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. The government shall make no law establishing a religion or religious practice.

Principle 18

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

#### Principle 19

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

#### Principle 20

The people shall have the right to privacy and to be secure in their persons, houses, papers, conversations, ideas and effects. This right shall not be infringed upon through unreasonable searches and seizures. No Warrants shall issue, but upon probable cause, supported by oath or affirmation particularly describing the place to be searched, and the persons or things to be seized.

#### Principle 21

No person shall be held for a felony unless on a presentment or indictment of a grand jury, unless in the military service of the government in time of war or public danger. No person shall be subject for the same offense to be twice put in jeopardy, to be compelled in any criminal proceeding to be a witness against himself, nor be deprived of liberty or property without due process of law. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of his peers within the district wherein the crime shall have been committed, to be informed of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel.

#### Principle 22

1. Every citizen has the right to take part in the government, directly or through freely chosen representatives.
2. Every citizen has the right to equal access to public service.
3. The will of the citizens shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Every elector shall be free from arrest on election days, during his attendance at election and in going to and returning therefrom, except in cases of treason, felony, or breach of the peace. No elector shall be obliged to perform military duty on the day of election as to prevent his voting, except in time of war or public danger.

#### Principle 23

All citizens have the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. All citizens have the responsibility for the contributions to society necessary to effectuate the social security and economic, social and cultural rights accorded to its citizens.



**Principle 24**

1. All citizens have the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

**Principle 25**

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Principle 26**

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities for peace in the world.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

**Principle 27**

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Principle 28**

1. Everyone has duties to the community.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations

as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public, peace, safety, and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of this constitution and of pono.

#### **Principle 29**

Nothing in this Bill of Rights may be interpreted as implying for the government, any group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The rights of the people established by this constitution shall not be abridged unless as set forth in this constitution or by the process established herein and in no other manner.

#### **Article V, Aboriginal/Hawaiian Fundamental Rights**

**Right of Self-Definition:** The Kanaka Hawai'i Maoli are the aboriginal people of the islands of the Hawaiian archipelago and those people whom they shall define within their system of self-governance. Individuals so defined as Kanaka Hawai'i Maoli shall have the opportunity to decline such attribution to themselves individually.

**Right of Self-Governance:** The Kanaka Hawai'i Maoli shall have the right to decide their own priorities in the process of development, as it affects their lives, beliefs, institutions and spiritual well-being and the territories (including land and sea) under their jurisdiction, as further defined by this constitution. They shall also have control over their own economic, social and cultural development, including management and policy control over vocational training, health services, and education. The administration of justice and the power to retain or create social institutions to address the needs of the Kanaka Hawai'i Maoli are also reserved to them.

**Territorial Rights:** There shall be set aside lands, waters, and other natural resources for the exclusive control of the Kumu Hawai'i established in this constitution at Article VII. Such areas shall be limited to undeveloped or minimally developed lands which were previously in the inventory of the Crown and Government lands of Hawai'i prior to July 4, 1894. Such resources shall be sufficient for the maintenance of the Kanaka Hawai'i Maoli in their traditional system of living. These include the rights to hunt, fish, trap and gather, and to control mineral and sub-surface resources for the purpose of religious, cultural, and subsistence purposes.



**Cultural Rights:** The right to maintain the cultural traditions of the Kanaka Hawai'i Maoli shall not be impaired. Included in this right shall be the right to maintain contact with other indigenous and tribal peoples across oceans to pursue shared economic, social, cultural, spiritual and environmental development, the right to educate their children in their own native language, the right to practice their own traditional health and healing practices, and the right to express their own sense of spirituality in their own form. All of these rights shall remain subject to the limitations that they are not to be destructive to the protected rights of all other individuals in the society.

**Custom and Protocol:** Reserved to the Kanaka Hawai'i Maoli, as expressed through the Kumu Hawai'i, shall be all of the official state customs and protocols, including ceremonies of international import with other states.

**Immigration & Population:** The Kumu Hawai'i shall have the control over immigration, determining the criteria for further transfer of population into Hawai'i, the conditions of visa awards, and treaties and executive agreements touching on the temporary and permanent residents of non-Hawaiian citizens.

