



10 of 11 DOCUMENTS

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**TEXT:**

**Background n1**

n1 Some of the material in this background section is adapted and updated from Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 *YALE L. & POLICY REV.* 95-147 (1998).

Almost 240,000 people n2 now living in Hawaii are descendants of the Polynesian people who had a complex thriving culture in the Hawaiian Islands until Westerners started arriving at the end of the eighteenth century. n3 Native Hawaiians n4 had a stable political order, a self-sustaining economy based on agriculture and fishing, and a rich spiritual and artistic life, as evidenced by intricate feathered capes and adornments, large temples of worship, striking

carved images, formidable voyaging canoes, sophisticated tools for fishing and hunting, weapons of war, and beautiful and moving chants and dances. n5 The newcomers from Europe and the United States brought their technology, their religions, their ideas about property and government, and their diseases to the islands. n6 By the end of the nineteenth century, the Native Hawaiian population had plummeted, n7 their traditional practices and communal land structures had been replaced by Western models; n8 the independent Kingdom of Hawaii had been illegally overthrown; n9 Hawaiian lands had been taken without compensation to or consent of the Hawaiian people; n10 and Hawaii had been annexed by the United States as a territory. n11 Native Hawaiians are now at the bottom of the socio-economic scale in their own islands. n12

n2 OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK-2006 at 17 (Office of Board Services, Lea K. Young, 2006) (hereafter cited as NATIVE HAWAIIAN DATA BOOK). At least another 200,000 people of Hawaiian ancestry live in other parts of the United States, with about 30% of those living in California. *Id.* at 17-18.

n3 *See generally* PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS (University of Hawaii Press 1985); SAMUEL MANAIKALANI KAMAKAU, THE WORKS OF THE PEOPLE OF OLD (Bishop Museum Press 1976); DAVID MALO, HAWAIIAN ANTIQUITIES (Bishop Museum Press 1951); JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY (Bishop Museum Press 1959); E.S. CRAIGHILL HANDY AND ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII (Bishop Museum Press 1972); LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES-PEHEA LA E PONO A? (1992).

n4 The term "native Hawaiian" is defined in § 201(7) of the Hawaiian Home Commission Act, 1920, 42 Stat. 108 (1921), as referring to persons with 50% or more Hawaiian blood, but in other federal statutes this term is used to cover all persons who are descended from the people who were in the Hawaiian Islands as of 1778, when Captain James Cook "discovered" the islands for the Western world. In this article, "Native Hawaiian" is used to refer to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain Cook arrived.

n5 *See, e.g.*, JOSEPH FEHER, HAWAII: A PICTORIAL HISTORY 36-132 (Bishop Museum Press 1969); PETER H. BUCK (TE RANGI HIROA), ARTS AND CRAFTS OF HAWAII (Bishop Museum Press 1957).

n6 *See, e.g.*, Melody K. MacKenzie, *Historical Background*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 3-25 (Melody K. MacKenzie ed. 1991); KAME'ELEIHIWA, *supra* note 3; DAVID E. STANNARD, BEFORE THE HORROR (University of Hawaii Press 1989).

n7 Estimates of the population of the Hawaiian Islands prior to Captain Cook's arrival in 1778 vary greatly. *Compare*, DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989) (at least 800,000) with ROBERT C SCHMITT, HISTORICAL STATISTICS OF HAWAII 7 (University of Hawaii Press 1977) (citing estimates from 100,000 to 400,000). By 1850, the population in the Islands had dropped to 84,165, and by 1872 it had dropped further to 56,897. This population decline was "due in part to venereal disease-resulting in sterility, miscarriages, and death-and epidemics such as small pox, measles, whooping cough, and influenza. Decline was also accelerated by a low fertility rate, high infant mortality, poor housing, inadequate medical care, inferior sanitation, hunger and malnutrition, alcohol and tobacco use. Over two centuries after European contact many of these situations still exist." Office of Hawaiian Affairs, Native Hawaiian Data Book - 1996 at 4 (Mark Eshima ed. 1996). *See infra* note 12.

n8 *See, e.g.*, MacKenzie, *supra* note 6, at 3-10; Neil Levy, *Native Hawaiian Land Rights*, 63 CALIF. L REV. 848 (1975); Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden,

