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Priority: Normal

Subject: Comment on Draft Report re
Hawaiian issues

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Date: 9/21/00 3:13:53 PM

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To: KAREN SPRECHER

KEATING at ~SOLHQ

To: Edward K

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Subject: Comment on Draft

Report re Hawaiian issues

Several hours ago I e-mailed you the letter attached hereto but
did not

include the enclosure referenced in the letter. Both are
attached to this

e-mail and both are on their way to your Department by snail
mail. The

format of the attachments is Word 2000. Thank you for your
attention to

this matter.

Lotus cc:Mail for Karen Sprecher Keating

File attachments follow. If you are unable to view the attachments, please refer to the instructions below.

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Word 97-2003

Word 97-2003 (2)



Word 97-2003

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September 20, 2000

Assistant Secretary John Berry
C/o Document Management Unit
Department of the Interior
1849 C Street NW, Mailstop 7229
Washington, DC 20240

Re: "Draft Report on the Reconciliation Process Between the Federal
Government and Native Hawaiians"

Dear Mr. Berry:

This letter comments on the above-referenced Draft Report. The Report's historical narrative, although incomplete, nonetheless succeeds in refuting the Report's conclusions and demonstrating the unconstitutionality of its primary recommendation.

Since you apparently believe that your job requires you to pretend to believe the allegations in the preamble to the Apology Bill, Pub. Law 103-150 (1993), I will not detail the errors and omissions in the section of the Draft Report titled "A Brief History of Hawai'i." For the sake of argument, let's assume the facts as stated there.

The draft report's primary recommendation is that Congress should exercise its power over Indian tribes under the Commerce Clause to enact legislation that creates a Native Hawaiian government analogous to an Indian tribe. (Dr. Rpt. at 17.) The alleged justification for this is to compensate for "past wrongs suffered by the Native Hawaiian people" at the hands of the United States, in connection with the overthrow of the government of the Kingdom of Hawai'i in 1893. Dr. Rpt. at 20, Apology Bill quoted at Dr. Rpt. at 8-10. The alleged wrongs are the theft of lands and "sovereignty" by the United States from "native Hawaiians" (defined in terms of ethnicity, Dr. Rpt. at 6, n. 1).

However, the Draft Report itself shows that no land was stolen from Native Hawaiians. It notes that by 1893 most Native Hawaiians did not even own any private land. Dr. Rpt. at 25. The Report does not even try to argue that the United States or the Republic of Hawaii stole any private land.

The Draft Report discusses the Maahele at length but to no effect. Even assuming for the sake of argument that the Maahele was a policy fiasco, it was the policy fiasco legislated by King Kamehameha III and his ali'i who ran the government at the time and set the policy. As the Draft Report notes, they came out of the process with most of the land, Dr. Rpt. at 24 – which should not surprise anyone who has studied politics. The United States is no more responsible for the Maahele than it is for the consequences of English government policy in Ireland during the same period (the Great Famine, etc.).

The Draft Report refutes its own argument that the Crown Lands and Government Lands of the Kingdom belonged to the class of native Hawaiians in 1893. As the Report notes, the Crown Lands were originally the private property of the King. Dr. Rpt. at 24. In 1864, as a result of a deal between Kamehameha V and the Kingdom's legislature, the Crown Lands were transformed into a kind of government land, controlled by government officials (the Crown Land Commissioners) and dedicated to the special governmental purpose of paying the salary of Kingdom's chief executive. Dr. Rpt at 25; Act of Jan. 3, 1865, L. 1864, p. 69, reprinted in 2 R.I.H. (1925) at 2177; Lijjūkalanī v. United States, 45 Ct. Claims 418, 427-28 (1910); Estate of Kamehameha IV, 2 Haw. 715 (1864). As both the Supreme Court of the Kingdom and the U.S. Court of Claims held, the Crown lands did not belong to the King or Queen in their personal capacities but to the government of the monarch. The Crown, the Government, and the Crown Land Commissioners were each distinct from the ethnic class of Native Hawaiians.

Similarly, the Government Lands belonged to the Government, not to the class of Native Hawaiians. An individual Native Hawaiian could not have sold or willed a personal share of the Government Lands to another person. Nor could he have excluded anyone from any part of the Government Lands. See College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board, (U.S. S.Ct. 1999) (right to exclude others is the hallmark of a property interest). Nor did ethnic Hawaiians, individually or as a group, have any special legal privileges to use those lands. The Government Lands and Crown Lands belonged to the Government both before and after the Revolution. Not only were the lands not stolen, they did not even change hands.

What changed in 1893 was political control of the Government. The claim for stolen lands thus collapses into the claim for stolen sovereignty. I will not spoil the rhetorical value of "sovereignty" by trying to define it. Its value is its vagueness. What is significant in this context is political power. The decisive question is who controlled the government of Hawai'i immediately before and after the 1893 Revolution? Whoever controlled the "sovereign" government of Hawai'i also controlled the Government Lands and Crown Lands. The Draft Report shows that the class of Native Hawaiians did not control the government of the Kingdom. Dr. Rpt. at 26. Most Native Hawaiians could not even vote. As the Draft Report notes most of the people holding important public office were not Native Hawaiian. The 1893 Revolution merely replaced one small oligarchic clique with another small oligarchic clique.

