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# Racial Separatism in the Aloha State: The Bishop Estate Trust and Hawaii's Kamehameha Schools

**By Phil Brand, James Dellinger, and Karl Crow**

***Summary**: The Bishop Estate, a 501(c)(3) nonprofit and Hawaii's largest private landowner, operates the racially separatist Kamehameha Schools, the wealthiest secondary educational institution in the U.S. The 121-year history of the Estate and Schools is a story of race, politics and ultimately, the corrupting nature of power in Hawaii. But issues concerning Hawaiian identity and culture have now reached the mainland. The school system is backing a bill inspired by one of Hawaii's Democratic senators, Daniel Akaka, that would grant special privileges based on race. The bill, which would give Native Hawaiians the right to create their own government, is now pending in the U.S. Senate.*

**Standing in the schoolhouse door blocking integration in 1963, Alabama Governor George Wallace claimed to be defending principle too: Hawaii Governor Linda Lingle (at right in photo at upper left) and Lieutenant Governor James "Duke" Aiona Jr. (at left in photo at upper left) lead an August 6, 2005 rally at Honolulu's Iolani Palace against a Ninth Circuit Court decision that ordered Kamehameha Schools to desegregate. The other three photos show other scenes at the rally.**

Last February, Hawaii's Kamehameha Schools system paid $7 million to settle a lawsuit by a student who was denied admission to the system's boys' school because of its policy of giving first preference to Native Hawaiians. The settlement short-circuited a much-anticipated review of the school's policy by the U.S. Supreme Court. That ruling might have had a profound impact on many federal and state public policies and programs that target Native Hawaiians for assistance. There is some disagreement about what constitutes a Native Hawaiian, but it is generally agreed that a Native Hawaiian is someone who can trace his or her ancestry to the indigenous people living in the Hawaiian islands at the time Captain James Cook discovered them in the late 1700s.

But while the Supreme Court was shut out of the issue of Hawaiian race and ethnicity, the U.S. Congress was getting in on the action. On October 24, 2007, the House of Representatives passed by a vote of 261 – 153, the Native Hawaiian Government Reorganization Act of 2007 (H.R. 505). A Senate version of the bill (S. 310), known as the Akaka bill after its sponsor, U.S. Senator Daniel Akaka (D-Hawaii), may be voted on in the coming weeks. Senator Akaka is an alumnus of the Kamehameha Schools. If the bill passes and becomes law, it will grant Native Hawaiians a legal status comparable to that enjoyed by Native American Indian tribes, and allow them to create their own separate government based merely on their racial ancestry. It will exempt government offices and policies

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affecting Native Hawaiians from the equal protection provisions of the U.S. Constitution. And it will give Native Hawaiians the sort of sovereign immunities enjoyed by Indian tribes that are exempted from the full authority of our founding document. The Akaka bill does not lay out in detail what form the new governmental entity will take, nor does it require that the new entity be subject to the same taxes, health, safety, environmental, and homeland security regulations and laws that apply to other citizens of the United States.

To understand the origins and likely consequences of the Akaka bill you need to know something about how native Hawaiians relate to other Hawaiians. And that brings up the crucial role played by the Bishop Estate and the Kamehameha Schools. The stories of politics and race and the accusations of abuse of power that circulate in Hawaii today only scratch the surface of the century-long saga of the Kamehameha Schools.

**The Kamehameha Schools**

The history of the Schools dates back to October 31, 1883, when Princess Bernice Pauahi Bishop, a member of Hawaii's royal family and Hawaii's largest private landowner, signed her will. She bequeathed her estate to the care of five trustees, including her husband, Charles R. Bishop, a businessman and philanthropist. She indicated that the Bishop Estate—which in 1883 had an estimated value of $470,000—was to be used to "erect and maintain" two schools, one for boys and one for girls, to be called the Kamehameha Schools, named after her great-grandfather, the legendary Hawaiian king.

The two-page testament dictated that the Schools were "to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood." Bishop gave the trustees the power to "regulate the admission of pupils."

Since its founding —the boys' school in 1887 and the girls' school seven years later—the Kamehameha Schools has wrestled with the meaning and intent of Bishop's will.

In accordance with the will, the Schools' early curricular focus was heavily vocational—reflecting the thinking of the time—and military training was prominent at the boys' school. In the early decades of the 20th century, the focus began to shift away from vocational training and towards academic excellence. In order to raise standards, the Schools implemented IQ tests and admission exams. By the early 1940s, less than 2% of Hawaii's 26,000 Hawaiian children were admitted into the Schools. The Hawaiian community responded bitterly, accusing the system and its trustees of ignoring the will's clear command to improve the plight of all Native Hawaiians, particularly those most in need. The policy again changed. During the next two decades entrance exams were dropped and the Schools' student population ballooned.

