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March 21, 2006

The Honorable Gerald Reynolds  
U.S. Commission on Civil Rights  
624 Ninth Street, NW  
Washington, DC 20425

Regarding: Native Hawaiian Government Reorganization Act

Dear Chairman Reynolds:

On behalf of the American Bar Association, thank you for the opportunity to provide these written comments to the Commission to aid in its analysis of S. 147 (Akaka, D-HI), the Native Hawaiian Government Reorganization Act of 2005. I request that this letter be included in the record of the briefing held by this Commission on January 20, 2006.

As the national voice of the legal profession, the ABA has a long-standing interest in the legal issues concerning America's native and indigenous peoples. Most recently, the Association adopted policy supporting the right of Native Hawaiians to seek federal recognition of a governing entity similar to that which many American Indians and Alaska Natives currently enjoy. The policy and its accompanying report, which provides background information, are attached for your reference and for insertion in the record.

The ABA supports S. 147. It is a conservative measure drafted to establish a process to restore self-determination to Native Hawaiians. The goal of the process is to allow indigenous Hawaiian people to choose a political framework recognized by the federal government that will best serve their unique cultural and civic needs. Once enacted, the legislation would return sovereignty to Native Hawaiians, who, for 1,000 years prior to the overthrow of the Hawaiian Monarchy practiced self-determination in an organized political framework. The kingdom had a written constitution, passed in 1840, and was governed by the rule of law. In fact, the U.S. Government recognized this nation and Congress ratified treaty agreements with its representatives.

The events that resulted in the destruction of the Hawaiian nation's form of government are acknowledged in Joint Resolution 19 (the "Apology Resolution") (Pub. L. No. 103-150), which called for reconciliation with the Native Hawaiians and was passed by the U.S. Congress in 1993. S. 147 has received bipartisan support as an appropriate vehicle to further this goal.

Opponents of the legislation argue that granting self-determination to Native Hawaiians will violate the equal protection rights of others by creating a system of benefits disadvantaging Hawaiian natives of other ethnicities. However, Native Hawaiians, in seeking rights and privileges that other indigenous people of the United States enjoy under our legal system, are not compromising the rights of others but exercising their own rights.

This legislation is rooted in Articles I and II of the U.S. Constitution. The framers recognized the importance of maintaining a system for federal recognition of indigenous nations within our borders and empowered Congress through the Indian Commerce Clause (art. I, § 8, cl. 3) and the Treaty Clause (art. II, § 2, cl. 2) to achieve those goals. Further, the federal courts have noted that Congress' power to recognize indigenous nations includes the power to re-recognize nations whose recognition had been compromised in the past.

As you know, in 2000, the Department of Interior and the Office of Tribal Justice of the Department of Justice issued a joint report analyzing the issue of reconciliation between the

federal government and Native Hawaiians in light of the Apology Resolution and the decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), in which the Court upheld the rights of non-Native Hawaiians to vote in elections for trustees of the Office of Hawaiian Affairs. Both federal departments, each with considerable expertise in Indian Law and civil rights jurisprudence, found no contradiction between self-determination for Native Hawaiians and the civil rights of non-Native Hawaiians. I hope that your deliberations will be informed by the joint report as well as by the June 2001 report of this Commission's own Hawaii Advisory Committee, which also cited the need for reconciliation and recommended formalization of the political relationship between Native Hawaiians and the United States.

Thank you for your consideration of our views on this important issue.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: Commission Members



**AMERICAN BAR ASSOCIATION**

**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 RESOLVED, that the American Bar Association urges Congress to pass legislation to establish a
- 2 process to provide federal recognition and to restore self-determination to Native Hawaiians.
- 3
- 4 FURTHER RESOLVED, that self-determination and self-governance are defined as an authority
- 5 similar to that which American Indian and Alaska Native governments possess under the
- 6 Constitution to govern and provide for the health, safety, and welfare of their members.