The Kingdom of Hawai'i followed the same rule of citizenship that the United States follows: anyone born in the country was a citizen by birth, and anyone who moved to Hawai'i could qualify for naturalization. The Kingdom also offered a status called "denizenship" which gave foreigners all of the privileges and status of citizens without asking them to give up their original citizenship. Citizenship and political rights in the Kingdom never depended on ancestry. Attached is a brief history of citizenship and voting rights in Hawai'i that fill in some of the details the Draft Report leave out.

When you've got nothing you've got nothing to lose. The Draft Report demonstrates that the class of Native Hawaiians did not lose either land or political power in 1895. Dr. Rpt. at 25-26. After the United States annexed Hawai'i, all citizens of Hawai'i became American citizens. The franchise was widened to include all adult citizens, far beyond the narrow franchise permitted by the Kingdom. Thus, political rights for Native Hawaiians expanded when they became Americans.

Furthermore, all the alleged victims of the events in the 1890s are dead. The claim for special privileges for ethnic Hawaiians now amounts to a claim for hereditary political power. Even if the ancestors of some Native Hawaiians lost political power in 1893, their descendants today have no claim to inherit privileged status. That is as undemocratic as saying that white American citizens who can trace their ancestry in America back to 1776 are entitled to special political privileges. Hereditary political power is unfair, undemocratic and un-American.

The Draft Report's summary of the history of the Ceded Lands Trust confirms that there is no claim arising from alleged breaches of trust. In the first place, the United States accepted the ceded lands with the promise that the land would be held in trust for all of the inhabitants of Hawai'i. Dr. Rpt. at 30; Newlands Resolution. In Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982), the Supreme Court of Hawai'i held that transferring trust assets from Hawaiian Home Lands trust for use of general public was a breach of the Home Lands trust. By the same logic, Congress breached the original ceded lands trust when it transferred part of the trust corpus to the Hawaiians Home Commission in trust for the exclusive use of a minority (persons having at least 50% ethnic Hawaiian ancestry). Hawaiian Homes Commission Act of 1920.

More importantly, the definition of "native Hawaiian" in the Hawaiian Home Lands Act is a racial classification. The Act's legislative history shows that the racial classification was intentional and combined patronizing attitudes towards Hawaiians with blatant racism directed to Japanese (who qualified for homesteads under the prior homestead act). In 1920, Congress believed that it could indulge in racial discrimination as it pleased but we now know that intentional racial discrimination is unconstitutional, even when committed by Congress. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). Since the Hawaiian Home Lands trust is itself an unconstitutional breach of trust, no one has just cause to complain about not getting as much from it as they would like. Even if the Hawaiian Homes Commission Act were constitutional, no one has just cause to complain that Congress was not more generous: if I create a trust for you, I do not breach the trust by funding it at, say, \$10,000 rather than at \$1 million.

The Admissions Act, § 5(f) provides no basis for a claim of racial privilege. That provision leaves it to the discretion of the state how to address the five listed purposes. The State was perfectly within its legal rights to spend all of the ceded land revenues on public education for the benefit of children without regard to race. Moreover, insofar as § 5(f) incorporates the racial definition of "native Hawaiian" under the Hawaiian Homes Commission Act, it is equally vulnerable to constitutional challenge.

Giving one racial group exclusive hereditary privileges and political power is unconstitutional. "Native Hawaiian" is defined in terms of descent from the people who lived in Hawai'i in 1778 when Captain Cook made first contact with Hawaii. This is essentially the same definition as the definition of "Hawaiian" in Haw. Rev. Stat. §§ 10-2 and 11-1, regulating who could vote for and run for trustee of the Office of Hawaiian Affairs ("OHA"). In Rice v. Cayetano, 120 S.Ct. 1044 (2000), the United States Supreme Court held that this is a racial classification for constitutional purposes. The Court held that applying that racial classification to limit who can vote in an election violates the Fifteenth Amendment.

In Rice, the Supreme Court considered and rejected the argument, based on a misreading of Morton v. Mancari, 417 US 535 (1974), that the racial discrimination was constitutional because Hawaiians are like American Indians. The Supreme Court explained what is different about Indian tribes: they are not federal or state agencies. Rice, 120 S.Ct. at 1057. The Court has held that tribes pre-existed the United States and "retained some elements of quasi sovereign authority even after cession of their lands to the United States." Id. Their lingering remnants of original sovereignty – "quasi-sovereignty" as the Supreme Court described it – are not created by or derived from the United States or any State. Id. United States v. Wheeler, 435 U.S. 313, 322-323 (1978). This has two constitutional consequences.