Linda Sur, Manabu Tagamori, and Ralph Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 146-66 (1979); NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983); RALPH S. KUYK-ENDALL, THE HAWAIIAN KINGDOM 1778-1854 (University of Hawaii Press 1938, reprinted 1989).

n9 Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (hereafter cited as Apology Resolution), Section 1(1) and (3), which refers to the "*illegal overthrow* of the Kingdom of Hawaii on January 17, 1893" (emphasis added) and "the participation of agents and citizens of the United States." The Senate passed this public law on Oct. 27, 1993, the House passed it on Nov. 15, 1993, and President Clinton signed it on Nov. 23, 1993. "Congress drafted the joint resolution with great care because it is an enforceable statute." Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M.L. REV. 65, 86 (1995).

n10 Apology Resolution, *supra* note 9, para. 25: "Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, *without the consent of or compensation to the Native Hawaiian people* of Hawaii or their sovereign government" (emphasis added).

n11 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) (hereafter cited as the Annexation Resolution).

n12 For instance, in 1999, 16% of all Native Hawaiian families lived below the poverty level, compared to 10.7% of all families in the state. KA HUAKA'I 2005 NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT 342 (Kamehameha Schools 2005). The data for 2002 show that 32% of families receiving temporary assistance and 29.2% of individuals on general assistance in Hawaii were Native Hawaiian. NATIVE HAWAIIAN DATA BOOK, *supra* note 2, at 118, 121. Hawaiians are disproportionately represented in the prison population, making up approximately 40% of all inmates incarcerated under Hawaii law. *Id.* at 169. In 2004, Hawaiians accounted for 45% of all births in the state to unmarried mothers and 31% of all infant deaths. *Id.* at 28, 31. In a speech on the floor of the U.S. Senate in 2005, Sen. Daniel Inouye noted that Native Hawaiians have the highest cancer mortality rate in Hawaii, 21% higher than the rate for the total male population and 64 percent higher than the rate for the total female population; nationally, Native Hawaiians have the third highest mortality rate as a result of breast cancer. In 2000, Native Hawaiians had the highest mortality rate associated with diabetes in the state--a rate 138% higher than the statewide rate for all racial groups. The Native Hawaiian mortality rate associated with heart disease is 68% higher than the rate for the entire state, and the mortality rate for hypertension is 84% higher than that for the entire state. 151 CONG. REC. S 647, 660 (daily ed. Jan. 31, 2005) (Statement of Sen. Inouye).

Ever since the illegal overthrow and annexation, the native people of Hawaii -- identified as "Kanaka Maoli," "Native Hawaiians," or "Hawaiians" -- have struggled to regain their culture, recover their lands, and restore their sovereign nation. n13 Some argue that this process should be undertaken without governmental assistance while others believe accepting financial support from the state and federal governments is appropriate because these governments have benefited from lands and resources that should belong to the Native Hawaiian people. n14 Some have focused on regaining a land base and becoming economically self-sufficient while others have argued that restoring the Native Hawaiian nation should come before any negotiations take place regarding the return of lands. n15 Some favor complete independence from the United States while others favor the establishment of a "nation within a nation," similar to the sovereign status of the large Indian tribes in the 48 contiguous states. Although considerable disagreement exists among different Native Hawaiian groups, the momentum behind the movement for a return of land and a restoration of sovereignty remains strong and continues to grow.

n13 See, e.g., MacKenzie, *supra* note 6; S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994); Noelle M. Kahanu and Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L AND COMP. L. 2:77 (1991).

n14 In 1994, the Hawaii State Legislature created the Hawaiian Sovereignty Elections Council as a semi-autonomous body to conduct an election to determine the views of the Native Hawaiian people regarding self-determination. In 1996, this Council conducted a mail-ballot in which 73% of the voters indicated that they favored moving toward self-determination. HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, FINAL REPORT 28 (Dec. 1996). Some Native Hawaiian groups boycotted this process because they felt it was tainted since it was financed and supported by the state government, and some have criticized its result, because fewer than half of the Native Hawaiians who received a mail ballot voted.

n15 For articles discussing various perspectives see e.g., Trask, *supra* note 13, Dennis Pu'uhonua "Bumpy" Kanahale, *Clandestine Manipulation Toward Genocide*, 34 ARIZ. ST. L.J. 63 (Spring 2002); R. Hokulei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAWAII L. REV. 693 (Summer 2002); Poka Laenui, *Walking the Crooked Path Straight*, 8 UCLA ASIAN PAC. AM. L.J. 225 (Spring 2002).

