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## Rice v. Cayetano: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights

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## ***Rice v. Cayetano*: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights<sup>1</sup>**

Jeanette Wolfley<sup>2</sup>

Good Evening. I am honored to be here with you and to participate on this panel to discuss the decision in *Rice v. Cayetano*.<sup>3</sup> I feel privileged to share some thoughts with you about the decision as it relates to Indian Country, and its impact on Indian tribes and individual Indians.

The grand scholar of federal Indian law, Felix S. Cohen, wrote in 1953 that, “like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith . . . .”<sup>4</sup> Felix Cohen’s canary surely darkened many shades during the 2000 term of the U.S. Supreme Court. The *Rice* decision affecting Native Hawaiians and the *Nevada v. Hicks* decision<sup>5</sup> impacting Indian tribes reflect a continuing shift in the Court’s jurisprudence on Indian tribes’ jurisdiction, and now Native Hawaiians rights.

Over the past fifteen years, the Supreme Court has increasingly become a forum to be avoided by Indian tribes. This fifteen-year period has marked a shift in the Court’s Indian law jurisprudence and coincides with the rise of William Rehnquist as Chief Justice. Although the Court under Chief Justice Warren Burger was not considered to be particularly thoughtful of Indian interests, its record stands in sharp contrast to that of the Rehnquist Court.

The record is revealing in terms of wins and loses. In the last ten terms, Indian tribal interests have lost seventy-seven percent of all their

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<sup>1</sup> These comments were prepared for oral presentation at the University of Hawaii, William S. Richardson School of Law’s Panel on “Beyond *Rice v. Cayetano*: Its Impacts and Progeny,” April 18, 2002.

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<sup>3</sup> 528 U.S. 495 (2000).

<sup>4</sup> See Felix S. Cohen, *The Erosion of Indian Rights, 1950 - 1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348 (1953).

<sup>5</sup> 533 U.S. 353 (2001).

cases before the Rehnquist Court; they lost only thirty-six percent of their cases before the Burger Court.<sup>6</sup> 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.<sup>7</sup> It is difficult to find another class of cases or type of litigant that has fared worse before the Supreme Court. Indeed, even criminals seeking reversals of their convictions succeed thirty-six percent of the time in the Rehnquist Court compared to tribes' twenty-three percent success rate!<sup>8</sup>

The recent Indian law decisions by the Court are radical departures from the established principles of Indian law. The decisions reflect a conviction of a majority of the Rehnquist Court that states' rights must be protected, color-blind justice must be advanced, and mainstream values must be promoted.<sup>9</sup>

The Rehnquist Court in Indian law cases routinely ignores precedent from prior courts. It rarely employs the traditional canons of construction to give the benefit of doubt to Indians when interpreting ambiguous treaties or laws.<sup>10</sup> More devastating, though, the Supreme Court has refused to stay its hand and rely on the Congress to decide the boundaries of Indian sovereignty and jurisdiction. In short, the Supreme Court is mapping new Indian policy instead of leaving it to Congress. Indeed, it is now Congress that is the protector of native interests against the onslaught of the Supreme Court decisions.<sup>11</sup>

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<sup>6</sup> David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of State's Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See generally* Getches, *supra* note 6.

<sup>10</sup> *See e.g.*, *Hagen v. Utah*, 510 U.S. 399, 421-22 (1994) (holding that Congress had diminished the Ute Reservation and therefore Utah courts had jurisdiction over an Indian defendant); *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (holding that certain federal statutes abrogated the treaty rights of the Cheyenne River Sioux Tribe to regulate hunting and fishing by non-Indians on reservation lands acquired by a reservoir project).