In the 1960s the Schools moved back towards a merit-based policy. The lottery admission system was dropped and entrance exams were reinstated. To preempt the community's accusations of elitism, the system added an "outreach" program to help Hawaiian students in the public schools who were rejected by Kamehameha. But in the 1990s the Schools again reversed course, as a micromanaging trustee, Lokelani Lindsey, reintroduced testing and cut many of the system's programs to help poor Hawaiians.

Has the Schools system done enough to help those it was established to help? That has been the enduring debate. Some complain that the system isn't putting enough money into operating the Schools. And of the money that goes to educational programs, they say administrative costs take a disproportionately high percentage of the costs.

According to its 2005 IRS Form 990, Kamehameha's income for the year was $656 million, but it spent only about $255 million on the Schools. Program services for the Schools consumed $176 million, while administrative overhead was $78 million, nearly a third of the total.

Compare that to other large private nonprofit schools in Hawaii: the Iolani School, with 2005 income of $34 million, spent $33 million, $30 million of which went to program services; the Mid-Pacific Institute with 2006 income of $23 million, spent $21 million, $16.5 million of which went to program services; and the Punahou School with $71 million in income, reported expenses of $68 million, of which $57 million went directly to programs.

With an income more than double its expenses, why doesn't Kamehameha expand the number of students it serves? Any answer requires a consideration of Hawaii's complex racial history and the role of the Bishop Estate in it.

**Race at Kamehameha**

The Princess's will requires that her trust give preference in charitable giving to orphans and indigent Hawaiians of "pure or part aboriginal blood," but it does not list race as an explicit criterion for admission to the Schools. The trustees were granted "full power…to regulate the admission of pupils," and they established an admission policy of racial-preference for Native Hawaiians.

As a result, applicants must first meet the system's academic standards, and then verify that they possess aboriginal blood. The Schools then employs a "Hawaiians first" policy, where any qualified applicant with at least a drop of Native Hawaiian blood is admitted before even the most highly qualified non-Native Hawaiian. This policy of racial preference is well established at Kamehameha, though it clashes with the multiracial reality of Hawaii.

Hawaii is a melting pot of people of different races and ethnicities. Hawaii was first settled by Polynesians, around 1000 A.D. The first European to discover the islands was Captain James Cook in 1778, who called them the Sandwich Islands. In 1810 King Kamehameha I (Princess Pauahi was the last Hawaiian royal who was a direct descendant of the king) united the Islands for the first time, but relied on British protection. The King included foreigners as full members of society, and gave high government positions to non-Hawaiians. In the early 19th century, the work of American missionaries helped to convert Hawaii into a majority Christian nation. As the century progressed, demand for Hawaiian sugar rose dramatically, and a large influx of Asian workers migrated to Hawaii to work on the plantations. Interracial and interethnic marriage was commonplace, and the population of Hawaii was diverse long before its inhabitants voted overwhelmingly (94%) for U.S. statehood in 1959.

The Office of Hawaiian Affairs, which is a state agency, defines Native Hawaiians as people who can trace some ancestry to the islands prior to Captain Cook's arrival. The 2000 U.S. census puts the number of Native Hawaiians living in Hawaii at just under 240,000, about 20% of the state's total population of some 1.3 million. Many Native Hawaiians –160,000— live on the mainland.

In order to facilitate the verification of Hawaiian ancestry, the Kamehameha Schools system founded the Ho'oulu Hawaiian Data Center in 2003. According to the system, "The center verifies the Hawaiian ancestry of program applicants who wish to be considered under the schools' preference policy. During the 2005 fiscal year, the center received a total of 19,200 ancestry verification applications. Since its inception, the center has reviewed over 42,000 applications resulting in the verification of nearly 26,000 Hawaiian learners."

Of the nearly 70,000 school-age children with Hawaiian blood, the Kamehameha Schools enrolled about 5,400 students last year. Kamehameha has accepted only a handful of non-Native Hawaiians in its 121-year history.

**The Bishop Estate**

The official name of the tax exempt 501(c)(3) entity that manages the Kamehameha Schools is "Trustees of the Estate of Bernice Pauahi Bishop." The Estate's tax return for 2005, the most recent year available on the online database, Guidestar, reveals total assets of $6.1 billion, though a Honolulu Advertiser article in February reported that the system's net assets are now closer to $9.1 billion. According to a January 2008 New York Times article, Kamehameha's endowment outranks those of all secondary institutions nationwide, and is comparable in size to the endowments of America's wealthiest universities. The wealth of the Estate during its early years was derived mostly from land holdings throughout the Hawaiian Islands. At its peak, the Estate controlled over 9% of all land in Hawaii.