## REPORT

The ABA has played a leading role in addressing legal issues concerning America's native and indigenous peoples. Current policy, however, does not adequately address the status of Native Hawaiians as indigenous people native to the United States. The purpose of this American Bar Association resolution is to support the extension of federal policies of self-determination and self-governance for America's native and indigenous people to include Native Hawaiians. As used in this Recommendation, self-determination and self-governance mean an authority similar to that which American Indian and Alaska Native governments possess under the Constitution to govern and provide for the health, safety, and welfare of their members. The Recommendation does not seek to recognize a right of secession from the United States or to accord to Native Hawaiians any independent international status.

### The Need for Legislation

In 1978, in furtherance of the provisions of the Hawaii Admission Act,<sup>1</sup> the citizens of the State of Hawaii amended the State constitution to provide for the establishment of a quasi-independent State agency, the Office of Hawaiian Affairs ("OHA"). The State constitution, as amended, provides that the OHA is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. In accordance with laws enacted by the State following the 1978 constitutional amendment, OHA administers programs and services using revenues derived from the Ceded Lands consistent with the conditions of Section 5 of the Admission Act.

OHA's use of these revenues to provide programs and services for Native Hawaiians reflects the provision in section 5(f) of the Admission Act requiring that the ceded lands and the revenues derived therefrom be held by the State of Hawaii as a public trust for five stated purposes--one of which is "the betterment of the conditions of native Hawaiians."

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice v. Cayetano*,<sup>2</sup> holding unconstitutional the eligibility requirements for voting in elections of OHA trustees. The Court held that because OHA is an agency of the State of Hawaii, funded in part by appropriations made by the State legislature, the election for the trustees of the OHA must be open to all citizens of the State of Hawaii who are otherwise eligible to vote in statewide elections. The Court held that the provision of state law requiring those voting for the office of Trustee of the Office of Hawaiian Affairs to be Native Hawaiian violated the Fifteenth Amendment prohibition against abridging the right to vote on account of race.

The State of Hawaii had argued in *Cayetano* that the state law excluding non-Hawaiians from voting in OHA elections should be analyzed in accordance with the Court's rule enunciated in

<sup>1</sup> Pub. L. No. 86-3, 73 Stat. 4 (March 18, 1959) (the "Admission Act").

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

*Morton v. Mancari*,<sup>3</sup> where the Court upheld against an equal protection challenge the policy for Indian preference in hiring within the Bureau of Indian Affairs. The *Cayetano* Court rejected the State's *Mancari* argument, reasoning as follows:

If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii, established by the State Constitution, responsible for the administration of state laws and obligations.<sup>4</sup>

Following the Supreme Court's decision in *Cayetano*, new civil actions were filed challenging the constitutionality of other aspects of OHA as well as Hawaii's provision of programs and services to Native Hawaiians. In *Arakaki v. State of Hawaii*,<sup>5</sup> the Court of Appeals for the Ninth Circuit ruled that the State law requiring candidates for the OHA Board of Trustees to be Native Hawaiian was unconstitutional on grounds similar to those in *Cayetano*. Accordingly, all citizens of the State of Hawaii may now vote for the candidates for the nine trustee positions and may themselves be candidates for these offices.

Other civil actions filed since the *Cayetano* decision have gone beyond the voting rights issues raised in that case and in *Arakaki v. Hawaii*. These other cases target the provision of programs and services to Native Hawaiians by OHA, the Hawaiian Homes Commission and the Department of Hawaiian Home Lands on the grounds that providing benefits exclusively to Native Hawaiians is racially discriminatory under the Equal Protection clauses of the Fifth and Fourteenth Amendments.<sup>6</sup>

If these challenges were to succeed, those elements of the United States' 1959 compact with the people of Hawaii intended to benefit Native Hawaiians may be lost.

