Native Hawaiians Have the Right to Vote for Their Leaders

by Sherry P. Broder and Jon M. Van Dyke

More than 200,000 people now living in Hawai`i are descendants of the Polynesians who had a rich self-sufficient culture in the islands until Westerners started arriving 221 years ago. These native people established the Kingdom of Hawai`i in the early nineteenth century, which operated as a constitutional monarchy. The Kingdom was widely recognized as an independent country, it participated in international negotiations, and it entered into four treaties of peace, friendship, and economic reciprocity with the United States. But in 1893, this independent government was overthrown by Westerners – aided in significant ways by the U.S. military and the U.S. minister in Honolulu -- and five years later the islands were annexed by the United States.

While Hawai`i was a territory of the United States, Native Hawaiians were prohibited from speaking their language in school, business, and government, and were discouraged from practicing their culture. Since statehood in 1959, a cultural renaissance has been underway, and the Native Hawaiian People now want to control their lands and resources and to govern themselves. The momentum behind this movement is threatened, however, by the case of *Rice v. Cayetano* now before the U.S. Supreme Court, which challenges the right of the Native Hawaiian People to elect their own representatives. This case appears to raise complicated issues, but its resolution should not be difficult once one understands Hawai`i's history and remembers how the Court has approached legislation dealing with other Native Americans.

In 1993, the U.S. Congress enacted a law formally apologizing for the participation of U.S. troops and diplomats and acknowledging that the 1893 overthrow was illegal. This law also admitted that the United States had acquired 1.8 million acres of land "without the consent of or

compensation to the native Hawaiian people of Hawaii or their sovereign government." It further recognized that the illegal overthrow and annexation had the effect of depriving the Native Hawaiians of "their inherent sovereignty as a people" and their "rights...to self-determination." This enactment – and a series of other statutes passed by Congress in recent years -- confirms that the Native Hawaiian People have a political relationship with the United States similar to that of other Native Americans.

At the time of our country's founding, native people were recognized as constituting separate nations with a separate political status. Although the United States mistreated its natives during much of the nineteenth century, our record as a country has been much better in the latter half of this century and many wrongs have been corrected. Other Native Americans have been able to pursue their claims against the federal and state governments and most are now able to exercise self-governance over their autonomous land and resources.

Congress's 1993 legislation apologizing to the Native Hawaiians did not establish a settlement program, but did call for a "reconciliation" between the United States and the Native Hawaiian People. This reconciliation process is now underway, and the State of Hawai`i is also playing an important role in assisting to rectify the injustices that have been imposed upon the Native Hawaiians. The State has incorporated the historical findings listed by Congress in the Apology Legislation into its own laws. The State's actions in recognizing the political status of Native Hawaiians and their right to self-governance has been important in protecting the racial harmony of the community, and most nonnatives in Hawai`i agree that the Native Hawaiians have been mistreated and deserve to have a better status in the islands.

The State of Hawai`i began to take its responsibility seriously in 1978, when its voters amended the state constitution to establish the Office of Hawaiian Affairs (OHA) and to require

that a pro rata share of the revenues generated by the public lands should go to OHA.

OHA is governed by nine "trustees" who are elected for four-year terms by persons of Native Hawaiian ancestry. This voting restriction is logical, because the specific mission of OHA is to to serve as an advocacy body for the Native Hawaiians, to pursue claims on their behalf, to manage their resources, and to facilitate their self-determination process. Similar restrictions apply in other native situations. Only Navajos vote for Navajo leaders. Only Alaska Natives vote for leaders of the Alaska Native corporations. The federal government has conducted hundreds of native-only elections in this century under the Indian Reorganization Act. OHA has been in operation now for some 20 years, and it has played an important role in Hawai`i to permit the Native Hawaiian People to work together toward common goals. Through litigation and legislative victories, OHA now has resources of more than $300 million.