**Gambling man: Matsuo Takabuki (left) in 1971 at his first meeting of the Estate's board. Also shown are Frank E. Midkiff, Richard Lyman Jr., Hung Wo Ching, and Atherton Richards.**

Until the 1990s the schools were funded from revenue derived directly from the land. The Estate, a tax exempt charity, was allowed to generate revenue only through passive investment. This meant the Estate was not allowed to develop or systematically sell its property. It was allowed only to rent its undeveloped land. In the post-WWII era, land for housing and resort development became a premium asset in Hawaii. The Estate, as the state's largest private landowner, was positioned to make huge profits if it could find a way around the passive investment regulation. It found a loophole and began leasing tracts of land to developers for unusually long-term leases that ran anywhere from 50 to 99 years.

But an Estate land development project in the 1970s stoked public resentment. Flush with cash and eager to take advantage of rising land values, the Estate looked to develop the area around the Kalama Valley, which was home to many low-income and working class Native Hawaiian families. The Estate began clearing its land to prepare for development, and driving out those who resisted. When lawyers couldn't evict inhabitants, the Estate systematically shut off their power and water. Residents sued but lost in court. Whether or not the Estate was acting illegally was largely irrelevant at this point because it had already lost in the court of public opinion. The irony of the non-profit Bishop Estate, whose mission was "educating and bettering Native Hawaiians," was not lost on the residents of the Aloha State: They saw it clearing its land for commercial development at the expense of Native Hawaiians who were living on it.

In 1967 the state's legislature enacted the Hawaii Land Reform Act, a law that abridged the Estate's property rights by giving leaseholding renters on Estate lands the opportu-

nity to buy the land, regardless of the wishes of the Estate. The Estate was provided "just compensation" for the forced sales. The Estate fought the law, taking its legal challenge all the way to the U.S. Supreme Court. In a decision that helped set the stage years later for the infamous *Kelo v. New London* decision (2005), the high court upheld Hawaii's land-redistribution scheme. In *Hawaii Housing Authority v. Midkiff* (1984), the court deferred to the judgment of the state legislature which had found that land ownership in Hawaii was too concentrated and needed to be broken up.

The compelled sale of the lands to long-term lease holders brought in a windfall of $2 billion more to the Bishop Estate. The Estate, which had long been a land-based trust, now had amassed a large amount of liquid capital—cash. According to its critics, the influx of cash quickly led to the Estate's politicization and corruption.

**More Money Than Brains**

In the 1970s, Jack Burns, a Democrat, was beginning his third term as governor of Hawaii. He had appointed all five of the state's sitting Supreme Court justices, who in accordance with Bernice Bishop's will, were designated to appoint Bishop Estate trustees. In 1971 the court appointed Matsuo Takabuki, a political operative with ties to the governor, to be a Bishop trustee. Activists sued to block the controversial appointment, but a panel named by the court's chief justice unanimously upheld it.

Takabuki's appointment was a turning point in the history of the Bishop Estate because it was clearly political. Hereafter, trustee openings were treated as patronage posts, sinecures for the well-connected. Moreover, Takabuki was an activist trustee who took the lead in making what many considered financially reckless investment decisions.

In 1991, the current governor of New Jersey, Democrat Jon Corzine, at that time a partner in powerhouse investment bank Goldman Sachs, reached out to Takabuki, urging him to invest $250 million of the Bishop Estate's money. Two years later, Corzine came back to Takabuki hat in hand to beg him for another $250 million cash infusion for Goldman Sachs, which had recently fallen on hard times and was teetering on the brink of collapse.

Although Goldman Sachs nowadays is the King Midas of investment banks, at that time, the investment was considered risky. Takabuki got lucky. When Goldman Sachs had a public stock offering in 1999, the Estate's $500 million investment was suddenly worth a whopping $1.5 billion.

Takabuki was outgunned when he met with outgoing Goldman Sachs co-chairman Robert Rubin in 1992, according to Samuel P. King and Randall W. Roth, authors of *Broken Trust* (University of Hawaii Press, 2006). Rubin, who was leaving the bank in order to become Bill Clinton's treasury secretary, needed to dispose of his private holdings and managed to convince Takabuki to have the Estate enter into an unusual, potentially disadvantageous financial transaction. Rubin, the master negotiator, had the Estate guarantee a promissory note covering his interest in the bank, estimated then at $50 million, in exchange for Rubin's annual payment to the Estate of a mere $200,000.