**Crown and Government Lands and Natural Resources:** The Kumu Hawai'i shall have the exclusive right of management over the lands and natural resources whose titles were previously part of the inventory of the Crown and Government lands of the Hawaiian nation prior to July 4, 1894 or lands which have subsequently been exchanged for such lands. With the exception for the lands set aside under territorial rights described above, all net proceeds from the management of the former Crown and Government lands and natural resources under this provision shall be allocated 20% to the Kumu Hawai'i and 80% to the general Hawai'i public.

**Participation in the Kumu Hawai'i:** Initially, any Kanaka Hawai'i Maoli, 16 years and older, shall be permitted the privilege of participating, including voting, in all activities of the Kumu Hawai'i.

**Limitations of Rights:** All of the kuleana set aside for the Kumu Hawai'i and the Kanaka Hawai'i Maoli shall be limited by the constitutional guarantees of human rights as well as other constitutional limitations or powers specifically set forth therein.

## Article VI, Citizenship

Citizenship shall consist of three general classes:

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

## Article VII, Government Structure

The nation shall have two primary governing bodies operating in partnership for the Kanaka Hawai'i Maoli public and the general Hawai'i public.

- 1) The Kumu Hawai'i, comprised of Kanaka Hawai'i Maoli, whether citizen or not, shall have exclusive management rights over crown and government lands and natural resources; the right to self-definition; the right to self-governance; control over immigration and population transfer; indigenous education and health care; and international protocol all as set forth above in Article V. All other powers not specifically reserved to the Kumu Hawai'i shall accrue to the General Government.
- 2) The General Government, comprised of all citizens, shall have all powers not reserved to the Kumu Hawai'i.

Either or both of these bodies, the Kumu Hawai'i or the General Government, may permit appropriate political subdivisions within their realm of responsibilities, such as counties, ahupua'a, townships, etc. These bodies may also create other branches of government, including an executive and judicial branch, for the nation.

An advisory conflict resolution office shall be established to which disputes not readily resolvable between the two bodies shall be submitted. This office shall consist of five members, two of whom shall be appointed by each government partner and the fifth appointed by the members appointed by the partners. Should it not be able to resolve any dispute of a non-constitutional nature, this office shall be empowered to put the question of controversy before all the citizens of Hawai'i for a vote and require a mere majority of the votes cast to decide the matter. If a dispute of a constitutional nature should arise calling for an amendment to this constitution resulting in



a detraction of the rights and powers of the Kumu Hawai'i or of the Kanaka Hawai'i Maoli citizen, both government partners would have to ratify said amendment. Otherwise, only a majority of the votes cast would be required to amend the constitution. The advisory conflict resolution office shall be empowered to determine the definition of any controversy, whether constituting a dispute of a non-constitutional nature, or a constitutional nature detracting from the rights and powers of the Kumu Hawai'i or of the kanaka Hawai'i Maoli citizen.

### **Article VIII, General Provisions**

#### Private Real Property Ownership

##### I. Assurances to Private Ownership:

Hawaiian citizens and non-citizen residents may own their residence in their own name.

##### II. Forfeiture for Non-residents

Non-citizen, non-residents: Non-citizen non-resident ownership of land may be subject to termination within ten (10) years following their continuous non-residence of Hawai'i. If terminated, said land ownership will be included in the inventory of the general government.

Citizen, non-resident: Citizen, non-resident ownership of land may be subject to termination within twenty (20) years following their continuous non-residence of Hawai'i. If terminated, said land ownership will be included in the inventory of the general government.

##### III. Prohibition of Sale of Real Property to Non-residents

Transfer of real property title to non-resident, non-citizens shall be prohibited.

There shall be no transfer of real property to non-residents with the exception of citizens who establish residence in Hawai'i within five years from date of transfer.

#### Official Languages

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

The Education Department of the General government shall be required to incorporate the teaching of 'Ōlelo Hawai'i co-extensive with the teaching of English.

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

Flag

A national flag design shall be chosen by agreement of the two governing partners.

Motto

A national motto shall be chosen by agreement of the two governing partners.

Anthem

A national anthem shall be chosen by agreement of the two governing partners.