First, because Indian tribes are not agencies of the United States or any state, tribal elections are not subject to the Fourteenth or Fifteenth Amendments. See Talton v. Mayes, 163 U.S. 376 (1896) (tribe not limited by Fifth Amendment to US Constitution when dealing with its members). Rather, tribal elections "are the internal affair of a quasi-sovereign." Rice 120 S.Ct. at 1059. Second, because Indian tribes have lingering remnants of sovereignty not derived from the United States or any State, the United States enters into political relations with them, government to government. As part of that political relationship, the federal BIA exercises a guardian's power over Indian tribes. See Mancari, 417 U.S. at 541-42, 551 (plenary power of Congress exercised through Bureau of Indian Affairs ("BIA") as guardian of tribal wards). Exercising that power, the BIA promulgated the regulation at issue in Mancari concerning enrolled members of federally recognized Indian tribes. The Supreme Court concluded that the regulation was based on the unique political relationship between the BIA and Indian tribes and so was a political classification, not a racial classification. Id. 417 U.S. at 554, n.24.

On August 19, 2000, the federal District Court for the District of Hawai'i followed the reasoning of Rice to hold that denying candidates the right to run based on their not being "Hawaiian" under this racial identification is also unconstitutional. Akakaki v. State of Hawai'i. The Court held that that racial discrimination violates the Fourteenth Amendment Equal Protection Clause as well as the Fifteenth Amendment. Like the Supreme Court, the District Court rejected the argument that the racial discrimination was saved by an analogy between Hawaiians and Indians. Slip op. at 25-

33. "The requirement that only Hawaiians serve as trustees of OHA is, however, a racial classification. . . . Mancari cannot be read to permit Congress to discriminate on account of race. Such discrimination runs counter to the principles of our Constitution." Id. at 32-33.

The Fifteenth Amendment applies to the United States as well as to the States. The United States Supreme Court has held that the Due Process Clause of the Fifth Amendment includes an equal protection principle that limits the power of Congress to the same extent that the Equal Protection Clause of the Fourteenth Amendment limits the power of the states. Adarand Constructors, Inc. v. Peña.

As the historical summary in the Draft Report makes clear, Native Hawaiians are not now and never have been an Indian tribe. The Kingdom of Hawai'i was, from the perspective of American law, a foreign nation. Just as an Indian tribe is not a foreign nation, a foreign nation is not an Indian tribe. See Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (Indian tribe does not have standing to bring suit against under original jurisdiction of Supreme Court because it is neither a State nor a foreign nation but merely a domestic dependent nation). Unlike membership in a tribe, citizenship in the Kingdom of Hawai'i was never limited by ancestry. From the time that King Kamehameha set out on his conquest of Hawai'i, his subjects included people who were not ethnic Hawaiians. The only historical precedent for a governmental unit limited to ethnic Hawaiians is the unconstitutional racial discrimination perpetrated by OHA.

Congress has no power to create an Indian tribe. Any creature of Congress is created by an exercise of Congress' delegated power under the Constitution. Congress' power under the Indian Commerce Clause, like all of its powers, is limited by the Fifth and Fifteenth Amendments. All entities created by Congress are similarly limited by the Constitution. Congress has no power to define a racial group as an Indian tribe. United States v. Sandoval, 231 U.S. 28, 46 (1913).

Congress also does not have any plenary power over "Native Americans" or "aboriginal peoples" or "native peoples" or "indigenous peoples." Those terms cannot be found in the Constitution. The Commerce Clause delegates Congress a power only to "regulate commerce" with "Indian tribes." In Rice, the Supreme Court laid to rest the theory that Mancari recognized a "Native American" exception to the Constitution. Rice is confirmed by Adarand and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which applied the same strict scrutiny test to racial discrimination in favor of American Indians, Eskimos and Aleuts that they applied to discrimination in favor of other racial groups. Nor can unconstitutional racial discrimination concerning political rights be saved by invoking an alleged trust relationship. Rice; Arakaki. See Rice at 1060-61 (Breyer and Souter, JJ concurring) (no trust relationship between Hawaiians and U.S.).

In short, the Draft Report, combined with Rice and Arakaki, establishes:
(1) There is not now a Hawaiian tribe, so no such entity can be "recognized" by Congress. (2) There never was a Hawaiian tribe, so no Hawaiian tribe can be "restored"

or "revived." (3) Congress cannot create a Hawaiian tribe or tribal government because it would be creating a federal agency practicing racial discrimination in voting and office holding. Congress lacks the power to authorize racial discrimination. Because there is no Hawaiian tribe, Congress has no more power over American citizens of Hawaiian ancestry than it has over other American citizens. Congress can neither favor nor disfavor the racial group defined by descent from the inhabitants of Hawai'i in 1778.

This conclusion cannot be evaded by saying that the "Native Hawaiians" will be empowered by Congress to "develop a community membership rule consistent with Federal law." Dr. Rpt. at n.1. That notion creates a vicious circle: you cannot know who are the "Native Hawaiians" who get to define the membership rule until you know the membership rule that defines who are "Native Hawaiians." The Draft Report would break the vicious circle by assuming that "Native Hawaiians" are descendants of the inhabitants of Hawai'i in 1778. The Report proposes that Congress should authorize that group to vote on a decision about membership. Id. But that definition of "Native Hawaiian" uses the racial classification that the Supreme Court held in Rice cannot be used to limit voting rights. The entire process would be set in motion by a congressional act. That act would violate the Fifteenth Amendment, just as Hawai'i's attempt to create a racially limited government for native Hawaiians violated the Fifteenth Amendment.