<sup>11</sup> For example, in 1990, Congress responded to the U.S. Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990), by means of a rider to a Defense Appropriations Act amending the definition section of the Indian Civil Rights Act to correct the Court's misreading of congressional intent, and thus to implicitly overturn

Moreover, the Supreme Court no longer seems willing to view Indian law cases as a distinct field of law with its own legal and policy roots. It seems to have lost sight of the historical fact that Indian law cases define the relationship of tribes in the United States – a matter rooted in centuries old policy created as part of the nation’s constitutional framework.<sup>12</sup>

There has been a two-fold response in Indian Country to the Court’s decisions. The first response of Indian tribes is to avoid Supreme Court litigation. Certainly, it is not always possible to prevent the Court from hearing an Indian case, but more and more tribal attorneys are encouraging their clients to settle, or not to appeal certain appellate court decisions. The second response has been to pursue Congressional legislation. There is now a movement in Indian Country to propose remedial legislation to overturn or limit the Court’s recent decisions in Indian law.<sup>13</sup>

As I read and reread the *Rice* decision, I realized how similar it is to the trend in the recent Indian law cases decided by the Supreme Court. For example, *Rice*, in many respects, represents the discomfort the Justices feel for upholding “special treatment” of Native Americans under the law. The Court in *Rice* reversed the Ninth Circuit’s decision allowing the State of Hawaii to conduct a Natives-only election of trustees to administer a trust to benefit Native Hawaiians. It found that the Fifteenth Amendment, adopted after the Civil War to prevent states from denying the elective franchise to former slaves, prevented Hawaii’s attempt to address a perceived history of injustice toward its Native peoples.

Particularly disturbing about the *Rice* decision is the cavalier approach by the Court to the significant issues presented. In particular, the Supreme Court demonstrated no awareness of the real circumstances of

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*Duro*. Defense Appropriations Act of FY 91, Pub. L. No. 101-938, § 8077 (1990) (amending 25 U.S.C. § 1301 (1983)).

<sup>12</sup> Three key decisions of the early nineteenth century form the foundation of federal Indian law. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543 (1823). The foundational concepts have constitutional roots relying upon the Commerce Clause and the pre-constitutional relationship between Indian tribes and the United States.

<sup>13</sup> On February 27, 2002, a hearing was held by the Senate Committee on Indian Affairs to address the Supreme Court’s judicial activism in the area of federal Indian law. *Oversight Hearing Before the Senate Committee on Indian Affairs on Rulings of the United States Supreme Court as They Affect the Power and Authorities of Indian Tribal Governments*, 109<sup>th</sup> Cong. (2002), available at [http://indian.senate.gov/2002hrgs/022702trust/022702scourt\\_wit.htm](http://indian.senate.gov/2002hrgs/022702trust/022702scourt_wit.htm).

Native Hawaiians. The Court totally disregarded the significant circumstances, the motives, and the historical backdrop that led to the non-Native, majority-sanctioned special election of trustees for the benefit of disadvantaged Native minority in the state. These facts alone should have taken the case out of the purpose of the Fifteenth Amendment, which was to prevent the white majority from excluding racial minorities from the basic civil rights of participating in democratic government.

Indeed, in *Rice*, it was not necessary for the Court to confront the 15<sup>th</sup> Amendment issue because of the Court's decisions supporting the constitutional authority of Congress to legislate on behalf of Native peoples. Thus, regardless of the Court's tortured construction of the Fifteenth Amendment, the Court might have distinguished the case as being such that it is within Congress's power to delegate the ability to protect Native Hawaiians' interests to the State of Hawaii.

The Supreme Court, however, refused to face the voluminous body of federal Indian law that is applicable to the rights of Native Americans, including Native Hawaiians. The absence of any Indian law analysis, however, comports with the Rehnquist Court's lack of respect for case precedent in Indian law cases. This case is also an example of the Court's mission that has been characterized by Justice Scalia as determining "what the current state of affairs ought to be."<sup>14</sup>

Justices Stevens's and Ginsburg's dissent in *Rice* sets forth the principles of federal Indian law that were applicable to the case.<sup>15</sup> The well-established principles begin with the trust relationship of the federal government of the United States with indigenous peoples. This trust relationship is established by treaties, agreements, court decisions, congressional acts, and the United States' general dealing with indigenous sovereign peoples.<sup>16</sup>

As part of that trust relationship, Congress has authority to enact legislation on behalf of Native people. Congress has broad power in Indian affairs, including the authority to identify indigenous groups falling within the Indian affairs powers. This power is drawn from the Indian Commerce Clause and Treaty Clause of the U.S. Constitution.<sup>17</sup>

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<sup>14</sup> See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996).

<sup>15</sup> *Rice*, *supra* note 3, at 527-39.