### **The 1893 Overthrow and the Uncompensated Seizure of Ceded Lands**

Throughout the nineteenth century, the United States recognized the independence of the Kingdom of Hawaii; extended full and complete diplomatic recognition to the Hawaiian government; and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887. n16 In the year 1893, the United States Minister assigned to the sovereign and independent Kingdom of Hawaii, John L. Stevens, conspired with a small group of non-Hawaiian residents of the Kingdom, including citizens of the United States, to overthrow the indigenous and lawful government of Hawaii. In pursuing that conspiracy, the United States Minister and the naval representative of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation in support of the overthrow of the indigenous and lawful government of Hawaii. The United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native people of Hawaii or the lawful government of Hawaii, in violation of treaties between the two nations and of international law.

n16 Apology Resolution, *supra* note 9, at para. 3. The description of historical events in this section of this article is taken from the Apology Resolution,

Although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it could not rally the support of two-thirds of the Senate needed to ratify a treaty of annexation. In a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on these illegal actions, and admitted that the government of a peaceful and friendly people was illegally overthrown. "A substantial wrong has thus been done," concluded the President, "which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair." n17 On July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii. n18

n17 *Id.* at para. 15.

n18 *Id.* at para. 20.

Queen Liliuokalani, the lawful monarch of Hawaii, and the Hawaiian Patriotic League, representing the aboriginal citizens of Hawaii, petitioned the United States for redress of these wrongs and for restoration of the indigenous government of the Hawaiian nation. These petitions went unanswered.

### **Annexation and Territorial Period**

In 1898, the United States annexed Hawaii through the Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, n19 "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied . . . their lands and ocean resources." n20 The Native Hawaiian people actively opposed the annexation of Hawaii, as evidenced by petitions signed by 21,269 people representing more than half of the Native Hawaiian population at the time. n21 Through the 1898 Joint Resolution and the 1900 Organic Act, n22 the United States received 1.8 million acres of lands, formerly Crown and Government Lands under the Hawaiian Kingdom, and exempted these lands from the existing public land laws of the United States by mandating that the revenue and proceeds from these lands be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes," n23 thereby establishing a special trust relationship between the United States and the inhabitants of Hawaii. n24 These lands are referred to as the "Ceded Lands" or the "Public Lands Trust." In 1921, Congress passed the Hawaiian Homes Commission Act n25 in recognition of the deteriorating condition of the Hawaiian people, setting aside about 200,000 acres of ceded lands for a homesteading program to provide residences, farms, and pastoral lots for native Hawaiians of fifty percent or more Hawaiian ancestry. n26

n19 Annexation Resolution, *supra* note 11.

n20 Apology Resolution, *supra* note 9, at para 25.

n21 See Nalani Minton & Noenoe Silva, *Ku'e: The Hui Aloha 'Aina Anti-Annexation Petitions 1897-1898* (1998).

n22 Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900), *reprinted in* 1 *Hawaii Revised Statutes* (Haw. Rev. Stat.) 43 (hereafter cited as Organic Act).

n23 Annexation Resolution, *supra* note 11, at para. 3.

n24 See *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159, 737 P.2d 446, 449 (Haw. 1987), *cert. denied*, 484 U.S. 898 (1987).

n25 Act of July 9, 1921, ch. 42, 42 Stat. 108.

n26 See *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982), in which the Hawaii Supreme Court found that the purpose of the HHCA was to rehabilitate Native Hawaiians. The court drew on language in the legislative history of the HHCA to conclude that there was "an intent to establish a trust relationship between the government and Hawaiian persons." *Id.* at 338, 640 P.2d at 1162.