Government of the race, by the race and for the race is anathema to American democracy. "Race cannot qualify some and disqualify others from full participation in our democracy." Rice, at 1060. The Departments of Interior and Justice fail in their duty to Congress and to the American people when they advise Congress to deny the equal constitutional rights of American citizens.

The Draft Report is correct about one thing: it is time for a true reconciliation. It is time for Native Hawaiian activists and federal officials to reconcile themselves to the historical facts: no land was stolen and no political power was stolen from any living person. It is time to reconcile themselves to the fact that "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." Rice at 1060. It is time to abandon self-righteous claims of racial privilege. It is time that everyone reconciled himself to being an equal citizen of a democracy. As free and equal citizens of the United States of America, we are all sovereign now. No one can fairly claim more.

Very truly yours,

Patrick W. Hanifin

Enclosure

A BRIEF HISTORY OF CITIZENSHIP AND VOTING RIGHTS IN HAWAII

Patrick W. Hanifin

When Hawai'i was an independent country, everyone born here (except children of foreign diplomats) was a citizen. The government actively encouraged immigration and offered immigrants easy naturalization. Immigrants to the Kingdom of Hawai'i who did not want to give up the citizenship of the country they came from could become "denizens" entitled to full legal rights of Hawaiian subjects. Basically, the Kingdom extended citizenship to everyone born here and everyone who came here and wanted to join. Race and ethnicity did not matter. There is no historical basis for a "nation within a nation" with membership restricted to ethnic Hawaiians.

I. THE COMMON LAW RULE: CITIZENSHIP BY PLACE OF BIRTH

Hawai'i, when it was independent, followed the Anglo-American common law rule of "jus soli": everyone born in the country and subject to its jurisdiction is a citizen. GORDON, MAILMAN & YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 92.04[3] (1999).

The common law rule has been traced back to the Norman Conquest of England in 1066. When William the Bastard of Normandy made himself William the Conqueror of England he insisted that everyone in England was his subject and owed loyalty directly to him as the King. To be the King's loyal subject a person necessarily had to be the King's legal subject. Hence the rule developed at common law that everyone born in England was a subject of the King. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Chapter 10 *366-*372 (1765); United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898); IMMIGRATION LAW AND PROCEDURE, § 92.03[a]. Under the common law, a child born outside England was not an English subject, even if his parents were English subjects. However, Parliament passed statutes that made most such children subjects.

The English common law rule lasted through the 19th century as Britain built an empire that circled the globe and that was largely populated by non-whites. Under British law, anyone born in the Empire was a British subject and any British subject living in a parliamentary constituency (i.e. in the British Isles) could vote if he met the voter requirements (being male, satisfying property qualifications, if any, etc.). Thus an Indian who moved to London had the same rights as a British subject born in London. DICEY, THE LAW OF THE CONSTITUTION, p. liv n. 43 (1982 reprint of 1914 edition).

The English common law rule was adopted in the United States as part of the American common law, with royal "subjects" becoming republican "citizens." United States v. Wong Kim Ark, 169 U.S. at 658; IMMIGRATION LAW AND PROCEDURE, § 92.03[b]. The Constitution gives Congress the power to enact uniform rules for naturalization. U.S. Constitution Art. I, sec 8. In 1856, the Supreme Court invented an exception to the common law: the Court barred blacks from citizenship, even if they were born free in the United States. Dred Scott v. Sandford, 60 U.S. 393 (1856). That decision was widely condemned in the North and helped precipitate the Civil War. After the North won the Civil War, the 14th Amendment overruled Dred Scott by constitutionalizing the common law rule that, "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Children born in the United States of alien parents who are not eligible for

citizenship are nonetheless native-born citizens. United States v. Wong Kim Ark.

II. THE KINGDOM OF HAWAII

A. Hawaiian Custom

Before contact with the outside world, Hawaiian custom was in accord with the rule that all people living in a kingdom were subjects of the king, no matter where they had come from.

When Captain James Cook arrived in 1778, Hawaii'i was divided into four kingdoms. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 30 (1938). The aristocratic ali'i and their retainers moved freely among these kingdoms, taking the best jobs they could find from whichever king or high ali'i would hire them. MALO, HAWAIIAN ANTIQUITIES 58-59, 61, 65 (1951 reprint of 1898 ed.). The makaainana (the peasants) generally remained on the land where they were born but they, too, had the right to move about in search of better economic conditions. HANDY & HANDY, NATIVE PLANTERS IN OLD HAWAII 288 (1972); CHINEN, THE GREAT MAHELE 5-6 (1958) MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (1991). The king expected newcomers to be his loyal subjects and to follow the rules that he laid down. When a king extended his kingdom by conquering an area from another king, the makaainana on the conquered land became subjects of the conquering king. Kamehameha I, like William the Conqueror, was a feudal overlord who demanded loyal obedience from all the subjects that he had conquered in his rise to unchallenged power over Hawaii'i, wherever they had been born. He rewarded his loyal followers with grants of land populated by peasants who paid rents and taxes. In return, his ali'i followers were obliged to support him in his wars and pass on to him as much as he demanded of the profits of peasant labor. CHINEN, THE GREAT MAHELE 5-6. See generally MALO, HAWAIIAN ANTIQUITIES 52-64, 187-204 (discussing the pre-contact system of government).