The legislation pending in both the House and Senate establishes a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States. After the formation of this governing entity, the programs and services now provided by OHA in furtherance of the provisions of the Admission Act would likely be provided instead by the Native Hawaiian governing body to its members--that is, to persons who have a political affiliation with a federally recognized Native Hawaiian governing entity with which the United States would have a formal, government-to-government relationship--so that equal protection challenges to those programs and services would be subject to the analysis of *Morton v. Mancari*.

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<sup>3</sup> 417 U.S. 535 (1974).

<sup>4</sup> *Id.* At 520.

<sup>5</sup> 314 F.3d 1091 (9th Cir. 2002).

<sup>6</sup> See, *Arakaki v. Cayetano*, T1324 F.3d 1078, 1081 (9th Cir. 2003).]

**Analysis of the Legislation**

The Senate bill, which was reported out of Committee in March 2005, establishes a process for establishing a Native Hawaiian governing entity, and contains the following major substantive provisions:

*Section 4. United States Policy and Purpose*

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a special political and legal relationship. It also affirms that Native Hawaiians have the right to self-determination and to reorganize a Native Hawaiian governing entity. Section 4 also states that the purpose of the Act is to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

*Section 5. United States Office for Native Hawaiian Relations*

This section establishes the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of Interior. This Office is charged with, among other responsibilities, (1) continuing the process of reconciliation with the Native Hawaiian people in furtherance of the Apology Resolution; and (2) upon reaffirmation and Federal recognition of the Native Hawaiian governing entity, effectuating and coordinating the special political and legal relationship between the Native Hawaiian people through the Secretary and with other Federal agencies.

*Section 6. Native Hawaiian Interagency Coordinating Group*

This section establishes the Native Hawaiian Interagency Coordinating Group composed of officials from each Federal agency administering Native Hawaiian programs, to be designated by the President, and a representative from the U.S. Office of Native Hawaiian Relations. The Department of Interior is to serve as the lead agency of the Interagency Coordinating Group. The primary responsibility of the Coordinating Group is to coordinate Federal policies or acts that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Coordinating Group is also charged with assuring that each Federal agency develops a Native Hawaiian consultation policy and participates in the development of a report to Congress.

*Section 7. Process for the Reorganization of the Native Hawaiian Governing Entity and the Reaffirmation of the Political and Legal Relationship Between the United States and the Native Hawaiian Governing Entity*

This section sets forth the process for the reorganization of the Native Hawaiian governing entity and reaffirms the political and legal relationship between the United States and the Native Hawaiian governing entity. This section authorizes the establishment of a nine-member Commission, to be appointed by the Secretary of the Interior, for the purposes of preparing and maintaining a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and for certifying to the Secretary that those proposed for inclusion on the roll meet the definition of "Native Hawaiian" as set forth in the legislation.

This section also provides that the adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary may develop eligibility criteria for election to serve on the Native Hawaiian Interim Governing Council, may determine the structure of the Council, and may elect the members of the Council from those listed on the final roll.

This section provides that following the organization of the Native Hawaiian governing entity and the adoption of organic governing documents, the Council shall submit the ratified organic governing documents to the Secretary. Following completion of the certifications made by the Secretary, the Council may hold elections of the officers of the Native Hawaiian governing entity. Upon the certifications of the organic governing documents of the Native Hawaiian governing entity and the election of the officers of the Native Hawaiian governing entity, the political and legal relationship between the United States and the Native Hawaiian governing entity is reaffirmed and United States extends Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.

*Section 8. Reaffirmation of Delegation of Federal Authority; Negotiations; Claims*

This section reaffirms the United States' delegation of authority to the State of Hawaii in the Admission Act to address the conditions of the indigenous, native people of Hawaii.

This section provides that, upon the Federal recognition and reaffirmation of the Native Hawaiian governing entity, the United States and the State of Hawaii are authorized to enter into negotiations with the Native Hawaiian governing entity that are designed to lead to an agreement or agreements addressing matters such as the transfer of lands, natural resources and other assets to the Native Hawaiian governing entity, the protection of existing rights related to such lands or resources, and the exercise of governmental authority over such lands, natural resources and other assets, including the exercise of civil and criminal jurisdiction by the Native Hawaiian governing entity, the delegation of governmental power and authorities to the Native Hawaiian governing entity, and the scope of any residual responsibilities of the United States and the State of Hawaii.