Let's recap: the Estate is on the hook for $50 million in the event a shaky bank failed, and in exchange, it receives an annual payment equivalent to 0.4% of the total amount at risk. Not a bad deal – for Rubin, that is. In the end, Takabuki got lucky again and Goldman Sachs recovered from a temporary crisis and went on to become the world's preeminent investment bank.

In 1993, when three trustee positions became vacant, Democratic Governor John Waihe'e appointed Richard Sung Hong "Dickie" Wong, Lokelani Lindsey, and Gerard Jervis to the board. Their primary qualification was a close friendship with the governor. Lindsey, a retired gym teacher, was put in charge of education and communications at the Estate, while Dickie Wong, a former state senator, headed government relations, and Gerard Jervis, a lawyer with little knowledge of trust law, assumed control of the Trust's legal affairs.

The trustees made what observers considered unusual and ethically questionable investments and appeared to violate their fiduciary responsibility to act in the best interests of the Estate. In one case, the trustees invested $12 million of the Estate's funds in a methane exploration company. The trustees also invested their own personal funds in the same company. As the company floundered, the trustees tried to keep it afloat by directing more Estate monies to it. Though Bishop's will stated that she wanted the Estate's financial affairs to be transparent, the trustees shrouded the investment in secrecy, repeatedly citing attorney-client privilege and refusing to produce requests for documents. By the time the company failed, the Estate had invested almost $80 million.

The board members' compensation also skyrocketed. By the 1990s, the trustees were each pocketing $1 million annually in trustee service fees. King and Roth observed in their book:

"Trustees at prominent private schools in Hawaii, such as Punahou, 'Iolani, and Mid-Pacific Institute on O'ahu; Seabury Hall on Maui; and Hawaii Preparatory Institute on the Big Island, took no compensation. Neither did members of the governing boards at well-endowed universities, such as Harvard, Yale, and Stanford. It had always been that way. Why would the Bishop Estate be different?"

Curiously, in 1995, the Bishop Estate parted ways with essentially the entire nonprofit sector to oppose a proposed change in the tax code that would have given the IRS the power to pursue "intermediate sanctions" against individual wrongdoers at an organization. The proposal, which became law in 1996, enjoyed widespread support among nonprofit leaders because it gave the IRS the option when probing wrongdoings at an organization to go after individuals rather than take the more drastic step of revoking nonprofit status. Bishop Estate trustees, perhaps fearing what might happen if the corporate veil were pierced and they were made answerable for their conduct, called it a terrible idea, and, according to King and Roth, spent nearly $1 million to defeat it.

In a bizarre incident in the 1990s, reports suggest the Estate was searching for ways to avoid government scrutiny. "In an apparent attempt to circumvent state and federal oversight, the Bishop Estate paid Washington D.C.-based Verner Liipfert Bernhard McPherson and Hand more than $200,000 to look into moving the estate's legal domicile, or corporate address, to the mainland, sources said," according to a Honolulu Star-Bulletin report (October 12, 1999).

Hawaiians eventually became suspicious of the Estate's business dealings. In an article in a local Hawaiian newspaper, five respected Hawaiians wrote about the politically rigged selection process and serious breaches of trust, including "excessive compensation and inadequate pursuit of the trust's charitable mission." In 1997 Patrick Yim, a retired judge, was brought in to look for mismanagement at the Schools. His initial report in November found that the "trustees were nowhere near compliance either with the law or with Pauahi's will." Caught up in the Estate's ongoing controversies, the Supreme Court of Hawaii in 1999 announced that it would no longer select Trustees, citing "a climate of distrust and cynicism" that would "undermine the trust that people must have in the

judiciary." In addition, Judge Bambi Weil ruled that Lindsey could no longer serve as trustee. In May 1999, a federal judge ordered the other four trustees removed from the Estate's board.

**Admission Policy in Jeopardy**

While the Bishop Estate was losing the trust and esteem of Hawaiians of all races and ethnicities, the state of Hawaii was increasingly caught up in legal disputes over race and ethnicity. In 1997, Harold Rice, a Hawaiian rancher not of Native Hawaiian descent, sued the state of Hawaii and then-Governor Ben Cayetano, a Democrat. Rice challenged a state law that allowed only Native Hawaiians to vote in statewide elections for the Office of Hawaiian Affairs (OHA), an agency created in 1978 to handle policy related to the Native Hawaiian population. OHA receives and distributes federal funding specifically earmarked for Native Hawaiian programs. In 2000, the case reached the U.S. Supreme Court, which ruled in Rice v. Cayetano that the election policy was unconstitutional because it violated the Fifteenth Amendment.

Because there are over 150 federal statutes that relate specifically to Native Hawaiians, the Rice decision opened up a Pandora's box. The decision also affected the private Kamehameha Schools, calling into question the system's Native Hawaiian-first policy.

