

***Rice v. Cayetano:***  
**Reaffirming the Racism of Hawaii's Colonial Past**

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I. Posture of the Case

On February 23, 2000, the U.S. Supreme Court issued its decision in *Rice v. Cayetano*,<sup>2</sup> striking down a state constitutional voting scheme for the State of Hawaii Office of Hawaiian Affairs (“OHA”). Elections for OHA Trustees were held as part of the state's election process, but only indigenous Hawaiians were allowed to vote and run for office. The State relied on 1978 Constitutional Amendments, which established OHA to oversee the entitlements of indigenous Hawaiians, including the assets of the Ceded Land Trust, created at the time of statehood. The State argued that it was fulfilling a trust obligation which had been transferred to it by the federal government at Statehood, and that the process was intended to allow Native Hawaiians to designate those people who would make decisions relating to their trust assets. Briefs submitted in the case in support of the State, including briefs of Native American Indian and Alaskan Natives, argued that treatment of Hawaiians by the State should be viewed in the same legal light as treatment of other classes of Native Americans by the federal government.

Harold F. Rice sued because he is a white man and was not allowed to vote in the OHA election. Rice was a descendant of the missionaries who had conspired with the United States to overthrow the Hawaiian Kingdom in 1898. His case was supported and partially funded by the Coalition for Color Blind America, a racist organization that was raising legal challenges in the courts to programs and entitlements of Black, Asian and Native Americans.

Rice and the Coalition argued that all Americans were “equal,” that Hawaiians were not a federally recognized “tribe” who enjoyed a political relationship with the Federal Government and, consequently, that benefits extended to them were unconstitutional because the benefits were based on race. Rice claimed that the State voting scheme violated the Fifteenth Amendment of the U.S. Constitution, which prohibits states from

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<sup>2</sup> 528 U.S. 495 (2000).

abridging the right to vote based on race.

The U.S. Supreme Court ruled in favor of Rice. The decision spawned several new court cases challenging the Hawaiian Ceded and Home Land Trusts, and all state and federal programs that provide health, housing, education, job training or other benefits to the impoverished Hawaiian community, which includes the poorest and most politically disenfranchised peoples residing in the United States. The decision has fueled a firestorm of racist, anti-Hawaiian sentiment similar to the atmosphere that existed in 1893 when the U.S. annexationists overthrew the Hawaiian Kingdom.

The *Rice* decision, at its core, demonstrates why the status of indigenous Hawaiians as wards of the state is untenable and unconstitutional. The case also raises serious equal protection issues, by exposing significant contradictions in U.S. domestic policy relating to Native Americans. Most importantly, *Rice* and its legal spawn undermine the validity of the Statehood Compact and raise critical issues under international law.

## II. Equal Protection Issues

The Equal Protection Rule in the American juridical system does not guarantee that all peoples are treated equally. It does require that people similarly situated be given equal protection of the law. Consequently, Equal Protection does not require that white Americans receive the same benefits that Native Americans receive, but it does require that all Native Americans be similarly treated under the law.

In 1970, President Richard Nixon delineated the current U.S. policy relating to Native Americans. Under this policy, known as the Native American Self-Determination Policy, Native Americans are allowed to form autonomous governments to hold tribal elections, limit membership and determine economic, social and cultural policy on their lands.

Congress has passed more than forty federal laws acknowledging that Native Hawaiians are Native Americans. These include the American Indian Religious Freedom Act, the Native American Programs Act of 1974 and the Native American Languages Act of 1992. Despite this fact, Hawaiians continue to be excluded from the protections of the Self-Determination Policy, which is extended only to Indians and Alaska Natives. Hawaiians are considered wards of the State of Hawaii and have never been allowed to exercise jurisdiction over their extensive trust lands and assets, which since the time of statehood, in 1959, have been held in trust by the State of Hawaii. The Native trusts have never been inventoried by the State Trustee, nor have any of the lands or revenues of the trusts ever been transferred to the Hawaiian peoples who are

beneficiaries of the trust. There is extensive evidence of the State's breach of trust towards Hawaiians.

The exclusion of Hawaiians from the Native American Self-Determination Policy has had a devastating impact on Hawaiian peoples, and has resulted in years of civil rights violations against them. This fact has been the subject of several reports of the U.S. Civil Rights Commission. In December 1991, for example, the Hawaii Advisory Committee to the United States Commission on Civil Rights published a report entitled *Broken Trust*. This report documented the failure of the United States to protect Hawaiian civil rights for seventy-three years. Seventy-nine years have now elapsed, and Hawaiian civil rights continue to be violated because of our peoples' status as wards of the state.