### **The 1959 Admission Act**

When Congress admitted Hawaii as the 50th state of the United States in 1959, it enacted an Admission Act, n27 which required the new state to accept responsibility - as a condition of statehood - for the Hawaiian Homes

Commission Act. Congress also conveyed in trust to the State another 1,200,000 acres of the lands that had been ceded to the United States in 1898. The Admission Act reaffirmed the trust relationship between the United States and native Hawaiians and transferred part of the trust responsibility to the new State of Hawaii. n28 Section 5(f) of the Act required the State to use the revenues from the ceded lands for the betterment of the conditions of native Hawaiians, as well as for general public purposes. n29 The State interpreted the provision as allowing it to use the revenues for any one of five stated trust purposes and allocated all revenues to public education. n30

n27 An Act to Provide for the Admission of the State of Hawaii into the Union, approved March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (hereafter cited as Admission Act).

n28 *Trustees v. Yamasaki*, 69 Haw. at 162-163, 737 P.2d at 451. The Hawaii Supreme Court held that by virtue of Section 5(f) of the Admission Act, the ceded lands are "held by the State as a public trust for native Hawaiians and the general public."

n29 *Id.* at 160, 737 P.2d at 450.

n30 MacKenzie, *supra* note 6, at 19.

Because of this neglect, the delegates to Hawaii's 1978 Constitutional Convention proposed a series of amendments to the state Constitution that were subsequently adopted by Hawaii's people. One of these amendments affirmed that the State holds the ceded lands as a Public Land Trust with Native Hawaiians and the general public as the two named beneficiaries. n31 Other amendments created the Office of Hawaiian Affairs (OHA) and required the State to allocate revenues from a pro rata share of the Public Land Trust to OHA to be used explicitly for the betterment of native Hawaiians. n32 In 1980, the Hawaii Legislature determined that OHA should receive 20% of the revenues generated from the ceded lands held in trust by the State. n33 Although substantial disputes remain as to how much revenue OHA is owed, this revenue stream has already allowed OHA to accumulate more than \$ 300 million in assets. n34

n31 Haw. Const. art. XII, sec. 4; see generally MacKenzie, *supra* note 6, at 19-20; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63 (1985); Kahanu and Van Dyke, *supra* note 13, at 446-51.

n32 Haw. Const. art. XII, secs. 5-6. The term "native Hawaiian" in this provision refers to those entitled to benefit under the Hawaiian Homes Commission Act, primarily those with 50% or more Hawaiian blood.

n33 *Haw. Rev. Stat. §§ 10-3(1), 10-13.5.*

n34 HO'OLA HOU, OFFICE OF HAWAIIAN AFFAIRS ANNUAL REPORT 2003, 44.

Since the early 1970s, Congress has enacted over 160 statutes providing separate programs for Native Hawaiians or including them in laws and benefit programs that assist other native people. n35 Examples of separate acts benefiting Native Hawaiians include the Native Hawaiian Healthcare Improvement Act n36 providing programs and services designed to improve the health status of Native Hawaiians, the 1994 Native Hawaiian Education Act (reauthorized in 2000) establishing programs and funding for educational initiatives, n37 and the Hawaiian Homelands Homeownership Act of 2000 relating to affordable housing for Native Hawaiian families. n38 Native Hawaiians have been included in the Native American Languages Act protecting native languages, n39 the Native American Graves Protection and Repatriation Act protecting native burials and calling for the repatriation of human remains and funerary objects, n40 and the American Indian Religious Freedom Act expressing the federal policy protecting native religions. n41

n35 See Van Dyke, *Political Status*, *supra* note 1, at 106 n. 67 (listing statutes); and *see also* the complete list found in Appendix A in the *Amicus Curiae* brief of Hawaii's Congressional Delegation in *Rice v. Cayetano*, 528 U.S. 495 (No. 98-518).

n36 Pub. L. No. 100-579, § 2, 102 Stat. 2916, and Pub. L. No. 100-690, Title II, Subtitle D, § 2302, 102 Stat. 4223 (1988), and Pub. L. No. 102-396, Title IX, § 9168, 106 Stat. 1948 (1992), codified as 42 U.S.C. § 11701 et seq.

n37 Pub. L. No. 103-382, 108 Stat. 3794 (1994). The Native Hawaiian Education Act was re-enacted as part of the No Child Left Behind Act of 2001, as part B of title VII of Pub. L. No. 107-110 (2002), and is currently codified at 20 U.S.C. § 7512 et seq.

n38 Pub. L. No. 106-569, § 201 & Subtitle 5, §§ 511-514, 114 Stat. 2966 (2000), codified at 25 USCS § 4221 et seq.

n39 Pub. L. No. 101-477, Title I, 104 Stat. 1153 (1990), codified at 25 U.S.C. § 2901 et seq.

n40 Pub. L. No. 101-601, 104 Stat. 3048 (1990), codified at 25 U.S.C. § 3001 et seq.

n41 Pub. L. No. 95-341, 92 Stat. 469 (1978), codified as amended at 42 U.S.C. § 1996 et seq.

