



The Indian Commerce Clause sheds light on question of federal authority over Hawaiians

This month's community perspective piece is offered by respected independence advocate and historian Keanu Sai. Sai is a graduate student in Political Science at the University of Hawai'i at Mānoa specializing in International Relations. He also argued a legal case (Lance Larsen vs. the Hawaiian Kingdom) at the Permanent Court of Arbitration in The Hague, Netherlands, concerning the continued legal existence of Hawai'i as an independent State.

By Keanu Sai

On July 25, the *Honolulu Star-Bulletin* reported that the Akaka Bill has been stalled in the Senate by the Department of Justice for legal reasons. The article quoted Governor Lingle as stating, "My understanding now is, it's an issue of whether or not Congress has the authority under the Indian Commerce Clause of the Constitution to grant this type of recognition to native Hawaiians."

This quote sheds some light on a very important piece of the Akaka puzzle that I think has not been properly addressed. This being Congressional authority under the Commerce Clause as defined by the U.S. Constitution. Article I, sec. 8(3) of the constitution empowers Congress "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Professor Rice, author of *"The Position of the American Indian in the Law of the United States"* (1934), p. 80, answers the question as to the constitutional basis of Congressional authority over the Indians. He states, "The chief foundation appears to have been the treaty making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made." What this means is that the U.S. Congress cannot be empowered under the Indian Commerce Clause unless it is authorized to do so by treaty.

Regarding the 1971 Alaska Native Claims Settlement Act, Congress obtained authority under the Indian Commerce Clause by the 1867 Russian-American Treaty. Russia held the Alaskan territory since 1741 and agreed to sell it to the U.S. for \$7.2 million. The terms of the treaty were settled between each of the governments on March 30, 1867, and the U.S. Senate ratified the treaty on April 9, 1867.

On May 17, 1884, the U.S. Congress acted upon its acquired authority by enacting an Organic Act called "An Act Providing a Civil Government for Alaska." The Organic Act's preamble acknowledges the 1867 Treaty, which vested Congress the authority to legislate. Similar treaties that vested Congress to legislate under the Indian Commerce Clause over other Native American tribes were the 1848 Mexican-American Treaty transferring all lands Mexico formerly held north of the Rio Grande river; and the 1803 French-American Treaty, also known as the Louisiana Purchase, which transferred 820,000 square miles west of the Mississippi river from the Gulf of Mexico to the Canadian border.

In Hawai'i's case, there is no authority Congress can point to that authorizes legislation for native Hawaiians, let alone over the Hawaiian Islands as a whole.

Genealogy of Congressional Actions concerning Hawai'i:

1898 — Congress enacted a joint resolution purporting to annex the Hawaiian Islands as a foreign country.



Keanu Sai presenting legal arguments before the Tribunal at the Permanent Court of Arbitration in The Hague, Netherlands, in December 2000. Video capture taken from a documentary made by Aotearoa filmmaker Merata Mita.

1900 — Congress enacted the Organic Act creating a government for the Territory of Hawai'i.

1921 — Congress amended the 1900 Organic Act creating a Hawaiian Homes Commission.

1959 — Congress enacted Public Law 86-3 creating the State of Hawai'i.

1993 — Congress enacted another joint

resolution apologizing for the illegal overthrow.

Nowhere in this genealogy of events can you find anything like the 1803 French-American Treaty, the 1848 Mexican-American Treaty, or the 1867 Russian-American Treaty, that granted the Congress any authority to legislate over the Hawaiian Islands. Adding to this quagmire is that Hawai'i was not an Indian tribe, but rather a recognized independent state and bona fide member of the international community of nations with over 90 legations and consulates throughout the world.

On Oct. 4, 1988, the same Department of Justice, in a legal opinion, seriously questioned the legality of the annexation of the Hawaiian Islands in 1898. It concluded, "It is therefore unclear which constitutional power Congress exercised when it acquired Hawai'i by joint resolution. Accordingly, it is doubtful that the acquisition of Hawai'i can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."

Just like a microwave oven can't heat food without someone hitting the timer, nor can Congress legislate over foreign territory without a treaty.

For more information, you can visit www.HawaiianKingdom.org. The views expressed above are those of the author and do not necessarily reflect the views of the Office of Hawaiian Affairs.



Lili'uokalani

"Kaulana Nā Pua" song honors Queen Lili'uokalani and her vision

A *Ka Wai Ola* reader wrote and requested that we reprint the song Kaulana Nā Pua. Composed by Ellen Kekoa'ohi-waikalani Wright Prendergast in January 1893 following the overthrow, the inspiring hymn of Hawaiian nationalism evokes Queen Lili'uokalani's grace, integrity and strength. As we celebrate the queen's birthday Sept. 2, the song serves to remind the Hawaiian people of her motto "'Onipa'a." Let us persevere as she did and advance together to restore pono.

Kaulana Nā Pua

Kaulana nā pua a'o Hawai'i
Kūpa'a ma hope o ka 'āina
Hiki mai ka 'elele o ka loko 'ino
Palapala 'ānunu me ka pākaha

Pane mai Hawai'i moku o Keawe
Kōkua nā hono a'o Pi'ilani
Kāko'o mai Kaua'i o Mano
Pau pū me ke one o Kākuhihewa

'A'ole a'e kau i ka pūlima
Ma luna o ka pepa a ka 'enemi
Ho'ohui 'āina kū'ai hewa
I ka pono siwila a'o ke kanaka

'A'ole mākou a'e minamina
I ka pu'u kālā o ke aupuni
Ua lawa mākou i ka pōhaku
I ka 'ai kamaha'o o ka 'āina

Ma hope mākou o Lili'ulani
A loa'a 'ē ka pono o ka 'āina
Ha'ina 'ia mai ana ka puana
'O ka po'e i aloha i ka 'āina

Famous Are the Children

Famous are the children of Hawai'i
Loyal to the land
The evil-hearted messenger comes
with a document of extortion and greed

Hawai'i island of Keawe answers
The bays of Pi'ilani help
Kaua'i of Mano lends support
Firmly united with the sands of Kākuhihewa

Do not fix a signature
To the paper of the enemy
With its sin of annexation and sale
Of the civil rights of the people

We do not value
The heaps of money of the government
We have enough with stones
The remarkable food of the land

We support Lili'u[oka]lani
Until we gain the rights of the land
The story is to be told
Of the people who love the land