The Civil Rights Commission made the following finding in its report:

Finding 2: Unlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for federal recognition.

The lack of formal recognition of Native Hawaiians by the federal government has resulted in their inability to secure control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination. This constitutes disparate treatment and must be remedied without delay.

Recommendation 2: Federal Recognition of Native Hawaiians

The Congress should promptly enact legislation enabling Native Hawaiians to develop a political relationship with the federal government comparable to that enjoyed by other native peoples in the Nation. Such legislation would encourage the realization of sovereignty and self-determination for Native Hawaiians, a goal that this Advisory Committee strongly endorses.

The legislation should also explicitly confer eligibility to Native Hawaiian beneficiaries for participation in federal programs designed to assist Native Americans, Alaska Natives, and other protected groups who have suffered from historical discrimination.

Native Hawaiians should receive the full protection of civil rights statutes and regulations applicable to Native Americans and other protected groups in the United States.<sup>3</sup>

Throughout the years, indigenous Hawaiians have repeatedly sought congressional legislation to correct the abuse of state wardship and address their exclusion from federal policies applicable to other classes of Native Americans. These bills have failed to pass through Congress due to opposition from Hawaii's senior Senator Daniel Inouye, and Hawaii's powerful Democratic Party, which benefits from a co-mingling of trust assets set aside for the "public" and the "Native." These efforts within the State have been fruitless. The State has consistently refused to segregate or inventory the vast trust resources it received at Statehood and continues to hold the traditional lands of Hawaiians for public use. OHA has, since its creation in 1978, refused to allocate funds (as of 2000, OHA had \$500 million in its account) to sponsor federal corrective legislation, and has never disbursed funds to its beneficiaries.

The exclusion of Native American Hawaiians from the federal policy which allows Native American Indians and Alaskan Natives to exercise internal self-determination through autonomous, federally recognized sovereign entities is a clear violation of the Equal Protection Clause of the U.S. Constitution, which the Court failed to address in the *Rice* case. Most importantly, the exclusion of Hawaiians from the policy means that Hawaiians continue to be denied the right to self-determination to this very day.

### III. International Legal Issues

Hawaii is the only state in the Union that upon the imposition of statehood received title to land in trust for the "public" and the Native indigenous peoples. This unique situation, ignored by the Court in *Rice* and conveniently bypassed in briefs submitted by the State of Hawaii and its subsidiary agency, OHA, is the direct result of Hawaii's history as an independent nation-state and the complicity of the United States in the illegal overthrow of the Hawaii Kingdom.

The bitter debate over the U.S. involvement in the overthrow of the Kingdom and the Annexation of Hawaii ended in 1993 when Congress passed the Apology Law in 1993.<sup>4</sup> In the Apology Law, Congress

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<sup>3</sup> HAWAIIAN ADVISORY COMM., U.S. COMM'N ON CIVIL RIGHTS, *A Broken Trust, the Hawaiian Homelands program: Seventy Years of Failure of the Federal and State Government to Protect the Civil Rights of Native Hawaiians* (1991), available at <http://www.law.umaryland.edu/edocs/usccr/html%20files/chrolist.asp#1991>.

<sup>4</sup> 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).

admitted that U.S. agents conspired to overthrow the Kingdom and participated in the creation of a self-declared government known as the Republic of Hawaii, which thereafter ceded 1.8 million acres of land and the sovereign jurisdiction of the islands to the United States “without consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.” The Apology Law specifically states that the actions of the United States were in violation of treaty law, international law and “in deprivation of the rights of Native Hawaiians to self-determination.”

Queen Liliuokalani did not abdicate the throne, nor was she defeated in armed conflict. If either of these events had occurred, the sovereignty and property rights of the Kingdom and its citizens would have been irretrievably lost. Instead, Liliuokalani ceded her authority to the U.S. Minister “. . . until such time as the . . . United States shall . . . reinstate me in the authority which I claim as the Constitutional Sovereignty of the Hawaii Islands.” The United States did not accept the cession of the Kingdom but instead extended diplomatic recognition to the Provisional Government (“P.G”). Following the political transformation of the P.G. into the Republic, the Republic ceded the sovereignty and territory of the Kingdom to the United States.

Under applicable international law, cession preserves the property rights of the inhabitants of the ceded territory. This critical fact has been ignored by the parties in the *Rice* case. The cession of the sovereignty and lands of the indigenous Hawaiian peoples was affected by the Newland Resolution, which provided for the annexation of Hawaii by the United States. Years later, the U.S. Congress would admit in the Apology Law that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their monarchy, or through a plebiscite or referendum.”