Kamehameha also hired immigrant European and American advisors, such as John Young and Isaac Davis, to help him conquer and govern the islands. He rewarded them with ali'i status and prominent government positions. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 25. For instance, Kamehameha made Young the governor of the island of Hawaii and made Oliver Holmes governor of Oahu. *Id.*, 54.

B. The Common Law Rule Adopted in Hawaii'i

In the mid-nineteenth century the Hawaiians transformed the feudal monarchy of Kamehameha I into a constitutional monarchy based on ideas of law and democracy borrowed from England and America. The new court system was designed and managed by American lawyers such as John Ricord and William Lee, who had been trained in the common law. KUYKENDALL, 1 THE HAWAIIAN KINGDOM, 236-37, 241-45; Silverman, Imposition of a Western Judicial System in the Hawaiian Monarchy, 16 THE HAWAIIAN J. OF HISTORY, 48, 56-61 (1982). An early statute expressly authorized the courts to apply common law rules. Third Act of Kamehameha III, An Act to Organize the Judiciary Department of the Hawaiian Islands, ch. 1, sec. IV (September 7, 1847); see Hawaii v. Mankichi, 190 U.S. 197, 211 (1903) (noting that 1847 marked the beginning of the common law system in Hawaii'i). The judges, most of them trained in America and England, typically applied common law rules. Like the courts of every common law jurisdiction, the courts of Hawaii'i were free to adapt the common law to local conditions. See generally, Damien P. Florigan, On the Reception of the Common Law in the Hawaiian Islands, 3 HAW. BAR J. No. 13, 87 (1999).

The common law rule that everyone born in the country and subject to its jurisdiction is a subject fit well with the Hawaiian tradition and was readily adopted as part of the creation of a system of written law in Hawai'i. An early statute expressly enacted the common law rule:

All persons born within the jurisdiction of this kingdom, whether of alien foreigners, of naturalized or of native parents, and all persons born abroad of a parent native of this kingdom, and afterwards coming to reside in this, shall be deemed to owe native allegiance to His Majesty. All such persons shall be amenable to the laws of this kingdom as native subjects.

I Statute Laws of Kamehameha III, p. 76, sec. III (1846).

In 1850, H.W. Whitney, born in Hawaii of foreign parents, asked the Minister of the Interior, John Young II, about his status. The question was referred to Asher B. Hates, legal adviser to the Government, who replied that "not only the Hawaiian Statutes but the Law of Nations, grant to an individual born under the Sovereignty of this Kingdom, an inalienable right, to all of the rights and privileges of a subject." JONES, NATURALIZATION IN HAWAII 18 (1934)

In 1856, the Supreme Court decided Naone v. Thurston, 1 Haw. 220 (1856), recognizing that persons born in Hawai'i of foreign parents were Hawaiian subjects. The defendant Thurston was Asa Thurston, father of Lorrin Thurston, who challenged a law that required foreigners to pay \$5 extra a year to educate their children in English language schools. The court's statement of the facts shows that the junior Thurstons, born in Hawai'i, were subjects of the Kingdom by birth. 1 Haw. at 220-21 (referring to "subjects of foreign birth or parentage" and citing I Statute Laws, p. 76) This may have been the first equal protection case in Hawai'i's history. Thurston lost because (1) there was no equal protection clause in the 1852 Constitution; *id.* at 221, and (2) the Supreme Court believed that he was getting a good deal because, "a better style of education must . . . cost a better price." *id.* at 222. The court quoted the legislative preamble to the challenged statute which explained that the reason for the special education was that children born in the Kingdom of foreign parents were "destined to have a great influence, for good or evil, on the community." *Id.* (Asa's son Lorrin certainly did.)

In 1859, the Kingdom's statutes were codified and the provision of I Statute Laws of Kamehameha III, sec. III, was dropped. However, the repeal of the 1846 statute did not affect the background common law rule of citizenship by place of birth. Wong Fong v. U.S., 69 F.2d 681, 682-683 (9th Cir. 1934). The 1859 Civil Code continued to provide that every naturalized subject would "be deemed to all intents and purposes a native of the Hawaiian Islands and entitled to all the rights privileges and immunities of an Hawaiian subject." 1859 Civil Code sec. 432. Thus Hawaiian subjects were either native-born or naturalized.

In 1868, the Minister of the Interior rendered an opinion that:

In the judgment of His Majesty's government no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents (either native or naturalized) during their temporary absence from the Kingdom, or unless having been the subject of another power, he becomes the subject of this Kingdom by taking the oath of allegiance.

Quoted in Wong Foong v. U.S., 69 F.2d at 682.

In 1892, shortly before the end of the Kingdom, “the common law of England as ascertained by English and American decisions” was declared to be the common law of Hawai‘i except where a different rule had been “fixed by Hawaiian judicial precedent, or established by Hawaiian usage.” L. 1892, c. 57, sec. 5 (now codified at HRS sec. 1-1). The English, American and Hawaiian precedents, as well as Hawaiian usage, all coincided on a rule of citizenship by place of birth. Thus, the rule of jus soli was the law of Hawai‘i at the end of the Hawaiian Kingdom.