Building on Rice, attorney Eric Grant challenged the school system's race-testing policy. He represented an anonymous Hawaiian student whose application to Kamehameha was rejected on the grounds that he had no aboriginal blood. In 2003, a federal district judge ruled against the student and in favor of the Schools. But the U.S. Court of Appeals for the Ninth Circuit overturned the decision in *John Doe v. Kamehameha Schools* (2005), ruling 2-1 that a policy of race-based discrimination was unconstitutional. The judges noted that although Congress had established a special relationship with Native Hawaiians, it does not give "blanket approval for private race discrimination."

Kamehameha supporters were outraged. Robert Kihune, chairman of the five-member board of trustees, said, "Let me make this clear, as long as our admissions policy is at risk, we will do whatever is necessary to protect our right to offer preference in admissions to our native Hawaiian people."

University of Hawaii professor Lilikala Kame`eleihiwa sounded strangely like an Aztlan-embracing racial separatist when she commented on the decision:

"There are only two kinds of Hawaiians that live in Hawaii: the ones who like Hawaiians and the ones who don't like Hawaiians. Good Hawaiians will never try to steal from the Hawaiian people by applying to Kamehameha Schools and to take a place of a Hawaiian child who needs education. The non-Hawaiians who are bad and against us, we ask them to please leave our country."

The outrage had its desired effect, and on December 6, 2006, a 15-judge panel of the Ninth Circuit voted 8-7 to uphold the school system's policy. Encouraged by the split decision, on March 1, 2007, Grant filed papers asking the U.S. Supreme Court to review the decision. But before the high court could rule on the request, the parties reached a settlement out of court. In February 2008 the Kamehameha Schools paid $7 million to "John Doe," the anonymous student, leaving its admission policy in place for the time being.

**Leading the charge for Hawaiian apartheid: Senator Daniel Akaka (left) and Representative Neil Abercrombie (right) at a 2006 banquet.**

**The Akaka Bill**

The Rice decision in 2000 spurred legislative action in the U.S. Congress. Senator Akaka introduced a bill a few months after Rice to grant Native Hawaiians the right to create their own separate government. The thinking was that by giving Native Hawaiians a kind of tribal status, the legislation could preserve the constitutionality of the race-based preferences practiced by the Kamehameha Schools. Akaka has re-introduced the measure in every Congress since. His bill, which would also create a U.S. Office for Native Hawaiian Relations within the Office of the U.S. Secretary of the Interior, was approved by the Senate Indian Affairs Committee in February. The measure could come up for a Senate vote at any time.

Passed in the fall of 2007 by the U.S. House of Representatives, the proposed Native Hawaiian Government Reorganization Act of 2007, introduced by U.S. Representative Neil Abercrombie (D-Hawaii), could be taken up by the Senate as soon as this May. The federal legislation confers on Native Hawaiians a tribe-like status and creates a nine-member board which will have "expertise in the determination of Native Hawaiian ancestry and lineal descendancy." This racial purity panel will determine who is a Native Hawaiian and thus eligible to be a beneficiary of any entitlements or programs created by the new office.

The House bill provides that the existing state Office of Hawaiian Affairs (OHA) would help transfer lands that are held by the state of Hawaii for the benefit of Native Hawaiians to the new entity that the bill would create. Abercrombie, who represents Honolulu, told the House Committee on Natural Resources (May 2, 2007), "The bottom line here is that this is a bill about the control of assets. This is about land, this is about money, and this is about who has the administrative authority and responsibility over it."

Between 2003 and November 2006, OHA spent over $2 million of ceded lands trust funds on its congressional lobbying efforts for the Akaka-Abercrombie measure. That amount does not include the $900,000 that OHA spent to maintain a Washington office. "It paid $660,000 in 2005 to Patton Boggs, helping the firm finish first in the race for lobbying revenue last year," reported Jim Snyder in The Hill newspaper in 2006. OHA also appears to have spent millions of dollars on advertising campaigns to win public support.

Balkanizing, multi-culturalist groups also support Akaka's bill. According to www.nativehawaiians.com, a website established by the Office of Hawaiian Affairs to promote the bill, the measure is endorsed by: the Mexican American Legal Defense Education Fund (MALDEF); the National Council of La Raza; the League of United Latin American Citizens (LULAC); and the National Association for the Advancement of Colored People (NAACP).