This section also provides that nothing in this Act shall be construed as a settlement of any claim against the United States.

*Section 9. Applicability of Certain Federal Laws*

This section provides that nothing in this Act is to be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act.

**Historical Background of the Overthrow of the Kingdom of Hawaii<sup>7</sup>**

Prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion. In 1810, unified under the reign of King Kamehameha I, a sovereign and monarchical Hawaiian government was established. The Kingdom of Hawaii enjoyed full diplomatic relations with nations throughout the world, including the United States. From 1826 until 1893, 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 monarch to govern commerce and navigation in 1826, 1842, 1849, 1875 and 1887.

In 1893, a conspiracy to overthrow the indigenous and lawful government of the Hawaiian Kingdom was led by the United States Minister, John L. Stevens, and a small group of non-Hawaiian residents and U.S. citizens. On January 16, 1893, the United States Minister and naval representatives of the United States invaded the sovereign Hawaiian nation and positioned themselves near the Hawaiian Government buildings and Iolani Palace, the nation's capitol building.

On January 17, 1893, a Committee of Safety, composed of American and European sugar planters, descendents of missionaries, and financiers, was formed. The Committee then deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government. The United States Minister thereupon extended diplomatic recognition to the Provisional Government, in violation of treaties between the two nations and of international law. Queen Liliuokalani, when informed of the risk of bloodshed with resistance, and due to lack of active support from the United States government and insufficient arms, yielded under protest her authority to the United States rather than to the Provisional Government.<sup>8</sup> On February 1, 1893,

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<sup>7</sup> The relevant historical and factual events summarized and referenced in this ABA Report were acknowledged by the United States Congress in Joint Resolution 19 of the 103<sup>rd</sup> Congress. Pub. L. No. 103-150 (1993).

<sup>8</sup> Queen Liliuokalani issued a statement which read in part: Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the

the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States. Hawaii's last reigning monarch, Queen Liliuokalani, was then imprisoned in Iolani Palace.

In a Presidentially established investigation surrounding the events of the overthrow, former Congressman James Blount concluded that the United States diplomatic and military representatives abused their authority and were responsible for the change in government. In a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such as an "act of war, committed with the participation of a diplomatic representative of the United States and without the authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people were overthrown.

Members of the Provisional Government protested the Blount report and successfully lobbied the U.S. Senate Committee on Foreign Relations to conduct a new investigation surrounding the overthrow of the Hawaiian Kingdom. During December 27, 1893, through February 26, 1894, the Committee conducted hearings in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation to Hawaii. While the Provisional Government was able to obscure the role of the U.S. in the illegal overthrow, it was unsuccessful in its attempt to rally a two-thirds vote of the Senate to ratify a treaty of annexation with the United States. Hence, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii. On January 24, 1895, while still imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne.

On July 7, 1898, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii, wherein the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States. Through the Newlands Resolution, the Republic of Hawaii also ceded 1.8 million 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. On April 30, 1900, President McKinley signed the Organic Act that established Hawaii as a Territory of the United States.<sup>9</sup> On August 21, 1959, Hawaii became the 50<sup>th</sup> State of the United States.

Throughout this tumultuous history with the United States, 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 plebiscite or referendum.

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Government of the United States, shall upon facts being presented to its representatives and reinstatement in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands. January 17, 1893.

<sup>9</sup> Act of April 30, 1900, ch. 339, 31 Stat 141 (1900).

