

August 23, 2000

TO: US Senate Committee on Indian Affairs
US Senator Ben Nighthorse Campbell
US Senate Committee on Resources

FROM: Mililani B. Trask, Trustee-At-Large
Office of Hawaiian Affairs

RE: S.2899 Testimony

Aloha Senators and Committee Members:

I am an elected Trustee of the Office of Hawaiian Affairs and a native Hawaiian attorney who is a member of the Native Hawaiian Community Working Group which has monitored the evolution of S.2899 and previously proposed amendments to earlier drafts of the measure.

I. General Comments

I support the purpose and intent of this measure. It is long overdue. Indigenous Hawaiians have been included in many Congressional bills as Native Americans, but we have always been excluded from the US Native American Policy for Self-Determination. I consider this exclusion to be a deprivation of Constitutional magnitude, a violation of the equal protection clause of the US Constitution, and a violation of the civil rights of Native Hawaiians.

II. Specific Comments

(a) Equal Protection and Native Hawaiians

The Equal Protection Rule in the American juridical system does not guarantee that all people are treated equally. It does provide 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 does require that all National Americans be similarly treated under the law.

As the result of recent challenges to affirmative action programs, and the US Supreme Court ruling in Adarand Constructors, Inc., programs and entitlement based on racial or ethnic classifications have come under “strict judicial scrutiny” requiring evidence of a “compelling governmental interest” in order to be maintained.

Programs and entitlements of Native Americans are not subject to the above analysis because such programs are not based on race, but upon the unique legal status of Indians under federal law and the political relationship of Native American Peoples to the U.S., Morton v. Mancari 417 U.S. 535(1974).

The US Congress has repeatedly recognized and reaffirmed that Hawaiians are Native Americans through passage of several federal laws conferring benefits on Native Americans (Indians, Alaskan Natives and Hawaiians). The quote below was taken from Congressional Acts:

“...through treaties, Federal statutes, and rulings of the Federal courts, the United States has recognized and reaffirmed that—

- (A) the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives; and
 - (B) the aboriginal, indigenous peoples of the United States have —
 - (i) a continuing right to autonomy in their internal affairs; and
 - (ii) an ongoing right of self-determination and self-governance that has never been extinguished;
- (13) the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States as evidenced by the inclusion of Native Hawaiians in –
 - (A) the Native American Programs Act of 1974 (42 U.S.C. 2291 et seq.);
 - (B) the American Indian Religious Freedom Act (42 U.S.C. 1996 et seq.);
 - (C) the National Museum of the American Indian Act (20 U.S.C. 80 q et seq.);
- (D) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.);
 - (E) the National Historic Preservation Act (16 U.S.C. 470 et seq.);
 - (F) the Native American Languages Act of 1992 (106 Stat. 3434);
 - (G) the American Indian, Alaskan Native and Native Hawaiian Culture and Arts Development Act (20 U.S.C. 4401 et seq.);
 - (H) the Job Training Partnership Act (29 U.S.C. 1501 et seq.), and
 - (I) the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.); and

In the area of housing, the United States has recognized and reaffirmed the political relationship with the native Hawaiian peoples through:

- (A) The enactment of the Hawaiian Homes Commission Act, 1920 (42 Stat. 108 et seq.), which set aside approximately 200,000 acres of public lands that became known as Hawaiian Homes Lands in the Territory of Hawaii that had been ceded to the United States for homesteading by Native Hawaiians in order to rehabilitate landless and dying people:
- (B) The enactment of the Act entitled “An Act to provide for the Admission of the State of Hawaii into the Union,” approved March 18, 1959 (73 Stat. 4)—
 - (i) by ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held in public trust, for the betterment of the conditions of Native Hawaiians, as that term is defined in section 801(15) of the Native American Housing Assistance and Self-Determination Act of 1996, as added by section 3 of this Act; and
 - (ii) by transferring what the United States considered to be a trust responsibility for the administration of Hawaiian Home lands to the State of Hawaii, but retaining the authority to enforce the trust, including the exclusive right of the United States to consent to any actions affecting the lands which comprise the corpus of the trust and any amendments to the Hawaiian Homes Commission Act, 1920 (42 Stat. 180 et seq.), enacted by the legislature of the State of Hawaii affecting the rights of beneficiaries of the Act;
- (C) the authorization of mortgage loans insured by the Federal Housing Administration for the purchase, construction, or refinancing of homes of Hawaiian Home Lands under the Act of June 27, 1934 (commonly referred to as the “National Housing Act” (42 Stat. 1246 et seq., chapter 847; 12 U.S.C. 1701 et seq.));
- (D) authorizing Native Hawaiian representation on the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing under Public Law 101-235;
- (E) the inclusion of Native Hawaiians in the Act commonly known as the “Native American Veterans’ Home Loan Equity Act of 1993;” and
- (F) the enactment of the Hawaiian Home Lands Recovery Act (109 Stat. 357; 48 U.S.C. 491, note prec.) which establishes a process for the conveyance of Federal lands to the Department of Hawaiian Home Lands that are equivalent in value to lands acquired by the United States from the Hawaiian Home Lands inventory.”

(b) Civil Rights and Equal Protection Violations under the Federal Domestic Policies

1. Background

Although there were numerous federal statutes which recognize the indigenous Hawaiian peoples as ‘Native American,’ the United States has failed to include Hawaiians in the Federal

policy which provides Indians and Alaskans with a limited right of self-determination. Several federal commissions and bodies have called for the acknowledgement of the political relationship between the U.S. and Kanaka Maoli, but no congressional action has been taken. In December 1991, 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 U.S. to protect Hawaiian civil rights for 73 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 controls 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.”

The Above Recommendation of the Civil Rights Report has not been addressed to date.

2. The Conflicting Solicitors Opinions – A Confused Federal Policy on Native Hawaiians

On January 19, 1979, US Deputy Solicitor Fredrick Ferguson issued an opinion for the Western Regional Office of the US Commission on Civil Rights which acknowledged that the US had a ‘trust’ obligation to Native Hawaiians by virtue of the Hawaiian Homes Act of 1920 and the Statehood Admissions Act.

Following the publication of the Civil Rights Report, Broken Trust, in 1991, the US Department of Interior began to disclaim its trust obligation. On January 19, 1993, in the waning hours of the Bush Administration, Deputy Solicitor Thomas Sansonetti issued an opinion overruling the Ferguson Opinion and finding that there was no trust obligation owed to Hawaiians by the US.

On November 15, 1993, nine (9) days before President Clinton signed Pub. L. 103-150, the Federal Apology Law, Solicitor John Leshy issued a third opinion withdrawing both the 1979 and 1991 opinions. In his opinion, Leshy states that the US would not bring legal action to enforce the provisions of federal statutes providing entitlements to Native Hawaiians, but would continue to assert that the US has no trust obligation to Native Hawaiians. The Leshy Opinion clearly states that as a matter of policy, the US will not protect Hawaiian entitlements. This is a violation of the Equal Protection Doctrine. The Leshy Opinion is now in clear derogation of the brief the United States filed in Rice v. Cayetano. Section 1c herein.

As a result of the above, Hawaiians continue to suffer from civil rights violations, poverty, ill health and homelessness while their vast land and fiscal resources are mismanaged by the State government.

3. A Comparison of Native American Indian and Alaskan Nation to Nation Status to Native Hawaiian Status as Wards of the State

Native Indians/Alaskan Natives	Native Hawaiians
1. <u>Legal Status:</u> Under the US Domestic Policy, Indian Nations have the right to create native nations with jurisdiction over lands and natural resources.	Hawaiians are wards of the state. There is no federal process to confer recognition on Ka Lahui Hawaii. Hawaiians are excluded from the US Policy because of their race.
2. <u>Judicial Protection:</u> Native American Indians and Alaskan Natives have the right to sue State and the US to enforce their property (trust) entitlements.	Native Hawaiians cannot sue to enforce the trust obligations of the US or the State. Neither the State or US has sued in their behalf due to conflict of interest.
3. <u>Health:</u> Indians and Alaskan Natives received health services through the Indian Health Service (HIS).	There is no state or federal health entitlements guaranteed for Hawaiians. Congressional legislation is piecemeal and not guaranteed.