### **The 1993 U.S. Apology Resolution**

One of the most important recent Congressional enactments is the 1993 Apology Resolution n42 explicitly acknowledging the "special relationship" that exists between the United States and the Native Hawaiian people. Congress confirmed in the Apology Resolution that Native Hawaiians are an "indigenous people," which is the key characterization that establishes that a "political" (rather than "racial") relationship exists between the Native Hawaiian people and the United States government. n43 This characterization is important because United States courts have distinguished explicitly between statutes authorizing separate or preferential treatment for native or indigenous people and those granting separate or preferential treatment for other racial or ethnic categories.

n42 Apology Resolution, *supra* note 9.

n43 The Apology Resolution, *supra* note 9, states that United States military and diplomatic support was essential to the success of the 1893 overthrow of the Hawaiian Monarchy and that this aid violated "treaties between the two nations and international law." Among the other findings in the Apology Resolution are the following:

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to *the native Hawaiian people* of Hawaii or their sovereign government. . . .

Whereas *the indigenous Hawaiian people* never directly relinquished their claims to *their inherent sovereignty as a people* or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum. . . .

*Id.* at paras. 25, 29. After documenting in detail the wrongs done to the Hawaiian people at the time of the illegal overthrow -- including "the deprivation of the rights of Native Hawaiians to self-determination" -- the Apology Resolution urges the President of the United States to "support reconciliation efforts between the United States

and the Native Hawaiian people." *Id.* at § 1(5).

Although styled as a "joint resolution," the Apology Resolution was enacted by Congress as a public law and signed by President William Clinton. It is therefore a statute of the United States and has the same effect as any other law enacted by Congress. n44 In the 1993 Apology Resolution, Congress found that the Hawaiian people "never directly relinquished their claims to their inherent sovereignty as a people," and listed among the wrongs done to them "the deprivation of the rights of Native Hawaiians to self-determination." n45 The right to self-determination is the most basic of human rights under federal and international law, n46 and efforts to facilitate the exercise of this right are mandated by fundamental principles of human rights and human decency. In the Apology Resolution, the U.S. Congress also acknowledged that (1) the Republic of Hawaii ceded 1,800,000 acres of Crown, Government and Public Lands of the Kingdom of Hawaii without the consent of or compensation to the Native Hawaiian people or their sovereign government, (2) the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty over their national lands to the United States, and (3) the overthrow was illegal.

n44 *See, e.g., Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by Congress).

n45 Apology Resolution, *supra* note 9, at para. 29 and at § 1 (3); similar language is in the 2000 reauthorization of the 1994 Native Hawaiian Education Act, which reconfirmed that "Native Hawaiians are a distinct and unique indigenous people," and that the United States had apologized for "the deprivation of the rights of Native Hawaiians to self-determination." 20 U.S.C. § 7512(1) & (5).

n46 *See, e.g., Jon M. Van Dyke, Carmen Di Amore-Siah, and Gerald W. Berkley-Coats, Self-Determination for Nonsself-governing Peoples and for Indigenous Peoples: The Cases for Guam and Hawaii*, 18 U. HAWAII L. REV. 623 (1996).

The Congress thereby expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people, and urged the President of the United States to support reconciliation efforts between the United States and the Native Hawaiian people. n47 This reconciliation process is now underway. In 2000, the United States government released a substantial study of the current plight of Native Hawaiians. n48 In 2004, Congress established the Office of Native Hawaiian Relations in the Office of the Secretary of the Interior to "continue the process of reconciliation with the Native Hawaiian people," n49 and the United States Congress is now considering a bill n50 that would establish formal federal recognition of the Native Hawaiian people as indigenous people under United States law and lead to negotiations that would return lands and resources to a reestablished autonomous Native Hawaiian Nation.

n47 *See* Apology Resolution, *supra* note 9, § 1: Acknowledgment and Apology, (4)-(5). The Hawaii State Legislature approved of the Apology Resolution and agreed that the actions of the United States were illegal in Act 359 (1993) and Act 329 (1997).