**Apology from Congress to the Native Hawaiian People**

On November 23, 1993, to acknowledge the 100<sup>th</sup> anniversary of the 1893 overthrow of the Kingdom of Hawaii, the United States Congress acknowledged that the U.S.-sponsored overthrow of the Hawaiian Kingdom was illegal, and issued an apology to the Native Hawaiian people. Joint Resolution 19, states that Congress:

- (1) on the occasion of the 100<sup>th</sup> anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
- (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;
- (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;
- (4) expresses 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
- (5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.<sup>10</sup>

**A Process for Reconciliation and Federal Recognition is Appropriate**

In light of Joint Resolution 19, pursuing reconciliation efforts and a process for federal recognition for Native Hawaiians is appropriate. The United States Congress has acknowledged the illegal overthrow of the Kingdom of Hawaii, issued a formal apology to the Native Hawaiian people, and supports efforts of reconciliation between the United States and the Native Hawaiian people.

Furthermore, the United States has time and time again recognized its trust responsibility

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<sup>10</sup> *Id.*

to Native Hawaiians, including the creation and funding of special programs for Native Hawaiian people. Despite its tumultuous and historic relationship with Native Hawaiians, the United States has continually acknowledged its special responsibility to them. Congress over the years has enacted more than 160 federal laws addressing, benefiting, providing revenues to, though in every case “recognizing,” Native Hawaiians, in a way similar to that of Native Americans and Alaskan Natives.

For example, in 1921, Congress created a homestead program to provide for the rehabilitation of Native Hawaiians under the Hawaiian Homes Commission Act.<sup>11</sup> In 1938, Congress authorized Native Hawaiians to lease land in the Hawaiian National Park and granted exclusive fishing rights to them.<sup>12</sup>

Congress continues to specifically include Native Hawaiians in legislation concerning Native Americans and Alaskan Natives, who receive Federal funding on broad array of educational, health, human services, workforce, agricultural and other programs impacting their respective native and indigenous communities. Currently, about \$70 million in federal programs benefit Native Hawaiians annually.<sup>13</sup> A lengthy list of such measures readily demonstrates Congress’ historic and existing recognition of Native Hawaiians is present and pervasive.

The need to clarify the United States’ trust responsibility to the Hawaiian people is also timely, especially in light of the Supreme Court’s decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). Although *Rice* was based on a Fifteenth Amendment voting rights issue, its focus on racial (as opposed to political) classifications has left the State of Hawaii open to legal challenge, and put Native Hawaiian programs potentially at risk.<sup>14</sup> Such legal challenges may likely focus on the State’s implementation of federally mandated trust responsibilities to Native Hawaiians as set forth in the Hawaii Statehood Admissions Act (“Admissions Act”).<sup>15</sup> Federal recognition would strengthen the legal relationship between the U.S. Government and Native Hawaiian peoples, clarifying, among other things, the political government-to-government origins rather than racial origins.

#### **Legal Authority of Congress To Provide Federal Recognition to Native Hawaiians**

<sup>11</sup> Pub L. No. 66-34, 42 Stat. 108 (1921).

<sup>12</sup> Act of June 20, 1938, ch. 530, § 3(a), 52 Stat. 784 (1938). *See also* 20 U.S.C. § 7902(9) (acknowledging “the unique status of the Hawaiian people” by providing for leases of certain federal lands for use and fishing “only by native Hawaiian residents . . . and visitors under their guidance”).

<sup>13</sup> CNHA Policy Brief: Economic Impact of Native Hawaiian Federal Recognition, Council for Native Hawaiian Advancement (May 2003).

<sup>14</sup> *See e.g., Arakaki v. Lingle*, 305 F. Supp. 2d 1161 (II) (Haw. 2004); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003).

<sup>15</sup> Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat 4 (1959).

Integral to the fabric of the United States are the histories and cultures of America's native and indigenous people -- American Indians, Native Alaskans and Native Hawaiians. While these three indigenous groups differ in culture, history, and anthropological origin, all share three fundamental attributes:

1) they were here long before any European explorer ever set foot on the North American continent or the Hawaiian archipelago;

2) they lived according to their own governmental structures on their homelands long before the federal government of the United States was imposed upon them; and

3) the United States historically acknowledged their existence as distinct nations.