National Security Board

A National Security Board shall be established to advise on the nation's security from domestic or external influences. This board shall consist of 15 members from among whom shall be individuals with education, training and experience in the fields of economics, agriculture, international affairs, public health, military defense, and local cultures. Members of the board shall be appointed, 8 by the general governing body and 7 by the Kumu Hawai'i. The members shall appoint their leadership from among themselves and may otherwise organize their work as they deem appropriate. None of these members may hold any elective office nor any rank within any military force, and shall resign from office and remain out of office for a period of two years prior to undertaking any public office or military post.

Taxation

The government shall have the power to impose taxes.

### Article IX, Amendments

Any amendment to this Constitution must be approved by a majority of the citizens of Hawai'i.

However, any amendment to this constitution which would alter the defined rights of the Kumu Hawai'i or of the Kanaka Hawai'i Maoli would require the approval of the Kumu Hawai'i.



**Article X, Ratification & Transition Process**

Upon approval of this constitution by the Aha Hawai'i 'Ōiwi, it shall be presented to the Kanaka Hawai'i Maoli population throughout the world for ratification. If ratified by a majority of the votes cast, an election for 51 members of the Kumu Hawai'i shall be held.

Upon election of said members of the Kumu Hawai'i, this constitution shall be presented to the eligible citizens of Hawai'i for ratification. If ratified by a majority of the votes cast, an election of 51 delegates constituting the general governing body shall be held.

Upon election of said members of the general governing body, the Kumu Hawai'i and the general governing body shall collaborate in the review of this constitution, determine their on-going structure of governance, and establish the mechanism for the safe and smooth transition of authority in Hawai'i from the United States of America.



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## ABOUT THE AUTHOR

Pōkā Laenui (a.k.a. Hayden Burgess) graduated from the University of Hawai'i William S. Richardson School of Law and has been an advocate for Hawai'i's self-determination since 1971. He served as trustee of the Office of Hawaiian Affairs (1982–86), vice president and international spokesperson for the World Council of Indigenous Peoples (1983–90), indigenous expert for the International Labour Organization (1989), and speaker at the UN General Assembly (1991), where he was named one of five pioneers of indigenous rights. He also served as chairperson of the Native Hawaiian Convention, convenor of the Hawai'i National Transitional Authority, and director of the Hawaiian National Broadcast Corporation. He is a primary contributor to the website [www.hawaiianperspectives.org](http://www.hawaiianperspectives.org), which contains many of his writings, radio programs, lectures, and videos. His wife is Puanani Burgess, his children are Pua'Ena, Pohaokalani, and La'ameaomauna'ala, with daughter-in-law Christianna and mo'opuna Layla Ahonuialanakila.

## NOTES

1. Personal interview in May 2018 with Coline Aiu, kumu hula and daughter of Margaret Aiu and heir to her hālau.
2. Story related to author from unnamed confidential informants in preparation for a 1978 double murder/kidnap trial in Hawai'i.
3. President Cleveland's joint message to Congress, December 1893.
4. *Territory of Hawai'i v. Grace Fortescue et al.*, 1931.
5. The purpose statement of Hui Na'auao includes the following, taken from its original By Laws:
  - a. To promote an awareness and understanding of Hawaiian sovereignty and self-determination;
  - b. To promote and increase an awareness of Hawaiian cultural values, heritage, history and current events;
  - c. To enable Native Hawaiian descendants to understand and exercise their explicit and implicit rights;



