

CHAPTER 30

NATIVE HAWAIIAN CLAIMS

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*“Why would the State pay over
\$100 million in damages to
Hawaiians and go along with
demands for ‘sovereignty’?”*

Some of the issues are pretty complex but (1) Hawaiians are legally and morally entitled to much more than the \$100 million-plus they are likely to receive from the State, (2) sovereignty is not as crazy as it may sound, and (3) it will happen.

Don't go blaming the present administration and legislators. To really understand what happened and why the taxpayers of today and tomorrow are getting stuck for the tab, you have to go way back.

The root cause. Ho'okipa, in a sense, was the root cause. This Hawaiian value translates to hospitality of the *highest order*. In ancient days, it applied to members of the same 'ohana or when kama'āina (old timers) entertained malihini (newcomers). When haole (at first Caucasians, later other races) began arriving, conflict was inevitable. These malihini were welcomed with full-on ho'okipa, without any inkling of how their Western mores would clash with Hawaiian values.

At first, I'm sure, this hospitality was accepted graciously and little thought was given to its implications, but all that changed about the time that the first foreigner realized the strategic advantage and economic viability of these islands.

If space permitted, I would tell you a number of stories: there would be the one about King Kamehameha III in 1843, with the guns of H.M.S. *Caryfort* trained on him, relinquishing his kingdom to its commander, Lord George Paulet; another would portray Hawaii as an anything-goes R & R stop for New England whalers tuckered out from slaughtering whales. I might add a very sad one about a Hawaiian population, conservatively put at 200,000 in 1778, plunging to 34,000 by 1893; another would involve the fortunes made in Hawaii by haole businessmen during the gold rush years when Hawaii was California's breadbasket, and even bigger fortunes made when sugar could be sold for top dollar to the North during the American Civil War. I would want to detail what these same businessmen did to King Kalákaua when he was so audacious as to suggest that their profits should be taxed more heavily. Mind you, these are just a few of the stories I could tell. They don't begin to provide the whole story of exploitation visited upon Hawaiians since the arrival of Captain Cook.

Some people blame the Hawaiians for having let others run roughshod over them. Well, I guess that just brings us back to ho'okipa, and to the clash of Hawaiian values with Western mores. To ask how the Hawaiians could allow this to happen is a bit like asking how Bambi's mother could have allowed the hunter to shoot her.

***"But that's ancient history.
Why make a big deal of it now?"***

I could answer that in many ways. I happen to be a lawyer, so I'm going to focus on the legal analysis.

First, crimes have been committed. Like most crimes, these were about money and passion—particularly about sugar fortunes, tariffs and "American Destiny." By 1887, an unfamiliar Western political system and a new land-title regime had been superimposed on the Kingdom. King Kalákaua was balking at the latest demands of the haole businessmen. What they *really* wanted was annexation by the United States to

get around sugar import tariffs. But, aware of popular opposition to annexation, they sought a renewal of the Reciprocity Treaty which let Hawaiian sugar into the U.S. duty-free. The U.S. Government wanted Pearl Harbor in exchange for the treaty's extension. The King refused.

So, in January of 1887, a "Hawaiian League" was formed and by midyear membership had grown to about 400. The few part-Hawaiian members were far outnumbered by Americans, English, Germans and Portuguese. Orientals were barred from membership. Also in 1887 the Honolulu Rifles, a para-military group of foreign nationals, built up its membership and prepared for battle.

"Bayonet Constitution." On July 6, while the Rifles patrolled the streets outside the palace with bayonets fixed, the League's leaders confronted King Kalákaua and forced him to sign a new constitution. This "Bayonet Constitution" truncated the powers of the monarch, established property ownership as a voting qualification (thus disenfranchising most Hawaiians), and allowed foreign noncitizen residents to vote so long as they could demonstrate their understanding of the constitution in English, a language foreign to most Hawaiians. When Lili'uokalani ascended to the throne in 1891, the Hawaiian political base was so eroded that a Western takeover was inevitable.