It should also surprise no one that the Kamehameha Schools system, arguably the most powerful private entity in Hawaii, wants to safeguard its privileges and racially discriminatory

admissions policy by supporting the measure. (Editor's note: On October 24, 2007, during a speech on the U.S. House floor, Representative Mazie K. Hirono, a Hawaii Democrat, read into the official record a document called "Standing together for justice" that identifies the Kamehameha Schools as an endorser of both the Akaka and Abercrombie bills. The document Hirono referenced appears at page H11967 of the Congressional Record for the 110th Congress. Until recently, an OHA website also displayed the same document, but as of April 18, 2008, a modified version of the document was displayed. On the altered document, the name of endorser Kamehameha Schools is conspicuously absent. The web page appears at http://www.nativehawaiians.com/listsupport.html.)

Congressional horse-trading has allowed Akaka-Abercrombie supporters to secure the support of several Republican lawmakers. Surprisingly, four of the Senate bill's nine cosponsors are Republicans: Norm Coleman (Minnesota), Gordon Smith (Oregon), and both Alaska senators, Ted Stevens and Lisa Murkowski. Among the House bill's seven cosponsors are two Republicans: Tom Cole (Oklahoma), and Don Young (Alaska).

Hawaii's Republican state legislators have joined Democrats in supporting the measure. Governor Linda Lingle, a Republican, wholeheartedly backs the bill and has aggressively lobbied federal lawmakers.

**Are Native Hawaiians Really an "Indian Tribe"?**

Invoking the authority of the Commerce Clause of the U.S. Constitution, the Akaka bill gives Native Hawaiians an Indian tribe-like status. Since the Founding of the American Republic, Indian tribes have been treated by the courts and the federal government as quasi-sovereign; neither a state nor an independent nation. Following the defeat of the western Indian tribes after the Civil War, Congress exercised more power than ever over Indian tribes. Tribes were confined to reservations and grew increasingly dependent on government subsidies to survive. That dependency theme dominated federal Indian law for the early part of the 20th century as Congress attempted to assimilate the defeated Indian tribe members into American society. American citizenship was conferred on all American Indians in 1924.

By 1934, however, Congress had re-embraced the sovereignty approach. Congress reorganized the Indian tribes, granting them greater autonomy in their affairs. Trying to mesh sovereignty with American citizenship, however, revealed some ugly inconsistencies. How can one be an American citizen, but not have to follow the U.S. Constitution? The schism led Congress in 1968 to pass the Indian Civil Rights Act, requiring tribal constitutions to include similar constitutional protections found in the Bill of Rights. The Act sought to extend widely accepted constitutional norms like free speech, due process, and equal protection, to tribal territory.

But over time, tribal sovereignty has trumped the individual rights that the Act was created to preserve. In *Santa Clara Pueblo v. Martinez* (1978), the Supreme Court affirmed a Navajo tribal decision denying membership to children whose mother, but not father, was a tribe member. Under a tribal law, members must have both a father and a mother who are tribe members. And in 2006, a Cherokee court ruled in *Lucy Allen v. Cherokee Nation Tribal Council* that tribe membership must be open to descendants of slaves held by the Cherokee prior to the outbreak of the Civil War. These so-called "Freedmen" had been registered as tribe members during the assimilationist period of the early 20th century and were often living side by side on tribal land. Following the controversial 2006 decision, the entire Cherokee tribe membership voted the Freedmen out of the tribe, leaving them second-class citizens on their own land.

The Akaka bill's award of a kind of tribal status to Native Hawaiians poses similar problems. Enactment of the measure could disenfranchise many Hawaiian residents whose lineage dates back centuries. Furthermore, the bill leaves issues of land allocation and claims against Hawaii and the United States up for future negotiation. This ominous ambiguity relies significantly on the 1993 Apology Resolution, in which the federal government officially apologized for alleged American complicity in the nonviolent overthrow of the Hawaiian monarchy.

The Akaka bill sets a dangerous precedent. Could ethnic activists in the American Southwest argue that they deserve tribal status? What about ethnic Cajun or Creole peoples in Louisiana, who trace their roots in the Mississippi Delta to the exodus from French Nova Scotia before the Louisiana Purchase? The federal government has a constitutional duty to protect the individual equality of all Americans on the basis of their citizenship. It should not balkanize neighbors on the basis of their race or ethnic heritage.

**Opposition to the Bill**

In 2006, the U.S. Commission on Civil Rights held hearings on the Akaka bill and published a report recommending strongly against it. Gerald Reynolds, chairman of the commission, observed that the bill "would authorize a government entity to treat people differently based on their race and ethnicity…This runs counter to the basic American value that the government should not prefer one race over another." The Project 21 black leadership network, a nonprofit organization sponsored by the National Center for Public Policy Research, said the Akaka bill would represent a step backwards in the civil rights struggle for equality under the law.