n48 United States Dept. of the Interior and United States Dept. of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* (2000), available at <http://www.oha.org/pdf/report1023fin.pdf>. The Report recommended that as a matter of justice and equity:

[T]he Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. . . . To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians'

political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

n49 Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, div. H, sec. 148 (2004). This Office was established by the Secretary of the Interior in Order No. 3254, June 24, 2004, and the Interior Department has named a director to head the office.

n50 The "Native Hawaiian Government Reorganization Act of 2005," generally referred to as the "Akaka Bill," after Hawaii Senator Daniel Akaka, which is discussed *infra* in text at notes 57-60.

***Rice v. Cayetano (2000)*** n51

n51 *Rice v. Cayetano*, 528 U.S. 495 (2000).

Despite the compelling arguments that support the unique political status of Native Hawaiians, the United States Supreme Court ruled in February 2000 that the election procedure for the nine-member OHA Board of Trustees was unconstitutional as violative of the Fifteenth Amendment, n52 because the only people allowed to vote were those of Native Hawaiian ancestry. The Court was careful to avoid undercutting the *Morton v. Mancari* n53 line of cases, which allow Congress to "fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." n54 But it concluded that the election process for OHA did not qualify under this doctrine because the OHA election was administered by the State to elect "public officials" rather than being an election run by a native group to select its leaders, which would be "the internal affair of a quasi-sovereign." n55

n52 The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

n53 *Morton v. Mancari*, 417 U.S. 535 (1974).

n54 528 U.S. at 519.

n55 *Id.* at 520.

The Court's majority thus appeared to recognize that the outcome would be different if Native Hawaiians formed a "quasi-sovereign" political entity and conducted election of their leaders themselves, because it is solely on this basis that Justice Anthony Kennedy (writing for the majority) distinguished the OHA election from the many elections conducted by natives across the country to select their leaders. n56 Hawaii's Congressional delegation acted swiftly to facilitate the process of establishing such a "quasi-sovereign" entity by drafting a new statute n57 designed to (a) reconfirm the special political relationship between the United States and the Native Hawaiian People and (b) establish a process to create a self-governing autonomous political entity to enable the Native Hawaiian People to achieve self-governance and make progress toward their goal of self-determination. This law, known as the "Akaka Bill" after Hawaii Senator Daniel Akaka, complies with the road map set forth in Justice Kennedy's opinion, n58 where he cites the Menominee Restoration Act n59 and the Indian Reorganization Act n60 as examples of appropriate Congressional enactments to establish quasi-sovereign political entities within which native-only elections are permissible. If this statute, pending before the Congress as of this writing, is enacted, the Native Hawaiian people will take their place among other Native Americans, with sovereignty over their internal affairs, and authority over their own resources. If it

is not enacted, then Native Hawaiians will likely face constant challenges to the programs that have been established on their behalf.

n56 *Id.* at 519-521. The Court seems to have invited Native Hawaiians to pursue that solution, but then in an enigmatic paragraph also says that it is unclear whether Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes," 528 U.S. at 518, that "[i]t is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes," *Id.*, and that it is a "question[] of considerable moment and difficulty" whether Congress has or could "delegate to the State a broad authority to" establish preferential or separate programs for Native Hawaiians. *Id.* To illustrate the competing views on this question, Justice Kennedy cited Van Dyke, *Political Status*, *supra* note 1, and Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

Justice Kennedy's majority opinion closes by explaining that the "essential ground" for the Court's holding is that any classification utilizing a racial criteria is "demeaning," that it is improper to assume that a non-Hawaiian would cast an "unprincipled vote" on the selection of leaders to make decisions regarding Native Hawaiian resources and policies, and that the State of Hawaii's initiative to promote Native Hawaiian self-governance by facilitating their election of their own leaders "would give rise to the same indignities, and the same resulting tensions and animosities, [that] the [Fifteenth] Amendment was designed to eliminate." 528 U.S. at 523. This characterization is based either on an ideological perspective that rejects the value of diversity in our pluralistic country and the obligation to rectify the injustices imposed on the Native Hawaiian People, or on a complete misunderstanding of the careful balance that has been achieved in Hawaii - based on the respect and honor that all races have toward Native Hawaiians - and the widespread support that exists in Hawaii for a just resolution of the claims of the Native Hawaiian people. In a poll of 429 Hawaii voters conducted September 5-9, 2000, for instance, those expressing an opinion supported a bill for Native Hawaiian federal recognition by a two-to-one margin (49% in favor, 25% opposed, with 27% expressing no opinion). Pat Omandam, *Most Isle Voters Plan to Take Part in OHA Ballot*, HONOLULU STAR-BULLETIN, Sept. 15, 2000, at A1, col. 1.