C. Citizenship Rights for Immigrants to the Kingdom

In its last half century the government of the Kingdom actively sought immigrants from around the world, to replenish a population sadly depleted by disease, to recruit persons with modern skills, and to provide labor for the growing sugar industry. See KUYKENDALL, 2 THE HAWAIIAN KINGDOM 177-195; 3 THE HAWAIIAN KINGDOM 116-85. As part of this effort, the Kingdom’s statutes provided for easy naturalization of immigrants and offered political rights even to immigrants who did not wish to give up their citizenship in the countries from which they had come. See JONES, NATURALIZATION IN HAWAII (summarizing the naturalization statutes of the Kingdom).

In 1846 the Kingdom’s law code provided for naturalization of any alien immigrant who applied after living in Hawai‘i for at least one year. 1 Statute Laws of Kamehameha III, p. 78, Sec. X.

Furthermore, the statute went on to provide that aliens who did not want to give up their citizenship in the country they came from could become “denizens,” entitled to full legal rights of Hawaiian subjects. Id. Sec. XIV (“letters patent of denization conferring upon such alien, without abjuration of native allegiance, all of the rights, privileges, and immunities of a native”). Denizens had the right to vote and hold public office. Aliens and Denizens, 5 Haw. 167 (1884). Similar provisions for naturalization and denizenship can be found in the 1859 Civil Code, secs. 428-434, and the 1884 Civil Code, secs. 428-434.

Using these provisions, many Americans, Europeans and Asians became naturalized citizens or denizens of the Kingdom of Hawai‘i. For instance, “between 1842 and 1892, 731 Chinese persons and three Japanese persons were naturalized in Hawaii.” Historical note appended to Organic Act sec. 4 in Michie’s annotated edition of Hawai‘i Revised Statutes. Naturalized citizens and denizens held high public office, including cabinet posts, legislative seats, and judgeships. See list of cabinet members in 1891 THURM’S HAWAIIAN ANNUAL 92-95; GAVIN DAWES, SHOAL OF TIME, 214 (1968) (26 of 37 cabinet appointees between 1874 and 1887 were not ethnic Hawaiians); see the list of judges in the opening pages of each of the first 10 volumes of the Hawaii Reports; see generally, KUYKENDALL, THE HAWAIIAN KINGDOM.

D. Voting Rights in Kingdom Elections

Under the constitutions of the Hawaiian Kingdom, being a subject was neither necessary nor sufficient to be a voter. Denizens could vote if they met the other qualifications of gender and wealth. Aliens & Denizens, 5 Haw. 167 (1884); 1852 Const. Art. 78. Under the Kingdom’s 1887 Constitution any resident who met the voting qualifications could vote. 1887 Const. Arts. 59, 62. However, women could not vote, even if they were Hawaiian subjects. Id.; 1852 Const.

Art. 78; 1864 Const. Art. 62. Property qualifications for voting were imposed by the 1864 Constitution of the Kingdom. *Id.* In 1874 that property qualification was removed by constitutional amendment. KUYKENDALL, 3 THE HAWAIIAN KINGDOM 192. About three out of four ethnic Hawaiians (i.e. persons descended from the inhabitants of Hawai'i in 1778) could not vote at all. See 1890 census statistics reported in THURM'S HAWAIIAN ANNUAL FOR 1892 p. 16, showing that 23.5% of all ethnic Hawaiians were registered voters in 1890; see generally, Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, XVII HAWAII BAR JOURNAL No. 2, p. 107, 118-21(1982) (discussing limitations on voting rights under 1887 Constitution). There were also literacy requirements. 1887 Const. Arts 59, 62; 1864 Const. Art. 62.

Until 1887, the King appointed the upper half of the Legislature, the "Nobles." 1852 Const. Art. 72; 1864 Const. Art. 57. The 1887 Constitution broadened voting rights by making the Nobles elected officials, but there was a stiff property qualification for voting for Nobles. 1887 Const. Art. 59. There was no property qualification for voting for representatives under the 1887 Constitution. *Id.* Art. 62.

But for the first time in 1887, a racial qualification was imposed, disenfranchising persons of Asian ancestry. In *Ahlo v. Smith*, 8 Haw 420 (1892), naturalized citizens of Chinese ancestry who had voted before 1887 challenged this provision on equal protection grounds. They lost because the Supreme Court said that it could not do anything about a qualification written into the Constitution itself.

The number of Hawaiian subjects who could claim descent from pre-contact inhabitants of Hawai'i continued to decline throughout the history of the Kingdom and by 1893 were a minority of about 40% of the population. See SCHMIDT, HISTORICAL STATISTICS OF HAWAII 74 (1977) (reporting statistics from 1890 census showing ethnic Hawaiians and part-Hawaiians were 45% of the population and statistics from 1896 census showing ethnic Hawaiians and part-Hawaiians were 36% of the population). Since almost all of the immigrants were adults, the ethnic Hawaiian portion of the voting age population was even lower. Ethnic Hawaiians were a majority of the electorate because of the discriminatory rule preventing Asians from voting even if they became naturalized.

