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## Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians

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LEGACY IN PARADISE:  
ANALYZING THE OBAMA ADMINISTRATION’S  
EFFORTS OF RECONCILIATION  
WITH NATIVE HAWAIIANS

*Troy J.H. Andrade\**

*This Article analyzes President Barack Obama’s legacy for an indigenous people—nearly 125 years in the making—and how that legacy is now in considerable jeopardy with the election of Donald J. Trump. This Article is the first to specifically critique the hallmark of Obama’s reconciliatory legacy for Native Hawaiians: an administrative rule that establishes a process in which the United States would reestablish a government-to-government relationship with Native Hawaiians, the only indigenous people in America without a path toward federal recognition. In the Article, Obama’s rule—an attempt to provide Native Hawaiians with recognition and greater control over their own affairs to counter their negative socio-economic status—is analyzed within the historical and political context of a government coy to live up to its reconciliatory promises. The Article analyzes past attempts to establish a government-to-government relationship and considers new avenues for reaching this end. The Article concludes that although the rule brings the federal government closer to its ideals of justice, it does not go far enough to engender true social healing, specifically because of the uncertainty that the rule will be followed by a conservative Trump Administration that will likely be hostile toward Native Hawaiians and other indigenous communities.*

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## INTRODUCTION

The locals in Hawai'i are accustomed to the holiday vacation of the first family. Some mind little the additional traffic congestion caused by the motorcade or the slight economic boost for the local shave ice shops or high-end restaurants. After all, Hawai'i is a respite for America's only island-born President, Barack Obama. Yet the Obama-Hawai'i connection often brings unsolicited attention to the struggles facing the island State, including Hawai'i's homelessness crisis, dilapidating infrastructure, and increasing cost-of-living.<sup>1</sup> Despite its problems—problems that are not unique to the fiftieth state—Hawai'i was Obama's "home state."<sup>2</sup>

In 1961, a time when interracial marriage was illegal in parts of the country,<sup>3</sup> Ann Dunham, a Kansas-born college student, and Barack Obama, Sr., an economist from Kenya, welcomed their son and future president.<sup>4</sup> "Bar" or "Barry," as he was colloquially called by his friends and family, would be raised by his mother and grandparents in the multicultural State of Hawai'i.<sup>5</sup> He was sent to a prestigious preparatory school

1. See, e.g., Guy Adams, *America's Homeless Crisis, Washes Up in Obama's Birthplace*, INDEPENDENT (Sept. 18, 2011), <http://www.independent.co.uk/news/world/americas/americas-homeless-crisis-washes-up-in-obamas-birthplace-2356870.html>.

2. President Barack Obama, *Remarks by the President to Leaders from the Pacific Island Conference of Leaders and the International Union for the Conservation of Nature World Conservation Congress* (Sept. 1, 2016), <https://obamawhitehouse.archives.gov> (follow link then use the query bar to search archives with title of the piece).

3. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a state law prohibiting interracial marriage because "the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State").

4. STU GLAUBERMAN & JERRY BURRIS, *THE DREAM BEGINS: HOW HAWAII SHAPED BARACK OBAMA* 37–38 (2009).

5. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 23–25 (Crown Publishers 2004) [hereinafter *DREAMS FROM MY FATHER*].

before making his way to college, law school, the urban communities of Chicago, the United States Senate, and the White House.<sup>6</sup> Through his adventures across the nation, Hawai'i remained special to Obama: "No place else could have provided me with the environment, the climate, in which I could not only grow but also get a sense of being loved[.]"<sup>7</sup> He continued, "[t]here is no doubt that the residue of Hawaii will always stay with me, and that it is a part of my core, and that what's best in me, and what's best in my message, is consistent with the tradition of Hawaii."<sup>8</sup> He even highlighted his upbringing in Hawai'i as a symbol of his own political philosophy: "The opportunity that Hawaii offered—to experience a variety of cultures in a climate of mutual respect—became an integral part of my world view, and a basis for the values that I hold most dear."<sup>9</sup> It was this utopian view, often referred to as the "Aloha Spirit," that skyrocketed Obama to the highest echelons of political power.<sup>10</sup>

However, lurking behind the façade of an idyllic paradise home of multi-cultural acceptance and generosity is the history of a people dislocated from their land and stripped of their self-governance—a history Obama himself characterized as "[t]he ugly conquest of the native Hawaiians through aborted treaties and crippling disease brought by the missionaries[.]"<sup>11</sup> This history, which runs the all-to-familiar narrative of a colonizing nation forcing itself into and then upon a smaller nation, is not unique to Hawai'i.<sup>12</sup> But, in the case of Hawai'i, there is no doubt that

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6. Congregationalist missionaries founded Obama's preparatory school, Punahou School, in 1841. See Philip Rucker, *With Obama's Rise, Hawaii School Adds to Its Distinctions*, WASH. POST (Jan. 3, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/02/AR2009010202325.html>.

7. Philip Rucker, *Hawaii's Influence on Barack Obama*, WASH. POST (Jan. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/01/AR2009010102035.html>.

8. *Id.*

9. B.J. Reyes, *Punahou Left Lasting Impression on Obama*, HONOLULU STAR-BULL. (Feb. 8, 2007), <http://archives.starbulletin.com/2007/02/08/news/story02.html>.

10. 152 CONG. REC. S5576 (daily ed. June 7, 2006) (statement of Sen. Obama) ("In addition to its scenic landscapes and rich history, it is the living legacy of aloha—the spirit of openness and friendliness that is ingrained in the shared, local culture that shapes and enhances each island encounter and experience."); see Haw. Rev. Stat. § 5-7.5(a) (1993) (describing "Aloha" as "mutual regard and affection and extend[ing] warmth in caring with no obligation in return . . . [and] the essence of relationships in which each person is important to every other person for collective existence").

11. DREAMS FROM MY FATHER, *supra* note 5, at 23. For purposes of this Article, the terms "Native Hawaiian" and "Hawaiian" will be used interchangeably to refer to any individual of Hawaiian ancestry regardless of blood quantum. The term "native Hawaiian" will be used throughout this Article to refer to individuals of not less than one-half part Hawaiian ancestry as defined by the Hawaiian Homes Commission Act. See Hawaiian Homes Commission Act, 67 Pub. L. No. 34, 42 Stat. 108 (1921).

12. Many scholars have articulated the tragic history of colonization visited upon the Hawaiian people. See, e.g., Melody K. MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE 268–71 (MacKenzie ed., 2015) (discussing the way in which the

the United States actively participated in the overthrow of the Kingdom of Hawai'i and, under a conservative administration, shepherded annexation despite vocal opposition from Native Hawaiians.<sup>13</sup> Indeed, the federal government itself recognized its involvement and “apologize[d] 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.”<sup>14</sup> Over the years, and despite several efforts, the issue of reconciliation for these past injustices has, thus far, eluded Native Hawaiians.

With the ascension of Hawai'i's favorite son to the highest seat of American political power, could justice through formal political recognition of Native Hawaiians as a self-governing polity finally be realized? Indeed, the Obama Administration captured the need for equality: “As a political community entitled to self-determination, the Native Hawaiian people have the same fundamental rights of political liberty and local self-government as any Indian tribe. Native Hawaiians should not be relegated to *second-class status* among our Nation's indigenous peoples.”<sup>15</sup> This Article seeks to address the hallmark of President Obama's reconciliatory legacy for Hawai'i's indigenous community: an administrative rule that sets a process in which the United States would reestablish a government-to-government relationship with Native Hawaiians.

To contextualize President Obama's historic and unprecedented action, Part I of this Article begins with an overview of the failed federal reconciliation efforts during the administration of President George W. Bush (“Bush II Administration”) following the United States Supreme Court's decision in *Rice v. Cayetano*.<sup>16</sup> Part II then details the hodgepodge, yet innovative, strategy for obtaining Native Hawaiian reconciliation—a tripartite effort that wove together the State of Hawai'i's compilation of a list of Native Hawaiians, a private organization's reorganization of a Hawaiian governing entity, and the centerpiece of the effort, the Obama Administration's rule that set a pathway to reestablish a government-to-government relationship with a Hawaiian governing body. To assess the

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Kingdom of Hawai'i was “deprived of the most basic right of a nation, the right to exist”); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 1–19 (2004) (detailing the history of Hawai'i's colonization).

13. Some have argued that Hawai'i was never properly annexed to the United States. See Williamson Chang, *Darkness Over Hawaii: The Annexation Myth Is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 71–72 (2015) (arguing that the United States has no jurisdiction in Hawai'i because Hawai'i was not properly annexed). This Article takes no position on the validity of the argument that, under international law, the United States lacked jurisdiction over Hawai'i.

14. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

15. Brief for the United States as Amicus Curiae at 23, *Akina v. State*, 141 F. Supp. 3d 1106 (D. Haw. 2015) (No. 1:15-cv-00322-JMS-BMK) (emphasis added).

16. 528 U.S. 495 (2000).

constitutional validity of this multi-faceted reconciliation effort, Part III of this Article analyzes: (1) *Akina v. Hawaii*,<sup>17</sup> which challenged the State's compilation of a roll and the independent entity Na'i Aupuni's private reorganization of a Hawaiian governing body; and (2) President Obama's use of his executive authority. Using the Social Healing Through Justice framework, Part IV of this Article then critiques the most important aspect of the tripartite effort: President Obama's action. In the end, this Article concludes that the rule—indeed Obama's reconciliatory legacy for Native Hawaiians—does not go far enough to engender true reconciliation and address the deep societal wounds that have plagued Hawai'i's indigenous people for over a century.

#### I. THE CONTEXT AND ASCENSION OF PRESIDENT OBAMA'S NATIVE HAWAIIAN LEGACY

Barack Obama has not minced words when talking about the lingering effects of colonization on Native Hawaiians:

As someone who grew up in Hawaii and has enormous love for the Hawaiian culture, I also think it is important . . . [to] acknowledge[ ] that there have been difficulties within the community of Native Hawaiians, oftentimes despite the fact that we are visitors to Hawaii; that many times particularly young Native Hawaiians have had difficulties in terms of unemployment, in terms of being able to integrate into the economy of the islands, that some of the historical legacies of what has happened in Hawaii continue to burden the Native Hawaiians for many years into the future.<sup>18</sup>

To address these negative “historical legacies” that have manifested themselves in various negative socio-economic indicators for Native Hawaiians,<sup>19</sup> the State of Hawai'i and the federal government have, for the past forty years, made some efforts to reconcile.

For the State, following the resurgence of the Hawaiian culture and the courageous steps taken by Hawaiian protestors in the 1960s and 1970s, the people of Hawai'i, through a vote following the State's 1978 Constitutional Convention, approved a constitutional amendment creating the Of-

17. 141 F. Supp. 3d 1106 (D. Haw. 2015).

18. 152 CONG. REC. S5576 (daily ed. June 7, 2006) (statement of Sen. Obama).

19. Native Hawaiians continue to have the highest rates of incarceration, homelessness, and serious illness, and the lowest rates of educational attainment and family income. See OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN HEALTH FACT SHEET 2015 2–16 (2015), <http://19of32x2yl33s8o4xza0gfl4.wpengine.netdna-cdn.com/wp-content/uploads/Volume-III-Social-Determinants-of-Health-FINAL.pdf>. Indeed, recent studies have shown that Native Hawaiians are expected to live to 74.3 years of age compared to the state's average of 80.5 years; and 20.5 percent of Native Hawaiian households received Supplemental Nutrition Assistance Program benefits in 2013 compared to 11.3 percent of the state's population overall. *Id.* at 4, 9.

Office of Hawaiian Affairs.<sup>20</sup> The drafters of the amendment envisioned the Office of Hawaiian Affairs as an entity that would act to better the conditions of Native Hawaiians, and serve as a receptacle for reparations between the Hawaiian community, the State, and the federal governments.<sup>21</sup> The agency was to be funded through revenues from the public lands trust that was established at Statehood to, among other things, improve the condition of Hawaiians.<sup>22</sup> Pursuant to the State constitutional amendment, Native Hawaiians would elect other Native Hawaiians from across the State to serve as trustees of the entity.<sup>23</sup> The goal of the entity was reconciliatory: to “unite Hawaiians as a people[,]” to ensure that “Hawaiians have more impact on their future[,]” and to provide the agency with “maximum independence.”<sup>24</sup> On the federal side, after multiple failed attempts at seeking reparations for Native Hawaiians for the tragic effects of colonization, in 1993—one hundred years after the overthrow of the Kingdom of Hawai‘i—Congress approved and President Bill Clinton signed into law the Apology Resolution. That law set forth an apology on behalf of the American people for the actions of Americans in supporting and orchestrating the overthrow of the Kingdom and called for reconciliatory efforts between Native Hawaiians and the United States.<sup>25</sup>

With support in the State and key support in the federal government, the time was opportune for true reconciliation. That time, however, quickly dissipated as the political winds shifted and a conservative regime gained control of the federal government.

#### A. “That Difficult Terrain”

In the early months of 2000, over twenty years after the State constitutional amendment created the Office of Hawaiian Affairs, the U.S. Supreme Court sent shockwaves through the Hawaiian Islands when it dismantled the State’s reconciliatory framework by striking down the provision mandating that voters for trustees of the entity be Native Hawai-

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20. See, e.g., Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 AMERASIA J. 29, 29–55 (1980); TOM COFFMAN, *THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAI‘I* 289–316 (2003).

21. STATE OF HAWAI‘I, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, VOLUME I, at 1018 (1980).

22. The federal government required the State of Hawai‘i, upon its admission into the Union, to hold public lands and its associated revenue in trust for several purposes, including the betterment of the conditions of native Hawaiians. See An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959). The State subsequently designated that a portion of the Section 5(f) trust funds from these Public Trust Lands would be given to the Office of Hawaiian Affairs. HAW. CONST. art. XII, § 6.

23. HAW. CONST. art. XII, § 5 *invalidated in part by* Rice v. Cayetano, 528 U.S. 495, 522 (2000).

24. STATE OF HAWAI‘I, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, VOL. I, at 1018 (1980).

25. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

ian.<sup>26</sup> In *Rice v. Cayetano*, the Rehnquist Court continued the conservative march against indigenous rights.<sup>27</sup>

With a romanticized and narrowly-tailored view of Hawai'i political and legal history,<sup>28</sup> Justice Anthony Kennedy, writing for a majority, concluded that the voting scheme for the Office of Hawaiian Affairs, although argued as being based on ancestry and political status, was intended to serve as a racial classification: "The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose."<sup>29</sup> Justice Kennedy boldly added: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."<sup>30</sup> Justice Kennedy had the audacity to then cite the following quote about racial equality from a 1943 decision, *Hirabayashi v. United States*, in which an earlier Court held that the internment and curfews of Japanese Americans by the American government during World War II was constitutionally firm: "Distinctions between citizens solely because of their ancestry, are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>31</sup>

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26. See *Rice*, 528 U.S. at 522 (holding that "the elections of OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. . . . A State may not deny or abridge the right to vote on account of race, and this law does so."); see also Eric K. Yamamoto & Catherine C. Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in *RACE LAW STORIES* 541, 544–45 (Rachel F. Moran & Devon W. Carbado eds., Foundation Press, 2008); Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 *RUTGERS L. REV.* 91, 98–108 (2000).

27. The Rehnquist Court has been criticized for its hostility toward indigenous interests, which was a radical departure from Courts of the past. See Jeanette Wolfley, *Rice v. Cayetano: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 *ASIAN-PAC. L. & POL'Y J.* 359, 359–60 (2002):

In the last ten terms, Indian tribal interests have lost seventy-seven percent of all their cases before the Rehnquist Court; they lost only thirty-six percent of their cases before the Burger Court. Tribal interests have not won a single case before the Supreme Court involving state jurisdiction over non-Indians, and they have lost seventy-three percent of the cases involving tribal jurisdiction over nonmembers. It is difficult to find another class of cases or type of litigant that has fared worse before the Supreme Court.

*Id.* The conservative majority's judicial activism has led one scholar to characterize one of their pivotal decisions as "courting anarchy." See Aviam Soifer, *Courting Anarchy*, 82 *B.U. L. REV.* 699, 700 (2002) (describing the Court's political decision and the results of *Bush v. Gore* as embodying "considerable anarchy and chaos").

28. See *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

29. *Id.* at 515 (majority opinion).

30. *Id.* at 517.

31. *Id.* (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

As a defense—a defense with which the federal district court and Ninth Circuit panel agreed<sup>32</sup>—the State argued that the exclusion of non-Hawaiians from voting for trustees of the Office of Hawaiian Affairs was permissible under *Morton v. Mancari*, which allowed differential treatment of Native Americans.<sup>33</sup> The Court, however, brushed aside the *Mancari* analogy. Justice Kennedy noted that the preferential hiring policy in *Mancari*, while having a racial component, was specifically directed towards members of “federally-recognized” tribes—a status that had not yet been conferred upon Native Hawaiians by the political branches.<sup>34</sup> Accordingly, while the history of colonization of Native Americans was very similar to that of Native Hawaiians, the Court in *Rice* remarked that the State wanted to “extend the limited exception of *Mancari* to a new and larger dimension.”<sup>35</sup> Nevertheless, the Court ultimately sidestepped deciding whether to extend *Mancari* because, according to the Court, “[i]t [was] a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes.”<sup>36</sup> Instead of navigating “that difficult terrain,” Justice Kennedy chose to decide the issue based on the State’s lack of authority to enact the type of voting scheme at issue.<sup>37</sup> The Court thereby concluded that the Fifteenth Amendment was applicable because the election of trustees for the Office of Hawaiian Affairs “are elections of the State, not of a separate quasi sovereign[.]”<sup>38</sup> In refusing to definitively rule on the *Mancari* issue, the Court signaled its unwillingness to decide what, if any, was the “political status” of Native Hawaiians. The determination of “political status” would thus need to instead be made by the political branches.