Conservative columnist George Will has been a vocal opponent of the legislation. After the bill passed the House, he wrote that Native Hawaiians don't meet the criteria laid out in federal law for recognition as a tribe: "Tribes were nations when the Constitution was written and are geographically separate and culturally distinct communities whose governments have long continuous histories." However, Will notes that Native Hawaiians are interwoven in the nation's most multiethnic and multiracial state. "As the state of Hawaii has said, 'The tribal concept simply has no place in the context of Hawaiian history.'"

Senator John Kyl (R-Arizona) is the leading opponent of the legislation in the Senate. He characterizes the bill as a "recipe for permanent racial conflict ... motivated by a desire to immunize government preferences for Native Hawaiians from constitutional scrutiny." Senator Lamar Alexander (R-Tennessee) has also denounced the Akaka bill. In 2006, he said "It is about sovereignty. It is about race. We are taking a step toward being a United Nations and not the United States."

**An Uncertain Future**

The legal question of Kamehameha's race-based admissions policy also remains unsettled. The Schools recently dodged a bullet when the lawsuit challenging its policy was settled out of court. It would make things a lot easier for Kamehameha if Akaka's bill succeeded in redefining Native Hawaiians as an Indian tribe: then the Schools wouldn't have to worry about legal challenges. The Bishop Estate could continue to stash away its cash while enforcing a

race-based admissions policy at its Schools.

And the Akaka bill, which narrowly failed in a June 2006 procedural vote in the U.S. Senate, faces an uncertain future. Although Akaka is hoping this year he will finally have enough votes in the Senate to pass the bill, President Bush has promised to veto the measure should it reach his desk.

Members of the current field of presidential candidates have differing views on the Akaka bill. Republican Senator John McCain of Arizona previously seemed to flirt with supporting the bill but now opposes it. Suggesting he would vote in favor of the bill, McCain said in 2005, "Here in Washington, it's hard for us to go against the view of the governor, the Legislature — Republican and Democrat — the senators and the congressmen," (Honolulu Advertiser, June 29, 2005). But on the Senate floor (June 8, 2006) McCain blasted the bill because it "would lead to the creation of a new nation based exclusively—not primarily, not in part, but exclusively—on race."

Democratic Senators Hillary Clinton and Honolulu-born Barack Obama both support the legislation. Clinton told reporters earlier this year that she supported the 1993 Apology Resolution and now supports Akaka's legislation that "remedies a long history of problems." (Honolulu Star Bulletin, February 14, 2008)

Obama spoke in favor of the bill on the Senate floor on June 7, 2006, suggesting its enactment would promote "liberty, justice, and freedom," by giving "Native Hawaiians the opportunity to recognize their governing entity and have it recognized by the federal government." Obama also said the bill enjoys the support of "the indigenous peoples of America, including American Indians and Alaska natives."

**Phil Brand** *is Director of EducationWatch, and* **James Dellinger** *is Executive Director of GreenWatch at Capital Research Center.* **Karl Crow** *is a student at Temple University Beasley School of Law.* **Colin Dunn***, an intern at Capital Research Center in 2008 who is studying Political Science at American University, assisted in researching this article. The article relies heavily on the work of Samuel P. King and Randall W. Roth in* Broken Trust *(University of Hawaii Press, 2006).*

*FW*

## ERRATA

A conservative film organization mentioned in "George Soros, Movie Mogul: 'Social Justice' Cinema and the Sundance Institute," by Rondi Adamson, *Foundation Watch*, March 2008, was misidentified. Its name is the Moving Picture Institute.

And a clarification: The August 2007 *Foundation Watch* article by Deborah Corey Barnes called "Al Gore's Carbon Crusade: The Money and Connections Behind It," contained unclear wording in one instance. It indicated that Henry (Hank) Paulson, the Goldman Sachs CEO who is now U.S. Treasury Secretary, was "co-founder" of Generation Investment Management (GIM). Paulson played a role in the creation of GIM, but the firm does not identify him as a co-founder.

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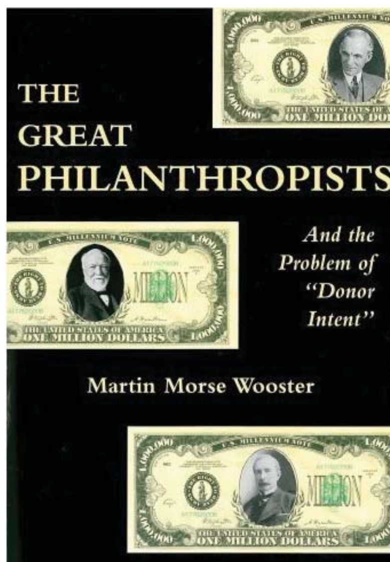


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# GOOD DEEDS, SQUANDERED LEGACIES

A cautionary tale first published in 1994, this third edition by Martin Morse Wooster testifies to the continuing importance of the issue of donor intent. It contains new material focused on the ongoing *Robertson Foundation v. Princeton University* case and an update on the tragic battle over the Barnes Foundation. An Executive Summary is also included.