During the spring of 1892, the annexationists and the resident U.S. Minister, John L. Stevens, hatched a plot to overthrow the Queen. Among other overt acts, they wrote to the U.S. Secretary of State, stressing the strategic advantages of annexation. All that was needed was a convenient excuse to take action.

On January 14, 1893, at the end of a frustrating and unfruitful session of the legislature, Queen Lili'uokalani announced to the cabinet that she would proclaim a new constitution restoring some of the monarch's powers stripped away by the Bayonet Constitution, and restricting voting to those born in Hawai'i or naturalized. This was the opportunity the annexationists wanted. A "Committee of Safety" of 13 men took it upon itself to declare that the actions of the Queen were *revolutionary*. Of the 13, none was Hawaiian and only seven were citizens of Hawai'i!

The Queen yields and appeals. In three short days, it was all over. American troops had landed from the U.S.S. *Boston*; a provisional government, formed by the 13 non-Hawaiians (without so much as an

attempt to organize a vote of the people), had been recognized by the U.S. Minister; and the Queen, in carefully phrased words, had agreed to “yield to the superior force of the United States ... to avoid any collision of armed forces and perhaps the loss of life.” The Queen immediately appealed to the President of the United States expecting, as had been the experience of Kamehameha III in 1843, to secure the return of Hawaiian sovereignty.

President Grover Cleveland responded by sending James H. Blount of Georgia, former chairman of the House Committee on Foreign Affairs, to investigate. Blount reported that the so-called revolution was caused by the dissatisfaction of a small group of white businessmen; that without the interference of the U.S. Minister (not to mention the U.S. Navy), there could not have been a revolution; and that a majority of both native and white residents favored a monarchy. President Cleveland was appalled by what he read and strongly expressed his support for the Queen in a message to a U.S. Congress that did nothing. The annexationists simply waited until Cleveland was out of office and William McKinley was in before seeking annexation again in 1898 ... this time successfully. (Ever wonder why there is a McKinley Street and a McKinley High School, but no Cleveland *anything* in Hawai'i?)

In 1895, Robert Wilcox, a part-Hawaiian, instigated a counter-revolution aimed at restoring the monarchy. It was quickly put down and about 200 Hawaiians and haole sympathizers were arrested. Queen Lili'uokalani, forced to abdicate, was fined and imprisoned.

***“All the foregoing may be true, but could
anyone even begin to untangle the current situation
in such a way that all fruits of these crimes could be
returned to their rightful owners?
Shouldn't we let bygones be bygones?”***

Wait, there's more to the story.

The U.S. Congress in 1921 established the “Hawaiian Homes” program, a land trust of roughly 200,000 acres for homesteading by persons of 50 percent or more Hawaiian blood. But sugar interests conditioned their support of this legislation on exclusion of the prime agricultural land they were using. As a result, the homestead trust



consisted largely of the worst land in the territory. Also, opponents of Hawaiian Homes insisted that the homestead program be self-supporting, without direct federal assistance. Lacking funds, most of the land just sat there.

Breached duty. During the territorial years, some egregious breaches of fiduciary duty were committed. Thousands of acres of homestead land were transferred to federal and territorial agencies by executive orders and proclamations of federally appointed territorial governors. In the end, 29,633 acres were lost. In addition, vast Hawaiian Home acreage was leased at pittance to private sugar and ranching interests leaving little to homestead even if there had been money to build necessary infrastructure. These breaches and other failures in the administration of the program are well-documented in reports of federal agencies. The Federal-State Task Force on the Hawaiian Homes Commission Act Report (August 1983), for example, lists 134 major infractions.

At the time of statehood (1959), the federal government transferred administration of the homestead program to the new State of Hawaii, retaining only "oversight" responsibilities. At one time, the federal government viewed itself as a "co-trustee" of the program, but in recent years it has claimed otherwise.

"So why haven't Hawaiians sued?"

Under the Hawai'i Admission Act, only the United States itself can bring suit in federal court for breaches of the homestead trust and no suit has ever been filed. At the state level, Hawaiians have sued ... and won.