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32. *Rice v. Cayetano*, 146 F.3d 1075, 1081 (9th Cir. 1998); *Rice v. Cayetano*, 963 F. Supp. 1547, 1554 (D. Haw. 1997).

33. See *infra* part III.C.

34. *Rice*, 528 U.S. at 519–20.

35. *Id.* at 520.

36. See *id.* at 518–19.

37. *Id.* at 519. The Court also rejected the State’s argument that this case was similar to a line of decisions where the Court held that the principle of “one man, one vote” did not apply in certain circumstances. The Court held, however, that “[t]he Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to vote on account of race, and this law does so.” *Id.* at 522. Finally, the Court dismissed the State’s defense that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of the trust. According to the Court, it was “not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers” (i.e., even though the Office of Hawaiian Affairs’ funds from section 5(f) of the Admissions Act were earmarked for the benefit of “native Hawaiians,” the State permits both “native Hawaiians” and “Hawaiians” to vote for trustees). *Id.* at 523. More importantly, the Court added, the State’s argument failed because it rested on the “demeaning” premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. *Id.*

38. *Id.* at 522.

The harm from the *Rice* majority opinion is in its legitimization of American superiority over indigenous peoples.<sup>39</sup> The *Rice* majority, as one scholar concluded, “turned a blind eye to history.”<sup>40</sup> In a scathing dissent, Justice John Paul Stevens wrote: “The Court’s holding today rests largely

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39. In a concurring opinion, liberal Justice Stephen Breyer (with whom Justice David Souter agreed) joined the result of the majority’s decisions, but specifically took aim at the Office of Hawaiian Affairs’ electorate and the “trust” that was established. Justice Breyer concluded that the State’s effort to justify its voting rules through analogy to a trust for an Indian tribe should be rejected because there was no “trust” to native Hawaiians established. *See id.* at 525 (Breyer, J., concurring). He specifically concluded that the State Constitution’s use of the word “trust” when referring to the 1.2 million acres of ceded lands, *see supra* note 22, bore little resemblance to a trust for native Hawaiians because section 5(f) of the Admissions Act made clear that the ceded lands were to benefit all people of Hawai’i and not just native Hawaiians. *Id.* Breyer then concluded that the Office of Hawaiian Affairs’ electorate did not sufficiently resemble an Indian tribe. *Id.* To Justice Breyer, the Office of Hawaiian Affairs was nothing more than “a special purpose department of Hawaii’s state government.” *Id.* at 526. Although he did not need to address the issue, Justice Breyer focused on blood quantum and how the State’s definition of “Hawaiian” was so “broad” that it “goes well beyond any reasonable limit.” *Id.* Some concluded that the Court “relied on the logics of dilution to undermine inclusive conceptualizations of Nateness.” J. Kehaulani Kauanui, *The Politics of Blood and Sovereignty in Rice v. Cayetano*, 25 POL. & LEGAL ANTHROPOLOGY REV. 110, 118 (2002) [hereinafter *Politics of Blood*]. In other words, for some on the Court, there needed to be a clean delineation by blood quantum of those who qualified for benefits and those that did not.

Indeed, during oral arguments in this case, Justices Kennedy and Scalia pressed the federal government’s attorney about whether it was okay to allow someone with “148th,” “196th,” or “195th Hawaiian blood” to participate in the Office of Hawaiian Affairs’ elections, thereby suggesting the arbitrariness of ancestry. Transcript of Oral Argument at 51, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 U.S. Trans. LEXIS 71. Justice Breyer, a Clinton appointee who is usually a consistent liberal vote, noted: “It seems to me . . . that everyone who has one Hawaiian ancestor at least gets to vote, and more than half of those people are not native Hawaiians. They just have a *distant ancestor*.” *Id.* at 36. Citing the remoteness of an ancestor, Justice Breyer asked, “How do we extend that to people 10 generations later, who had 10 generations ago one Indian ancestor? I mean that might apply to everybody in the room. We have no idea.” *Id.* at 44. In his concurring opinion, Justice Breyer declared the connection to one Native Hawaiian ancestor as meaningless: “There must . . . be some limit on what is reasonable, *at the least when a State (which is not itself a tribe) creates the definition*. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—*goes well beyond any reasonable limit*.” *Rice*, 528 U.S. at 527 (Breyer, J., concurring) (emphases added). In much the same way that opponents of the one thirty-second blood quantum quota in the Hawaiian Homes Commission Act debates argued that such dilution of blood made a Hawaiian individual “to all intents and purposes a white person[,]” *see Politics of Blood* at 118 (citing Harry Irwin, Hawai’i Attorney General, Statement to U.S. Senate (1920)), Justice Breyer’s line of questioning and decision implied that dilution of blood quantum disqualifies individuals from being members of a sovereign indigenous body. The Court reaffirmed the early twentieth century doctrine and again tied indigeneity, and thus sovereignty, to blood quantum, which has enabled “white American economic, political, and social domination” to endure. J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 183 (2008).

40. Eric K. Yamamoto, *The Colonizer’s Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Aug. 20, 2000), <http://www.colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again>.

on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii.”<sup>41</sup>

Following the decision, the plaintiff boldly professed:

I’m proud to be part of Hawaii’s history . . . . It was good for Hawaiians, and certainly good for the state. Got everybody thinking. Hawaiians took advantage of being able to play the part of victim and get entitlements based on race. They stepped over the line. The *Rice* decision made everyone step back.<sup>42</sup>

The *Rice* decision indeed made Hawaiians “step back.” Yet, future Chief Justice and the Office of Hawaiian Affairs’ then-attorney, John G. Roberts, Jr., saw the decision as a victory:

The good news is that the majority’s opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected.<sup>43</sup>

*Rice* erased from memory the fact that the Office of Hawaiian Affairs was created as a vehicle to reconcile the harm caused by a century of atrocity committed against Hawaiians. *Rice* questioned the validity of all programs that benefitted Native Hawaiians. *Rice* opened the floodgates to more legal challenges to Native Hawaiians and Native Hawaiian programs.<sup>44</sup> Thus, *Rice* shifted the momentum from reconciliation to protection.

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41. *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting). Perhaps more troubling, with the same stroke of a pen, the Court put civil rights jurisprudence toe-to-toe with indigenous law and, pandering to the tenuous arguments of an alleged “color-blind” plaintiff, legitimized the continued subordination of Native Hawaiians and failed to live up to the principle of “Equal Justice Under Law,” as emblazoned across the western façade of the Supreme Court building. The Court (un)successfully stuffed the issue of the Office of Hawaiian Affairs’ narrowly tailored voting scheme into a box of affirmative action and civil rights. As one scholar wrote, “What does affirmative action have in common with Native Hawaiian sovereignty? Absolutely nothing, except in the manner that America responds to Peoples of Color.” Danielle Conway-Jones, *Beyond Rice v. Cayetano: Its Impacts and Progeny: The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano*, 3 ASIAN-PAC. L. & POL’Y J. 371 (2002).

42. Eric K. Yamamoto & Catherine C. Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in RACE LAW STORIES 541, 546 (Rachel F. Moran & Devon W. Carbado eds., Foundation Press, 2008) (citation omitted).

43. Helen Altonn & Christine Donnelly, *Top Court Backs Rice in OHA Vote Challenge*, HONOLULU STAR-BULL. (Feb. 23, 2000), <http://archives.starbulletin.com/2000/02/23/news/story1.html>.

44. See, e.g., *Arakaki v. Lingle*, 477 F.3d 1048, 1052 (9th Cir. 2007) (“In this case we are called on, yet again, to hear a challenge to state programs restricting benefits to ‘native Hawaiians’ or ‘Hawaiians.’ ”); *Doe v. Kamehameha Schools*, 470 F.3d 829 (9th Cir. 2006) (concluding that “a Hawaiian private, non-profit K-12 educational that receives no federal funds” does not violate 42 U.S.C. § 1981 by preferring Native Hawaiians in its admissions policy).

B. *Failed Reconciliation in Congress*

Given the assault on Native Hawaiian programs, on July 20, 2000, United States Senator Daniel K. Akaka introduced “A bill to express the policy of the United States regarding the United States’ relationship with Native Hawaiians, and for other purposes[,]” which proposed to formally recognize Hawaiians as indigenous people that have a right to self-determination under federal Indian law.<sup>45</sup> Specifically in response to *Rice*, Senator Akaka’s bill, later referred to as the Native Hawaiian Government Reorganization Act or the Akaka Bill, sought to clarify the political status of Native Hawaiians with the federal government, establish a process to create a Hawaiian governing entity that would be “federally recognized,” and protect various Hawaiian-serving programs from constitutional challenges.<sup>46</sup> The Akaka Bill specifically called for the creation of a federal commission that would certify a list of Native Hawaiians eligible to create a governing body that the United States would recognize.<sup>47</sup>

The Akaka Bill, which would go through various iterations and be introduced in every Congress for well over a decade, represented an admirable effort by Hawai’i’s congressional delegation to facilitate and codify self-governance and self-determination for Native Hawaiians in American law.<sup>48</sup> Through the Akaka Bill:

[T]he Native Hawaiian people [sought] the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.<sup>49</sup>

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45. S. 2899, 106th Cong. (2000); H.R. 4904, 106th Cong. (2000).

46. See S. 2899, 106th Cong. §§ 1, 7 (2000).

47. See *id.* at § 7(a).

48. See S. 81, 107th Cong. (2001); H.R. 617, 107th Cong. (2001); S. 746, 107th Cong. (2001); S. 1783, 107th Cong. (2001); S. 344, 108th Cong. (2003); H.R. 665, 108th Cong. (2003); H.R. 4282, 108th Cong. (2004); S. 147, 109th Cong. (2005); H.R. 309, 109th Cong. (2005); S. 3064, 109th Cong. (2006); S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007); S. 1011, 111th Cong. (2009); H.R. 2314, 111th Cong. (2010).

49. Testimony of S. Haunani Apoliona on behalf of the Office of Hawaiian Affairs, Hearing on S. 1011 (August 6, 2009) before Committee on Indian Affairs of the United States Senate, at 13. The path of federal recognition for Native Hawaiians was akin to the process that now-recognized Indian tribes have gone through to “reestablish” government-to-government relationships with the United States. Since 1970, it has been the “policy”—though not necessarily the practice—of the United States to recognize and support America’s indigenous people’s rights to self-determination and self-governance. See Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, § 1, 88 Stat. 2203, 2203 (1975) (noting the purpose of the law is “[t]o provide maximum Indian participation in the Government and education of the Indian people . . .”). Federal courts have limited Native American tribal jurisdiction. See Catherine T. Struve, *Sovereign Litigants: Native American Nations in Court*, 55 VILLANOVA L. REV. 929, 934-48

Thus, federal recognition, for some, meant the conveyance of a special status to an indigenous government that could come with a broad array of federal protections and benefits.<sup>50</sup>

However, Native Hawaiian views of federal recognition as envisioned through the Akaka Bill waned as the political tides shifted toward a more conservative American regime. For example, the first draft of the Akaka Bill, S. 2899, reflected the concerns of the Hawaiian people.<sup>51</sup> One of the principle reasons for the wide support was the inclusion of an express disclaimer that historical claims against the federal government by the Hawaiian people would not be barred and that international recourse would be available to address future claims.<sup>52</sup> Indeed, after public hearings in Hawai'i, and in response to those Native Hawaiians pursuing international claims, the bill was redrafted to command that, "Nothing in this Act [was] intended to serve as a settlement of any claims against the United States, or to affect the rights of the Native Hawaiian people under international law."<sup>53</sup> At the time, some of the opposition to the Akaka Bill was "based only on principle" as the disclaimer clearly set forth a protection of an

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(2010) (summarizing federal common law limitations on tribal authority). The outcome of the federal recognition process is a nation-within-a-nation model in which the Indian tribe is provided some forms of independence, but is in all other respects still part of the United States.

50. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Nell Jessup Newton et al. eds., 2005). The federal recognition experience of other indigenous peoples provides ample evidence of both the successes and pitfalls of such a process. For some indigenous communities, federal recognition has brought more control to the community and has been a means to better themselves through the availability of services and an affirmation of their existence. See Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STANFORD L. & POL'Y REV. 271, 277 (2001) ("Now people are going to believe we exist . . . . To be told you are unrecognized stabs you right in the heart."). For others, being federally recognized has, among other things, brought with it uncertainty in how a tribal government will enforce its laws and, more importantly, has brought with it an abdication of some powers to the federal government. *Id.* Opponents of federal recognition often cite the harm and violence of recognition politics, in which, on the one hand, the process defines who is "deserving" of rights and citizenship, but, on the other hand, expressly defines who is *not* "deserving" of rights and citizenship. See AMY E. DEN OUDEN & JEAN M. O'BRIEN, *RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES* 2 (2013):

[I]ndigenous struggles for recognition in the twentieth and early twenty-first centuries are deeply rooted in history. They have entailed complex confrontations and engagements with U.S. federal and state laws and policies, and they are struggles that remind us of the destructive power of the racial stereotypes and popular myths about Indians that persist today and that have obscured not only how native nations and communities see themselves but also what they have surmounted to sustain themselves as peoples.

51. S. 2899, 106th Cong. § 10 (2000).

52. *Id.*

53. *Id.*

international recourse.<sup>54</sup> Over time, and in an effort to capitulate to the demands of the Bush II Administration and most Senate Republicans, the Akaka Bill became watered down. The express disclaimers stating that the rights of Native Hawaiians would not be foreclosed in the international arenas were eliminated and replaced with provisions that mandated federal oversight and waiver of any claims against the federal government.<sup>55</sup> Because of the elimination of the protective disclaimers, some Native Hawaiians vigorously opposed the Akaka Bill as it would foreclose Native Hawaiians from pursuing independence under international law.<sup>56</sup>

Opposition to the Akaka Bill also came from pro-American conservatives, both Hawaiian and non-Hawaiian, who viewed the “special treatment” of Native Hawaiians as unconstitutional and inconsistent with their ideal of equality. One commentator vilified those lawmakers that supported the passage of the Akaka Bill: “the legislation is an important symptom of Democrats’ constitutional flippancy and itch for social engineering. ‘One nation, indivisible’? Not for the House majority or the Senate committee that has approved Akaka’s mockery of the Pledge of Allegiance.”<sup>57</sup> Conjuring the imagery of the Jim Crow-esque system in South Africa, attorney H. William Burgess suggested that the Akaka Bill would create “apartheid” in Hawai’i.<sup>58</sup> Burgess was a member of the Grassroot Institute of Hawaii—an organization staunchly opposed to the Akaka Bill that would, through the guise of promoting democratic principles, unnecessarily incite fear through propaganda and misinformation.<sup>59</sup>

Leading the opposition’s charge against the Akaka Bill in the Senate was Arizona Senator Jon Kyl, the chairman of the Senate Republican Pol-

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54. R. Hokulei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 UNIV. HAW. L. REV. 693, 721 (2002).

55. See S. 3064, 109th Cong. § 8(c) (2006).

56. Professor Kauanui concluded, “Because of the limits on independent national sovereignty under the proposed plan for federal recognition, dozens of Hawaiian sovereignty groups have persistently and consistently rejected the application of U.S. federal Indian law that would recognize a Hawaiian domestic dependent nation—as ward to guardian—under the plenary power of Congress.” J. Kehaulani Kauanui, *Resisting the Akaka Bill*, in *A NATION RISING: MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 318–19 (Goodyear-Ka’opua, ed., Duke Univ. Press 2014). Other amendments made to appease Washington lawmakers included banning gambling activities, precluding the United States from taking any Native Hawaiian lands into trust, and removing the need for additional consultation of the Native Hawaiian governing body by the United States military. See S. 3064, 109th Cong. § 9 (2006).

57. George F. Will, *Social Engineers in Paradise*, WASH. POST, Nov. 29, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/28/AR2007112802053.html>.

