

**ANALYSIS OF AMENDMENTS TO S. 147
(THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT)**

Professor Charles F. Wilkinson
Moses Lasky Professor of Law
Distinguished University Professor
University of Colorado School of Law

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During the past year, a number of changes have been proposed to S. 147, The Native Hawaiian Government Reorganization Act (often referred to as "the Akaka Bill"). Recently, the Hawai'i congressional delegation, the State of Hawaii, and Bush Administration officials engaged in negotiations over the bill. As a result, amendments to the language in S. 147 were agreed to in September, 2005. This paper will analyze the effect of those recent amendments.

Overview

While every bill goes through revisions, often amendments are proposed late in the legislative process as potential issues come to the surface. In this case, the negotiators representing the interests of Hawaii have managed to preserve the integrity of the bill and thereby have performed a major service to the Native Hawaiian people.

In my judgment, no substantial negative changes have resulted. Several of the changes are technical only. Another change, such as eliminating the requirement that only Native Hawaiians can serve on the commission that will establish the initial membership roll for the Native Hawaiian government, will avoid litigation that could halt the process of organizing a government before it has even begun. Other changes deal with important issues, such as Native Hawaiian claims, but are best understood as lending clarity to existing understandings of the

objectives of the legislation. Still other changes, such as the prohibition against taking land into trust, are consistent with positions that Native Hawaiians have long supported.

Without question, the central thrust of the bill—especially the overarching goal of establishing a sovereign Native Hawaiian government, recognized by the United States and assuming responsibility for the significant financial and land resources currently administered by Hawai`i state agencies—remains completely intact. Further, although S. 147 will likely be subject to legal challenges, the enactment and implementation of this bill will provide legal protection to the existing programs and institutions now under race-based attacks. The U.S. Supreme Court has rejected such attacks when asserted against other sovereign Native governments.

Analysis of Issues

This memorandum is organized to address the amendments to S. 147 in rough order of their complexity and importance. Page references are to the version of S. 147 that shows both the new language as well as that which would be deleted. This is commonly referred to as the “red line” version and is available on the OHA website.

1. Sovereign Immunity (section 8(c), pages 20-22)

The ancient doctrine of sovereign immunity has its origins in Old England. Back then, it was reasoned that “the King can do no wrong”—in other words, a sovereign cannot be sued unless it gives its consent.

When the United States broke away from England, it kept many elements of British law, including the doctrine of sovereign immunity. Right or wrong, the rule remains in effect today. The United States and the State of Hawaii—and Native governments—cannot be sued unless they agree to be sued. This applies to

matters large and small, from a major land claim to a fender-bender caused by a government driver.

Over time, the immunity doctrine has sometimes resulted in unfairness. Congress and state legislatures have authorized waivers of their immunity that cover many different kinds of injuries that governments or their employees cause. But sovereign immunity has never been waived outright. In particular, waivers involving federal and state lands have been few and narrowly drawn.

Therefore, in the kind of twists and turns that the law sometimes takes, it is possible to have an entirely valid claim against a government—*except that no lawsuit can be brought because the government has not waived its sovereign immunity.*

Before S. 147 was introduced, there were no sovereign immunity waivers that applied to damages caused by the Overthrow of the Kingdom of Hawaii and other historic events. For example, when the United States extended an apology to the Native Hawaiian people for the Overthrow of the Kingdom of Hawaii, there was no waiver of sovereign immunity that would allow suits to be brought.

From the beginning, S. 147 was neutral on claims—the concept of the bill was that it would neither create new claims against the United States nor extinguish existing claims. One seemingly unresolved issue is whether there are any existing claims, especially with respect to the Overthrow of the Kingdom of Hawaii, that could actually go to court. To my knowledge, Congress has not enacted legislation waiving the sovereign immunity of the United States with respect to Native Hawaiian claims. Those waivers that Congress has authorized involve claims of Indian tribes, not the Kingdom of Hawaii or its successors.¹

¹ The principal statutes are the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70n (money damages in the Indian Claims Commission to tribes for loss of tribal land before 1946); 28 U.S.C. § 1505 (post-1946 tribal claims for money damages based on treaty and other violations); and the Quiet Title Act, 28, U.S.C. § 2409a (limited waiver for suits to quiet title to federal lands with an exception for “trust or restricted Indian lands.”).

