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Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act

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BELATED JUSTICE: THE FAILURES AND PROMISE OF THE HAWAIIAN HOMES COMMISSION ACT

*Troy J.H. Andrade**

In July 1921, the United States Congress enacted and President Warren G. Harding signed into law the Hawaiian Homes Commission Act of 1920, establishing a land trust of approximately 203,500 acres of former Crown and Government Lands to provide homestead leases at a nominal fee for native Hawaiians, those individuals of fifty percent or more Hawaiian blood. At present, the Hawaiian Homes Commission oversees the State of Hawai‘i’s Department of Hawaiian Home Lands, which administers the HHCA and manages the lands set aside for the program. Although steps have been made to put beneficiaries on land, the history of the HHCA demonstrates the failure of the federal and state governments to live up to their promises of justice for Hawaiians.

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I. Introduction

In the Hawaiian enclave of Waimānalo, Raymond Pae Galdeira, a native son of that community, established a government funded program to keep teens off the street and out of trouble.¹ This program—the Waimānalo Teen Project—provided respite and safe activities for the predominantly indigenous teens.² One night, Galdeira took some of his teens “home” to a collection of makeshift sheds at Waimānalo Beach Park.³ Because a storm sent strong gusts of wind and consistent sprays of ocean water toward the tent city, Galdeira and the teens ran to help hold down a family home on the cusp of going airborne and flying into the ocean.⁴ Galdeira saw his students—these children—and their families struggling to live, not by choice, on the beach.⁵ He saw these Kānaka Maoli families struggling to survive in their own homelands and questioned how this could happen.⁶

Galdeira found an answer from Legal Aid volunteer Elizabeth Tuttle, who had researched the state and federal governments’ consistent failures to follow through with promises made to native Hawaiians under the 1921 Hawaiian Homes Commission Act (“HHCA”).⁷ The HHCA—a federal law incorporated into state law—set aside approximately 203,500 acres of Kingdom of Hawai‘i Crown and Government Lands for those of at least fifty percent Native Hawaiian blood.⁸ The aim of the HHCA was to provide a vehicle to “rehabilitate” the dying Native Hawaiian population through the use of homesteads.⁹ The irony of the teens’ situation—Kānaka Maoli

1. Interview with Raymond Pae Galdeira, Founder, The Hawaiians, in Henderson, Nev. (May 7, 2015) [hereinafter Galdeira Interview]; Troy J.H. Andrade, *Hawai‘i ‘78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PA. J.L. & SOC. CHANGE 85 (2021) [hereinafter Andrade, *Hawai‘i ‘78*]. For purposes of this Article, the terms “Native Hawaiian,” “Hawaiian,” and “Kānaka Maoli” will be used interchangeably to refer to any individual of Hawaiian ancestry regardless of blood quantum. See Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past*, 39 U. HAW. L. REV. 631, 652 (2017) (“[M]ost Hawai‘i citizens recognize that ‘Hawaiian’ refers to a person of Native Hawaiian ancestry.”).

2. See Galdeira Interview, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921) (defining “native Hawaiian” as “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”).

9. See *Ahuna v. Dep’t of Haw. Home Lands*, 640 P.2d 1161, 1167 (Haw. 1982) (“In *In re Ainoa*, we recognized the purpose of the HHCA was to rehabilitate the native Hawaiians

living on the beach dodging a severe rainstorm while hundreds of thousands of acres of land lay idle with no tenants—struck a nerve.