58. H. William Burgess, *Federal Recognition Will Result in Legal Apartheid*, HONOLULU ADVERTISER, Oct. 1, 2000, at B4.

59. See Maile Arvin, *Distorting Optics: Political Visibility in Hawaii*, MAILE VINE (Jan. 25, 2008), <https://mailevine.wordpress.com/2008/01/25/distorted-optics-political-visibility-in-hawai'i> (criticizing a racist cartoon published in the Hawaii Reporter that characterized the Office of Hawaiian Affairs’ enrollment effort “Kau Inoa”).

icy Committee.<sup>60</sup> In the summer of 2005, Kyl released a thirteen-page report, titled “Why Congress Must Reject Race-Based Government for Native Hawaiians.”<sup>61</sup> In the Kyl Report, the Republican Senator argued that the Akaka Bill created a race-based government that promoted “racial division and ethnic separatism.”<sup>62</sup> The Kyl Report further advised Republican Senators, “Congress should not be in the business of creating governments for racial groups that are living in an integrated, largely assimilated society. . . . If Congress can create a government based on blood alone, then the Constitution’s commitment to equality under the law means very little.”<sup>63</sup> Kyl’s efforts were supported in concept and in funding by the Grassroot Institute.<sup>64</sup>

To bolster support of the Akaka Bill, Hawai’i’s congressional leaders enlisted the help of Republican Governor Linda Lingle and her Administration to curry favor with Republican lawmakers. Lingle—a rare Republican leader in a State dominated by the Hawai’i Democratic Party and a rising star of the national Republican Party—specifically met with those undecided Republican senators to rally support. Governor Lingle shot back at the lobbying efforts of Senator Kyl for his “false” statements: “His opinion is wrong, his facts are wrong and now it’s up to us to make clear where he’s mistaken, to make it clear to his colleagues.”<sup>65</sup> By June of 2005, many supporters were confident that the Akaka Bill had the necessary fifty-one votes to become law.<sup>66</sup>

On July 14, 2005, the Bush II Justice Department sent a letter to Senator John McCain, chairman of the Senate Indian Affairs Committee, informing him that the Bush II Administration had four concerns with the Akaka Bill: limitations periods, military matters, criminal jurisdiction, and gaming.<sup>67</sup> Akaka Bill supporters welcomed the letter as it was the first time that the Bush II Administration commented on the proposed legislation and because it did not express concerns with the *constitutionality* of the bill. Amendments were proposed to the bill to allay the concerns of the Bush II

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60. Gordon Y.K. Pang, *Lingle Fires Back at Foe of Akaka Bill*, HONOLULU ADVERTISER, June 24, 2005, at A1, A13.

61. *Id.*

62. Republican Policy Committee, *S. 147 Offends Basic American Values: Why Congress Must Reject Race-Based Government for Native Hawaiians*, at 2 (June 22, 2005).

63. *Id.* at 13.

64. 151 CONG. REC. S6645 (daily ed. June 15, 2005) (statement of Senator Kyl). Indeed, Kyl inserted into the congressional record several documents titled “Hawai’i Divided Against Itself Cannot Stand,” which was written by Washington attorney Bruce Fein, who was under contract with the Grassroot Institute. *Id.*

65. Gordon Y.K. Pang, *Lingle Fires Back at Foe of Akaka Bill*, HONOLULU ADVERTISER, June 24, 2005, at A1, A13.

66. *Id.*

67. Richard Borreca, *Akaka Bill Prospects Brighter*, HONOLULU STAR-BULLETIN, July 14, 2005, at A1, A9.

Administration, but those amendments also alienated pro-nationalist Hawaiians.<sup>68</sup>

With the Bush II Administration's concerns seemingly addressed and Republican support trickling in, the stage was set for a vote by the United States Senate on September 6, 2005.<sup>69</sup> Before the vote could be taken, however, Hurricane Katrina decimated the Gulf Coast and the work of Congress came to a halt so legislators could address the emergency.<sup>70</sup> The vote was postponed indefinitely.<sup>71</sup>

The Bush II Administration subsequently raised constitutional concerns with the legislation: "As the Supreme Court has stated [in *Rice*], whether Native Hawaiians are eligible for tribal status is 'a matter of some dispute' and 'of considerable moment and difficulty.'" <sup>72</sup> It was yet another setback to the Akaka Bill. After lobbying efforts with the Senate's Republican leadership to schedule a vote on the Akaka Bill proved unfruitful, and after a shameful vote by the United States Commission on Civil Rights to recommend that Congress not pass the legislation,<sup>73</sup> Senator Akaka took to the Senate chambers in May 2006, and vowed to take the Senate floor every day until a vote on the bill was called.<sup>74</sup> After three days, Senator Akaka announced that the Republican leadership would petition for a cloture to force a vote on the bill following the Senate's May recess.<sup>75</sup>

Debate in the Senate was limited to three hours.<sup>76</sup> The debate and vote came during a week when Senate Republican leadership brought various measures that appealed to the party's conservative bloc, including a constitutional amendment to ban gay marriage and a bill to repeal the estate tax.<sup>77</sup> One commentator recognized, "[a]lthough both measures failed to gain enough votes, the objective was to stir up the conservative Republican base to turn out to vote this year and divert attention from less

68. See *supra* note 56.

69. Gordon Y.K. Pang and Zenaida Serrano, *Vote on Akaka Bill Postponed Indefinitely*, HONOLULU ADVERTISER, Sept. 6, 2005, at A1, A5.

70. *Id.*

71. *Id.*

72. Derrick DePledge & Gordon Y.K. Pang, *Feds Still Objects to Akaka Bill*, HONOLULU ADVERTISER, Sept. 22, 2005, at A1, A2.

73. See U.S. COMMISSION ON CIVIL RIGHTS, BRIEFING REPORT: THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005 (2006).

74. 152 CONG. REC. S4151 (daily ed. May 8, 2006).

75. Cloture is a procedure under the Senate's rules to halt a filibuster and bring pending legislation for a vote by Senators; cloture required a vote by three-fifths of the Senate, or sixty Senators to break a filibuster. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 9–10 (2014).

76. See *Akaka Bill Faces Crucial Vote*, HONOLULU STAR-BULLETIN, June 7, 2006, at A8.

77. 152 CONG. REC. S5439–5484 (June 6, 2006) (debate regarding S.J. Res. 1, the Marriage Protection Amendment, which defined marriage as the "union of a man and a woman"); *id.* at S5509 (considering H.R. 8, which relates to repealing the "death tax").

flattering issues such as the Iraq war and rising gasoline prices.”<sup>78</sup> In other words, it appeared to have been a calculated strategy by Senate Republicans to rally their base in support of conservative causes. Ignoring the special treatment that had been given to Native Hawaiians for over a century and the federal government’s commitment to reconciliation through the Apology Resolution—Senate Republicans instead utilized the debate period to lament their opposition to the Akaka Bill and any form of political recognition of Native Hawaiians. For example, invoking the *Rice* march of “color-blind” justice and again refusing to accept that Native Hawaiians should be treated similarly to Native Americans and Alaska Natives, Republican Senator Jeff Sessions stated: “It is not too much to say the legislation could create a crack in the American ideal of equal rights and color-blind justice. This would be a huge step. It is a step we must not take.”<sup>79</sup>

Senator Akaka took the floor and reminded his colleagues of the intent of the legislation: “At the heart of it, this bill is about *fairness*[.] . . . [it] provide[s] a structured process to finally address long-standing issues resulting from a dark period in Hawaii history, the overthrow of the [K]ingdom of Hawaii.”<sup>80</sup> Then-Illinois Senator Barack Obama spoke of the need to reconcile:

. . . [M]any of you know that I was born and raised in Hawaii. Anyone who has been fortunate enough to visit or call Hawaii home, as I once did, and as my grandmother and sister and adorable niece still do, anybody who has spent time in Hawaii cannot help but recognize the uniqueness of the place. In addition to its scenic landscapes and rich history, it is the living legacy of *aloha*—the spirit of openness and friendliness that is ingrained in the shared, local culture that shapes and enhances each island encounter and experience.

Throughout Hawaii’s history, individuals of all nationalities, races and creeds have found solace in Hawaii. In large part this stems from the culture of Native Hawaiians, who have always acknowledged and celebrated diversity. This incorporation of new cultures and practices over the years has strengthened and unified the community. And as the child of a black father and a white mother, I know firsthand how important Native Hawaiian efforts are to foster a culture of acceptance and of tolerance.

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78. Dennis Camire, *Akaka Bill: After the Defeat*, HONOLULU ADVERTISER, June 9, 2006, at A1, A12–A13.

79. 152 CONG. REC. S5563–64 (June 6, 2006).

80. *Id.* at S5561 (emphasis added). Rebuking the notion that the legislation would divide people in Hawai’i, Senator Daniel K. Inouye said, “I want Congress to know that, if anything, this will unite the people of Hawaii. . . . I think it is about time that we reach out and correct the wrong that was committed in 1893.” *Id.* at S5570.

For this reason, I am proud to join Senator [Akaka] to extend the Federal policy of self-governance and self-determination to Native Hawaiians. Native Hawaiians are a vital part of our Nation's cultural fabric, and they will continue to shape our country in the years to come. . . .

As Americans, we pride ourselves in safeguarding the practice and ideas of liberty, justice, and freedom. By supporting this bill, we can continue this great American tradition and fulfill this promise by affording Native Hawaiians the opportunity to recognize their governing entity and have it recognized by the Federal Government. . . .

This bill gives us an opportunity not to look backward but to help all Hawaiians move forward and to make sure that the Native Hawaiians in that great State are full members and not left behind as Hawaii continues to progress.<sup>81</sup>

Senator Obama's eloquent plea, however, likely fell on deaf ears as, earlier that day, the Bush II Justice Department sent a letter to Senate Majority Leader Bill Frist concluding that the Akaka Bill was:

further subdividing the American people into discrete subgroups accorded varying degrees of privilege. As the President has said, 'we must . . . honor the great American traditions of the melting pot, which has made us one nation out of many peoples.' This bill would reverse that great American tradition and divide people by their race.<sup>82</sup>

One lawmaker called the Justice Department's letter "grossly disingenuous" as the Bush II Administration's concerns were all addressed in the revised version of the bill,<sup>83</sup> and that the Republican leadership used the letter as a statement of the Bush II Administration's position to shore up those last few votes from undecided Republicans.<sup>84</sup>

The Senate Democrats in attendance, including Obama and New York Senator Hillary Clinton, voted unanimously in favor of the motion to invoke cloture.<sup>85</sup> Future Republican presidential candidate John McCain, joined by fellow Arizona Senator John Kyl, crossed over the aisle and supported bringing the Akaka Bill up for a vote to end debate consistent with a promise McCain had made as Chairman of the Senate Indian Af-

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81. *Id.* at S5576.

82. Letter from Assistant Attorney Gen. William E. Moschella of the U.S. Dep't of Justice Office of Legis. Affairs to the Honorable Bill Frist, S. Majority Leader (June 7, 2006), at 1 (brackets omitted) (on file with author).

83. Crystal Kua & Gregg K. Kakesako, *Lingle Resolute After Bill Dies*, HONOLULU STAR-BULLETIN, June 9, 2006, at A15 (regarding the statement of U.S. Senator Daniel K. Inouye).

84. *Id.*

85. 152 CONG. REC. S5640 (June 8, 2006).

fairs Committee.<sup>86</sup> Republican Senator Ted Stevens recalled how previous congressional representatives' fears of the unique treatment of Alaska Natives was unjustified and never panned out: "Time has proven them wrong. This bill will fulfill our federal obligation to these native Hawaiian people."<sup>87</sup>

But it was not enough. The motion to invoke cloture was defeated 56 to 41.<sup>88</sup> In the end, the cloture vote was four votes short of the necessary amount to bring the Akaka Bill to a final up-or-down vote by the Senate.<sup>89</sup> The Senate Republicans, shirking their commitment to reconciliation with Native Hawaiians, stonewalled the process. After six years of legislative maneuvering and millions spent to get the federal government to anti-up to its reconciliatory promises, the Senate failed to even bring the legislation to the floor.

### C. *Stalling Reconciliation*

Despite the setback, Senator Akaka would continue to introduce his signature legislation.<sup>90</sup> The Akaka Bill, however, did not get the same amount of attention from lawmakers as it did in 2006. In 2008—no doubt because of the dissatisfaction with the Bush II Administration's policies and actions—Senator Barack Obama and his "blue wave" won back the Presidency and Congress.<sup>91</sup> After the election results settled and with the defection of Republican Arlen Specter to the Democratic Party in April 2009, the Senate Democrats had the required sixty votes needed to over-

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86. McCain added: "I would like the record to reflect clearly, though, that I am unequivocally opposed to this bill and that I will not support its passage should cloture be invoked." *Id.* at S5636. Alaska's Republican Senators Ted Stevens and Lisa Murkowski, both loyal friends of Inouye and Akaka, joined McCain, Kyl, and eight other Republicans to invoke cloture.

87. *Id.*

88. *Id.* at S5640. Democratic Senators Chuck Schumer and John D. Rockefeller, IV, were not present to vote. Republican Senator Lindsey Graham, a co-sponsor of the Akaka Bill, failed to make it back to the chamber in time to cast his vote. See Dennis Camire, *Akaka Bill: After the Defeat*, HONOLULU ADVERTISER, June 9, 2006, at A12–A13. Some saw Graham's absence as a "sign of the pressure that was being put on Republicans by party leadership and the White House not to support the bill." *Id.*

89. While it could have been approved by a narrow majority in the Senate, there was little chance that the Akaka Bill would have received President Bush's signature given his Justice Department's concerns, and an even slimmer chance that the Akaka Bill had a supermajority of votes in the Senate to override a presidential veto.

90. See S. 81, 107th Cong. (2001); H.R. 617, 107th Cong. (2001); S. 746, 107th Cong. (2001); S. 1783, 107th Cong. (2001); S. 344, 108th Cong. (2003); H.R. 665, 108th Cong. (2003); H.R. 4282, 108th Cong. (2003); S. 147, 109th Cong. (2005); H.R. 309, 109th Cong. (2005); S. 3046, 109th Cong. (2006); S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007); S. 381, 111th Cong. (2009); S. 708, 111th Cong. (2009); S. 1011, 111th Cong. (2009); H.R. 2314, 111th Cong. (2009); S. 675, 112th Cong. (2011); H.R. 1250, 112th Cong. (2011).

91. Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 4, 2008, at A1.

come a filibuster and to move forward with their agenda.<sup>92</sup> Although the time was ripe (filibuster proof Senate and clear presidential support), there was little movement to bring the Akaka Bill up for a vote as other issues, such as universal health care, captured the attention of lawmakers.<sup>93</sup> Then, on August 25, 2009, Massachusetts Senator Ted Kennedy passed away.<sup>94</sup> After a special election, Republican Scott Brown filled Kennedy's vacant seat.<sup>95</sup> The Senate Democrats lost their super-majority and their opportunity to move legislation, like the Akaka Bill, to final votes. Putting aside the likely unified support by Senate Democrats, the Akaka Bill still had Republican allies, like Alaska's Lisa Murkowski. But, Senator Akaka took the risk of putting forth an amended version of the bill that Hawai'i's Republican Governor refused to support.<sup>96</sup>

By 2010, however, the political atmosphere had become so partisan that the election brought in a new tranche of Republican legislators who refused to support the Akaka Bill.<sup>97</sup> In an attempt to pass the legislation during the lame-duck session of 2010, President Obama's Attorney General, Eric Holder, and Interior Secretary, Ken Salazar, sent a letter to the Senate leaders requesting passage of the Akaka Bill.<sup>98</sup> The Obama Administration recognized: "Of the Nation's three major indigenous groups, Native Hawaiians—unlike American Indians and Alaska Natives—are the only one that currently lacks a government-to-government relationship with the United States."<sup>99</sup> Despite the Obama Administration's plea, the Akaka Bill never again made it to the Senate floor.

The 2011 version of the Akaka Bill, the final one introduced by Senator Akaka, was his swan song.<sup>100</sup> It was co-sponsored by Hawai'i's senior Senator Daniel K. Inouye and Alaskan Senators Murkowski and Mark Be-

92. Carl Hulse & Adam Nagourney, *Specter Switches Parties: More Heft for Democrats*, N.Y. TIMES, Apr. 28, 2009, at A1.

93. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

94. John M. Broder, *Social Causes Defined Kennedy, Even at the End of a 46-Year Career in the Senate*, N.Y. TIMES, Aug. 26, 2009, at A1.

95. Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1.

96. See Press Release, U.S. House of Representatives Nat. Res. Comm. Republicans, Hawaii Governor Expresses Opposition to Latest Version of Native Hawaiian Recognition Bill (Feb. 23, 2010) (on file with author) ("Ultimately, although we had good and productive discussions, the current draft of the bill is not one I can support.").

97. Jeff Zeleny, *G.O.P. Captures House, But Not Senate*, N.Y. TIMES, Nov. 2, 2010, at A1.

98. Letter from Eric H. Holder, Jr., U.S. Att'y Gen. & Ken Salazar, U.S. Sec'y of the Interior, to Harry Reid, U.S. Senate Majority Leader (Dec. 9, 2010) (on file with author).

99. *Id.*

100. S. 675, 112th Cong. (2011). See Carl Hulse, *For Akaka, a Senate Role as No. 1 on the Roll*, N.Y. TIMES (Dec. 25, 2012) <http://www.nytimes.com/2012/12/26/us/politics/for-akaka-a-senate-role-as-no-1-on-the-roll.html> (noting Akaka's retirement after his failed attempt at "pursuing a measure to win sovereignty for native Hawaiians . . .").

gich.<sup>101</sup> It sailed through The Senate Committee on Indian Affairs, which Akaka chaired, but never received a vote by either the Senate or the Republican-controlled House of Representatives before Congress adjourned.<sup>102</sup> As Senator Akaka had previously announced his intention to retire and with the unexpected passing of Senator Inouye, the Akaka Bill—and thus any movement toward reconciliation with the federal government—was dead.<sup>103</sup>

## II. FORGING A NEW PATH FOR RECONCILIATION AND FACILITATING THE REESTABLISHMENT OF HAWAIIAN GOVERNANCE

With the dramatic failure of the Akaka Bill in Congress and little prospect of the passage of similar legislation given the Republican control of the Senate, a new path forward needed to be devised. A new strategy for reconciliation needed to be pieced together. The strategy involved the State laying a foundation by funding a roll of Native Hawaiians and President Obama's bold use of his presidential power to pass an administrative rule detailing a path for the reestablishment of a formal relationship between the federal government and the Hawaiian community.