However, had the Kingdom endured another generation, most of its adult citizens would have been the native-born children of Asian immigrants. It is hard to imagine that they would have put up with being disenfranchised on racial grounds. They would have become voters or revolutionaries. If an independent Kingdom had lasted into the mid-twentieth century, most of its voters would not have been ethnic Hawaiians.

III. CITIZENSHIP AND VOTING RIGHTS UNDER THE REPUBLIC OF HAWAII

The 1894 Constitution of the Republic, Art. 17, included a provision copied from the 14th Amendment of the United States Constitution that everyone born in Hawai'i was a citizen of the Republic: "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic are citizens thereof." In *McFarlane v. Collector*, 11 Haw 166 (1897), the Supreme Court held that a person of British parentage born in Hawai'i in 1847 was a citizen by birth. The Supreme Court not only relied on the Republic's Constitution, citing American 14th Amendment cases to interpret it, but also quoted an American case that said that the rule of citizenship by birth went back to the common law.

The 1894 Constitution of the Republic dropped the racial qualification for voting. There

were no subsequent racial qualifications on voting in Hawai'i until the Office of Hawaiian Affairs ("OHA") was created in 1978 with a racially discriminatory franchise. Rice v. Cayetano, 528 U.S. ---, 145 L.Ed.2d 1007 (2000) (limiting voting rights to persons descended from inhabitants of Hawai'i in 1778 is racial classification).

Like the Kingdom, the Republic was not a democracy. Voting was restricted to those the governing group considered sufficiently loyal to be trusted to vote. The Constitution of the Republic provided for a voter registration board with broad discretion to determine who should be registered. 1894 Const. Arts. 77-78. In effect, instead of the voters choosing the government, the government chose the voters. (This is an idea that is being revived by some of the sovereignty activists who would extend the franchise only to ethnic Hawaiians and to others who they decide are "politically correct.")

IV. AMERICAN CITIZENSHIP FOR HAWAIIAN CITIZENS

After Hawai'i was annexed to the United States in 1898, Congress enacted the Organic Act making Hawai'i a territory in 1900. Sec. 4 of the Organic Act granted American citizenship to everyone who had been a citizen of the Republic of Hawaii, i.e. everyone who was born or naturalized in Hawai'i during the Monarchy or the Republic periods.

For instance, in 1901, Ching Tai Sai arrived in Honolulu from China, claiming to be an American citizen even though he had never set foot in America and his parents had been Chinese subjects. In United States v. Ching Tai Sai, 1 US Dist. Ct. Haw. 118 (1901), the court held he was an American because (1) he had been born in Hawai'i during the days of the Kingdom; (2) therefore, he had been a Hawaiian citizen under Hawaiian law; (3) therefore he became an American citizen under the Organic Act. See United States v. Dang Mew Wan, 88 F.2d. 88, 89 (9th Cir. 1937) (woman born of Chinese parents in Hawaii during period of Provisional Government became American citizen under Organic Act).

Furthermore, by virtue of the 14th Amendment, everyone born in Hawai'i after the adoption of the Organic Act was a native American citizen, regardless of their ancestry or the citizenship of their parents. United States v. Wong Kim Ark. The Organic Act removed the property qualifications for voting that had applied in the Kingdom and the Republic as well as the political disqualifications imposed by the Republic. Organic Act secs. 60, 62. In 1920, the Nineteenth Amendment gave women the right to vote for the first time in the history of Hawai'i.

It is noteworthy that while ethnic Hawaiians who were born in Hawai'i became American citizens as a result of the Organic Act and the 14th Amendment, tribal American Indians were not American citizens because they were not directly "subject to the jurisdiction" of the United States. Elk v. Wilkins, 112 U.S. 94 (1884). It was not until 1924 that an act of Congress made all American Indians American citizens, 43 Stat. 253. Hawaiians, being neither Indians nor tribal, were not affected by this discriminatory rule regarding tribal Indians.

Although persons of Asian descent who had been Hawaiian citizens before Annexation became American citizens under the Organic Act, sec. 4, United States v. Ching Tai Sai, Asian immigrants were not eligible to become naturalized American citizens at that time. The racial restriction on naturalization of Asians predated Annexation. Chinese Exclusion Act of May 6 1882, 22 Stat. 58; Toyotsu v. United States, 268 U.S. 402, 408 (1925) (discussing history of racial restriction on naturalization)

The result of the discriminatory naturalization laws was that ethnic Hawaiians, although

they were a minority of the population, were a majority of the electorate until the 1930s. The Organic Act, secs. 60 and 62, made American citizenship a requirement for voting in Territorial elections. Thus, during most of the Territorial period, Asian immigrants (except for those who had become naturalized in Hawai'i before Annexation) were barred from voting because they were not citizens and could not become citizens.