n57 This bill, denominated as S. 147, is formally called the Native Hawaiian Reorganization Act of 2005. S. 147 was favorably reported out of the U.S. Senate Comm. on Indian Affairs on May 16, 2005. See generally John Heffner, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide*, 37 TEXAS INTERNATIONAL LAW JOURNAL 591, 600-01 (2002).

n58 528 U.S. at 520.

n59 25 U.S.C. § 903b.

n60 25 U.S.C. § 476.

The ambiguities in the Supreme Court's *Rice v. Cayetano* opinion have invited such challenges, and several cases are now pending before federal and state courts. One challenge to the constitutionality of the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands was dismissed by the United States Court of Appeals for the Ninth Circuit because the plaintiffs lacked sufficient personal injuries to have "standing" to bring this challenge and because the United States was an indispensable party but could not be sued because of its sovereign immunity. n61 A similar challenge brought subsequently by state taxpayers was dismissed on standing grounds on most claims and is likely to be dismissed completely based on a recent United States Supreme Court decision on state taxpayer standing. n62

n61 *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003).

n62 In *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), *cert petition pending*, the 9th Circuit Court of

Appeals upheld the dismissal of all claims relating to the Hawaiian Homelands program and most claims against OHA. The claim challenging state expenditures is likely to be dismissed based on *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854 (2006).

A challenge has also been filed against the admissions policy of the Kamehameha Schools, which effectively limits admission to children of Native Hawaiian ancestry. The Schools were established by the will of Princess Bernice Pauahi Bishop, the last direct descendant of Kamehameha I, and are funded largely by lands of Hawaiian royalty placed into a trust. In August 2005, a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled two-to-one that the Hawaiians-only admission policy violated the 1866 Civil Rights Act prohibiting racial discrimination with regard to the making of contracts. In February 2006, the Ninth Circuit agreed to establish an *en banc* panel of 15 judges to reevaluate this decision. n63

n63 *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005), *rehearing en banc granted and opinion vacated*, 2006 U.S. App. LEXIS 4167 (2006).

In state court, the Hawaii Supreme Court has rejected previous claims brought by the Office of Hawaiian Affairs regarding the revenue stream it should be receiving from ceded lands, ruling that these claims present non-justiciable political questions or are barred by other procedural barriers. n64 A case is now pending before the Hawaii Supreme Court seeking a moratorium on the sale or transfer of any of the lands that were "ceded" to the United States through the 1898 annexation and subsequently transferred to the State in the 1959 Admission Act until the claims of the Native Hawaiian people are resolved. n65

n64 *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987), *cert denied*, 484 U.S. 898 (1987); *Office of Hawaiian Affairs v. State*, 96 Hawaii 388, 31 P.3d 901 (2001); *Office of Hawaiian Affairs v. State*, 110 Hawaii 338, 133 P.3d 767 (2006).

n65 *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, now pending before the Hawaii Supreme Court as S.C. No. 25570 (2003).

## Conclusion

Native Hawaiians are one of the largest groups of indigenous peoples in the United States. They stand alone, however, in having never been granted a settlement or access to a claims commission. The deprivations and injustices they have suffered are well documented. Congress acknowledged in the 1993 Apology Resolution that the United States violated international law when it provided the crucial support to the overthrow that allowed it to succeed, and Congress called for a "reconciliation" between the United States and the Native Hawaiian people. Although some steps have been taken in that direction, the recognition of claims to sovereignty and the return of the land and resources to the Native Hawaiian people remain unfinished business.

In 1893, President Cleveland acknowledged that a substantial wrong had been done to the Hawaiian people and urged that "a due regard for our national character" required repair of that wrong. After more than a century, the failure to address and resolve the claims of the Native Hawaiian people continues to be a significant stain on the national character of the United States.

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