<sup>16</sup> See generally *Cherokee Nation*, *supra* note 12; *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

<sup>17</sup> The United States Constitution grants certain powers to the federal government that have been held to authorize its role as a trustee to indigenous people.

Legislation on behalf of any such group defined by Congress is not to be viewed as discrimination based on race, as long as it is rationally tied to the fulfillment of the United States' unique trust obligations.<sup>18</sup>

Certainly, the decision in *Rice* was a severe blow to the self-determination efforts of Native Hawaiians, and its adverse ramifications have been detailed here by the other panelists. *Rice* represents yet another serious and continuing breach in a long history of dishonorable treatment of Native peoples by the Supreme Court. The decision is particularly harmful to Native Hawaiian interests because at least prior to the Rehnquist Court, Indian tribes had a body of established law interpreting and construing treaties and statutes passed by Congress. Unfortunately, Native Hawaiians do not have such established case law. It is particularly unfortunate that the *Rice* case reached the Court when the Supreme Court is hostile to any interests that are not viewed by the Court as mainstream values.

So, what does *Rice* mean for Indian tribes and individual Indians? What potential impacts does it have in the field of federal Indian law? I would like to explore those issues in the remainder of my presentation.

In *Rice*, the State of Hawaii argued that the Court has recognized both the plenary power of Congress in affairs of Native Americans and the special fiduciary trust relationship with descendants of the indigenous peoples.<sup>19</sup> Congress, thus, has a federal duty to provide for the protection and care of Native peoples.<sup>20</sup> The history of Native Hawaiians recited by the majority revealed the grounds for recognizing the existence of a federal trust relationship. Indeed, more than 150 laws passed by Congress, in carrying out its duty to indigenous peoples, expressly include Native Hawaiians as part of the class of Native Americans benefited.

Congress has identified Native Hawaiians as an indigenous group falling within its Indian affairs powers. Unquestionably, like numerous tribes in the continental United States, indigenous Hawaiians have both historical and current bonds, as well as unrelinquished sovereignty and territorial claims.

As pointed out by Justices Stevens and Ginsburg, the trust relationship with indigenous peoples has never depended on the origins of

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Most important are the congressional power to regulate commerce, U.S. CONST. art. I, § 8, cl. 3, and the presidential power to make treaties, U.S. CONST. art. II, § 2, cl. 2.

<sup>18</sup> Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

<sup>19</sup> *Rice*, *supra* note 3, at 518.

<sup>20</sup> *Id.*

the people.<sup>21</sup> The trust relationship has never depended on the allotment of lands.<sup>22</sup> The trust relationship has never depended on the existence of a tribal self-government. And finally, the trust relationship has never depended on the definition of “Indian” that Congress has chosen to adopt.<sup>23</sup>

Rather, Congress, in Indian affairs, has enacted legislation for the special treatment of Native peoples, and the Court has concluded, “as long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards Indians, such legislative judgments will not be disturbed.”<sup>24</sup> This standard was established in the *Morton v. Mancari* case.<sup>25</sup> *Mancari* is a case upholding the Bureau of Indian Affairs’ Indian preference in hiring and employment. Since 1974, this rational-basis test has never been interpreted by the U.S. Supreme Court to limit or deny the trust relationship to indigenous peoples.

Declining to confront the rather simple logic of the trust relationship and the application to Native Hawaiians, the majority of the Court simply stated, “If Hawaii’s restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law.”<sup>26</sup> The majority, not wanting to extend federal Indian law decisions to include Native Hawaiians, further stated, “These propositions would raise questions of considerable moment and difficulty.”<sup>27</sup> The majority, however, does not elaborate on what questions may be raised. It ended by saying, “We can stay far off that difficult terrain, however.”<sup>28</sup> Considering the majority’s reluctance to address the Indian law issues, it is no surprise that Justices Stevens and Ginsburg began their dissent by stating, “The Court’s holding today rests largely on

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<sup>21</sup> *Id.* at 531.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 532 (quoting *Morton v. Mancari*, 417 U.S. at 554-55).

<sup>25</sup> See *Morton v. Mancari*, 417 U.S. at 535.