The current situation, then, is that wrongs were committed at the time of the Overthrow of the Kingdom of Hawaii but those wrongs cannot be pursued in court because the United States has not waived its sovereign immunity. While section 8 provides that the United States “retains its sovereign immunity,” this language makes no change to existing law and thus is not an extinguishment of the right to bring claims. The current status may not be fair, but that is due to the doctrine of sovereign immunity, not the provisions of S. 147.

Importantly, the new section 8(b)(1)(F), page 19, provides that the negotiations among the federal government, the Native Hawaiian government, and the State of Hawaii may address “grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or the State of Hawaii.” Native Hawaiians can make a powerful case in that forum based on claims that cannot go to court because of the sovereign immunity doctrine but that should be redressed in the negotiations.

2. Trade and Intercourse Act (section 9(c), pages 22-23)

This complicated issue, which also relates to claims, can be analyzed as follows.

The Trade and Intercourse Act, 25 U.S.C. § 177, originally enacted in 1790, provides that “no purchase ... or other conveyance of lands ... from any Indian nation or tribe of Indians, shall be of any validity ... unless the same be made by treaty or convention entered into pursuant to the Constitution....” In other words, no transfer of Indian land is valid unless approved by Congress. The Act was passed to protect Indian tribes against unscrupulous land speculators on the frontier.

The land claims on the mainland under the Trade and Intercourse Act proceeded this way: (1) Some eastern states negotiated land treaties (many of them in the 1700s) directly with tribes. (2) Congress never approved the state treaties,

meaning that the transactions were invalid under the Trade and Intercourse Act.

(3) Nevertheless, states then transferred most of the land to corporations and individuals, basically for homesteading. (4) In modern times, tribes sued for quiet title and trespass damages to the lands that were transferred without congressional approval. The courts generally upheld the tribal claims even though landowners had held title for generations because no federal statute of limitations barred the tribal suits.² (5) Most of the cases were settled through lengthy negotiations among the tribes, the United States, the states, and private landowners; those settlement agreements were then ratified by congressional legislation.

In all likelihood, the Trade and Intercourse Act does not apply to lands in Hawaii, so the statute does not provide a basis for claims for lands taken from the Kingdom of Hawaii in the Overthrow. The statute applies to Indian tribes and was a protective act pursuant to the federal-Indian trust relationship. The Kingdom, on the other hand, was not an Indian tribe—and, as importantly, was an independent sovereign beyond the borders of the United States, not a “domestic, dependent nation” as mainland tribes are. Further, recent cases have cast doubt on the continuing validity of land claims cases under the Trade and Intercourse Act³.

The new section 9(c) provides that the Trade and Intercourse Act did not apply to Hawaii and will not apply after passage of S. 147. As with the sovereign immunity amendment, the Trade and Intercourse Act amendment does not change the status quo. The amendment makes it absolutely clear that the bill does not apply to private lands in Hawaii.

3. Gaming (section 9(a), page 22)

² The leading case is *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

³ See *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005) (Doctrines of laches, impossibility, and acquiescence bar tribe from contesting state taxes on tribal land within claim area); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2nd Cir., 2005) (Citing *Sherrill* and holding that the doctrine of laches bars land claim).

The previous language in S. 147 provided that “nothing in this Act shall be construed to authorize” gaming by the Native Hawaiian government under the Indian Gaming Regulatory Act. This amendment provides that the Native Hawaiian government “may not” engage in gaming under the Indian Gaming Regulatory Act. The amendment makes two other changes: the Native Hawaiian government may not use its inherent sovereign authority as a basis for gaming and it may not conduct gaming in any other state.