Galdeira needed to take action. He rallied support from the Waimānalo community and invited people from across Hawai‘i to learn and discuss the HHCA and the state agency that administered the Hawaiian Home Lands program, the state Department of Hawaiian Home Lands (“DHHL”).¹⁰ Those at the gathering complained of the long waiting list for a lease award and the lack of funding for the agency.¹¹ They discussed failed award and leasing policies.¹² They shared serious concerns regarding nepotism and favoritism within the DHHL.¹³ Unbeknownst to them at the time, this gathering—calling themselves, simply, The Hawaiians—began a political reawakening of Native Hawaiian consciousness of historical injustices against Hawai‘i’s Native people.¹⁴ The Hawaiians’ first objective was to discuss their grievances regarding the Hawaiian Home Lands program with Hawai‘i’s Governor John A. Burns.¹⁵

On October 13, 1970, Galdeira advised Governor Burns that, unless he agreed to a meeting, The Hawaiians would hold a rally at the State Capitol during the festivities of Aloha Week, the busiest tourist season, to “demonstrate that we Hawaiians are united in our drive to get more land through the [HHCA] and to help encourage our people to participate and

on lands given the status of Hawaiian home lands under section 204 of the HHCA. We further emphasized there that ‘(the) native Hawaiians are special objects of solicitude under the Act.’ This language indicates that we are aware of a high duty of care owed to native Hawaiians.” (alteration in original) (internal citations omitted)).

10. See Galdeira Interview, *supra* note 1.

11. *Id.*; see Pae Galdeira, *An Open Letter to the Hawaiian People*, HAWAII FREE PEOPLE’S PRESS, Dec. 1970, at 3, https://ilind.net/oldkine_images/open%20letter%201970.jpg [<https://perma.cc/VMQ5-SQ92>] (“We, the people of Hawaii, have journeyed a long and dark road together. A road which began a long time ago . . . a road which grew smaller, rougher and painful to us. It was only our spirit and love for our homeland, for our great mother Hawaii, that lightened the darkness like a flickering candle. There is a great truth in the old proverb that says, ‘It is better to light one candle than to curse the darkness.’ Let us stop cursing the darkness of extinction, disunity and poverty. Let us each light a candle of unity to light our way. Let us each light a candle of love to help our homeland and our people.”).

12. See Galdeira Interview, *supra* note 1.

13. *Id.*

14. See Andrade, *Hawai‘i ’78*, *supra* note 1, at 106–16.

15. See Galdeira Interview, *supra* note 1. The Hawaiians also sought to “gain ‘justice’ for the Hawaiians, to improve their social and economic position, and to restore racial pride.” George S. Kanahale, *The New Hawaiians*, 29 SOC. PROCESS HAW. 21, 28 (1982), https://scholarspace.manoa.hawaii.edu/bitstream/10125/22974/1/Vol_29.pdf.

strengthen our cause.”¹⁶ Galdeira continued to reach out to the Governor’s office, yet his calls were met with silence.¹⁷ Galdeira, thus, led a rally at the State Capitol of Hawaiians and non-Hawaiians from across Hawai‘i to challenge the Governor’s inaction on the Hawaiian Home Lands program and to demand a meeting.¹⁸ Governor Burns—clearly embarrassed by the rally at the heavily media covered event—finally granted The Hawaiians a meeting, but not before confronting Galdeira.¹⁹ Burns yelled to Galdeira, “What the fock you doing?”²⁰ Galdeira at first showed deference to the governor, but then shouted back, “Hey, fock you man, because we trying to reach you and you were giving us this kind of run around.”²¹ Burns, clearly enraged, responded, “Bullshit[.]”²² For about five minutes the governor and young kanaka from Waimānalo argued.²³ Finally, Burns backed down and said, “Okay, I want to meet with you at two o’clock.”²⁴

True to his word, Governor Burns met with Galdeira and the demonstrators, answered their questions, and assured the group that his administration would take concrete steps to address the failing Hawaiian Home Lands program.²⁵ Following the initial Aloha Week confrontation, the Governor continued to have open discussions with Galdeira and The Hawaiians about the state of DHHL and the Hawaiian Home Lands program. These continued discussions led to concrete action, including the appointment of one of The Hawaiians to lead DHHL.²⁶ Following the 1970

16. Letter from Raymond Pae Galdeira, Chairman, The Hawaiians, to John A. Burns, Governor of Hawaii (Oct. 13, 1970) (on file with author) (retrieved from the Hawai‘i State Archives).