### A. *Laying the Groundwork: Act 195, the Native Hawaiian Roll Commission, and the State of Hawai'i*

Sensing that recognition efforts through Congress had stalled, in 2011, the Hawai'i State Legislature passed Act 195, which created a Native Hawaiian Roll Commission whose responsibilities included facilitating reconciliation by preparing a roll of "qualified Native Hawaiians."<sup>104</sup> Governor Neil Abercrombie—the former Congressman that shepherded the Akaka Bill through the House of Representatives—choked up after signing the bill: "This bill is the first step in seeing to it that we have a Native Hawaiian governing entity. It's not only the first step, it is a practical manifestation of all that has gone on before."<sup>105</sup> Indeed, it was an effort to "rekindle momentum for Hawaiian self-governance after the Akaka Bill stalled in Congress."<sup>106</sup> The roll commission's chair, former Governor John Waihe'e, was more blunt, stating that the "valiant effort of [Senator]

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101. S. 675, 112th Cong. (2011).

102. S. REP. NO. 112-251, at 1-45 (2012).

103. Robert D. McFadden, *Daniel Inouye, Hawaii's Quiet Voice of Conscience in Senate, Dies at 88*, N.Y. TIMES, (Dec. 18, 2012), <http://www.nytimes.com/2012/12/18/us/daniel-inouye-hawaiis-quiet-voice-of-conscience-in-senate-dies-at-88.html>.

104. 2011 Haw. Sess. Laws Act 195, at 648.

105. B.J. Reyes, *New Law Upholds Hawaiian Identity*, HONOLULU STAR-ADVERTISER, July 7, 2011, at A1, A9.

106. Ian Lind, *What's the Point of Getting on the Sovereignty Roll?*, HONOLULU CIV. BEAT (Aug. 7, 2013), <http://www.civilbeat.com/2013/08/19643-hawaii-monitor-whats-the-point-of-getting-on-the-sovereignty-roll>.

Akaka was . . . yesterday's news."<sup>107</sup> Waihe'e continued, "Act 195 was really a stroke of genius[.]"<sup>108</sup>

Under Act 195, the government simply required the publication of the list of individuals: "The publication of the roll of qualified Native Hawaiians . . . [was] intended to *facilitate* the process under which qualified Native Hawaiians *may independently* commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves."<sup>109</sup> Act 195 required that an individual on the roll be "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands," and who has "maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity[.]"<sup>110</sup>

In practice, Act 195 simply required the roll commission to collect and compile a list of individuals sharing common characteristics. Despite some legislators' visions, Act 195 by its terms did not mandate any conduct or set any eligibility requirements for an election.<sup>111</sup> The roll commission's responsibility was no different than what the government, through agencies like the United States Census Bureau or the Bureau of Labor Statistics, already did—collect information that could then be sorted. Courts across the country have upheld the collection of demographic data pertaining to race.<sup>112</sup> These courts have been clear that the mere *collection* of data is distinguishable from *using* such information to classify individuals and treat them different from others.<sup>113</sup>

The language of Act 195 that referenced an intent to "facilitate" a process and serve as a "basis" for qualified Native Hawaiians to reorganize

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107. Anita Hofschneider, *More Than 130,000 Native Hawaiians Sign Up for Nation Building*, HONOLULU CIV. BEAT (May 5, 2014), <http://www.civilbeat.com/2014/05/22008-more-than-130000-native-hawaiians-sign-up-for-nation-building>.

108. *Id.*

109. 2011 Haw. Sess. Laws Act 195 (emphases added).

110. Haw. Rev. Stat. §§ 10H-3(a)(2)(A)–(B) (Supp. 2014); 2011 Haw. Sess. Laws Act 195, at 649.

111. *See id.* at 646–51.

112. *Morales v. Daly*, 116 F. Supp. 2d 801, 803–20 (S.D. Tex. 2000) (holding that the Constitution "does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens" (citation omitted)).

113. *United States v. New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976) ("In our opinion, the challenged regulations represent a reasonable administrative effort to fill up the details which Title VII implied but did not specify. The information which the regulations require a state to furnish on the EEO-4 form is essentially raw statistical data which, properly interpreted, can provide an intelligent basis for determining whether the state may be guilty of an unlawful employment practice within the purview of Title VII." (quotation marks and citations omitted)); *Morales*, 116 F. Supp. 2d, 803–20 (2000).

was merely aspirational. Act 195 in no way created a binding commitment to sanction a specific process that would lead to the establishment of a Hawaiian governing entity.<sup>114</sup> Pursuant to Act 195, once the roll was published, Native Hawaiians themselves could then use (or not use) that roll in whatever way they deemed necessary. Once the roll commission completed its publication, it could seek dissolution from the Governor.<sup>115</sup> Thus, under the enacted law, other than compiling and verifying the roll, the State would not participate in the details of creating or reorganizing a Hawaiian governing entity.<sup>116</sup>

The roll commission's campaign to register Native Hawaiians, called Kana'iolovalu, was unsuccessful at the beginning. The Commission spent over \$1.8 million to register fewer than 10,000 Native Hawaiians.<sup>117</sup> Within two years, the roll commission registered only 17,225 people out of an approximately 527,077 Native Hawaiians throughout the United States.<sup>118</sup> Partially due to confusion and/or a registration paralysis from previous efforts by the Office of Hawaiian Affairs to enroll Native Hawaiians, the roll commission was not successful.<sup>119</sup> The roll commission's lack of success was also attributable to it being an arm of a State that itself had done tremendous violence to Native Hawaiians and the cause of self-determination.<sup>120</sup>

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114. Haw. Rev. Stat. §§ 10H-2 and 4 (Supp. 2014); 2011 Haw. Sess. Laws Act 195, at 648-49.

115. Haw. Rev. Stat. § 10H-6 (Supp. 2014); 2011 Haw. Sess. Laws Act 195, at 650.

116. Haw. Rev. Stat. § 10H-2 (Supp. 2014); 2011 Haw. Sess. Laws Act 195, at 648.

117. Ian Lind, *What's the Point of Getting on the Sovereignty Roll?*, HONOLULU CIV. BEAT (Aug. 7, 2013), <http://www.civilbeat.com/2013/08/19643-hawaii-monitor-whats-the-point-of-getting-on-the-sovereignty-roll>.

118. *Id.*

119. See OFFICE OF HAWAIIAN AFFAIRS, 2004 ANNUAL REPORT 5 (2004), <http://19of32x2yl33s8o4xza0gf14.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/OHA2004AR.pdf> ("In support of OHA's nationhood goal, one of the most significant initiatives launched in FY-04 was the Kau Inoa registration on Jan. 17, 2004. This community-driven effort is an integral step in forming a Native Hawaiian governing entity."). The Kau Inoa campaign was preceded by the Office of Hawaiian Affairs' enrollment effort called Operation 'Ohana. See OFFICE OF HAWAIIAN AFFAIRS, RESEARCH DIVISION DATA BOOK, [http://www.ohadatabook.com/OHA\\_research.html](http://www.ohadatabook.com/OHA_research.html) (last visited Apr. 10, 2017) ("Operation 'Ohana was a Native Hawaiian registry program designed to locate, identify and register Hawaiians worldwide.").

120. See Noe Goodyear Ka'opua, *Can't You See Us Rising?*, KE KAUPU HEHI ALE, <https://hehiale.wordpress.com/2015/05/18/cant-you-see-us-rising> (last visited Apr. 10, 2017):

[S]ettler state-sponsored programs have never solved the problems that the occupier's presence created in the first place: houselessness, pollution, diminished local food production, substance abuse, and the overall devaluation of 'Oiwī ways of living. . . . [Y]ou are asking us to submit to a process initiated by that very state. In so doing, the new governing entity would enter any negotiation for a land base from a weakened position right from the get go.

As a runaround to the lack of support, in 2013, the State Senate fashioned a last-minute solution. In an interesting political maneuver, the State Senate “gutted and replaced” a bill regarding service of process, with a bill that mandated that the roll would include anyone that had registered in the prior enrollment efforts or anyone that met the ancestry requirements of Kamehameha Schools.<sup>121</sup> The State Senate’s legislation, while met with little opposition at the time—likely due to its belated nature—was signed into law as Act 77.<sup>122</sup> Act 77 allowed for the transfer of names and information from the various enrollment processes.<sup>123</sup> This law exponentially grew the size of the roll to upwards of 130,000.<sup>124</sup> In simply compiling a list of qualified Native Hawaiians, the State took the first steps to assist in the reconciliation efforts.

B. *Fortifying the Foundation: Obama Administration’s Rule*

In 2014, in response to a call for federal action and consistent with the Ninth Circuit’s invitation for the Interior Department to “appl[y] its expertise to . . . determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis,”<sup>125</sup> the Obama Administration issued an Advance Notice of Proposed Rulemaking (“ANPRM”).<sup>126</sup> Through the ANPRM, Obama’s Interior Department sought comments on the following questions:

- [1] Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community?
- [2] Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship?
- [3] If so, what process should be established for drafting and ratifying a reorganized Native Hawaiian government’s constitution or other governing document?

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121. See 2013 Haw. Sess. Laws Act 77, at 139–40. Kamehameha Schools is a private educational institution that provides education to indigent children, with a preference for children of Native Hawaiian ancestry. See *Doe v. Kamehameha Schools*, 470 F.3d 827, 829 (9th Cir. 2006).

122. 2013 Haw. Sess. Laws Act 77, at 139–40.

123. *Id.* at 140 (“requiring the inclusion of “all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs as demonstrated by the production of relevant office of Hawaiian affairs records”).

124. See Anita Hofschneider, *More Than 130,000 Native Hawaiians Sign Up for Nation Building*, HONOLULU CIV. BEAT (May 5, 2014), <http://www.civilbeat.com/2014/05/22008-more-than-130000-native-hawaiians-sign-up-for-nation-building>.

125. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004).

126. Procedures for Reestablishing a Government-to-Government Relationship With the Native Hawaiian Community, 79 Fed. Reg. 35296, 35296–303 (June 20, 2014).

- [4] Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with Federal law?
- [5] If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgment of a government-to-government relationship with the reorganized Native Hawaiian government?<sup>127</sup>

Following issuance of the ANPRM, a delegation from the Obama Interior and Justice Departments traveled across the State and through the continental United States to listen to hours of testimony regarding the five inquiries.<sup>128</sup> During the many hours of public comment, the Obama delegation heard a vocal segment of Native Hawaiians opposed to any federal effort to reestablish a government-to-government relationship.<sup>129</sup>

Despite the vocal opposition to the federal rule-making process, on October 14, 2016, the Interior Department announced a final rule that would create a pathway for a Native Hawaiian Governing Entity (“NHGE”) to reestablish a government-to-government relationship between Native Hawaiians and the United States (hereinafter referred to as the “Rule” or “Part 50”).<sup>130</sup> The Rule, 43 C.F.R. part 50, outlined the criteria that the federal government would consider in its determination of whether to reestablish a relationship with a requesting reorganized NHGE.<sup>131</sup> The Interior Secretary would assess the NHGE’s request and

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127. *Id.* at 35297.

128. See Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 81 Fed. Reg. 71278, 71317 (Oct. 14, 2016) (to be codified at 43 C.F.R. pt. 50).

129. Some opponents premised their arguments on the belief that the United States had no jurisdiction over Hawai’i as Hawai’i was an occupied sovereign nation. See Testimony of Williamson B.C. Chang at Public Meeting Regarding Whether the Federal Government Should Reestablish a Government-to-Government Relationship with the Native Hawaiian Community, at 94–96 (June 23, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/ohr/reorg/upload/Hawai-i-State-Capitol-Honolulu-O-ahu-062314.pdf>. See also Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW: A TREATISE 355–402 (Kamehameha Publishing 2015) (analyzing the theories of Hawai’i’s independence under international law).

130. See Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 81 Fed. Reg. at 71317. On October 1, 2015, the Obama Administration announced its Notice of Proposed Rule Making. See Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 80 Fed. Reg. 59113 (proposed Oct. 1, 2015). (to be codified at 43 C.F.R. pt. 50). The final Rule made several revisions to the NPRM. See Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71278, 71291 (Oct. 14, 2016).

131. See 43 C.F.R. § 50.16 (2016).

use the following criteria in determining whether to reestablish a formal relationship:

- (a) The request includes the seven required elements described in [section] 50.10;<sup>132</sup>
- (b) The process by which the Native Hawaiian community drafted the governing document met the requirements of [section] 50.11;<sup>133</sup>
- (c) The process by which the Native Hawaiian community determined who could participate in ratifying the governing document met the requirements of [section] 50.12;<sup>134</sup>
- (d) The duly ratified governing document, submitted as part of the request, meets the requirements of [section] 50.13;<sup>135</sup>
- (e) The ratification referendum for the governing document met the requirements of [sections] 50.14(b)-(c) and was conducted in a manner not contrary to Federal law;<sup>136</sup>
- (f) The elections for the government offices identified in the governing document, including members of the governing body, were consistent with [section] 50.15 and were conducted in a manner not contrary to Federal law[.]<sup>137</sup>

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132. Section 50.10 of the Rule requires: (1) a written narrative describing how governing documents were drafted; (2) a written narrative describing how it was determined who could participate in any ratification of a governing document; (3) a ratified governing document; (4) a written narrative describing how the governing document was adopted or approved; (5) a written narrative describing how and when elections for government offices were conducted; (6) a resolution of the governing body requesting the reestablishment of a government-to-government relationship with the United States; and (7) a certification that the submission was the request of the governing entity. 43 C.F.R. § 50.10 (2016).

133. Section 50.11 of the Rule requires a description of “how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community.” 43 C.F.R. § 50.11 (2016).

134. Section 50.12 of the proposed rule requires that the request explain the processes for verifying that participants were Native Hawaiians and for verifying those who were also HHCA Native Hawaiians. 43 C.F.R. § 50.12 (2016).

135. The governing document submitted to the Interior Department must, *inter alia*, include the government’s official name, prescribe the manner in which the government exercises its sovereign powers, establish the government’s structures and institutions, authorize the government to negotiate with the State and federal governments, provide for periodic elections, describe the criteria for membership, protect and preserve the liberties, rights, and privileges of all persons affected by the entity’s exercise of power, and not be inconsistent with federal law. 43 C.F.R. § 50.13 (2016).

136. The NHGE must include, *inter alia*, a written narrative describing how the Native Hawaiian community conducted a ratification referendum and verified whether a potential voter in the ratification referendum was a Native Hawaiian. 43 C.F.R. § 50.14 (2016).

137. 43 C.F.R. §§ 50.16(a)–(f). Section 50.15 of the proposed rule requires the NHGE to show that the election of government officials was free and fair, held by secret ballot, and open to all eligible Native Hawaiians. 43 C.F.R. § 50.15 (2016).

In terms of participation, the Rule required that at least half, and no fewer than 30,000, Native Hawaiians must cast a vote in favor of the governing document; this means that at least 60,000 Native Hawaiians must participate in the referendum vote.<sup>138</sup> Of those, 30,000 Native Hawaiians that vote in favor of the governing document at least 9,000 must be native Hawaiian, as defined by the Hawaiian Homes Commission Act, and at least half of all native Hawaiians must favor the referendum.<sup>139</sup>

The Rule was also clear that the process of reorganizing a governing body would come from the Native Hawaiian community and not the State or the federal government: “Any government reorganization would . . . occur through a fair and inclusive community-driven process. The Federal Government’s only role is deciding whether the request satisfies the rule’s requirements, enabling the Secretary to reestablish a formal government-to-government relationship with the Native Hawaiian government.”<sup>140</sup>

Some praised Obama’s efforts as a “a historic step towards doing what is right and just for Native Hawaiians[.]”<sup>141</sup> But, the dissidents still made their voices heard. Keli’i Akina of the Grassroot Institute—the same entity that bitterly opposed the Akaka Bill—sharply criticized Obama’s action:

This is yet another attempt by the Department of the Interior to do an end run around Congress by assuming powers it simply does not have. . . . The Congress has clearly indicated that they—and not the [Interior Department]—have the power to recognize a Native Hawaiian government. On multiple occasions, they considered and decided not to pass the Akaka Bill, demonstrating that the Constitutional concerns in the creation of a race-based government were real and unavoidable.<sup>142</sup>

Akina foreshadowed his direct challenge to any effort to reestablish a government-to-government relationship.