<sup>26</sup> *Rice*, *supra* note 3, at 518.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 519.

the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii.”<sup>29</sup>

Despite its reservations, the Court felt compelled to address the *Mancari* case. In so doing, it found that Congress’s trust-based power to enact legislation for Native peoples is confined to dealing with tribes, not with individuals, and no tribes or indigenous sovereign entity is found among Native Hawaiians. More specifically, the Court stated the classification in *Mancari* did not have a racial component, but rather a political component that applied “only to members of ‘federally recognized’ tribes.”<sup>30</sup> According to the Court, membership in a tribal structure recognized by the United States is the acid test for the exercise of Congressional power. In other words, the absence of a federally recognized tribal government automatically makes legislation designed to fulfill Congress’s unique obligation to the Indian “race.”

*Rice* is a prime example of the Court treading into the area of congressional policymaking, and represents the Court’s willingness to restrict congressional power over Indian affairs. Such judicial activism has been ongoing in the area of federal Indian law. Given the insulation of the judiciary from the political process and the case-by-case nature of the court’s mission, it is especially problematic when the Court assumes that its values are so pervasive and unexceptional that they should be extended to fill gaps in the law, and then recasts Indian law-related policy rather than deferring to Congress and the democratic process. Prior to *Rice*, the Congress only, not the Court, determined the status or definition of indigenous or Native Americans for purposes of legislating on behalf of native peoples. Indeed, for thirty years, Congress has pursued a policy of native self-determination, seeking wide public and Native American input before it legislates.

We now have a Supreme Court decision that reads *Mancari* to state that any legislation passed by Congress for the benefit of Indians is confined to federally recognized Indian tribes and their members. The Court has thus limited the reach of the trust-based power of Congress to federally recognized tribes and their enrolled members. In short, the Court has redefined the class of beneficiaries Congress is to protect.

What remains to be seen is what effect, if any, this decision will have on Congress’s plenary power in the area of Indian affairs. Certainly, as a separate arm of the federal government, Congress has the power to legislate for Native peoples. I believe that Congress will continue to

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<sup>29</sup> *Id.* at 527-28.

<sup>30</sup> *Id.* at 520, quoting *Mancari*, 417 U.S. at 553, n.24.

uphold its trust responsibility to Native Americans, including Native Hawaiians. In more recent years, the balance between the Court and Congress has switched. The Supreme Court seems bent on making its own Indian policy to please Western interests, and Congress is now the protector of Native interests.

Equally troubling about the *Rice* opinion is the idea that federal programs or benefits through legislation can be only for federally recognized Indian tribes or their members. A judicial narrowing of the scope and purpose of federal power in Native affairs to reach only federally recognized Indian tribes and their members would have devastating results. If the trend narrowing the reach of federal policy that is taking place in the judicial branch continues, non-federally recognized, un-enrolled Indians could soon become non-Indians for all purposes under Indian law.

This leads one to ask two primary questions. What does *Rice* and this narrowing of trust protections mean for all the unrecognized or state recognized tribal entities? And, what does this mean for individual Indians who are not enrolled in their tribe?

There are more than 570 federally recognized and state-recognized Indian tribes in the United States. State-recognized Indian tribes do not have an established government-to-government relationship with the United States. Instead, the United States may have terminated its relationship with the tribe, and the state legislature then took action to protect and provide for the benefit of those tribes. Many of those tribes do participate in federal programs, however.

More than 200 Indian tribes are seeking federal acknowledgement through the federal process. The federal recognition process is very time consuming, costly, and political. There are no guarantees that the federal process will result in an indigenous group being federally recognized.

Over the past 200 years, Congress has passed a tremendous amount of legislation in the areas of health, educational, cultural and religious protections that refer to Native Americans and include individuals, not recognized or not enrolled in Indian tribes. Does the *Rice* decision mean that any legislation that includes non-federally recognized tribal entities must be found unconstitutional? Does it mean that any legislation not meeting the newly construed *Mancari* test must fall by the wayside?

More disturbing is the *Rice* decision's potential impact on individual Indians who are *not* enrolled in a federally recognized Indian tribe. Tribal membership in and of itself is a very contentious issue within Indian communities. It is axiomatic that any sovereign has the inherent authority to exercise its prerogative of determining for itself the criteria by which its citizenry or membership is to be recognized by other sovereign nations.