17. See Galdeira Interview, *supra* note 1.

18. *Id.*

19. *Id.*

20. TOM COFFMAN, TEN YEARS OF COMMUNITY ACTION 18 (1975) (on file with author).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. See Galdeira Interview, *supra* note 1; Letter from John A. Burns, Governor of Hawaii, to Raymond Pae Galdeira, Chairman, The Hawaiians 4 (Oct. 25, 1970) (on file with author) (retrieved from the Hawai‘i State Archives) (“I would like to see every qualified applicant off the list and on a homestead. I would like to see the Commission and the department actively supporting our Hawaiian people in search for solutions to all their problems, not just housing. I would like to see these programs become a valuable tool in the revitalization of the Hawaiian culture and an increase of appreciation of what it means to be Hawaiian by Hawaiians and non-Hawaiians alike.”).

26. See Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 AMERASIA J., no. 2, 1980, at 29, 44.

Aloha Week protest, the small victories of Galdeira and other HHCA beneficiaries barely scratched the surface of the festering problems that plagued and continue to haunt the Hawaiian Home Lands program.

The year 2021 marks a century since the passage of the HHCA and over fifty years since The Hawaiians' Aloha Week protest against the failures of the DHHL. The 1921 HHCA was, from its noble inception, an attempt to rehabilitate a dwindling population of Hawaiians. Yet undergirding the 100-year-old law is an origin story colored by racism, rugged American individualism, and greed. Thus, while the humanitarian endeavor to rehabilitate Native Hawaiians was laudable, this effort, as discussed in Part II of this Article, was simply a façade to suppress Native Hawaiian claims to land and ensure the profitability of a handful of business interests in Hawai'i. Indeed, the land provided within the corpus of the HHCA was unsuitable for agrarian pursuits with little, if any, access to necessary infrastructure and resources like water; they were lands that, according to one legislator, "a goat couldn't live on."²⁷ In addition, and perhaps more insidious and damaging, the HHCA codified a divisive racial scheme that fractured Hawaiians by imposing a new identity based on an arbitrary fifty percent blood quantum, which ensured that stolen Kingdom lands would eventually return to the United States. The HHCA reflected the concessions and negotiations of Hawaiian leaders and the business elite in territorial Hawai'i.

The injustices, however, did not end with the creation of the HHCA. For nearly all of its existence, the United States and the State of Hawai'i shirked their responsibilities and obligations under the HHCA to the beneficiaries of the trust. Part III of this Article specifically analyzes the government's failure to address decades-long breaches of trust related to addressing the inordinately long waiting period to obtain a lease and the abysmal record of adequately funding DHHL.

Unsurprisingly, this story of injustice is truly a story that captures the journey of a people forced to demand, decade after decade, what they were entitled to by law. Pae Galdeira's interaction with the Burns Administration fifty years after the HHCA's passage was an interaction that repeated itself with each successive administration and generation of Kānaka Maoli. This injustice continued as the State of Hawai'i and the federal government stymied the potential of the Hawaiian Home Lands program and left the promises of justice unfulfilled.

27. *Rehabilitation Should Be Limited to Hawaiians of Pure Blood, Says Governor*, HONOLULU STAR-BULLETIN, Apr. 23, 1921, at 1, 7.

II. Land, Power, and the Guise of Rehabilitation: Analyzing the Origins of the Hawaiian Homes Commission Act

*Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice—belated justice.*²⁸

– Jonah Kūhiō Kalanianaʻole, 1920

In November 1914, at his home in Waikīkī, United States Delegate to Congress and Hawaiian Prince Jonah Kūhiō Kalanianaʻole hosted a meeting of 200 Kānaka Maoli interested in forming an organization to uplift the Hawaiian people, who were reeling from high mortality rates and the theft of their Kingdom.²⁹ The group agreed to form Ahahui Puʻuhonua o Nā Hawaiʻi, the Hawaiian Protective Association (“Ahahui Puuhonua”), which dedicated its efforts to the rehabilitation of Kānaka Maoli.³⁰ The organization sought to “build the unity of the Hawaiian people in order to rebuild the strength of an enlightened Hawaiian race” and pursue objectives to “help restore stable and pleasant living conditions among the Hawaiian in the city.”³¹