### C. *Na’i Aupuni*

The federal and State governments laid the foundation for reorganizing a Native Hawaiian government and reestablishing a formal relationship with the United States. Although the State and federal governments made

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138. *Id.* at § 50.16(g). Section 50.16(g) also provides a “presumption” that the Native Hawaiian participation criterion is satisfied if more than 50,000 Native Hawaiians vote in favor of the governing documents. *Id.*

139. *Id.* at § 50.16(h). Section 50.16(h) also provides a “presumption” that the native Hawaiian participation criterion is satisfied if more than 15,000 native Hawaiians vote in favor of the governing documents. *Id.*

140. Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. at 71317.

141. Dan Nakaso, *U.S. Says Sovereignty Decision is Hawaiians’*, HONOLULU STAR-ADVERTISER, Sept. 23, 2016, at A9 (statement of Senator Brian Schatz).

142. Press Release, Grassroot Institute of Hawaii, Grassroot Institute Raises Questions About Proposed DOI Rule (Oct. 1, 2015) (on file with author).

the initial strides to set up a path for Native Hawaiian self-determination, the task of reorganizing a governing body was left to the Native Hawaiians themselves. On October 16, 2014, the Office of Hawaiian Affairs stepped forward and authorized the use of special trust funds to a neutral third-party to “facilitate an election of delegates, election and referendum monitoring . . . and a referendum to ratify any recommendation of the delegates. . . .”<sup>143</sup>

One private organization heeded the call and took it upon itself to organize an *‘aha* or gathering, in which a governing document could be drafted and proposed for an eventual ratification vote.<sup>144</sup> That entity, Na’i Aupuni, would serve as the backbone of the latest effort to organize Native Hawaiians. In its Bylaws, Na’i Aupuni described its creation:

[T]he Office of Hawaiian Affairs . . . authorized and approved the use of the Funds to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined by the collective will of the Native Hawaiian people by transmitting the Funds to an entity that is independent of [the Office of Hawaiian Affairs] and any apparatus of the State of Hawai’i. [The Office of Hawaiian Affairs] initially invited nine Ali’i trusts, Royal societies and Civic organizations to discuss the development of this independent body. From that group of nine, the following three organizations, each represented by two individuals, continued the discussion . . . . Eventually, the three organizations . . . decided that the purpose of the entity would be best served if the six individuals in their individual capacity and not as representatives of any organization should form and lead the independent entity by serving as directors of the Na’i Aupuni.<sup>145</sup>

Na’i Aupuni sought funding from the Office of Hawaiian Affairs to conduct its own election of delegates, a convention, and a possible ratification vote.<sup>146</sup> The Office of Hawaiian Affairs thereafter provided Na’i Aupuni with \$2,595,000.00 of Section 5(f) trust funds as a grant for Na’i Aupuni to coordinate its own election efforts.<sup>147</sup> The grant agreement

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143. Akina v. State, No. 1:15-cv-00322-JMS-BMK, at 652–56 (April 29, 2015) (Grant Agreement Between the Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of Na’i Aupuni).

144. See Akina v. Hawaii, 835 F.3d 1003, 1008 n.2 (9th Cir. 2016) (defining *‘aha* as “[m]eeting, assembly, gathering, convention, court, party” (citation omitted)).

145. Exhibit 4: Bylaws of Na’i Aupuni, Akina v. State of Hawaii, No. 15-00322 (D. Haw. 2015), ECF 79-6.

146. Exhibit 5: Grant Agreement, Akina v. State of Hawaii, No. 15-00322 (D. Haw. 2015), ECF 79-7 [hereinafter Grant Agreement].

147. *Id.* The court has held that the Office of Hawaiian Affairs can use Section 5(f) trust funds for any purpose so long as the funds provide a benefit to native Hawaiians as defined in the

mandated that the Office of Hawaiian Affairs would not “directly or indirectly control or affect the decisions of [Na’i Aupuni.]”<sup>148</sup> The Office of Hawaiian Affairs thereby provided Na’i Aupuni with a “no strings attached” grant for Na’i Aupuni to conduct its own independent election of delegates for Hawaiian people to consider whether and, if so, in what form, a Hawaiian governing entity should be reorganized. Na’i Aupuni, on its own accord, decided to use the State’s roll as a basis for its election because it believed that it was too expensive and time-consuming to have to create a new list of Native Hawaiians.<sup>149</sup> The roll also provided the most comprehensive list of individuals as it included the lists compiled by the Office of Hawaiian Affairs in its various registration efforts.<sup>150</sup> With the framework in place, and a contract with an election vendor secured, Na’i Aupuni commenced the election process in the summer of 2015.

Native Hawaiians criticized the Office of Hawaiian Affairs’ support of Na’i Aupuni. The unity that was initially sought was falling apart. Sovereignty-proponent Walter Ritte stated:

I am totally opposed to this idea of giving [five] individuals the reigns and letting them steer our canoe[.] I’ve never seen these people involved in the efforts over the years to build our nation. Somehow, before we strike this deal, we need to clean this up, because we can’t build our nation in the sand. We need a solid foundation, but this is not the foundation that we were told would represent us.<sup>151</sup>

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Hawaiian Homes Commission Act. See *Day v. Apoliona*, 616 F.3d 918, 924–28 (9th Cir. 2010); *Kealoha v. Machado*, 131 Hawai’i 62, 74–79, 315 P.3d 213, 225–30 (2013).

148. See Grant Agreement, *supra* note 146.

149. Declaration of James Kuhio Asam at 8–9, *Akina v. State of Hawaii*, No. 15-00322 (D. Haw. 2015), ECF 79-1 [hereinafter Declaration of Asam] (“[P]rior to entering into the below described Grant Agreement, [Na’i Aupuni] informed [the Office of Hawaiian Affairs] that it intended to use the Roll but that it might also look into whether there are other available lists of Native Hawaiians that it could also use to form its voter list. . . . Another issue that [Na’i Aupuni’s] directors discussed was the utility of available lists of adult Native Hawaiians other than the [Native Hawaiian Roll Commission’s] list. After considering this issue for over two-months, [Na’i Aupuni’s] directors determined that the [Native Hawaiian Roll Commission’s] list was the best available option because it is extraordinarily expensive and time consuming to compile a list of Native Hawaiians.”).

150. Declaration of Kamana’opono Crabbe at 3, *Akina v. State of Hawaii*, No. 15-00322 (D. Haw. 2015), ECF 83-1 (“[The Office of Hawaiian Affairs] compiled a database of all verified Hawaiians and Native Hawaiians . . . who have registered for one or more of [the Office of Hawaiian Affairs’] registry programs including Operation ‘Ohana, Kau Inoa and the Native Hawaiian Registry[.]”).

151. Will Caron, *OHA Pushes Forward With Nai Aupuni Despite Concerns*, HAWAII INDEP. (May 28, 2015), <http://hawaiiindependent.net/story/oha-pushes-forward-with-nai-aupuni-despite-concerns>.

Some cautioned that this recognition process mirrored those in Indian Country.<sup>152</sup> There, the goal of the federal government was assimilation so that the government could divest the native people of their claims to lands.<sup>153</sup>

The reorganization nevertheless moved forward. Na'i Aupuni used the roll to seek delegates for its 'aha.<sup>154</sup> Na'i Aupuni's independent process called for a gathering of forty elected delegates representing various geographic locations, including several delegate seats for Native Hawaiians that live in the continental United States.<sup>155</sup> The announcement of candidates for delegates was made on September 30, 2015.<sup>156</sup> The list of delegate candidates represented, as Na'i Aupuni President J. Kuhio Asam indicated, "a good cross-section of the Native Hawaiian community."<sup>157</sup> Some favored federal recognition for Native Hawaiians, while others believed that the Kingdom of Hawai'i still existed, and that the State and federal governments had no jurisdiction in the islands.<sup>158</sup> Clearly, the views on the entire Kana'iolowalu and Na'i Aupuni process and the Office of Hawaiian Affairs' apparent \$6.8 million involvement were diverse.<sup>159</sup> But, after over a decade of jockeying, the process of reconciliation finally reignited under President Obama's watch.<sup>160</sup>

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152. Jon Osorio, *Pondering Independence*, HAWAII INDEP. (Oct. 3, 2015), <http://hawaiiindependent.net/story/pondering-independence>.

153. See *id.*; see also GLEN SEAN COULTHARD, *RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* 17 (Univ. Minn. Press 2014) (recognizing from other examples across the globe that "when delegated exchanges of recognition occur in real world contexts of domination the terms of accommodation usually end up being determined by and in the interests of the hegemonic partner in the relationship").

154. See Declaration of Asam, *supra* note 149.

155. Will Caron, *Aha May Fail to Give Hawaiians True Self-Determination*, HAWAII INDEP. (Sept. 30, 2015), <http://hawaiiindependent.net/story/aha-may-fail-to-give-hawaiians-true-self-determination> [hereinafter *Aha May Fail*].

156. See Declaration of Asam, *supra* note 149.

157. *Aha May Fail*, *supra* note 155.

158. See *id.*

159. See Jon Osorio, *Pondering Independence*, HAWAII INDEP. (Oct. 3, 2015), <http://hawaiiindependent.net/story/pondering-independence>.

160. On November 27, 2015, Justice Anthony Kennedy enjoined Na'i Aupuni from "counting the ballots cast in, and certifying the winners" of its election "pending further order . . . of the Court." *Akina v. Hawaii*, No. 15A551, 2015 WL 7691943, at \*1 (U.S. Nov. 27, 2015) (Order). By a five-to-four decision, the conservative majority of the Court subsequently enjoined the counting of ballots and certification of winners in Nai Aupuni's election pending the disposition of the Ninth Circuit appeal. *Akina v. Hawaii*, 126 S.Ct. 581 (Dec. 2, 2015) (Mem.). Na'i Aupuni thereafter cancelled its election and invited all prospective delegates to attend an 'aha, which was held in February 2016. *Akina*, 835 F.3d at 1009. The 'aha created a constitution for a Native Hawaiian governing body. *Id.*

### III. THE LEGALITY OF THE HAWAIIAN RECONCILIATION EFFORT

The push for the tripartite strategy of reconciliation for Native Hawaiians, which combined the State's Roll, Na'i Aupuni's governance process, and the Obama Administration's Rule, undoubtedly raised questions about the legality of the entire effort. However, as described below, the efforts of Na'i Aupuni and the State were upheld as constitutional in *Akina v. Hawaii*, President Obama's Rule is a proper exercise of the president's constitutional authority, and the Rule would withstand an equal protection challenge if one were raised.

#### A. *No Close Nexus: The Constitutionality of the Efforts of Na'i Aupuni and the State of Hawai'i*

On August 13, 2015, anti-Akaka Bill proponent Keli'i Akina and several other individuals, including two non-Hawaiians and three Native Hawaiians, filed a lawsuit against the State of Hawai'i, the State Governor, the trustees of the Office of Hawaiian Affairs, the Commissioners of the roll commission, and Na'i Aupuni to halt the process of reorganizing a Hawaiian governing entity.<sup>161</sup> Judicial Watch, a "constitutionally conservative, nonpartisan educational foundation that promotes transparency, accountability and integrity in government, politics and the law[.]"<sup>162</sup> funded the *Akina* lawsuit. Harkening back to the comments made about the *Rice* decision, Judicial Watch President Tom Fitton stated:

Who would believe that in this day and age U.S. citizens are being denied access to the right to vote explicitly because of their race and their points of view. . . . Using a race-based enrollment list to help radicals in Hawaii tear the State apart and break away from the United States of America is a violation of the U.S. Constitution and basic federal voting rights law. And that Hawaiian officials would prevent you from voting if you don't sign up for their racial apartheid theories is an affront to the First Amendment. Our clients who are being denied their core constitutional rights believe courts can't shut down this racist scheme soon enough.<sup>163</sup>

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161. *Akina*, 141 F. Supp. 3d at 1112. Other individuals filed separate lawsuits against Na'i Aupuni and its directors. See *Amsterdam v. Na'i Aupuni*, Case No. 1:15-cv-00447-JMS-RLP (D. Haw. 2015); *Fuller v. Nai Aupuni Directors*, Case No. 1:15-cv-00470-HG-BMK (D. Haw. 2015); *Kealoha v. Ige*, Case No. 1:15-cv-00478-JMS-BMK (D. Haw. 2015).

162. *Press Release, Judicial Watch Announces New Team Member Robert D. Popper*, JUDICIAL WATCH: PRESS ROOM (Sept. 25, 2013), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-announces-new-team-member-robert-d-popper>.

163. *Press Release, Judicial Watch Files Civil Rights Lawsuit to Stop Race-Based Separatist Vote in Hawaii*, JUDICIAL WATCH: PRESS ROOM (Aug. 13, 2015), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-files-civil-rights-lawsuit-to-stop-race-based-separatist-vote-in-hawaii>.

In their Complaint, the plaintiffs asserted nine counts against the defendants.<sup>164</sup> The thrust of their lawsuit was that the roll commission's list of registered and eligible voters, and Na'i Aupuni's process of creating a Hawaiian governing entity, each violated the federal Constitution and the Voting Rights Act.<sup>165</sup> Specifically, and as in *Rice*, the non-Hawaiian plaintiffs asserted that Act 195, which detailed a process for creating the roll, violated the Fifteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Voting Rights Act because it allegedly denied the plaintiffs the right to vote on account of race.<sup>166</sup>

To succeed in their claim, which was brought pursuant to 42 U.S.C. section 1983, the plaintiffs needed to show that Na'i Aupuni was a state actor.<sup>167</sup> But, as the facts showed and as the district court held in denying a motion for preliminary injunction, "because [Na'i] Aupuni's election is a private election, [Na'i] Aupuni is not a state actor . . . . Its election does not fit under the public function test of state action, which requires a private entity to be carrying out a function that is traditionally the exclusive prerogative of the State . . . [n]or does [Na'i] Aupuni's election fall under a joint action test, which asks whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights."<sup>168</sup> The district court specifically concluded that there was

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164. The Plaintiffs asserted the following claims against the Defendants: (1) violation of the Fifteenth Amendment and 42 U.S.C. § 1983; (2) violation of the Equal Protection clause of the Fourteenth Amendment and 42 U.S.C. § 1983; (3) violation of the Voting Rights Act, 52 U.S.C. § 10301; (4) violation of the First and Fourteenth Amendments for alleged viewpoint-based restrictions relating to voting; (5) violation of the Fifteenth Amendment and 42 U.S.C. § 1983; (6) violation of Section 2 of the Voting Rights Act for allegedly disqualifying candidates based upon race; (7) violation of the Equal Protection clause of the Fourteenth Amendment for the unjustified qualification based on community ties; (8) violation of the Due Process clause of the Fourteenth Amendment for the alleged impairment of the fundamental right to vote; and (9) violation of the First Amendment for alleged compelled speech by virtue of involuntary registration. Complaint, *Akina v. State of Hawaii*, 141 F. Supp. 3d 1106 (D. Haw. 2015) (No. 15-00322) [hereinafter Complaint]

165. *Akina*, 141 F. Supp. 3d at 1112–13.

166. Complaint, *supra* note 164.

167. See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) (holding that a plaintiff must demonstrate that a constitutional deprivation occurred "under color of any statute, ordinance, regulation, custom, or usage of any State").

168. *Akina*, 141 F. Supp. 3d at 1128 (internal quotation marks and citation omitted). The district court specifically noted how the use of public trust funds from the Office of Hawaiian Affairs to conduct an election did not make Na'i Aupuni's election a public election; *id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (noting that the "receipt of public funds does not make [the agency's] discharge decisions acts of the State"). Relatedly, native Hawaiians Virgil Day, Mel Ho'omanawanui, Josiah L. Ho'ohuli, Patrick L. Kahawaiola'a, and Samuel L. Kealoha, Jr., sought court approval to intervene in the lawsuit to argue that the Office of Hawaiian Affairs' expenditure of section 5(f) trust funds should be used solely to benefit native Hawaiians, as defined in the Hawaiian Homes Commission Act. The district court, however, denied the motion to intervene because the arguments asserted by the proposed intervenors were wholly separate from the issues at stake in the *Akina* litigation, and the motion to intervene

no “close nexus” that would make Na’i Aupuni’s election a public election.<sup>169</sup>

B. *Executive Power: Analyzing the President’s Authority for Native Hawaiian Reconciliation*

With Na’i Aupuni’s process and the use of the State’s Roll held constitutional, the third and final part of the reconciliation effort—President Obama’s Rule—must be analyzed. In *Akina*, the district court clearly articulated that it was not deciding “whether the Department of the Interior even has the Congressional authorization to facilitate the ‘reestablishment’ of a government-to-government relationship with the Native Hawaiian community.”<sup>170</sup> Although the district court did not address the question (as it was never raised), resolution of the President’s authority to enact such a rule would eventually meet judicial scrutiny likely because of Republican opposition to the Akaka Bill and the general conservative disdain for President Obama’s use of his executive authority. As discussed below, the President has the legal authority to take executive action creating a separate path of reestablishing a government-to-government relationship with Native Hawaiians.

The question of whether the President has the authority to take such an executive action raises the classic constitutional issue of separation of powers and the extent of presidential authority. In his influential concurring opinion in *Youngstown*, Justice Robert H. Jackson set out a tripartite

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would have inserted issues related to the use of section 5(f) public trust funds, which several courts have rejected in the past; see *Day*, 616 F.3d at 924–28 (concluding that the Office of Hawaiian Affairs could allocate section 5(f) trust funds to support initiatives, like the Akaka Bill, which would benefit all Hawaiians); *Kealoha*, 131 Hawai’i at 74–79, 315 P.3d at 225–30. For these same reasons, the Ninth Circuit subsequently affirmed the denial of the intervention motion; *Akina*, 835 F.3d at 1111–12.