Contrary to universal practices, the United States has often preempted the rights of many indigenous nations to engage in this most fundamental level of decision-making. Beginning in the 1800s, the federal policymakers imposed Indian identification standards of their own design. These standards typically centered upon a notion of “blood quantum,” or degree of Indian blood. Such federal standards of “who is an Indian” have created havoc with the American Indian sense of nationhood and the individual sense of self over the past century.

In 1934, the Congress passed the Indian Reorganization Act (“IRA”), which was to replace the traditional Indian process of decision-making with a system approved and regulated by an elected tribal council. Tribes were given boilerplate model constitutions by the Department of Interior that contained membership requirements based on blood quantum. Thus, tribes adopted or internalized the federal standards into their once traditional decision-making regarding membership. Many tribes have set their membership based upon one-half or one-quarter degree of Indian blood of the particular tribe. They have determined that “Indianness” can be measured by only the degree of Indian blood one possesses.

Today, the elected Tribal Councils and their enrollment offices often make determinations about membership rather than relying upon the tribal traditions of community standards as residing with the community, knowledge of the tribal traditions, and service to the people. The blood quantum requirements have resulted in reducing the numbers of tribal enrollments. A person may be one-eighth Comanche, one-quarter Eastern Shoshone, one-eighth Shoshone-Bannock and one-half Shoshone-Paiute, and yet not meet the blood degree membership requirements of the Comanche or Shoshone-Bannock Tribes. For example, a person may be full-blooded Indian, reside on the Reservation, practice the traditions of the tribe, but not be enrolled. That person is not a *bona fide* Indian in the eyes of the tribal and federal government.

This tribal pattern of internalizing the federal standards has resulted in much resentment among tribal members. These policies have successfully kept Indians at odds with one another, even within their own communities. There are “full bloods” who look down upon the “mixed bloods,” and mixed bloods who look down upon the “breeds.”

Today, there exists a large population of Indians who are not enrolled in federally recognized Indian tribes because of their decision to not be part of the federal colonization, Indian-identification process because of an expression of religious or cultural conviction or because they do not meet the tribal criteria. Indeed, it is estimated that there are 1.7 million members of federally recognized Indian tribes. And, there are 8.7 million Americans who self-identify themselves as being Native American.

Regardless, Justices Breyer and Souter concurred with the majority

in *Rice* because they were concerned that the statute in question defined the electorate too broadly.<sup>31</sup> They were particularly concerned about the definition of “Hawaiian.”<sup>32</sup> Ironically, the statute was not that broad; otherwise it would have included individuals such as Mr. Rice. In fact, the first classification defined Native Hawaiians by the Congressionally fixed membership definition. This one-half blood degree requirement is similar to the early Indian allotment blood quantum statutes passed by the federal government. Yet, Justices Breyer and Souter compare some Tribal constitutional provisions with Hawaii’s statute and declare, “it is not like any actual membership classification created by any actual tribe.”<sup>33</sup> Thus, the statute in question is too broad.

The cited tribal constitutions in the concurring opinion, however, are the ones provided by the Department of Interior to tribes with blood degrees. Moreover, there are many tribes who base their membership on tribal residency, tribal traditions and knowledge, adopted members, persons married to members, and service to the communities. And, Congress has enacted similarly broad definitions of Indian or Native American.<sup>34</sup> These are broad definitions. Indeed, there is movement within Indian Country to do away with old IRA constitutional membership criteria that have diminished tribal membership, and replace it with traditional tribal standards. One wonders if some day these traditional tribal standards will be viewed as too broad by the Court. According to Justices Breyer and Souter, they probably would be.

*Rice* creates additional problems with the tribal membership issue because it states that the trust relationship is with members of federally recognized tribes. Does that mean that if one is Indian but not enrolled, he or she cannot participate in the federal services, receive certain federal protections to practice one’s native religion, or receive federal funding for

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<sup>31</sup> *Rice*, *supra* note 3, at 526.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 527.