Ahahui Puʻuhonua’s goals were put to the test in 1917, when, because of American involvement in World War I, Hawaiʻi shipping was disrupted. The prices of staple food items, particularly poi (taro), nearly doubled, causing economic strain for poor Hawaiians now living in tenements.³² Reports highlighted that Hawaiians in these tenements lacked food and were inundated with diseases.³³ Leaders of Ahahui Puʻuhonua, including Kūhiō and many middle and upper class Hawaiians organized an initiative that eventually led to the creation of the Hawaiian Civic Clubs.³⁴ Their first order of business was to gain federal support of a Hawaiian homesteading

28. 66 CONG. REC. 7453 (1920) (statement of Delegate Kalanianaʻole).

29. Davianna Pōmaikaʻi McGregor, *ʻĀina Hoopulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1, 1 (1990) [hereinafter McGregor, *Hawaiian Homesteading*], <https://evols.library.manoa.hawaii.edu/bitstream/10524/590/2/JL24007.pdf>.

30. *Id.* at 4.

31. *Id.*

32. *Id.* at 10.

33. *Id.* at 4; Frank Bailey, Jr., *ʻĀina Hoʻopulapula: A Contested Legacy: Prince Jonah Kūhiō Kalanianaʻole's Hawaiian Homes Commission Act During the Territorial Years, 1921-1959*, at 69–70 (unpublished Ph.D. dissertation, University of Hawaiʻi, 2009) (on file with the University of Hawaiʻi Hamilton Library, University of Hawaiʻi—Mānoa) (describing the conditions in tenement housing).

34. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 4.

program to provide the tenement residents with a new start.³⁵ A legislative committee of Ahahui Pu‘uhonua submitted a draft rehabilitation resolution to territorial legislator John H. Wise in December 1918.³⁶

Wise, who was imprisoned with Prince Kūhiō in 1895 for participating in a revolt against the self-proclaimed Republic of Hawai‘i following the illegal overthrow of the Kingdom,³⁷ became instrumental in the effort to return lands to the Hawaiian people through the enactment of a homesteading program.³⁸ Kūhiō and Wise joined forces to navigate politics in Hawai‘i and Washington D.C. to advocate for passage of the HHCA.

Given this advocacy, in 1920, Congress held hearings about the condition of Hawai‘i’s indigenous peoples.³⁹ Hawaiians were a “dying race” with the number of “full-blooded Hawaiians” dropping from 142,650 in 1826 to 22,500 in 1919.⁴⁰ In a statement to a congressional committee, territorial Senator Wise described what it meant to be Hawaiian and emphasized the importance of the people’s connection to the ‘āina (land):

The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.⁴¹

35. *Id.* at 5–6.

36. *Id.* at 6.

37. Troy J.H. Andrade, *American Overthrow*, HAW. B.J., Apr. 2018, at 4, 13 [hereinafter Andrade, *American Overthrow*].

38. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 242 (2008).

39. *Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearing on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii and on the Proposed Transfer of the Buildings of the Federal Leprosy Investigation Station at Kalawao on the Island of Molokai, to the Territory of Hawaii Before the H. Comm. On the Territories*, 66th Cong. 32, 47 (1920) [hereinafter *February House Hearings*], <https://books.google.com/books?id=KEAvAAAAMAAJ&pg=PA1&lpg=PA1&dq=#v=onepage&q&f=false> (statement of John H. Wise, Territorial Senator).

40. H.R. REP. NO. 66-839, at 2 (1920).

41. *Id.* at 4.