Wooster, senior fellow at Capital Research Center, tells a cautionary tale of what has gone wrong with many of this country's preeminent foundations. But he also shows that other foundations, such as those established by Lynde and Harry Bradley, James Duke, and Conrad Hilton, safeguard their founders' values and honor their intentions.

# **Philanthropy**Notes

What's wrong with this picture? Senator **Hillary Clinton** (D-New York) is urging President **George W. Bush** to boycott the opening ceremonies of the upcoming Beijing Olympics in order to protest China's crackdown in occupied Tibet. Meanwhile, the Los Angeles Times reports **Bill Clinton**'s foundation has been taking money from **Alibaba**, a Chinese Internet company alleged to be part of the same crackdown in Tibet. The report came after Mrs. Clinton's campaign disclosed that the former First Couple have earned $109 million since leaving the White House. Former President Clinton refuses to disclose the names of donors to the **William J. Clinton Foundation** but put some of the names up for sale to direct marketers. Other donors gave money while pushing the Clinton administration for policy changes, and two donors pledged $1 million each while they or their companies were undergoing Justice Department probes, as Deborah Corey Barnes and Matthew Vadum wrote in the February 2008 *Foundation Watch*.

**Lynne Munson**, a fellow at the **Center for College Affordability and Productivity**, argued in her *Foundation Watch* article last month that colleges and universities should start spending their endowments in order to keep the cost of tuition down. A New York Times article April 13 quoted Munson debunking the schools' claims that they're not legally allowed to spend more. "It is simply false to claim that donor restrictions prevent increased spending. Almost half of endowment funds at private institutions are unrestricted, as are nearly a quarter of endowment dollars at wealthy public institutions." Congress is considering legislation to require colleges to spend at least 5% of their assets each year, a requirement similar to the law governing private foundations.

**Harvard Business School** marketing professor **Gail J. McGovern** was appointed president of the **American Red Cross** last month. "This is a brand to die for," McGovern said. "It creates a visceral reaction. When people see it, they know that help is on the way." She replaces interim president **Mary S. Elcano**, the group's general counsel. Elcano stepped in after **Mark Everson** was allowed to resign as president last November following revelations that the married man had an affair with the head of a Red Cross chapter who became pregnant.

**Pilar O'Leary**, who headed the **Smithsonian Latino Center**, quit in February following an internal probe that determined she abused her expense account, attempted to steer a contract to her friend, and sought free tickets to fashion shows and other events, the Washington Post reported April 15. An internal report released following the newspaper's Freedom of Information Act request said O'Leary expensed "extravagant" and "lavish travel expenses" along with personal purchases. The Washington, D.C., socialite who graced the cover of Washington Life magazine two years ago when she won the publication's annual Substance & Style Award along with Senator **Barack Obama** (D-Illinois) and environmentalist **Philippe Cousteau**, denied any wrongdoing.

**Chevron Corp**. took the unusual step of protesting the award of the 2008 **Goldman Environmental Prize** to Ecuadoran personal injury lawyer **Pablo Fajardo** and his associate, **Luis Yanza**, the San Francisco Chronicle reports. The two men received the award and $150,000 a piece from the **Goldman Foundation** last month, which praised them for "leading an unprecedented community-driven legal battle against a global oil giant" in connection with oil contamination in the Amazon rain forest. Chevron said the contest judges were misled and that the award winners are going after it because it has deep pockets. The lawsuit claims **Texaco**, which Chevron acquired in 2001, dumped crude oil-tainted water that contaminated part of Ecuador. Texaco left Ecuador in 1992 and performed a $40 million government-approved cleanup. Chevron says **Petroecuador**, which still pumps oil in the region, is responsible for the rest of the problem.

Nonprofit hospitals are outperforming for-profit rivals, the Wall Street Journal reported April 4. The combined net income of the 50 biggest nonprofit hospitals skyrocketed from 2001 to 2006, rising almost 800% to $4.27 billion. According to a WSJ analysis, 77% of the 2,033 U.S. nonprofit facilities were profitable, compared to just 61% of for-profit hospitals. According to Senator **Charles Grassley** (R-Iowa) the tax breaks nonprofit hospitals receive amount to a taxpayer subsidy, and some nonprofit providers aren't giving enough back to their communities. Last year Grassley, ranking Republican on the Senate Finance Committee, threatened to introduce legislation requiring nonprofit hospitals to provide a minimum amount of charitable care.