The framers of the United States Constitution understood that the federal government needed to forge relationships with the governments of America's indigenous people, in no small part because those indigenous governments controlled significant amounts of land both within and without the borders of the fledgling American republic. Hence, the framers specifically gave Congress authority to structure the federal relationship with America's indigenous people.

Congress has clear constitutional authority to provide federal recognition and self-determination to America's indigenous peoples, including Native Hawaiians. Similar to legislation relating to Native Americans and Alaskan Natives, Congress' power to enact federal recognition legislation is derived principally from the Indian Commerce Clause,<sup>16</sup> as well as the Treaty Clause.<sup>17</sup>

The U.S. Supreme Court recently explained in *United States v. Lara* that the Constitution grants Congress broad general powers to legislate matters relating to Indian tribes that are described as "plenary and exclusive".<sup>18</sup> The case involved the question of whether tribes have criminal jurisdiction over non-member Indians. The Court held that Congress has broad power over Indian affairs under the Constitution, and that it can determine the nature of Native governmental powers. The opinion explained that the Constitution authorizes Congress to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."<sup>19</sup>

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<sup>16</sup> U.S. Const. art. I, § 8, cl. 3. Congress is authorized to "regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes".

<sup>17</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>18</sup> 541 U.S. 193, 200 (2004). *See also United States v. John*, 437 U.S. 634 (1978) (further supports Congressional authority to recognize reconstituted tribal governments and to re-establish sovereign relations with them).

<sup>19</sup> *Id.* at 202.

Of particular significance to Native Hawaiians, *Lara* recognized Congress' power to restore previously extinguished sovereign relations with Indian Tribes. The *Lara* opinion (referring to the restoration of the previously terminated Menominee Tribe of Wisconsin in 25 U.S.C. §§ 903-903f) stated that "indeed, Congress has restored previously extinguished tribal status -- by re-recognizing a Tribe whose tribal existence it previously had terminated."<sup>20</sup>

This broad congressional power to "recognize and affirm" powers of Native governments is persuasive in countering arguments that Hawaiian sovereignty was somehow "erased" by the Overthrow, or because Hawaiian Natives are not within Congress' expansive authority under the Indian Commerce Clause. The Menominee situation, cited with approval in *Lara*, parallels the Native Hawaiian overthrow. The termination of the federally recognized Menominee Tribe of Wisconsin in 1954, is another instance where the sovereign authority of an indigenous people was abrogated by the United States only to be restored by the Menominee Restoration Act in 1973.

#### **Economic, Health and Social Indicators of Native Hawaiians**

This report would not be complete without some discussion on the current status of Native Hawaiians. Like the histories and experiences of Native Americans and Alaskan Natives, the U.S. imposition of their form of governance on native people has been difficult and detrimental. Many indigenous peoples are unable to adjust to the dramatic change to Western values, laws and lifestyles that now surround and evaluate them. The impact of forcible U.S. governance on Native Hawaiians is no different.

Community indicators relating to economic, health and social welfare of Native Hawaiians is distressing. In particular, the health status of Native Hawaiians is alarming, having among the highest death rates of all groups in Hawaii (927 compared to 650 deaths per 100,000). When pure Native Hawaiians are disaggregated from part-Native Hawaiians, the mortality rates increases substantially (2,200 per 100,000). Native Hawaiians have the highest rate of deaths due to cancer compared to any other ethnic group in Hawaii (229 per 100,000), which is the third highest rate in the country. Native Hawaiians age 36-65 in Hawaii are nearly one and a half times more likely to experience heart disease than other racial groups.<sup>21</sup>

Other statistics and community benchmarks are equally disturbing:<sup>22</sup>

\*47% of known murder offenders are Native Hawaiian, the highest ethnic group followed by 26.5% Caucasian.

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<sup>20</sup> *Id.* at 203.