Because of the rapid population decline, Kānaka Maoli were “fast becoming a minority element among the races of the Islands, with the probable result that in the future political control will pass into other hands.”⁴² Senator Wise sought to provide land to all Hawaiians as a means to ensure their connection to the ‘āina and their continued existence in their homelands.

Wise’s plan, however, was met with considerable opposition from and undermined by powerful business interests, particularly in the sugar and ranching industries. These business elite, often called the Big Five, wielded nearly unmatched economic and political influence in territorial Hawai‘i and in Washington, D.C.⁴³ They exerted their power against Wise’s and Kūhiō’s rehabilitation measure. Indeed, the rehabilitation measure, while on its face an effort to redress historical injustices, became a means to perpetuate the subjugation of ancestral lands and rights through the seizure of Crown and Government Lands and the “gifting” of lands back to the indigenous people. With this law, Congress further undermined the prospect of rehabilitation by racializing Hawaiians and premising a lease award of homestead land on the satisfaction of a new “native Hawaiian” identity. These inherent flaws of the HHCA have, as explained below, furthered American colonization by clouding claims to land and poisoning Kānaka views of self and self-governance.

A. Justifying the Seizure of Crown and Government Lands

The decades-long conflict over land between Kānaka Maoli and the powerful sugar interests reared its head with passage of the HHCA.⁴⁴ While those like Wise and Kūhiō saw the value in rehabilitating the Hawaiian people—as it was a measure advocated for since passage of the Land Act in 1895—others saw the effort to place Hawaiians back on land through

42. *Id.* at 2.

43. The Big Five were five corporations (Castle & Cooke, Alexander & Baldwin, C. Brewer & Co., American Factors, and Theo H. Davies & Co.) that exerted considerable political and economic power in territorial Hawai‘i. Eric K. Yamamoto & George K. Yamamoto, *Ethnicity and the Hawaii Bar: Looking Back, Looking Forward*, HAW. B.J., Oct. 1999, at 111, 111, 3-OCT HIBJ 111 (Westlaw).

44. For example, the Kingdom of Hawai‘i granted long term leases for 26,653 acres of Crown lands that were the best agricultural land to sugar interests that were set to expire between 1917 and 1921. See Marylyn M. Vause, *The Hawaiian Homes Commission Act, 1920: History and Analysis* 17 (1962) (unpublished M.A. thesis, University of Hawai‘i—Mānoa) (on file with the University of Hawai‘i Law Library, University of Hawai‘i—Mānoa).

homesteading as an opportunity to convince Congress to release restrictions on the sugar industry that were put in place by the Organic Act of 1900.

The Organic Act, which created the Territory of Hawai‘i, limited agricultural leases of public land to five years and precluded businesses, like sugar planters and ranchers, from acquiring and holding more than one thousand acres of land.⁴⁵ In 1908, Congress amended the Organic Act and extended the leasing of public land from five years to fifteen years.⁴⁶ The 1908 amendment also permitted the government to withdraw agricultural leases for homesteading or other public purposes.⁴⁷ Fears about sugar and ranching interests peaked when Congress amended the Organic Act in 1910 to allow any twenty-five persons to obtain title to agricultural homesteads upon petitioning the territorial government.⁴⁸ The 1908 and 1910 amendments provided an opportunity for individuals to potentially access prime agricultural lands for homesteading. At stake with passage of any homesteading legislation, particularly one that addressed the health conditions of Kānaka Maoli, was the economic superiority of Hawai‘i’s business elite—the vast majority of whom participated in or were beneficiaries of the 1893 illegal overthrow of the Hawaiian Kingdom.⁴⁹

In February 1920, the territorial legislature sent a delegation handpicked by territorial Governor Charles J. McCarthy to Washington, D.C., to lobby the United States House Committee on Territories for approval of two proposals that would amend the existing homesteading laws and implement Wise’s plan with a new law concerning the rehabilitation of Hawaiians.⁵⁰ With the exception of the delegation’s leader, Senator Wise, the remaining members of this Hawaiian Legislative Commission were aligned with the business elite in Hawai‘i.⁵¹ The first proposal, territorial Senate Concurrent Resolution 2, which was authored by Senator Wise, requested a homesteading program of rehabilitation for Hawaiians:

45. Hawaii Organic Act, ch. 339, §§ 55, 73, 31 Stat. 141, 150, 155 (1900).

46. An Act to Amend Section Seventy-Three of the Act to Provide a Government for the Territory of Hawaii, ch. 124, § 1, 35 Stat. 56, 56 (1908).

