

actions could create a loss of all benefits to Native Hawaiians granted by the United States' 1959 compact with the people of Hawaii.

The sponsor also highlights the 1993 apology offered by the U.S. Congress to Native Hawaiians for the U.S.-sponsored "illegal" overthrow of the Hawaiian kingdom in 1893. In light of this apology, the sponsors contend "pursuing reconciliation efforts and a process for federal recognition for Native Hawaiians is appropriate."

The sponsor maintains, "The framers specifically gave Congress authority to structure the federal relationship with America's indigenous people." Congressional authority to provide federal recognition and self-determination to America's indigenous people is derived from the Indian Commerce Clause and the Treaty Clause. Congress can treat the Native Hawaiians like an Indian tribe due to *United States vs. Lara*, which recognized Congressional power to restore previously extinguished sovereign relations with Indian tribes. According to the sponsor, "This broad congressional power to 'recognize and affirm' powers of Native governments is persuasive in countering arguments that Hawaiian sovereignty was somehow 'erased' by the overthrow, or because Hawaiian Natives are not within Congress'

expansive authority under the Indian Commerce Clause."

Finally, the sponsor asserts that passage of this legislation would improve the health, economic, and social status of Native Hawaiians, and it would "restore the vibrant, healthy, and self-sufficient society they had prior to the 1893 overthrow."

Critics argue that the legislation is unconstitutional. They maintain that Native Hawaiians were never an American Indian tribe and cannot become one by Congressional decree. American Indian tribal governments already existed when their territories were incorporated into the United States, meeting specific standards such as existing as a separate community and exerting sovereignty. Native Hawaiians would not meet these standards.

Furthermore, critics state that Native Hawaiians do not live in a geographically or culturally separate or independent community like American Indians; they are integrated with the rest of the population of Hawaii and throughout the rest of the United States. Inter-marriage rates with non-Native Hawaiians are also quite high. Furthermore, critics cite a complicit understanding that existed when Hawaii became a state in 1959 that Native

Hawaiians would not be treated as a separate racial group or a tribe. A similar understanding existed at the time of annexation in 1898.

Critics suggest this is distorting the history of Hawaii. Native Hawaiians never exerted political sovereignty. Queen Liliuokalani's subjects were from diverse backgrounds, as were government officials at the time. When the monarchy fell in 1893, the Hawaiian legislature was multi-racial. Sovereignty only rested at the time with the Queen, rather than in the people. No "inherent sovereignty" existed.

Critics also maintain that creating a race-based government would be antithetical to the nation's commitment of equal justice under law and would violate the Equal Protection Clause of the 14th Amendment. On this view, the Supreme Court's decision in *Rice vs. Cayetano* confirms that an attempt to create a state-sanctioned, race-based entity of only Native Hawaiians would be unconstitutional. Although the Supreme Court's holding was only limited to the Fifteenth Amendment, they suggest any attempt by legislation supporters to relax the standard of review in federal courts from "strict scrutiny" will likely fail due to the Supreme Court's 1913 decision *United States vs. Felipe Sandoval*.

THE ABA RATES SUPREME COURT NOMINEES ROBERTS, ALITO "WELL-QUALIFIED"

The ABA's Standing Committee on the Federal Judiciary rated both of President George W. Bush's nominees to the United States Supreme Court "well-qualified," the highest possible ABA judicial rating.

Last summer, President George W. Bush nominated Judge John Roberts of the U.S. Court of the Appeals for the D.C. Circuit to the vacancy left on the Supreme Court when Justice Sandra Day O'Connor announced her resignation. After Chief Justice William Rehnquist's death in September, President Bush nominated Judge Roberts for the chief justice position. The ABA thus rated Judge Roberts for both positions on the Court. Each time, he received the unanimous rating of "well-qualified."

Stephen Tober, the chairman of the ABA's Standing Committee on the Federal Judiciary, testified on behalf of the Committee before the Senate Judiciary Committee's confirmation hearings for Judge Roberts. He was joined by his predecessor, Thomas Hayward, and the Washington, D.C. representative on the ABA Committee in 2004-05, Pamela Bresnahan.

In a letter to U.S. Senate Judiciary Committee Chairman Arlen Specter, Hayward

and Tober outlined their findings as to Judge Roberts' integrity, professional competence, and temperament. Hayward and Tober detailed how their Committee found that Judge Roberts met "the highest professional standards" for appointment as Chief Justice. The Committee determined Judge Roberts had "impeccable integrity and the finest judicial temperament," and he met "the highest standards of professional competence." Furthermore, the Committee reached this finding on a bipartisan basis. Hayward and Tober wrote, "During the Standing Committee's two investigations, a number of individuals commented that even though they were not of the same political party and did not share some of the ideological values held by Judge Roberts, they nevertheless believed, based on first-hand experience, that he is well-qualified and deserving of the Standing Committee's highest rating."

On January 5, the ABA Standing Committee on the Federal Judiciary released its rating on the nomination of Judge Samuel Alito, Jr. of the U.S. Court of Appeals for the 3rd Circuit. Judge Alito was also rated "well-qualified." The vote was also unanimous, with one recusal.

Stephen Tober testified before the Senate Judiciary Committee concerning the ABA's findings. While some questions were raised

concerning Judge Alito's recusal practices and temperament, he affirmed, "We are persuaded by what Judge Alito has demonstrated in the totality of fifteen years of public service on the Federal bench. He has, during that time, established a record of both proper judicial conduct and practical application in seeking to do what is fundamentally fair." He concluded, "Judge Alito is an individual who, we believe, sees majesty in the law, respects it, and remains a dedicated student of it to this day."

The ABA's report detailed its investigations into Judge Alito's 1985 employment application to the Reagan Administration and his membership in the Concerned Alumni of Princeton University (CAP) and discussed the Committee's investigation into allegations that Judge Alito demonstrated bias toward some categories of litigants. The Committee's findings were inconclusive, and overall "no clear, overarching pattern of bias for or against certain classes or parties" was found. Rather, the Committee ultimately concluded, "Judge Alito's integrity, professional competence, and judicial temperament are of the highest standing."