<sup>21</sup> APIAHF Health Briefs: Native Hawaiians, Asian Pacific Island Health Forum (Aug. 2003).

<sup>22</sup> Native Hawaiian Data Book, Office of Hawaiian Affairs (2002).

\*24.7% of adults arrested are Native Hawaiian, second highest ethnic group compared to 36.3% Caucasian. 36.1% Native Hawaiian juveniles arrested are the highest ethnic group, compared to 22.3% Caucasian.

\*28.1% of Native Hawaiian high school seniors have been under the influence of alcohol or drugs in school, compared to 19.9 statewide.

\*39% of inmate population in Hawaii correctional facilities is Native Hawaiian, the highest ethnic group.

\*7.2% of Native Hawaiians are unemployed, compared to statewide unemployment rate of 4.3% (2000)

\*23.6% of individuals in public housing are Native Hawaiians, the highest ethnic group next to Samoans (18.1%).

\*29.8% of Hawaii's homeless are Native Hawaiians, the second highest ethnic group compared to 40.9% Caucasian.

Providing Native Hawaiians with a mechanism for self-determination which is reflective of their own cultural, social, economic and moral values may improve their health, economic and social status, and restore the vibrant, healthy and self-sufficient society they had prior to the 1893 overthrow.

### **Conclusion**

The illegal overthrow of the Kingdom of Hawaii has been duly recognized by the United States Congress in Joint Resolution 19. The historic and factual chain of events instigated by U.S. officials who deposed the once sovereign Kingdom of Hawaii has been acknowledged by the United State Congress, which has also issued a formal apology on behalf of the United States to the Native Hawaiian people. Consequently, Joint Resolution 19 encourages acts of reconciliation to heal the wounds between the United States and the Native Hawaiian people.

It is important to note that the United States has a long history of providing for the benefit and protection of Native Hawaiians, passing over 160 laws<sup>23</sup> over the past century, which provide benefits and protections to Native Hawaiians similar to those provided to Native Americans and Alaskan Natives. Coupled with Congress' exclusive and plenary powers to grant federal recognition to indigenous people, this Recommendation supports legislative efforts to fulfill the legal and moral obligation of the United States to reconcile with the Native Hawaiian

<sup>23</sup> See Testimony of Raynard C. Soon to the US Senate Committee on Indian Affairs and the US House Committee on Resources, August 23, 2000.

people, and to create a process for their formal federal recognition and self determination.

Respectfully Submitted,

Paul M. Igasaki  
Chair, Section of Individual Rights and Responsibilities  
February 2006



## EXECUTIVE SUMMARY

a) Summary of the Recommendation:

This recommendation calls for the ABA to urge Congress to pass legislation to establish a process to provide federal recognition and to restore self-determination to Native Hawaiians. As used in this recommendation, self-determination and self-governance mean an authority similar to that which American Indian and Alaska Native governments possess under the Constitution to govern and provide for the health, safety, and welfare of their members. This recommendation does not seek to recognize a right of secession from the United States or to accord to Native Hawaiians any independent international status.

b) Summary of the Issue the Recommendation Addresses:

On November 23, 1993, to acknowledge the 100<sup>th</sup> anniversary of the 1893 overthrow of the Kingdom of Hawaii, the United States Congress acknowledged that the U.S.-sponsored overthrow of the Hawaiian Kingdom was illegal, and issued an apology to the Native Hawaiian people.

The Office of Hawaiian Affairs (“OHA”), a quasi-independent State agency, established by an amendment to the Hawaiian State constitution in 1978, administers programs and services to Native Hawaiians.