47. *Id.*

48. Act of May 27, 1910, ch. 258, § 5, 36 Stat. 443, 446.

49. See Andrade, *American Overthrow*, *supra* note 37.

50. J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 99–100 (2008).

51. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 18.

that the Congress of the United States of America be respectfully petitioned herein to make such amendments to the [Organic Act] or by other provisions deemed proper in the premises, that from time to time there may be set aside suitable portions of the public lands of the Territory of Hawaii by allotments to or for associations, settlements, or individuals of Hawaiian blood in whole or in part, the fee simple title of such lands to remain in the government, but the use thereof to be available under such restrictions as to improvements, size of lots, occupation and otherwise as may be provided for said purposes by a commission duly authorized or otherwise giving preference rights in such homestead leases for the purposes hereof as may be deemed just and suitable by the Congress assembled⁵²

The second proposal, territorial House Concurrent Resolution 28, which had the full support of the remaining delegation, was conditioned on “adequate provisions” being made to “accomplish the purpose” of Senate Concurrent Resolution 2.⁵³ Under House Concurrent Resolution 28, the territorial legislature, at the insistence of the sugar and ranching industries, requested that Congress amend the Organic Act to allow one-fifth of “highly cultivated public lands” to be exempt from general homesteading laws and be allowed to be sold to the highest bidder—resulting in more public lands being leased at low rates to the large businesses.⁵⁴

At the U.S. House Committee on Territories hearing, Wise pled that land be returned to Kānaka Maoli as Hawaiian commoners received very little land in the 1848 Māhele,⁵⁵ while the government took 1,505,460 acres and the crown received 984,000 acres.⁵⁶ With the assistance of Kūhiō, Wise sought to convince the House Committee that passage of the rehabilitation measure would ensure justice for Hawaiians: “The Hawaiian people, those

52. S. Con. Res. 2, 10th Leg., Reg. Sess. (Terr. of Haw. 1919), *reprinted in* S. JOURNAL, 10th Leg., Reg. Sess. 25–26 (Terr. of Haw. 1919), <https://babel.hathitrust.org/cgi/pt?id=umn.31951002253161e&view=1up&seq=48&skin=2021>.

53. H.R. Con. Res. 28, 10th Leg., Reg. Sess. (Terr. of Haw. 1919), *reprinted in* H.R. JOURNAL, 10th Leg., Reg. Sess. 300–06 (Terr. of Haw. 1919).

54. *Id.*

55. *See* McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330, 1336 n.5 (Haw. 1973) (“The term mahele means to divide or apportion. When used in the context of land titles, reference is usually to the Great Mahele of 1848, which accomplished the division of the undivided interest in land between the King on one hand and the chief and konohikis on the other.”) (internal citations omitted).

56. *February House Hearings*, *supra* note 39, at 28.

of Hawaiian blood, have rights to these crown lands, for the Government of the United States and the Territory of Hawaii have given them these rights. We feel that we have not got all that is coming to us.”⁵⁷ Kūhiō believed the common people “assumed that these lands were being held in trust by the crown for their benefit” and that the Republic of Hawai‘i’s merging of these Crown lands with the Government lands was another example of “the injustice done the common people by those in power.”⁵⁸ Kūhiō added: “Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice—belated justice.”⁵⁹ Thus, the Hawaiian politicians viewed the rehabilitation program as a means to effectuate the result of the Māhele in which Hawaiians had a continuing claim in the land.⁶⁰