The Newland Resolution was intended to be a vehicle for political subterfuge. It was drafted by annexationists who were U.S. agents for the purpose of eradicating native title to the lands and resources of the Kingdom and transferring the Kingdom's sovereignty and territory to the United States. The Newland Resolution provided that the revenues and proceeds of the Kingdom's lands “shall be used for the benefits of the inhabitants of the Hawaii Islands for education and other purposes.” This language is identical to the language contained in the Treaty of Annexation of 1897 and the Resolution of the Senate of Hawaii Ratifying the Treaty.

The Newland Resolution recognized a trust in the Ceded Lands of the Kingdom, reserving the beneficial interest to the “inhabitants” of Hawaii, but it did not and could not eradicate the property rights of Native

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Hawaiians or inherent rights of the indigenous Hawaiian peoples to self-determination and sovereignty. These rights were preserved and eventually devolved into the Ceded Land Trust, which has two beneficiary classes, the “public,” and the “Native Hawaiians.”

In 1898, there were two classes of “inhabitants” of the Hawaii Islands: thirty-one percent of the inhabitants of Hawaii were of Hawaiian ancestry, and sixty-nine percent were of foreign ancestry. The property rights of these two classes differed significantly. Native inhabitants possessed rights of native tenants to gather, fish and enjoy access throughout the Kingdom. Under Hawaii cultural practice, custom and usage, the indigenous peoples continued to be equitable titleholders as tenants in common to all the lands of the Kingdom. This fact was codified in the first Constitution of the Kingdom in 1840, which specifically recognized that the King held legal title to the land: “although it was not his own property, it belonged to the Chiefs and peoples in Common . . . .” Non-native inhabitants did not possess these rights.

The historical record indicates that the property rights of the Native Hawaiian peoples survive to the present day. The land division known as the Great Mahele, which occurred in 1848, operated to transfer title to some of the Kingdom's lands to the chiefs and a few non-Hawaiians who supported Kamehameha the Great in the unification wars. The Mahele did not eradicate the equitable title of the common people to their traditional lands.

The Hawaiian Statehood Bill was proposed in 1947; it became law in 1959. During the course of its review by U.S. agencies, the Department of Interior recommended changes to ensure that the Ceded Lands be impressed with a trust for two classes of beneficiaries, the “public” and the “native Hawaiian.” The Department of Interior’s position was that such changes were needed to ensure protection for Hawaii’s indigenous peoples. Such changes were also required to preserve the property and cultural rights of Native Hawaiian inhabitants of the Kingdom under State law. Interior’s amendments were significant because the department had the obligation to fulfill the U.S. trust obligation to Native Americans and had oversight of the sacred trust obligation imposed by international law on the United States as the administering agent over the United Nations Non-self-governing Territory of Hawaii.

The Statehood Act is a compact between the United States and the Territory, and its terms cannot be modified without the consent of all parties. The Statehood Compact made Hawaiians wards of the State and transferred their property rights to the State to be held in trust, but it never extinguished Native title to land or the inherent rights of the native people to self-determination. The Native Hawaiians’ trusts are referenced in sections 4 and 5 of the Statehood Compact. If the Hawaiian Home Lands Trust and the Ceded Land Trust are declared invalid by the U.S. Supreme

Court, the basis of the Statehood Compact will be rendered null and void.

#### IV. Conclusion

The U.S. Supreme Court's ruling in *Rice v. Cayetano* demonstrates that state wardship over Hawaiians is unconstitutional. States cannot recognize, create or empower indigenous governments. This power is exclusively reserved to the United States under Article 1, Section 8 of the U.S. Constitution. The United States has refused to correct the situation or to confer "federal recognition" on Hawaiians. It has encouraged the continuing violation of Hawaiian civil rights under international and domestic law, and unilaterally repudiated the compact for admission of the State of Hawaii into the Union.

Most tragically, racial tensions and social disruption continue to escalate in Hawaii. Hawaiians continue to live and die in abject poverty and homelessness, while their vast trust assets are utilized exclusively for the public. The history of Black Americans and Native Americans demonstrates that when socio-political issues relating to human liberties are ignored, the result is often violence. Indeed, the experience of the United Nations in global conflict demonstrates that there are two ways to achieve self-determination for oppressed peoples. It can be negotiated peacefully or by waging wars of national liberation.

The ruling of the U.S. Supreme Court in *Rice v. Cayetano* and the legal challenges that it has spawned, provide a strong basis for the United Nations to review the case of Hawaii and its indigenous peoples. Congress has admitted that Native Hawaiians were denied their right to self-determination, but it does not appear that the United States intends to correct the historic and current civil rights abuses, which continue to negatively impact Hawaiians today.