169. *Akina*, 141 F. Supp. 3d at 1129. Although it did not need to reach the issue as it had concluded that Na’i Aupuni was not a state actor, the district court also addressed the merits of an equal protection challenge. The district court recognized the Defendants’ “strong argument that *Mancari* can also apply to uphold Congressional action taken under its power to support Native Hawaiians as indigenous people.” *Akina*, 141 F. Supp. 3d at 1130. Much like the U.S. Supreme Court did in *Rice*, however, the district court sidestepped the *Mancari* issue as it would not reach this “difficult terrain.” *Id.* at 1131 (citing *Rice*, 528 U.S. at 519). In a bold move, the district court instead correctly determined that the equal protection challenge could withstand the stringent strict scrutiny analysis. *Id.* at 1131–33. The district court recounted the numerous legal provisions recognizing the unique status of Native Hawaiians and the context of Hawaiian history under which Act 195 was established. *Id.* at 1131–32. The district court then concluded, “It follows that the State has a compelling interest in bettering the conditions of its indigenous people and, in doing so, *providing dignity in simply allowing a starting point for a process of self-determination.*” *Id.* at 1132 (emphasis added). “Dignity”—a term that had been used months earlier by Justice Anthony Kennedy to strike down state bans against same-sex marriage—was used quite effectively as the district court’s visceral support for the entire effort; see *Obergefell v. Hodges*, 135 S.Ct. 2584, 2608 (2015) (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

170. *Akina*, 141 F. Supp. 3d at 1136.

framework for evaluating executive action and separation of powers.<sup>171</sup> First, Justice Jackson concluded that the President's authority is "at its maximum" when his actions are pursuant to "an express or implied authorization of Congress[.]"<sup>172</sup> When the President's authority is at its zenith, the action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>173</sup> Second, Justice Jackson articulated that there is a "zone of twilight in which [the President] and Congress may have concurrent authority" or where the distribution of authority "is uncertain."<sup>174</sup> In such circumstances, "congressional inertia, indifference or quiescence may sometimes, as least as a practical matter, enable, if not invite, measures on independent presidential responsibility."<sup>175</sup> The test of whether executive action was appropriate would likely "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>176</sup> Finally, Justice Jackson contended that the President's power is "at its lowest ebb" when executive action is taken that is inconsistent with an express or implied will of Congress.<sup>177</sup> In these situations, courts can sustain Presidential action "only by disabling the Congress from acting upon the subject."<sup>178</sup> Justice Jackson's scheme has been subsequently adopted as the "accepted framework" for evaluating separation of powers and the validity of executive action.<sup>179</sup>

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171. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (footnotes omitted). In *Youngstown*, the Court concluded that President Harry Truman did not have the authority to issue an Executive Order during the Korean War that directed the Secretary of Commerce to seize and continue to operate the steel mills throughout the nation. *Id.* at 582–84. The Court held that executive authority must derive from either an act of Congress or the United States Constitution, and the President's conduct did not amount to either. *Id.* at 588.

172. *Id.* at 635 (Jackson, J., concurring) (footnotes omitted).

173. *Id.* at 637 (footnotes omitted).

174. *Id.*

175. *Id.*

176. *Id.*; cf. *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (noting, within the context of national security, that any presidential action under category two needed to be narrowly "based on . . . a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." (citation and quotation marks omitted)). It can be argued that *Medellin*, authored by Chief Justice John G. Roberts, Jr.—former law clerk to then-Associate Justice Rehnquist at the time of the *Dames & Moore* decision—limited Justice Jackson's second category and required a "longstanding practice" of congressional acquiescence. Unlike in *Medellin*, however, there is a history in this circumstance of congressional acquiescence to the President's authority to acknowledge an indigenous community outside of the Part 83 procedures. See *infra* note 204.

177. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (footnotes omitted).

178. *Id.* at 637–38 (1952) (footnotes omitted).

179. See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (recognizing that "Justice Jackson's classification of executive actions into three general categories [are] analytically use-

As applied here, President Obama's executive action is consistent with the first category of Justice Jackson's framework.<sup>180</sup> Although the Constitution provides Congress with broad authority to regulate the affairs of the nation's indigenous peoples,<sup>181</sup> including Native Hawaiians,<sup>182</sup> that authority does not foreclose the President's power to address indigenous affairs.<sup>183</sup> Indeed, the President is provided with the power to execute all laws that are passed,<sup>184</sup> and he or she is directly responsible for the Interior Department,<sup>185</sup> which Congress has expressly vested with authority to, "under the direction of the Secretary of the Interior, and agreeably to such

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ful."); *Medellin*, 552 U.S. at 524 ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

180. The Rule does not fall within category three of the Jackson framework inasmuch as there is no specific legislation precluding President Obama from taking such action. While an argument could be made that Congress precluded executive recognition of an indigenous government through a procedure outside the scope of part 83 of the Code of Federal Regulations, *see* Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 103(3) (1994) ("The Congress finds that . . . Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court[.]" ), it is equally clear that Congress has failed to act on the President's actions to recognize multiple tribes outside the scope of Part 83. *See infra* note 205.

181. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes[.]"); 1 Stat. 137 (1790). *See* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause."). There should be no debate that Native Hawaiians, as the indigenous people of Hawai'i, should be considered "Indians" or part of an "Indian Tribe" for purposes of constitutional analysis; *see* *United States v. Sandoval*, 231 U.S. 28, 45–46 (1913) ("Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."). *See also* U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties, provided two thirds of the Senators present concur[.]")(emphasis added).

182. *See infra* notes 208–09 (citing various laws describing Native Hawaiians as indigenous).

183. *See* *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989) ("Though plenary, Congress' power is not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." (quotation marks and citation omitted)). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220–21 (1982 ed.).

184. U.S. CONST. art. II, § 3, cl. 4 ("[H]e shall take care that the laws be faithfully executed[.]").

185. 9 Stat. 395, 395 (Mar. 3, 1849) ("[T]here shall be created a new executive department of the government of the United States, to be called the Department of the Interior; the head of which department shall be called the Secretary of the Interior, who shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and who shall hold his office by the same tenure . . . and who shall perform all the duties assigned to him by this act.").

regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.”<sup>186</sup>

Congress also provided that the President “may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.”<sup>187</sup> Congress further broadened the scope of presidential authority when it granted power to the Interior Secretary to publish a list of recognized tribes that “the Secretary recognizes to be eligible for the special programs and services.”<sup>188</sup> This broad power of recognition was expressly affirmed in *Miami Nation of Indians of Indiana, Inc. v. United States Department of the Interior*, where Judge Richard Posner stated, “the analogy to recognition of foreign governments has prevailed to the extent that Congress has delegated to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power.”<sup>189</sup> Judge Posner also stated, “Recognition is, as we have pointed out, traditionally an executive function. When done by treaty it requires the Senate’s consent, but it never requires legislative action, whatever power Congress may have to legislate in the area.”<sup>190</sup> Accordingly, when framed within the context of presidential authority to deal with indigenous affairs, there is little doubt that Congress has expressly and implicitly delegated broad power to the President to promulgate an administrative rule to reestablish a government-to-government relationship with an indigenous community.

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186. Title 25 U.S.C. § 2 (emphasis added).

187. *Id.* at § 9.

188. *Id.* at § 479a-1(a) (“The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” (emphasis added)); 43 U.S.C. § 1457(10) (“The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies . . . Indians.” (emphasis added)); 5 U.S.C. § 301 (“The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.”).

189. *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of Interior*, 255 F.3d 342, 345 (7th Cir. 2001) (citations omitted) (emphasis added).

190. *Id.* at 346–47; see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) (“Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.” (citation omitted)); *James v. U.S. Dep’t of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (“Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations.”); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 134 (Nell Jessup Newton et al. eds., 2012) (“Tribes recognized by treaty, statute, administrative process, or other intercourse with the United States are known as federally recognized tribes.”).

The Court must defer to the President's exercise of his or her recognition authority as a political question not subject to review.<sup>191</sup>

In the case of Hawai'i, Congress implicitly authorized the Rule through its reaffirmation of reconciliation efforts with Native Hawaiians. In 1993, Congress specifically granted the President authority to reconcile with Native Hawaiians: "The Congress . . . 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>192</sup> Following the legislative pronouncement, the Clinton Interior and Justice Departments issued a report that recommended federal recognition of a Native Hawaiian governing body through the creation of "a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body" as a form of reconciliation.<sup>193</sup> In 2004, Congress mandated that the Interior Department, through its Office of Native Hawaiian Relations, "continue the process of reconciliation with the Native Hawaiian people[.]"<sup>194</sup> These laws and policy statements are, at the very least, an implied grant of authority to the President to facilitate a process of reestablishing a govern-

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191. United States v. Holliday, 70 U.S. 407, 419 (1865) ("In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.").

192. Apology Resolution, Pub. L. No. 103-150, § 1(5) (emphasis added). However, in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175-76 (2009), the United States Supreme Court determined that the "whereas" clauses of the Apology Resolution did not create substantive rights to "cloud" title of land in Hawai'i, but, relevant to this discussion, did not expressly address the Congressional grant of authority to the President to support reconciliation efforts. It is unfortunate that legislation enacted by Congress and signed by the President, regardless of form, can be flaunted as simply a paper with no meaning, yet can be used unilaterally to annex an independent nation to the United States; see Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

193. DEP'T OF THE INTERIOR AND DEP'T OF JUST., FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY: REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS, at 4 (Oct. 23, 2000):

As a matter of justice and equity, this Report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

194. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 148(b), 118 Stat. 445 (2004).

ment-to-government relationship with Native Hawaiians.<sup>195</sup> As then-Associate Justice, and former law clerk to Justice Jackson, William H. Rehnquist, wrote in a post-*Youngstown* opinion analyzing the breadth of executive power:

[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility. At least this is so where there is no contrary indication of legislative intent and when . . . there is a history of congressional acquiescence in conduct of the sort engaged in by the President.<sup>196</sup>

These congressional mandates evince an intent to provide the President with broad independent responsibility in the area of recognizing indigenous communities, specifically Native Hawaiians,<sup>197</sup> and reestablishing formal relationships with those communities.<sup>198</sup> President Obama's promulgation of the Rule is, thus, "pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that

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195. In *Kahawaiolaa*, the Ninth Circuit acknowledged that the Interior Department could take action to recognize Native Hawaiians on a government-to-government basis. 386 F.3d at 1283 ("We would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis. It would have been *equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance.*" (emphasis added)).

196. *Dames & Moore*, 453 U.S. at 678–79 (quotation marks and citation omitted). In *Dames & Moore*, the Court assessed whether the President had the authority to transfer Iranian funds and subsequently nullify legal claims against Iran. *Id.* at 660. Specifically, President Jimmy Carter invoked the International Emergency Economic Powers Act (IEEPA) and froze Iranian assets in the United States due to the seizure of the U.S. embassy and American nationals in Iran. *Id.* at 662–63. Claiming that President Carter's executive orders went beyond the scope of executive authority, *Dames & Moore* attempted to recover over \$3 million in debt from the Iranian government. *Id.* at 666–67. The Court held in favor of executive authority, concluding that the IEEPA constituted a specific congressional authorization, thus permitting the President to order the transfer of Iranian assets. *Id.* at 685–87.

197. The failure to pass the Akaka Bill does not preclude the various legislative enactments discussing an intent to recognize Native Hawaiians and treat them as a unique indigenous community. See *infra* note 210.

198. The argument that Congress provided the President with express and implied authority to promulgate the proposed rule is contrary to the position taken by the Bush II Justice Department in *Kahawaiolaa*. There, the Bush II Administration opposed the inclusion of Native Hawaiians in the Interior Department's acknowledgement process and argued that that determination of federal recognition for Native Hawaiians was left to Congress. See Brief for Respondent in Opposition at \*\*9–11, *Kahawaiolaa v. Norton*, 545 U.S. 2902 (2005) (No. 04-1041). 2015 WL 1112135, at \*\*9–11. However, this position was taken at the height of Bush II Administration's conservative march against indigenous rights and reconciliation for Native Hawaiians. See *supra* part I.B of this Article.

he possesses in his own right plus all that Congress can delegate.”<sup>199</sup> The Rule—executive action taken pursuant to broad congressional authorization—would be “supported by the strongest presumptions and the widest of latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>200</sup>

If there is doubt that Congress has authorized presidential action to formalize a process to reestablish a government-to-government relationship with Native Hawaiians, there is also ample support to show that President Obama’s Rule would meet the strictures of Justice Jackson’s second category as “congressional inertia, indifference or quiescence” enabled and invited “independent presidential responsibility” on the issue.<sup>201</sup> In 1978, the Interior Department established administrative rules for acknowledging tribes.<sup>202</sup> This independent executive action, which was subsequently codified in 25 C.F.R. part 83 (hereinafter referred to as “Part 83”), set forth procedures for establishing when an indigenous group would be federally recognized as an Indian Tribe. Native Hawaiians are not included in the federal acknowledgment process under Part 83 as they are not “indigenous” to the “continental United States.”<sup>203</sup> Yet, the courts have upheld executive recognition of indigenous communities outside the Part 83 acknowledgment process. Indeed, the court acknowledged that “Not every group must go through the Part 83 process to be recognized, however; Interior may waive the Part 83 process if waiver is, in Interior’s view, ‘in the best interest of the Indians.’ ”<sup>204</sup> The Interior Department has, on several occasions, recognized an indigenous community outside of the Part 83 process.<sup>205</sup> Congress has also not taken any action to invalidate those

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199. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

200. *Id.* at 637.

201. *See id.* (footnotes omitted).

202. Procedure for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39361 (Sept. 5, 1978).

203. 25 C.F.R. § 83.3 (2015) (“This part applies only to indigenous entities that are not federally recognized Indian tribes.”); 25 C.F.R. § 83.1 (2015) (defining “indigenous” as “native to the continental United States in that at least part of the petitioner’s territory at the time of first sustained contact extended into what is now the continental United States” and defining “continental United States” as “the contiguous 48 states and Alaska”).

204. *See, e.g.,* *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 212 (D.C. Cir. 2013) (citing 25 C.F.R. § 1.2 (“Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.”)).

205. *See, e.g.,* 61 Fed. Reg. 50862–63 (Sept. 27, 1996) (acknowledging, without going through the formal process of Part 83, but based upon a “comprehensive legal review,” that the Delaware Tribe of Indians “is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe”); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-348, INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES 22 (2012) (detailing the over \$100 million provided to non-federally recognized tribes).

recognized groups, and has thus acquiesced to the executive's power to do so. Furthermore, in the specific context of Native Hawaiian reconciliation, Congress, particularly the United States Senate, failed for over a decade to even bring the Akaka Bill to a simple up-or-down vote before the entire body.<sup>206</sup> Given the inertia or unwillingness to move on its commitment to reconciliation, Congress, in essence, invited Obama's executive action. Finally, the need for reconciliation with Native Hawaiians is imperative as the State of Hawai'i and federal government continue their efforts to resolve the injustices of the past.<sup>207</sup> Therefore, any argument that the President does not have authority to reestablish a government-to-government relationship is without merit as congressional acquiescence and inertia has invited such action.<sup>208</sup>

### C. *Surviving an Equal Protection Challenge*

Assuming a party established standing to file a lawsuit against the President and the Interior Department, a lawsuit challenging the Rule would also likely include an equal protection challenge. Under an equal protection challenge, a plaintiff would likely claim that the Obama Administration was denying non-Hawaiians the equal protection of the laws by treating Native Hawaiians differently. There is ample legal authority to

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206. See *supra* part I.B. of this Article.

207. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (holding that the validity of executive action in category two will "depend on the imperatives of events and contemporary imponderables . . .").

208. Haw. Rev. Stat. § 6K-9 ("Upon its return to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii."); 1993 Haw. Sess. L. Act 340, § 2.