<p>4. <u>Housing:</u> Indian Nations have housing authorities which receive significant federal funding and have the power of an authority to construct housing.</p>	<p>Hawaiians have the poorest housing conditions in the US based on a 1996 Urban Institute Report (see <u>Housing Problems and Needs of Native Hawaiians</u>, prepared for the US Department of Housing and Urban Development, Sept.95). Current federal legislation enforces wardship by providing benefits to the State DHHL, an agency with an extensive history of breach of trust (see <u>The Broken Trust</u>, Hawaii Advisory Committee to the US Commission on Civil Rights, Dec.1991).</p>
<p>5. <u>Child Protection:</u> Native Alaskan and Indian children removed from their homes are placed in cultural environments under the Indian Child Welfare Act (ICWA).</p>	<p>Hawaiian children removed from dysfunctional homes are placed in environments which are not cultural. Hawaiian children are excluded from the ICWA.</p>
<p>6. <u>Economic Opportunity:</u> Indians and Alaskan native governments are allowed significant tax benefits under the IRS Code. In addition, these tribal governments are allowed the economic freedom to develop their lands and resources.</p>	<p>Hawaiians are wards of the state, do not have the authority to control or develop their resources. The IRS Code provisions for other Native Americans does not apply to Hawaiians.</p>

(c) Rice v. Cayetano

The recent ruling of the US Supreme Court in the Rice v. Cayetano case presents a serious threat to Native Hawaiian benefits and to the Hawaiian trusts. The ruling is the logical result of the failure of the United States to acknowledge and formally establish a ‘political’ relationship with Native Hawaiians.

It is significant that the brief of the United States in the Rice Case, filed by Mr. Seth Waxman is an important departure from past positions of the Department of Justice. It is also a departure from the position of The Solicitor’s Office as stated by Mr. Lesly. The United

State's brief formally acknowledged that a trust obligation does exist between the US and our peoples. Despite these important changes, the US Supreme Court's ruling was against Hawaiians. Only the US Congress can clarify the political relationship and through passage of appropriate legislation.

IV. Restoring the Hawaiian Peoples Right of Self-Determination

"Self-determination" is a term defined in the International Covenant on Civil & Political Rights (ICCPR). The ICCPR states:

"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Self-determination is a human right. Some legal rights are rights that are recognized as national or state rights, some legal rights are recognized as corporate rights. Self-determination is not a right of the state of Hawaii or the USA or corporation, but it is a right that belongs to human beings.

Self-determination is a collective right. The international legal definition says that "peoples" have the right of self-determination. Individual people have individual rights – however, "peoples" rights go to collective groups of human beings. If we apply this to the Hawaiian situation this means that Hawaiians as a group have the right to determine their political status. Because of the overthrow of the Kingdom, Hawaiians lost our status as citizens of the Hawaiian Nation. As the result of annexation and statehood, Hawaiians were made to be wards or beneficiaries of the State and the United States. If Hawaiians are to be given their right of "self-determination" as part of the Reconciliation process under the Apology Law, then there must be a process which empowers Hawaiians to determine their political status.

To summarize, "Self-determination" is a collective human right which Hawaiians exercise through a process which allows them first to choose their political status, and then to use their political status to "freely pursue their economic, social and cultural development."

Conclusion

S. 2899 is a measure which the Hawaii Advisory Committee to the US Commission on Civil Rights called for in 1991. It is corrective legislation which provides for increased participation of the Hawaiian peoples in their own economic, social and cultural development.

It initiates and is part of the larger effort for Reconciliation which the Apology Law calls for and which the Hawaiian peoples indicated they are prepared to address.