<sup>34</sup> Federal law has broadly defined “Indians” or “Native Americans” in several instances. *See, e.g.*, Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603 (c) (defining member of a tribe as including those terminated and those recognized in the future; descendent in first or second degree of a member; and anyone “determined to be an Indian under regulations promulgated by the Secretary”). Also, the Native American Programs Act of 1974, creating the Administration for Native Americans, operates under regulations with a very broad definition of Indian: “any individual who claims to be an Indian and who is regarded as such by the Indian community in which he or she lives or by the Indian community of which he or she claims to be a part.” 45 C.F.R. § 1336.1 (1989).

education?

A recent case out of the Tenth Circuit illustrates this issue with regard to an Indian who is not enrolled but seeks to exercise his religious rights. The case, *Department of Interior v. Saenz*, was most recently argued *en banc* before the Tenth Circuit and is likely to be appealed by either party to the Supreme Court.

The facts are as follows. Saenz is a descendent from the Chiricahua tribe of Apache Indians. The Tribe was originally recognized by the United States, but later in the 1880s after an outbreak of warfare, the United States ceased relations. Mr. Saenz's ancestors fled to Mexico and returned in the 1930s. The Chiricahua Indians are not currently federally recognized. Mr. Saenz follows the traditions and beliefs of the Chiricahua Apache, and as part of this belief system, he possesses eagle feathers. In 1996, while New Mexico state police were executing a search warrant, officers noticed the eagle feathers and contacted United States Fish and Wildlife Service. The feathers were seized by the United States, and Mr. Saenz sought to get the feathers back.

The federal regulations for distribution of eagle feathers, amended in 1999, state that an applicant must be a member of a federally recognized Indian tribe. Of course, Mr. Saenz does not meet that requirement. The United States argued that the regulations are clear and they do not need to return the feathers to Mr. Saenz. The government maintained that it has a trust responsibility to federally recognized members and to protect the conservation of eagle feathers. Further, it argued that opening the process to all Native Americans, regardless of membership in a federally recognized tribe, would result in a permit system that relied on an impermissible racial classification. Mr. Saenz argued that the definition is too limiting; the permit process should be open to all Native Americans regardless of their political status. Also, the First Amendment, protecting an individual's free exercise rights, guaranteed him the right to such feathers to practice his religion.

The Tenth Circuit held for Mr. Saenz. The Court of Appeals found that the exercise of one's First Amendment free exercise rights should not be conditioned on his political status—whether or not he is a member of a federally recognized tribe. This decision certainly does not comport with the *Rice* decision. According to *Rice*, Congress only legislates for and on behalf of federally recognized Indian tribes, and any person not enrolled in such a tribe has no protections from the United States. We will have to wait to see whether the Supreme Court chooses to review this case and apply its *Rice* precedent.

In conclusion, the *Rice* decision goes well beyond Hawaii and its impact on Native Hawaiians. Indian tribes and Native Hawaiians share similar histories and a similar relationship with the United States. Until *Rice*, it had long been assumed that when Congress passed acts for Native

Americans, including Indian tribes, individual Indians, and Native Hawaiians, these acts were tied rationally to the fulfillment of Congress's unique obligation toward Native peoples and would not be disturbed by the judiciary. This assumption is because of the extensive legislative process that allows for public comments and opposition from all interested parties. The democratic process is the foundation of any enacted congressional bill.

But, as we now know, the majority of the Rehnquist Court is advancing a color-blind agenda. Thus, following *Rice*, it appears that there may be a narrowing of the trust relationship and there may be extra judicial scrutiny employed when reviewing statutes enacted for native peoples of the United States. Moreover, the Court, perhaps in dictum only, declares that any such legislation must be for only federally recognized Indian tribes and members of those tribes.

Fortunately, the new judicial limitations in *Rice* represent a judicial trend only. They have not been paralleled by any changes in congressional or executive policy concerning Native affairs. The recent trend, however, is a threat to Native peoples, and should not be taken lightly. This trend runs counter to the proclaimed federal policy of self-determination and federal Indian law principles.

As Indian tribes have shown, the Court's decisions must be confronted and not avoided. Native Hawaiians must arise above the *Rice* decision and seek redress in either Congress or the international arena. The international arena is increasingly a basis for affirming the rights of indigenous peoples upon moral and ethical foundations.

As always, I wish the Native people of Hawaii the best in their ongoing struggle to gain full self-determination. This concludes my presentation. I thank you for giving me this opportunity to express my views to you.