- d. To develop expertise and leadership skills amongst Hawaiian people;
  - e. To provide training and technical assistance to Hawaiians in areas of concern to the Hawaiian community;
  - f. To gather historic and current information regarding Hawaiian concerns for public dissemination;
  - g. To promote continuity of consciousness of the people of Hawai'i in all of its many aspects.
6. Names for such a list were obtained through a number of sources, including the OHA election list and the Kamehameha Schools list, as well as names obtained by registration using forms circulated by telephone books. Registrants were required to certify their qualification to vote. Upon returning the mail, in ballots, materials were checked to see if the accompanying certification was completed before the ballots were counted.
  7. Section 2, Act 195, Hawai'i Legislative Session 2011.
  8. Section 2, Act 195, Hawai'i Legislative Session 2011 at §-5, "Native Hawaiian convention." *Honolulu Star-Advertiser*, December 15, 2015.
  9. Rather than using the term *convention*, I have chosen the term congregation to denote a more generic gathering without necessarily any official authority, as this gathering seemed to be. A convention would suggest that members were elected as delegates to this gathering.
  10. This was formalized by Senate Joint Resolution 19, 103rd Congress (1993).
  11. N. Ota, records specialist, OHA, email communication to author, August 24, 2017.
  12. Traditional recitation of Kamehameha I's last words spoken on his deathbed in Kailua, Kona. Reported in Pukui's *Ōlelo No'eau* (1983).
  13. Preamble to the Constitution of the State of Hawai'i (1978). The words are from the acceptance speech of King Kamehameha III on July 31, 1843, on the occasion of the restoration of the Hawaiian Kingdom, as recorded in the song and notes to "Nā Ali'i," in *Nā Mele o Hawai'i Nei*, by Elbert and Mahoe (1975).
  14. *Honolulu Star-Advertiser*, July 15, 2015.
  15. Press release by Na'i Aupuni, March 16, 2016.

16. UN Declaration of Rights of Indigenous Peoples at Article 33 and the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO 169) (1989) at Article 1, Section 2. "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."
17. The NHC independence document has not been finalized. The latest draft is used for comparison in this paper. The underlines and brackets from that document reflect the latest editing updates for the document.
18. Annex to G.A. Res. 2200 (XXI) of 16 December 1966.
19. Annex to G.A. Res. 2200 (XXI) of 16 December 1966.
20. See Articles 2 and 3 of the UN Declaration on the Rights of Indigenous Peoples (UN General Assembly, 2007); see also Article 1, Section 2 of the ILO Convention 169.
21. A possible inclusive statement might be, "Hawai'i shall be free from all atomic, biological and chemical weapons and weapons residue, from nuclear power plants, from waste materials used as weapons such as depleted uranium, from weaponized drone planes, and from any weapon, whether considered offensive or defensive, with capability of reaching beyond 200 miles off the archipelagic line of the Hawaiian Islands."
22. 43 C.F.R. Part 50, at 50.42 (e)(2), at 171. The Act (Act to amend the Alaska Native Claims Settlement Act, and for other purposes, 1995) can be found at Public Law 104-42, 48 U.S.C. Note Prec. 491, 109 Stat. 357, 360.
23. Article 27 of the Rome Statute (UN General Assembly, 1998), establishing the International Criminal Court, states:

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.



The absolute immunity for heads of state in customary international law is now in flux as we consider relevant UN Security Resolutions (see Security Council Resolution 1593), in combination with the Rome Statute, and/or the Genocide Convention that had removed the immunity of heads of state.

24. Article 5 of the Rome Statute defines Crimes within the jurisdiction of the court:
  - i. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
    - (a) The crime of genocide;
    - (b) Crimes against humanity;
    - (c) War crimes;
    - (d) The crime of aggression.
25. Hawai'i was placed on the list of non-self-governing territories via UNGA Resolution 66, by the United States.
26. A record of President Cleveland's address (United States, 1894) is available at <https://catalog.hathitrust.org/Record/001261378>
27. These criteria are found at [www.federalregister.gov/documents/2015/10/01/2015-24712/procedures-for-reestablishing-a-formal-government-to-government-relationship-with-the-native](http://www.federalregister.gov/documents/2015/10/01/2015-24712/procedures-for-reestablishing-a-formal-government-to-government-relationship-with-the-native)
28. Press release, US Department of the Interior, September 23, 2016. Available at [www.doi.gov/hawaiian](http://www.doi.gov/hawaiian), 43 C.F.R. Part 50.
29. Federal Register/Vol. 80, No. 190/Thursday, October 1, 2015, Proposed Rules, p. 59129 at §50.4.
30. P. 157, 43 C.F.R. Part 50, [Docket No. DOI-2015-005]; Final Rule.
31. Federal Register/Vol. 80, No. 190/Thursday, October 1, 2015, Proposed Rules, p. 59129 at §50.4. "*Native Hawaiian* means any individual who is a: (1) Citizen of the United States.
32. See page 49 (B) Major Changes, citing the elimination of US citizenship requirement (50.4; 50.12), Final Rules, 43 C.F.R. Part 50.