At the outset, it is important to understand that the Indian Gaming Regulatory Act would not apply to the Native Hawaiian government because the statute allows gaming only on “Indian lands,” and the lands of the Native Hawaiian government will probably not fit within the statutory definition.⁴ Assuming however, that the Indian Gaming Regulatory Act would apply, the previous language in S. 147 arguably would have allowed gaming to be conducted by the Native Hawaiian government only in the event that the State of Hawaii were to authorize gaming in the future. Under the “may not” amendment, if the State ever did legalize gaming, then the Native Hawaiian government would have to go back to Congress for authority to conduct gaming consistent with the revised state law.

4. Negotiations and Historical Wrongs (section 8(b)(1)(F), page 19)

A large part of the promise of S. 147 will be determined in the section 8 negotiations among the Native Hawaiian government, the United States, and the State of Hawaii. With the amendment referred to above, it is now explicit that those negotiations may include “historical wrongs committed against Native Hawaiians by the United States and the State of Hawaii.” This means that the

⁴ The Indian Gaming Regulatory Act defines Indian lands as: “(1) all lands within the boundaries of a reservation or (2) trust or restricted tribal or individual lands over which a tribe exercises governmental powers.” S. 147 does not provide authority for the establishment of reservations in Hawaii and, as amended, S. 147 prohibits the taking of land into trust. S. 147 is silent on whether lands held by the Native Hawaiian government will be subject to restrictions against alienation.

Native Hawaiian government can seek redress in the negotiations process for damages caused by the Overthrow of the Kingdom of Hawaii—even though those claims are not justiciable in court because of sovereign immunity. In addition, this provision injects an element of morality that links these critical negotiations to the historical wrongs identified in the Findings, section (2) of the bill.

5. Land into Trust (section 9(b), page 22)

This amendment provides that the United States cannot take into trust any Native Hawaiian land, whether the land is held by individuals or the Native Hawaiian government.

6. Special Political and Legal Relationship (section 3(15), page 8)

This section, with the phrase being used in several other places in the bill, provides that the Native Hawaiian government will have the “special political and legal relationship” of the kind that “the United States has with the several federally-recognized Indian tribes.” It is hard to assess the full meaning of this provision, but it seems comparable to the federal-Indian trust relationship, with the exception that Native Hawaiian land cannot be taken into trust. The contours of the federal-Indian trust relationship cannot always be defined with precision, but tribal leaders on the mainland have consistently used the trust relationship to invoke a high standard of conduct for the United States in its dealings with America’s Native governments and their lands.

7. Membership of Commission (section 7(b)(2), pages 11-12)

In the earlier version of S. 147, only Native Hawaiians could serve on the Commission that will certify those who elect to be placed on a membership roll for the organization of the Native Hawaiian government. With the amendment, there is now no requirement that Commission members be Native Hawaiians. As mentioned, this amendment would prevent litigation, premised on a “race-based” argument, that could stall and disrupt the process of organizing a government. In

any event, Commission members must have at least ten years of experience in Hawaiian genealogy and be able to read documents in the Hawaiian language and translate them into English. Also, the amendment allows the Secretary of the Interior to consider recommendations from Native Hawaiian organizations in appointing Commission members.

8. Department of Defense Consultation (section 5(c), page 10, and section 6(e), page 11)

The amendments provide that the Office for Native Hawaiian Relations and the Native Hawaiian Interagency Coordinating Group will not be required to consult with the Defense Department. The department may appoint liaisons. These amendments do not apply to Defense Department consultations required by other statutes, such as consultations under the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and other laws.

9. A Single Native Hawaiian Governing Entity (section 9(d)(2), page 23)

This amendment is consistent with the common practice of the United States, states, mainland tribes, and foreign nations to have one single, official recognized government. This technical amendment, and the addition of the word "single" at several other places in the bill, provides that there will be only one Native Hawaiian governing entity. Federal recognition may not be extended to other Native Hawaiian groups through any other federal process.

10. Civil and Criminal Jurisdiction (section 8(b)(3), page 20, and section 9(e), page 23)

These are technical amendments clarifying that state and federal jurisdiction will not be altered until appropriate federal and state legislation has been enacted to implement the agreements of the three governments.