In 1988, realizing that these controversies would not just go away, and not wanting them to fester any longer, the State Legislature required the governor to present a proposal for resolution of the controversies which had developed since statehood. Governor John Waihee submitted an action plan in 1991. In February 1992, a task force recommended to the legislature that \$12 million be appropriated to pay back rents for state use of Hawaiian Home lands since statehood, and that future use be compensated under general leases or by land exchange.

One reason that amount is low is the difficulty in establishing with any degree of precision the exact amount of damages. The range of possibilities is wide and the report opts for a number at the low end. I hate to sound like a complainer, but this goes against the grain of established trust law. When a fiduciary duty has been breached (and everyone agrees that such duties have been repeatedly breached), any uncertainty in the calculation of damages is supposed to be resolved against the fiduciary.

Whatever the State finally decides to pay, it will be peanuts compared to the next little matter.

The Ceded Lands Trust. At the time of statehood, another important trust was created. Under the Admission Act, 1.2 million acres of the land ceded to the United States by the Republic of Hawai'i was ceded back to the State of Hawai'i. The income derived from this land was to be used for five stated purposes, including "the betterment of the conditions of Native Hawaiians."

Until 1980, however, not one penny of this income ever made its way to these intended beneficiaries. The Office of Hawaiian Affairs (OHA) was funded in 1980 and, for the first time, ceded-land income began to benefit Hawaiians directly. Not until 1990, however, was the full extent of this income determined.

Negotiations between OHA and the State for a settlement of unpaid benefits continued through early 1992 when it was announced that the settlement would be for \$111.8 million. At this writing the amount is being reviewed, but it is contemplated that the settlement will be paid—some in cash, the rest in land.

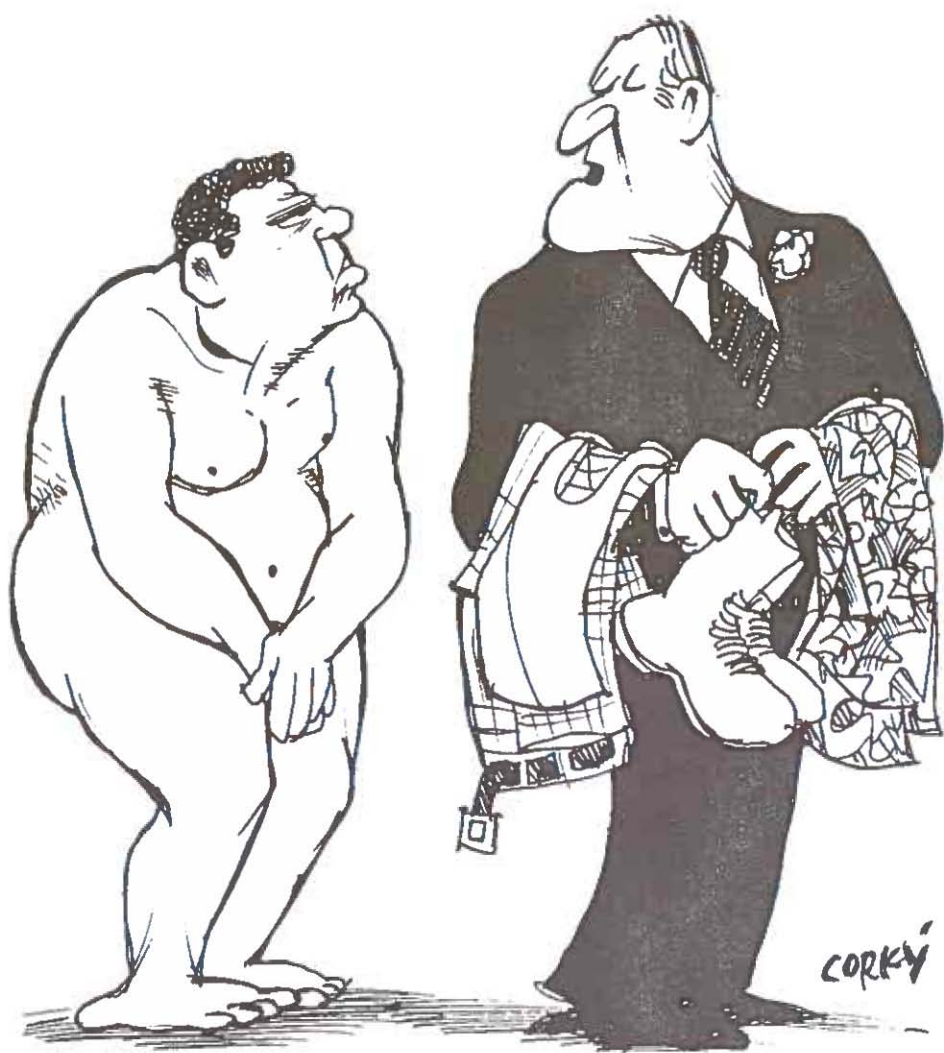
Let's summarize. The Kingdom of Hawai'i was illegally overthrown with the direct assistance of the U.S. Government, and the trustees of the several trusts established by the U.S. Government for the benefit of Hawaiians have repeatedly breached their fiduciary duties.