But this very logical restriction on who can vote for the OHA Trustees has been challenged by a lone Caucasian rancher on the Big Island of Hawai`i – Harold "Freddy" Rice -- in the case that will be argued in front of the Supreme Court this fall. Every court that has previously examined OHA has approved of its activities. In the present case, the federal district court in Hawai`i and the U.S. Court of Appeals for the Ninth Circuit (unanimously) agreed that OHA's voting restriction was consistent with the U.S. Constitution. Nonetheless, this issue has become a *cause celebre* in some conservative circles. Theodore Olsen is now representing Rice and Bruce Fein recently ran an op-ed piece in the Washington Times urging the Supreme Court to reverse the Ninth Circuit.

Rice argues that the OHA voting restriction constitutes racial discrimination, in violation of the Fifteenth Amendment and the "strict-scrutiny" level of judicial review that applies to racial discrimination after the Supreme Court's 1995 decision in *Adarand Constructors v. Pena.* He

concedes that the Supreme Court has permitted other Native Americans to exclude nonnatives from their elections (based on the 1974 decision in *Morton v. Mancari* which characterized the relationship with natives as "political" rather than "racial"), but he argues that Native Hawaiians are excluded from this status because they are not "Indian tribes." The U.S. Constitution refers to "tribes" in Article I, Section 8, Clause 3, and Rice argues that this term must be interpreted narrowly to prevent racial discrimination and protect the values enshrined in the Fifteenth Amendment and recognized in *Adarand.*

But the term "tribe" has had no fixed meaning during the past two centuries, and it has been used to cover a broad range of native political relationships. The Native Hawaiians are not "Indians," it's true, but neither are the Eskimos and Inuits in Alaska, and the North American "Indians" themselves constitute a broad range of ethnic groups who were grouped together by insensitive Westerners using this incorrect word.

Just as the Supreme Court has historically deferred to Congress in most disputes involving foreign affairs, it has also deferred in matters dealing with natives groups -- who were historically viewed as (conquered) separate nations. The many issues that result from such these complicated political relationships require flexible responses, and so the Court has wisely let the Congress take the lead rather than imposing any "close scrutiny" or heightened judicial review.

The treatment of the Native Hawaiian People certainly fits into this framework. The Hawaiian Islands became part of the United States after an illegal overthrow, lands were acquired without compensation, and natives were denied their right to sovereignty and self-determination. How the many resulting messy issues are to be sorted out should be left to the Congress, and the Court should defer to Congress and to the State of Hawai`i -- to whom Congress has delegated responsibility because of the State's expertise, knowledge, and sensitivity in determining how to

promote justice for its native people.

The fact that it was the State of Hawai`i (rather than Congress directly) that established OHA and determined who should vote for its Trustees does not change the constitutional situation, because the State was acting pursuant to a specific Congressional mandate laid out in the 1959 Admission Act. When Hawai`i became a state, 1.4 million acres of the 1.8 million acres the United States had acquired in 1898 (without compensation to or consent of the Native Hawaiians) were transferred to the new state on the condition that a proper share of their revenues be used for the betterment of the conditions of the Native Hawaiian People. (Although the definition of "Native Hawaiian" in the 1959 law referred to persons with 50% native blood, Congress has enacted numerous statutes since then providing benefits for Native Hawaiians with any amount of native blood, and the State has followed Congress's lead in broadening the definition.) What better way to ensure that funds are spent to improve the conditions of Native Hawaiians than to allow the Native Hawaiian People themselves to decide how those revenues should be spent? In a country committed to democratic decisionmaking, that solution is certainly the best possible approach. How is it conceivable that it could then be in violation of the U.S. Constitution?

The Native Hawaiian People are entitled to autonomy and self-government, just as all other Native Americans are. They are late in regaining their land and resources and reestablishing their governing authority, but this process is now underway. The Ninth Circuit wisely recognized that Congress and the State of Hawai`i must be given some flexibility to experiment and to develop programs that are appropriate to these unique natives. If the Supreme Court reverses that judgment, it would be reversing its long-standing deferential approach allowing legislatures to make political judgments to determine what programs should be

established for native people.

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