On November 11, 1993, Congress passed a defense authorization bill specifying the procedures for transferring Kaho'olawe to the State. See Department of Defense Appropriations Act of 1994, Pub. L. 103-139, Title X, § 10001(b), November 11, 1993 (" . . . the United States . . . shall . . . convey and return . . . to the State of Hawaii all right, title and interest of the United States . . . in and to that parcel of property consisting of approximately 28,776 acres of land known as Kahoolawe Island, Hawaii and its surrounding waters. Such conveyance of title shall occur no later than one hundred eighty days from the date of enactment of this Act[.]"), acquiesced to the State's legislative plan of June 30, 1993 to transfer Kaho'olawe to a future Hawaiian governing body. Aside from the authority granted to the President to enact a rule to reestablish a government-to-government relationship with Native Hawaiians, there is a bipartisan history of the President taking executive action in Hawai'i. Perhaps the most apt example of this is with the executive action of President George H.W. Bush, who ordered the halting of the bombing of Kaho'olawe and the transfer of the island to the State of Hawai'i. See generally Jordan K. Inafuku, *E Kukulū Ke Ea: Hawaii's Duty to Fund Kaho'olawe's Restoration Following the Navy's Incomplete Cleanup*, 16 ASIAN-PAC. L. & POL'Y J. 22 (2015) (criticizing the State for its inattention to its trust, responsibilities, and obligation to provide additional funding to restore Kaho'olawe).

conclude that President Obama's Rule would be upheld as subject to the less-stringent rational basis test set forth in *Mancari*.<sup>209</sup>

Similar to that of Native Americans and Alaska Natives, and despite the failed efforts to obtain federal recognition through the Akaka Bill, both the federal and state governments have already recognized the unique and special relationship they have with Native Hawaiians. Indeed, and as the Obama Administration recognized in its amicus brief in support of Na'i Aupuni's process, federal law already states that "Congress does not extend services to Native Hawaiians because of their race, but because of their *unique status as the indigenous people* of a once sovereign nation as to whom the United States has established a trust relationship."<sup>210</sup> More than 150 other federal laws recognize Native Hawaiians as akin to Native Americans.<sup>211</sup> Some federal laws specifically single out Native Hawaiians for special treatment not given to Native Americans.<sup>212</sup> Moreover, both Democratic and Republican Administrations have reaffirmed the "special relationship" between Native Hawaiians and the federal government. In 2004, for example, Congress enacted and President George W. Bush signed a law that created the Office for Native Hawaiian Relations within the Interior Department.<sup>213</sup> The duties of the Office of Native Hawaiian Relations included, among other things, to "effectuate and implement the *special legal relationship* between the native Hawaiian people and the United States" and to "*continue* the process of reconciliation with the Native Hawaiian people[.]"<sup>214</sup>

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209. Under an equal protection challenge, Na'i Aupuni must show that its allowance of only Hawaiians as the electorate "can be *tied rationally* to the fulfillment of Congress' unique obligation toward" the Hawaiian people. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

210. Brief for the United States as Amicus Curiae at 10, *Akina v. State of Hawaii*, 141 F. Supp. 3d 1106 (D. Haw. 2015) (No. 15-00322) (emphasis added); 20 U.S.C. § 7512(12)(B); 12 U.S.C. § 1715z-13b (2000) ("To provide access to sources of private financing to Native Hawaiian families who otherwise could not acquire housing financing because of the unique legal status of the Hawaiian Home Lands or as a result of a lack of access to private financial markets, the Secretary may guarantee an amount not to exceed 100 percent of the unpaid principal and interest that is due on an eligible loan under subsection (c) of this section."); 20 U.S.C. 80q et seq.; 20 U.S.C. 7511 et seq.; 25 U.S.C. 3001 et seq.; 25 U.S.C. 4221 et seq.; 42 U.S.C. 2991 et seq.; 42 U.S.C. 3057g et seq.; 42 U.S.C. 11701 et seq.; 54 U.S.C. 302706; HHCA, Act of July 9, 1921, 42 Stat. 108, as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; HHLRA, 109 Stat. 357 (1995); 118 Stat. 445 (2004).

211. *Rice*, 528 U.S. at 533 (Stevens, J., dissenting).

212. See Hawaiian Homes Commission Act, 67 Pub. L. No. 34, 42 Stat. 108 (1921).

213. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Title H, § 148(b), 118 Stat. 445 (2004). On the State side, numerous laws have reasserted the special treatment of Native Hawaiians, particularly found in the State Constitution, and a need to "acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." 1993 Haw. Sess. Laws Act 359, §§ 1(9)-2 at 1010 (1993).

214. Pub. L. 108-199, Title H, section 148(b), Jan. 23, 2004, 118 Stat. 445.

As it is clear that both the federal government and the State have recognized their unique relationship with the Native Hawaiian community, a core issue before a court in ruling on the validity of the Rule would be whether the federal government had the authority to treat Native Hawaiians in a special manner. There is, as discussed below, strong support through the *Mancari* decision to uphold the special treatment of Native Hawaiians.

In *Mancari*, a unanimous Court upheld a federal Bureau of Indian Affairs policy that favored hiring Native Americans because such “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians[.]”<sup>215</sup> The *Mancari* Court determined that hiring preferences ensure Native Americans are given greater participation in their own self-governance, further the federal government’s trust obligations to the Native American tribes, and reduce the negative effect of having non-Native Americans administer matters that affected Native American tribal life.<sup>216</sup> It specifically held that the Bureau’s hiring policy was not a “racial preference,” but was “an employment criterion reasonably designed to further the cause of Indian self-government and to make the [Bureau] more responsible to the needs of its constituent groups.”<sup>217</sup> The *Mancari* Court explained and contextualized why, in the case of native peoples, the constitutional standard to uphold the law is less demanding:

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, [section] 8, [clause] 3, provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation. . . . The Court has described the origin and nature of the special relationship:

. . . [T]he United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others. . . . Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

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215. *Mancari*, 417 U.S. at 555.

216. *Id.* at 541–42.

217. *Id.* at 553–54.

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau], single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. . . . Contrary to the characterization made by appellees, this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. . . .

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing, and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.<sup>218</sup>

As discussed above, Native Hawaiian—like Native American—is not a racial classification, but rather a political classification. The analysis, however, of whether *Mancari* applies necessarily rests upon the conclusion that Native Hawaiians constitute “Indians” or “tribes” under the Indian Commerce Clause of the United States Constitution, subject to the “assumption of a ‘guardian-ward’ status[.]”<sup>219</sup>

First, Native Hawaiians could, even under a strict constructionist view of the Constitution, be defined as “Indians” and “tribes” for purposes of federal law. Under the terms of the United States Declaration of Independence, the term “Indian” referred to the aboriginal “inhabitants of our Frontiers.”<sup>220</sup> The term “Indian” is also “commonly used in this country to mean ‘the aborigines of America.’ ”<sup>221</sup> In addition, Native Hawaiians would also, under a strict constructionist view of the Constitution, be defined as a “tribe.” To be clear, at the time of the founding of the country, “tribe” meant a “distinct body of people as divided by family or

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218. *Id.* at 551–55 (emphasis added) (citations omitted).

219. *Id.* at 551–52 (citing U.S. CONST. art. I, § 8, cl. 3).

220. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

221. *Pence v. Kleppe*, 529 F.2d 135, 139 n.5 (9th Cir. 1976) (citing *United States v. The Native Village of Unalakleet*, 411 F.3d 1255 (Ct. Cl. 1969)); see also *LUCAS MARTIN ET AL.*, 42 CORPUS JURIS SECUNDUM INDIANS § 1 (2016) (“ ‘Indians’ is the name given by the European discoverers of America to its aboriginal inhabitants.”).

fortune, or any other characteristic.”<sup>222</sup> Native Hawaiians are ancestrally distinct people with a deeply rooted connection to the land, a distinct culture, a distinct religion, and a distinct language.<sup>223</sup>

Second, *Mancari* was premised on the creation of a guardian-ward relationship between Native Americans and the federal government. Here, and whether one agrees with it or not, there is no contention that American law has created a “guardian-ward” relationship between the Hawaiian people and the government.<sup>224</sup>

Third, *Mancari* was also premised on an attempt to correct injustices from the past, such as violent and forcible dispossession of land, and the paternalistic notion of “protect[ing]” Native Americans.<sup>225</sup> Here, again, there is no doubt that sovereignty in the islands was forcibly taken and lands systematically stolen from Native Hawaiians,<sup>226</sup> and that the federal and state governments were attempting to “protect” Native Hawaiian interests by treating them specially.<sup>227</sup>

Finally, a federal district court has already acknowledged that the *Mancari* principles apply to Native Hawaiians and that any argument to the contrary is “meritless.”<sup>228</sup> Within the context of native Hawaiian beneficiaries, the Hawai’i Supreme Court also noted the comparison to Native Americans: “we are dealing with relationships *between the government and aboriginal people*. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.”<sup>229</sup>

Because *Mancari* is applicable in the context of dealing with governmental treatment of Native Hawaiians, any special treatment is subject to a rational basis test.<sup>230</sup> Under a rational basis test, the court must assess whether a law is rationally related to a legitimate governmental purpose.<sup>231</sup>

222. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789).

223. See Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

224. See generally H.R. REP. NO. 839, 66th Cong., 2d Sess. 4 (1920) (noting that the Hawaiian Homes Commission Act was premised on the very notion that the “natives of the islands” were America’s “wards.”).

225. *Morton v. Mancari*, 417 U.S. 535, 551–55 (emphasis added) (citations omitted).

226. See Melody Kapilialoha MacKenzie, *Historical Background in NATIVE HAWAIIAN LAW: A TREATISE* 12–38 (Melody Kapilialoha MacKenzie ed., 2015).

227. *Mancari*, 417 U.S. at 552.

228. *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1012–13 (D. Haw. 1990).

229. *Ahuna v. Dep’t of Hawaiian Home Lands*, 64 Haw. 327, 339 (1982).

230. See Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 113–14 (1998); but see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 537–38 (1996).

231. See *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (“This Court has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”) (internal quotation marks and ellipsis omitted).

In this circumstance, the court would analyze and likely conclude that the Rule would satisfy the rational basis test because it is rationally related to the government's goal of reconciliation with Native Hawaiians in that it provides a path for Native Hawaiian self-governance and control over their own affairs.

#### IV. PRESIDENT OBAMA'S LEGACY FOR NATIVE HAWAIIANS

There is no doubt that President Obama's Rule, which is firmly rooted in constitutional protection, represents a watershed moment in the federal-Native Hawaiian relationship. The Rule puts teeth to the unfulfilled promises of reconciliation as firmly articulated in the 1993 Apology Resolution. But, does the Rule provide for true and meaningful social healing between the Native Hawaiian community and the federal government?

##### A. *Social Healing Through Justice Framework*

Professor Eric K. Yamamoto developed a "praxis approach" to the healing of communal injustices that has appeal to policy makers and oppressed communities.<sup>232</sup> This approach may illuminate the federal government's current actions and its potential for social healing with Native Hawaiians. Yamamoto's framework, titled "Social Healing Through Justice," merges theories of law, theology, social psychology, political theory, human rights, economics, and indigenous practices.<sup>233</sup> As Yamamoto asserts, each discipline's theoretical approach to healing separately offer their benefits and their shortcomings. Law, for example, "speaks of equality and dreams of truly 'egalitarian' relations—a law-inspired leveling of social and economic hierarchies. Yet law also acknowledges that claims to reparations, with recent exceptions, have fallen short in the courts."<sup>234</sup> Theology emphasizes the "reunification of people according to religious tenets of acknowledgment and atonement."<sup>235</sup> Social psychology "works toward transformations in group consciousness and behavior in an effort to address present-day and future generational wounds." Political theory highlights "reshaping the polity by breaking old barriers and reincorporating people at the margins."<sup>236</sup> Human rights proponents "seek to change 'legal consciousness' and institutional behavior about what is right and just[.]" but such norms are "largely unenforceable absent collective political will."<sup>237</sup> Economic theory focuses on "'capacity-building' for those injured by in-

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232. See Eric K. Yamamoto, Miyoko Pettit, & Sara Lee, *Unfinished Business*, 15 *ASIAN-PAC. L. & POL'Y J.* 2, 7–8 (2014) [hereinafter *Unfinished Business*].

233. *Id.*

234. *Id.* at 8.

235. *Id.* at 9.

236. *Id.* at 12.

237. *Id.* 14–15.

justice to remove social structural impediments to societal advancement[.]” but such economic reparations are “quickly sacrificed on the altar of government fiscal restraints.”<sup>238</sup> Finally, indigenous practices focus on righteousness and communal resolution of disputes.<sup>239</sup>

But through his research, Yamamoto identified six common principles among the various theories:

- (1) mutual engagement by those responsible in some fashion and a convergence of their interests in social healing;
- (2) equality and fair treatment and at least a partial leveling of one group’s power over the other;
- (3) reparative measures addressing both the individual and the communal (or societal);
- (4) economic capacity-building and financial assistance for those harmed in ways that foster autonomy and self-determination;
- (5) a blend of words and actions that encompass acknowledgments of harms and causes, acceptance of responsibility and reconstruction of relationships in order to fully repair the damage; and
- (6) anticipation and handling of the risks of backlash and incompleteness.<sup>240</sup>

These principles serve as the bases for the Social Healing Through Justice framework and inform the “conceptual meaning and practical operation of the framework’s four points of inquiry”: recognition, responsibility, reconstruction, and reparation.<sup>241</sup>

The recognition prong of the framework examines, among other things, the way individuals continue to suffer “pain, fear, shame and anger” and the way institutions “embody discriminatory policies that deny fair access to resources or promote aggression.”<sup>242</sup> The responsibility prong of the framework involves an “assessment of power over others” and analyzes the “acceptance of responsibility of repairing the damage . . . imposed on others through power abuses.”<sup>243</sup> Reconstruction, the third prong, seeks to “build new production relationships” that bring about “genuine healing and a sense of justice restored” through apologies, forgiveness, and/or the reallocation of “political economic power.”<sup>244</sup> The final prong of the framework, reparation, includes an assessment of tangible actions made—whether through monetary restitution, financial, legal or educational sup-

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238. *Id.* 15–16.

239. *Id.* at 16.

240. *Id.* at 18–19.

241. *Id.* at 19–20.

242. Eric K. Yamamoto & Ashley Kaiāo Obrey, *Reframing Redress: A Social Healing Through Justice Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *ASIAN AM. L.J.* 5, 33 (2009) [hereinafter *Reframing Redress*].

243. *Id.* at 34.

244. *Unfinished Business*, *supra* note 232, at 21.

port, rehabilitation, to name a few—to heal the damage done and recognized.<sup>245</sup>

In 2009, Yamamoto and Ashley Kaiāo Obrey published an article critiquing the Native Hawaiian–Federal Government reconciliation efforts. In the article, the authors concluded that in the case of Native Hawaiians, the federal government satisfied the first two “R’s”, recognition and responsibility, through passage of the Apology Resolution and the 1999 Joint Reconciliation Report by the federal Departments of Justice and Interior that recommended recognizing some form of self-governance akin to Native Americans.<sup>246</sup> The authors concluded, however, that the federal government failed to live up to the reconstruction and reparation prongs needed to “build a new productive relationship” by failing to pass laws or take action that would fully repair past damage and reflect the Native Hawaiian community present-day demands for self-determination.<sup>247</sup>

B. *Although Admirable, the Rule Does Not Engender True Social Healing*

The Obama Administration, as mentioned above, finalized a Rule that sets a potentially broader path toward United States acknowledgment of a form of self-determination meaningful and acceptable to Native Hawaiians.

Again, the Rule sets forth the “procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community[.]”<sup>248</sup> To establish such a relationship, the Native Hawaiian Governing Entity (“NHGE”) must submit a “request” to the Interior Secretary and that “request” must be granted by the Secretary.<sup>249</sup> The request must include: a narrative of how the governing documents of the NHGE was drafted, how the decision was made as to who would ratify the governing documents, how the Native Hawaiian community ratified the governing documents, and how and when elections were conducted for government offices; a copy of the ratified documents; a resolution of the governing body certifying a request being made to the Interior Secretary to reestablish a formal government-to-government relationship; and a certification that the submission is at the request of the governing body.<sup>250</sup> The request must describe “how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects

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245. *Id.*

246. *Reframing Redress*, *supra* note 242, at 34, 46.

247. *Id.* (identifying the failure to take concrete action based on principles of self-determination in order to truly reconcile with Native Hawaiians).

248. 43 C.F.R. § 50.1.

249. *Id.* at § 50.2.

250. *Id.* at § 50.10.

the will of the Native Hawaiian community.”<sup>251</sup> In addition, the Rule requires that the minimum number of Native Hawaiians and native Hawaiians that need to vote to ratify the governing documents is 30,000 and 9,000 respectively.<sup>252</sup> Implicit in these minimum voter requirements is the federal government’s requirement that, at the very least, 60,000 Native Hawaiians and 18,000 native Hawaiians must participate in the process because the Rule requires that the number of Native Hawaiians and native Hawaiians that cast votes must exceed half of the ballots sent out.<sup>253</sup> If all these criteria are met, the United States will form a relationship with only “one sovereign” NGHE and that recognition will take effect upon publication in the Federal Register.<sup>254</sup> The Rule states that the NHGE will “have the same government-to-government relationship . . . as the formal government-to-government relationship between the United States and a federally-recognized tribe in the continental United States, in recognition of the existence of the same inherent sovereign governmental authorities[.]”<sup>255</sup> It also provided the following:

- (b) The [NHGE] *will be* subject to the plenary authority of Congress to the same extent as are federally-recognized tribes in the continental United States.
- (c) Absent Federal law to the contrary, any member of the [NHGE] will be eligible for current Federal Native Hawaiian programs, services, and benefits.
- (d) The [NHGE], its political subdivisions (if any), and its members *will not be eligible for Federal Indian programs, services, and benefits* unless Congress expressly and specifically has declared the Native Hawaiian community . . . to be eligible.<sup>256</sup>

The Rule mandated: “Reestablishment of the formal government-to-government relationship does not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.”<sup>257</sup>

The Rule, like the Akaka Bill, represents a sea of change in the relationship between Native Hawaiians and the federal government inasmuch as the Obama Administration is setting a clear path for potentially validating some form of a body of Native Hawaiians that would have self-governing authority. This path is historic inasmuch as it has not been before opened to Native Hawaiians, let alone to any other indigenous peoples. It

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251. *Id.* at § 50.11.