Is it any surprise that Hawaiians want more than apologies and social services? The fact of the matter is that many want more than just money and land; they want political autonomy.

Hawaiian Sovereignty. Recently initiatives for a restored sovereign Hawaiian nation have emerged. At least one envisions a sovereign and independent Hawai'i. Another sees a "nation within a nation" with status similar to that of the 308 Indian Tribal and Alaskan Native Nations that already exist within of the United States.

The Reagan and Bush administrations inadvertently pressured Hawaiians into thinking more seriously about sovereignty by formally rejecting federal funding of the Hawaiian Homes program on the basis that it would require illegal preferences based on racial classification as distinguished from the constitutional authority to benefit "Native Americans as members of [tribal nations]." If this position is correct Hawaiians *must* have sovereignty!

In early 1991, Hui Na'auao, a coalition of more than 40 organizations representing the full spectrum of Hawaiian political thought from conservative to self-proclaimed radical, was formed to seek a grant from the U.S. Administration for Native Americans. Hui Na'auao is embarking on a remarkable odyssey in search of a form of sovereignty self-determination and self-governance Hawaiians can choose for themselves. Under any scenario, the land base for the new nation will surely incorporate the tracts set aside for the Hawaiian Home Land



"YOU PEOPLE SHOULD HAVE PULLED YOURSELVES
UP BY YOUR BOOTSTRAPS BY NOW..."

Trust and at least a portion of the Ceded Lands Trust. If the "nation within a nation" option is chosen, there may be an attempt to consolidate, but more likely it will retain a "checkerboard" pattern. Just as you don't really know now whether you're on ceded land, you wouldn't necessarily know when you were on land of the new sovereign nation.

During deliberations over the Hawaiian Homes legislation in 1920 then Governor Charles J. McCarthy wrote: "Personally, I have my doubts as to whether the Act will do all that is claimed, but I am strongly in favor of it and I am willing to give it all the support I can. If it works it will be the best thing that could possibly happen to the Hawaiians and also the Territory at large. Should it fail the Hawaiian people will have only themselves to blame."

If Hawaiians are to be blamed for the failure of programs always administered by others, perhaps it is time for them to determine their own destiny. In a monumental clash of cultures over which they have had no control, Hawaiians continue to dominate the "bad lists" in criminal justice, health, education and welfare. It is sadly ironic that in many ways this is a direct result of their traditions of *ho'okipa* and *aloha*. It's as if their lunch keeps getting eaten by others, and then they are blamed for being malnourished.

The trust assets represented by the Hawaiian Home Land and Ceded Lands trusts should place Hawaiians among the wealthiest people in the United States. Despite this, they are the poorest, the sickest and the least educated of the State of Hawai'i.

With any luck, the many breaches of trust will be settled, Hawaiian will be given political and economic autonomy, and the land of *Aloha* can truly begin to heal its wounds.

JOB PROMOTIONS