However, their children were American citizens by birth and eligible to vote when they came of age. United States v. Wong Kim Ark; Terada v. Dulles, 121 F.Supp. 6, 8 (D. Haw. 1954) (person born in Hawaii of Japanese parents was by birth a citizen of both Japan and U.S.). Eventually Congress allowed Asian immigrants to become naturalized citizens. Chinese immigrants became eligible for naturalization in 1943, under Pub L. No. 78-199, 57 Stat. 600 (Dec. 17, 1943) amending Naturalization Act of 1940 § 303, 54 Stat. 1140. Japanese and other Asian aliens became eligible for naturalization under the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

In 1959, when Hawai'i became a state, its citizens gained the equal right to elect congressional representatives and senators and vote for president. Just as there is only one class of American citizen, there is only one class of American state. In 1978, a constitutional amendment created OHA. Haw. State Const. Art. XII, sec. 5. The proposed constitutional amendment limiting voting rights to persons descended from the inhabitants of Hawai'i in 1778 failed of ratification. Kahalekai v. Doi, 60 Haw. 324 (1979). However, the legislature added that limitation on voting rights by statute by defining the constitutional term "Hawaiian" in terms of ancestry and race HRS sec. 10-2. In Rice v. Cayetano, the United States Supreme Court held that that restriction was unconstitutional racial discrimination.

V. POLICY IMPLICATION: A "HAWAIIAN TRIBE" WOULD NOT BE THE SUCCESSOR OF THE INDEPENDENT COUNTRY OF HAWAII

Shocked at the prospect of sharing the voting booth with fellow citizens of other ancestries, and fearful that their racially-defined special benefits may also be found unconstitutional, some advocates of exclusive rights for ethnic Hawaiians have proposed inventing a "Hawaiian tribe" modeled on American Indian tribes. This proposal is sometimes called the "nation within a nation" model. It is intended to preserve the racial classification that the Supreme Court held unconstitutional in Rice.

According to the U.S. Supreme Court, the powers of Indian tribes are a remnant of their original sovereign power to govern themselves, not derived from the federal or state government. United States v. Wheeler, 435 U.S. 313, 322-23 (1978). The federal Constitution's Bill of Rights and the Fourteenth Amendment do not generally apply to Indian tribes. CANBY, AMERICAN INDIAN LAW, 327-28 (1998). A tribe can use its remaining sovereign power to set a rule of membership and voting based on ancestry. See Rice v. Cayetano, slip op. at 24 (tribal elections are internal affair of quasi-sovereign). Proponents of the "Hawaiian tribe" approach also hope that it would allow government agencies to continue to discriminate on account of race in favor of ethnic Hawaiians. See Morton v. Mancari, 417 U.S. 535 (1974) (upholding affirmative action program in Bureau of Indian Affairs for tribal Indians).

Sen. Daniel Akaka has introduced a bill that would try to evade the Supreme Court's ruling in Rice by having Congress create a sort of "Hawaiian tribe" with its own government. Bills S2899, HR4904. The bill tries to present this new government as a restoration, in part, of

the sovereign powers of the Kingdom of Hawai'i which it asserts was illegally overthrown by American forces in 1893. The new tribal government would have the same rule for membership that the Supreme Court held in Rice is racially discriminatory: descent from the pre-contact population of Hawai'i.

Such a political entity would be without precedent in Hawaiian history except for the racially discriminatory OHA voting rule struck down in Rice. The analogy to Indian tribes does not fit the history of Hawai'i. Hawaiians were never organized as a tribe. Jon Van Dyke, The Political Status of the Native Hawaiian People, 17 YALE LAW & POLICY REVIEW 95 (1998) ("Native Hawaiians have never organized themselves into tribal units ..."). The Kingdom of Hawai'i was not a tribe. Tribesmen are tribesmen because their parents were tribesmen. See Interior Dept. regulations defining criteria for tribal status, 25 C.F.R. sec. 83.7(h)(1), (e). As shown above, under the laws of the Kingdom, everyone born or naturalized in Hawai'i was a citizen of the Kingdom, no matter where his family came from. Membership and political rights in the Kingdom of Hawai'i were never limited to persons of Hawaiian ethnicity.

If the new government really is to be a partial revival of the government of the sovereign country of Hawai'i, so that, like Indian tribes, it could discriminate against nonmembers, then its rule for membership should be the Kingdom's own rule of membership at the time it was overthrown, not a rule created later by Congress. Applying the Kingdom's rule, everyone born in Hawai'i would be a citizen of the new government and everyone who comes to Hawai'i could become a citizen if they wished.

But that is basically the rule for citizenship in the State of Hawai'i. All adult ethnic Hawaiians now have the same right to participate equally in the multi-ethnic state and federal governments that their wealthy, male ancestors had to participate in the multi-ethnic Kingdom of Hawai'i in 1893. There is no historical basis for a claim that ethnic Hawaiians are entitled to a race-based government that excludes their fellow citizens.

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For more information on this and related topics, see the following websites created by Ken Conklin, Bill Burgess and Thurston Twigg-Smith, respectively:

Hawaiian Sovereignty : Thinking Carefully About it --
www.angelfire.com/hi2/hawahiansovereignty

Aloha for All -- www.aloha4all.org

Hawai'i Matters -- www.hawaiimatters.com