252. *Id.* at §§ 50.16(g)–(h).

253. *Id.*

254. *Id.* at §§ 50.3, 50.42.

255. *Id.* at § 50.44.

256. *Id.* at §§ 50.44(b)–(d) (emphases added).

257. *Id.* at § 50.44(f).

is arguably the type of reconstructive action that, under the Social Healing Through Justice framework, could lead to social healing because the Rule could arguably lead to a “new productive relationship” between the Native Hawaiian people and the federal government.<sup>258</sup>

However, the Rule falls short of ensuring true social healing. While certainly a laudable step toward social healing, the Rule does not, under the Social Healing Through Justice framework, go far enough to meaningfully reconcile with the Native Hawaiian community. Fundamentally, and despite this author’s firm belief in the constitutional validity of the action, the Rule is promulgated by the Administration and not by Congress and therefore leaves greater uncertainty in its validity with a change in regime. Simply put, the Rule could be undone by a subsequent President who may disagree with the policy.

Indeed, American voters recently elected Donald J. Trump as the President of the United States.<sup>259</sup> Trump has called for and enacted bans on Muslims to the United States,<sup>260</sup> decried Mexican immigrants as “rapists” and criminals,<sup>261</sup> positioned his campaign on the promise of building a wall across the United States–Mexican border,<sup>262</sup> and made his rallying cry, “Make America Great Again”—an attempt to delegitimize the strides made by President Obama.<sup>263</sup> Although he has not specifically addressed reconciliation with Native Hawaiians and other marginalized communities, President Trump has signaled his position with the appointment of Senator Jeff Sessions—an ardent opponent of the Akaka Bill—as United States Attorney General.<sup>264</sup> Trump and Sessions would have at the ready an arsenal of tactics to undermine the Rule, including, but not limited to, potentially authorizing the Interior Secretary to use his or her discretion to

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258. *Reframing Redress*, *supra* note 242, at 34.

259. Matt Flegenheimer & Michael Barbaro, *Trump Triumphs: Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016, at A1 (“The results amounted to a repudiation, not only of Mrs. Clinton, but of President Obama, whose legacy is suddenly imperiled.”).

260. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (noting that the State argued that President Trump’s executive order violated the constitution and was intended to disfavor Muslims).

261. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.f141b534798d](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.f141b534798d) (“When Mexico sends its people, they’re not sending their best. They’re not sending you. . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”).

262. *Id.* (“I would build a great wall, and nobody builds walls better than me, believe me, and I’ll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.”).

263. *Id.* (“Sadly, the American dream is dead. . . . But if I get elected president I will bring it back bigger and better and stronger than ever before, and we will make America great again.”).

264. Eric Lichtblau, *Poised to Seek Change as Attorney General*, N.Y. TIMES, Nov. 18, 2016, at A15; 152 Cong. Rec. S5564 (June 6, 2006) (Statement of Senator Sessions):

deny any applicant for recognition.<sup>265</sup> Similarly, if not abandoned by the new President, the Rule could be vitiated by a Congress that believes that President Obama may have overstepped his executive authority in promulgating such a Rule.<sup>266</sup> Hence, there are some inherent flaws in the Rule itself. As explained below, the Rule alone does not bring about meaningful social healing because it: first, does not “structur[e] everyone’s ‘power to’ participate fully and freely rather than to enable one’s ‘power over’ others” thereby failing the reconstruction prong, and second, it does not provide any reparations.

First, although the Rule provides a “doorway” toward federal recognition, the Rule still structures American “power over” Native Hawaiians in a guardian-ward relationship. As an example, while the federal government appeared to call for a neutral process and set a framework to open a “doorway” for Hawaiian self-governance, it did so under the auspices of federal Indian law, control, and oversight.<sup>267</sup> The Interior Department made little effort to reconcile the issue of the loss of Hawaiian sovereignty; it simply stated in response to a comment about the “occupation” of Hawai’i that:

Congress admitted Hawaii to the Union as the 50th State . . . This express determination by Congress is binding on the Department as an agency of the United States Government that is bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States of America.<sup>268</sup>

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This Nation in its maturity and wisdom must to succumb to any balkanization of America. . . . The [Akaka] bill would result in the State of Hawaii giving up substantial lands to the new nation which would begin a downward spiral from an America that is based on a shared ideal to one where race, ancestry, our nationality constitute a legally approved basis for segregation and really discrimination. . . . This legislation seeks to create an extra constitutional race-based government of Native Hawaiians by arbitrarily labeling that race of people as an Indian tribe.

265. While Trump cannot unilaterally repeal an administrative rule immediately after his inauguration, he could initiate the rulemaking process to repeal the Rule. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency may only rescind a rule by reinitiating rulemaking and providing a rational reason why a new rule is necessary).

266. *See* Mike Lillis, *113 Republicans Back Lawsuit Against Obama’s Immigration Actions*, HILL (May 11, 2015), <http://thehill.com/homenews/house/241668-113-republicans-back-lawsuit-against-obamas-immigration-actions>.

267. Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 81 Fed. Reg. 71278, 71285 (Oct. 14, 2016).

268. *Id.* at 71294.

The Interior Department thus regurgitated a skewed narrative of Hawaiian political and legal history, ignored the findings of the Apology Resolution, and thereby silenced a large segment of the Native Hawaiian community that firmly believed that the annexation and referendum on statehood were contrary to the law. Moreover, and although some advocates requested it, the Administration refused to insert the following disclaimer that the envisioned process would not foreclose international recourse: “Nothing in this part explicitly or implicitly abrogates, affects, or impairs any claim or claims of the Native Hawaiian people under Federal law or International law or affects the ability of the Native Hawaiian people or their representatives to pursue such claim or claims in Federal or International forums.”<sup>269</sup> The Administration stated that the Rule “does not address any existing claims that the Native Hawaiian people, either individually or collectively may assert for redress under Federal or international law. All such claims are outside the scope of this rulemaking[.]”<sup>270</sup> While this statement arguably leaves the door open for international recourse, there is nevertheless ambiguity.

In addition, while Native Hawaiians would have the same “status” as other Native American tribes, the Rule makes clear that they would *not* be afforded the same protections as Native Americans, such as the ability to decide for itself whether it will allow gaming on its lands. Instead, the Rule expressly states that Native Hawaiians would not receive the same benefits as an Indian tribe, and implicitly would, therefore, not benefit from the Indian Gaming Regulatory Act, which regulates gaming activities by federally recognized *tribes* on Indian lands.<sup>271</sup> Furthermore, the Interior Department stated that because the State of Hawai‘i prohibits gaming, the NHGE would not be permitted to conduct gaming, emphasizing the control that the State and State law would continue to have over any proposed NHGE.<sup>272</sup> In practice, this means that the NHGE would have to fight for its own benefits and programs and would not be able to partake in the resources (albeit grossly inadequate) available to Native Americans. The Rule also places the American government in a position of power over the Native Hawaiians who must request and lobby every year for State and federal resources. In a similar vein, the Rule makes clear that Native Hawaiians and the NHGE would, like federally recognized tribes, still be under the “plenary” authority of Congress, thereby severely limiting self-governance and holding Native Hawaiians hostage to the whims of political elections and partisanship.<sup>273</sup>

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269. *Id.* at 71315.

270. *Id.*

271. *Id.* at 71306.

272. *Id.*

273. 43 C.F.R. § 50.44(b).

Second, and more importantly, while the form of a NHGE was certainly left for the Native Hawaiian community itself to decide, the Rule did not clarify how that established relationship would work in practical terms and what reparations would be provided, if at all. The Rule does state, however, that federal lands in Hawai'i were off the table for an NHGE: "Reestablishment of the formal government-to-government relationship does not affect the title, jurisdiction, or status of Federal lands and property in Hawaii."<sup>274</sup> In other words, the Interior Department could recognize an NHGE, but it would not—at least for the initial recognition process—attempt to repair any of the historic injustices by providing land for the Native Hawaiians. The Rule is premised on the Native Hawaiian people *themselves* coming up with tremendous funds to conduct a private ratification vote that requires at least the participation of 60,000 individuals.<sup>275</sup> There are no provisions for funding or additional resources being provided to assist in the actual formation of an NHGE.<sup>276</sup> It has also been asserted that, after receiving recognition, the NHGE would be able to negotiate with the State and the federal government for lands and funds. But, such statements are noticeably absent from the Rule.<sup>277</sup> Put simply, there is no indication of what happens after the reestablishment of the government-to-government relationship. There is no indication of what steps the federal government must take after recognition occurs. Will there be reparations via land, funding, educational, and employment opportunities available for Native Hawaiians? Will the federal government ante up for the military's destruction of land and culturally significant sites? Will Native Hawaiians be afforded an opportunity to repair the harm caused by over one hundred years of colonization and suppression? It is not clear. Thus, while the Rule promotes quasi-reconstruction it is incomplete as to reparations to effectuate meaningful social healing.

The harm in failing to meaningfully reconcile with Native Hawaiians under the Social Healing Through Justice framework poses significant problems for the United States as it continues to position itself in the international arena. In her book, *Cold War Civil Rights: Race and the Image of American Democracy*, Mary L. Dudziak discussed historically how the United States' domestic problems with race during a time when American foreign policy focused on the containment of communism, was seen by developing countries after World War II as contradictory to its promotion of democratic principles.<sup>278</sup> The same principles apply today in the con-

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274. *Id.* at § 50.44(f).

275. *See id.* at § 50.16.

276. *See id.* at § 50.44(d) ("The Native Hawaiian Governing Entity, its political subdivisions (if any), and its members will not be eligible for Federal Indian programs, services, and benefits unless Congress expressly and specifically has declared . . . [them] to be eligible.").

277. *See* 43 C.F.R. part 50.

278. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (Princeton Univ. Press 2000).

text of America's self-interest in resolving claims with Native Hawaiians. Indeed, American moral authority and its reputation has been severely curtailed in recent years because of American imperialist actions across the globe, particularly in the Middle East. After the attacks of September 11, 2001, the United States launched a pre-emptive war in Iraq that destabilized the region.<sup>279</sup> In its "war on terror," the federal government has detained many people and committed human rights violations.<sup>280</sup> For example, in the Abu Ghraib prison in Iraq, the United States Army and Central Intelligence Agency physically and sexually abused detainees.<sup>281</sup> This conduct led the independent pan-Arab newspaper *Al-Quds al-Arabi* to write: "the aim of this invasion and occupation was primarily to humiliate the Arabs and Muslims and was never for changing the Iraqi dictatorship or establishing a model of democracy, justice, and human rights."<sup>282</sup> In Guantanamo Bay, the American military brutally tortured "enemy combatants" in contravention of the Geneva Convention signed by the United States.<sup>283</sup> On the home front, the federal government passed laws, like the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly referred to as the USA PATRIOT Act, that limited civil and legal rights by grossly expanding the ability of the government to use electronic surveillance on both citizens and non-citizens.<sup>284</sup> Recently, leaked documents showed the breadth of the National Security Agency's intrusive surveillance program on Americans.<sup>285</sup> The United States' conduct from the early 2000s to now reflects poorly in the international community. Curing some of its past local injustices may provide it greater moral authority abroad. Therefore, the United States has a significant international interest in embracing reconciliation efforts with those that it has oppressed—including, among others, Native Hawaiians, Native Americans, and African Americans.

## CONCLUSION

President Obama's legacy for Native Hawaiian self-determination is a mixed one. While he has ushered forth a new paradigm for assisting in the reestablishment of a government-to-government relationship between the

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279. *Iraq War Lies, 13 Years Later*, N.Y. TIMES, July 8, 2016, at A26 ("Thirteen years later, after voluminous studies and books and wave upon wave of terrible consequences, it would seem there is no doubt that these leaders created a false case for invading Iraq and then utterly mismanaged the occupation.").

280. *Id.*

281. Editorial Board, *Will Anyone Pay for Abu Ghraib?*, N.Y. TIMES, Feb. 5, 2015, at A26.

282. MELANI McALISTER, *EPIC ENCOUNTERS: CULTURE, MEDIA, & U.S. INTERESTS IN THE MIDDLE EAST SINCE 1945*, at 299 (Univ. Cal. Press, rev. ed. 2005).

283. *Id.* at 300.

284. *Id.* at 275.

285. Kenneth Roth and Salil Shetty, *Pardon Snowden*, N.Y. TIMES, Sept. 15, 2016, at A27.

federal government and the Native Hawaiian people, he has failed to take the final steps necessary to bring about true social healing.<sup>286</sup> Although his Rule is consistent with American law and shares broad support across the country, those same actions, for some, ignore principles of international law that arguably cast doubt on the validity of American authority in Hawai'i. What emerges is a complex portrait of a people fighting for justice and an American government still coy to take truly reconciliatory action.

In a speech to Pacific Island leaders, in perhaps his last official visit to Hawai'i as the Commander-in-Chief, President Obama recalled the strength of unity:

There's an old Hawaiian proverb that loosely translates to: "Unite to move forward." It seems simple enough, but the natives used it as a reminder that if you want to row a canoe, every oar has to be moving in unison, otherwise, I don't know, you go in circles. You just go around and around. Your pace slows, you drift. You get caught up in the currents, and you get off course.<sup>287</sup>

Although then speaking to the urgency of rising sea levels and the devastation caused by climate change, the President's words resonate for reconciliation. The cause of reconciliation and true social healing has lingered for generations. It is only through cooperation and unity among the Native Hawaiian people, the State of Hawai'i, and the federal government that social healing can be accomplished.

As Donald Trump assumes the presidency following a rancorous election of partisan divide, he has an opportunity to make drastic changes to the cause of self-determination and reconciliation for Native Hawaiians and the nation's other indigenous communities.<sup>288</sup> President Trump can

286. See Lehua Kinilau-Cano & Hokulei Lindsey, *Problems in Interior's Rule on Hawaii Home Lands*, HONOLULU CIV. BEAT (July 11, 2016), <http://www.civilbeat.org/2016/07/problems-in-interiors-rule-on-hawaii-home-lands> (criticizing the Interior Department's rule pertaining to Hawaiian home lands).

287. See President Barack Obama, *Remarks by the President to Leaders from the Pacific Island Conference of Leaders and the International Union for the Conservation of Nature World Conservation Congress* (Sept. 1, 2016), <https://obamawhitehouse.archives.gov> (follow link then use the query bar to search archives with title of the piece).

288. During his eight years in office, President Obama and his Administration unilaterally made significant strides in assisting Native Americans and Alaska Natives. See, e.g., Exec. Order No. 13,592, 76 Fed. Reg. 76603 (Dec. 8, 2011) (requiring the Interior Department and United States Department of Education "[t]o facilitate a new partnership . . . to improve [Native American and Alaska Native] education", "take advantage of both Departments' expertise, resources, and facilities" and "address how the Departments will collaborate in carrying out this policy"); Exec. Order No. 13,647, 78 Fed. Reg. 39539 (July 1, 2013) (establishing the White House Council on Native American Affairs and reasserting "a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better car-

either build upon the work and legacy of President Obama or he can, in much the same way that Washington conservatives did, dismantle and stonewall any attempts at finding common ground and reconciling. Time will tell what President Trump's legacy will be for indigenous America. As President Obama did, President Trump would be wise to heed the Hawaiian proverb: "*Pupukahi i holomua*; unite to move forward."

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rying out its trust responsibilities"); *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205 (2015) (Memo. Op.) (noting that the Obama Administration settled an eleven year old case of systemic racial discrimination of Native American farmers in the United States Department of Agriculture's Farm Loan Program for \$680,000,000); Press Release, U.S. Dept. of Ed., *Department Launches New \$2 Million Pilot Program to Support State-Tribal Education Partnerships* (May 29, 2012), <https://www.ed.gov/news/press-releases/department-launches-new-2-million-pilot-program-support-state-tribal-education-partnerships> (last visited Dec. 4, 2016) (investing funds to tribal education agencies to increase their role in the education of American Indian and Alaska Native students); Mitch Smith, *A Grass-Roots Push in the Plains to Block a Pipeline's Path*, N.Y. TIMES, May 6, 2015, at A12 (noting President Obama's veto of legislation that would allow the Keystone XL Pipeline to proceed—a position supported by the indigenous community).

In much the same way that the Rule is at risk, President Obama's efforts for Native Americans and Alaska Natives are also at severe risk of retrenchment given President Trump's historical animosity toward indigenous communities. See Shawn Boburg, *Donald Trump's Long History of Clashes with Native Americans*, WASH. POST (July 25, 2016), [https://www.washingtonpost.com/national/donald-trumps-long-history-of-clashes-with-native-americans/2016/07/25/80ea91ca-3d77-11e6-80bc-d06711fd2125\\_story.html?utm\\_term=.204471fc0443](https://www.washingtonpost.com/national/donald-trumps-long-history-of-clashes-with-native-americans/2016/07/25/80ea91ca-3d77-11e6-80bc-d06711fd2125_story.html?utm_term=.204471fc0443) (noting that Donald Trump "secretly paid for more than \$1 million in ads that portrayed members of a tribe in Upstate New York as cocaine traffickers and career criminals" and "suggested in testimony and in media appearances that dark-skinned Native Americans in Connecticut were faking their ancestry").