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice v. Cayetano*, holding unconstitutional the eligibility requirements for voting in elections of OHA trustees. Following the Supreme Court's decision in *Cayetano*, new civil actions were filed challenging the constitutionality of other aspects of OHA. If these challenges were to succeed, elements of the United States' 1959 compact with the people of Hawaii intended to benefit Native Hawaiians may be lost.

c) Explanation of How the Recommendation Addresses the Issue:

This Recommendation would put the ABA on record as supporting the extension of federal policies of self-determination and self-governance for America's native and indigenous people to include Native Hawaiians. In particular, this Recommendation would urge Congress to pass legislation to establish a process for federal recognition and self-determination for Native Hawaiians, similar to the federal recognition granted to Native Americans and Alaskan Natives by the United States Government.

The Recommendation also reaffirms the ABA's longstanding commitment to addressing legal issues concerning America's native and indigenous peoples.

d) Summary of Minority Views or Opposition

None known at this time.

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted By: Paul M. Igasaki, Chair  
Section of Individual Rights and Responsibilities

1. Summary of the Recommendation

The Recommendation urges Congress to pass legislation to establish a process to provide federal recognition and to restore self-determination to Native Hawaiians.

2. Approval by Submitting Entity

The Council of the Section of Individual Rights and Responsibilities approved the Report with Recommendation in principle during its Fall Meeting on Saturday, Oct. 29, 2005. The final version of the Report with Recommendation was approved for submission by the Section's Executive Committee on Nov. 15, 2005.

3. Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

No.

4. What Existing Association Policies Are Relevant to this Proposed Resolution and Would They Be Affected by Its Adoption?

The ABA has adopted numerous policies in support of American Indians and Alaska Natives, including:

- Urging the federal government to continue to recognize the relationship between the United States and Indian tribes and the responsibility to Indian people by strictly adhering to treaty obligations and exercising powers of abrogation only under the most compelling circumstances. 2/80

- Supporting federal legislation minimizing the impact of federal management of lands containing specific sites historically used by Native Americans for religious purposes. 2/90
- Supporting measures to prevent or minimize disproportionate effects of death penalty legislation on Native Americans. 8/91
- Urging Congress to amend Part E of Title IV of the Social Security Act to provide direct access for foster care and adoption services for Indian children under tribal court jurisdiction. 8/01
- Endorsing the use of negotiation and settlement processes to resolve Indian reserved water rights claims, and urging Congress and the Administration to support the settlement process through adequate funding and other measures. 8/02
- Supporting efforts of the National Tribal Steering Committee to address the inadequacy of health care for American Indians and Alaska Natives through the reauthorization of the Indian Health Care Improvement Act, and urging Congress and the Executive Branch to address the various areas where health care for American Indians and Alaska Natives is deficient. 2/04

This proposed resolution would build upon these existing policies by urging the establishment of a process to provide federal recognition and to restore self-determination to Native Hawaiians, similar to that already accorded other people native to the United States.

5. What Urgency Exists that Requires Action at this Meeting of the House?

Legislation currently is pending in both the United States House and Senate which would establish a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States. After the formation of this governing entity, the programs and services now provided by the Office of Hawaiian Affairs (OHA) in furtherance of the provisions of the Admission Act would likely be provided instead by the Native Hawaiian governing body to its members.

The ABA should act now to support legislation developed and endorsed by Native Hawaiians to ensure that federal funding and specific program authorizations and policy directives granted to Native Hawaiians under the existing 1959 compact with the United States remain in effect and to ensure those rights accorded other people native to the United States are provided to Native Hawaiians as well.

6. Status of Legislation

Two bills, S. 147 and H.R. 309, have been introduced and are under consideration by the 109<sup>th</sup> Congress to provide a process for the recognition by the United States of the Native Hawaiian governing entity.

7. Cost to the Association (Both Direct and Indirect Costs)

Adoption of this proposed resolution would result in only minor indirect costs associated with Government Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest

There are no known conflicts of interest.

9. Referrals

By copy of this form, this Report with Recommendation will be circulated to all ABA Sections and Divisions and other ABA entities or affiliates that may have an interest in the subject matter.

10. Contact Person (Prior to Meeting)

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11. Contact Person (Who Will Present the Report to the House)

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12. Contact Person Regarding Amendments to this Recommendation

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