At the request of the House Committee on Territories Chair Charles F. Curry, the two territorial proposals were revised and resubmitted as one piece of legislation, House Resolution 12683.⁶¹ Territorial Attorney General Harry S. Irwin drafted the new legislation for Kūhiō to introduce.⁶² House Resolution 12683 proposed “sweeping changes” to the Organic Act.⁶³ Among the heavily criticized changes was an amendment that would have allowed the leasing through public auction of all “highly cultivated public lands,” as opposed to only one-fifth as suggested in House Concurrent Resolution 28.⁶⁴ Attorney General Irwin designed what would be called the “Kuhio Bill” to ensure that the public auction process would guarantee that the sugar planters would win all bids for public lands.⁶⁵

57. *Id.* at 32.

58. Prince J.K. Kalanianaʻole, *The Story of the Hawaiians*, 21 MID-PAC. MAG. 117, 126, 129 (1921), <https://books.google.com/books?id=jcFBAQAAMAAJ&pg=PA101&lpg=PA101&dq=#v=onepage&q&f=false>.

59. 66 CONG. REC. 7453 (1920) (statement of Delegate Kalanianaʻole).

60. *See* VAN DYKE, *supra* note 38, at 253 (“For purposes of this study, the most important perception that emerged from the debates creating the Hawaiian Home Lands Program was the understanding that the Crown Lands were lands that the Hawaiian Monarchs held in trust for all the Native Hawaiian People, and that the common Hawaiians had a continuing claim to these lands because they received such a minimal amount of land during and after the 1848 Mahele. . . . Native Hawaiians have a continuing claim to these lands.”).

61. H.R. Res. 12683, 66th Cong. (1920).

62. *See* Vause, *supra* note 44, at 54.

63. Paul Nahoa Lucas et al., *Hawaiian Homes Commission Act*, in NATIVE HAWAIIAN LAW: A TREATISE 176, 185 (Melody Kapilialoha MacKenzie ed., 2015).

64. H.R. Res. 12683, 66th Cong.

65. *See* Vause, *supra* note 44, at 55–56.

A “firestorm of protest” erupted when news of the proposal reached the Hawaiian Islands: “Some citizens alleged that the legislative commission had violated the will of the territorial legislature and had succumbed to a sugar planters’ conspiracy ‘to prevent homesteading’ of the cultivated sugar lands.”⁶⁶ One citizen vehemently opposed the Kuhio Bill: “The proposed statute plays directly into the hands of the powerful corporations doing business here—in many cases founded by those who came to Hawaii bearing the banner of the cross upon their shoulders and the message of ‘peace on earth, good will toward men’ in their hearts”⁶⁷ Governor McCarthy, a member of the Hawaiian Legislative Commission, brushed off the proposal as a simple misunderstanding that he thought had the support of the people of Hawai‘i.⁶⁸

The Kuhio Bill was subsequently resubmitted as House Resolution 13500, which (un)surprisingly and despite the backlash in Hawai‘i afforded additional benefits to the sugar interests in Hawai‘i.⁶⁹ For example, the resolution exempted “all cultivated sugar-cane lands” from the inventory of “available lands” that would be set aside for Hawaiian homesteading.⁷⁰ At the same time, the resolution designated the most marginal and remote lands for Native Hawaiian homesteading.⁷¹ The proposed law also included, for the first time and as discussed further below, a blood quantum requirement of one thirty-second part or more Hawaiian blood to be eligible to obtain a lease—the length of which was also dramatically reduced from 999 to 99 years.⁷²

Several rounds of congressional hearings were held on the new bill.⁷³ A vocal dissent made clear their belief that the law was unconstitutional and, if passed, needed to be significantly curtailed to ensure that homesteads would only be available to full blooded Hawaiians.⁷⁴ Others opposed the

66. *Id.* at 56–84.

67. Dudley Burrows, *Raymond Ready to Spend Last Cent in Fight on Land Bill*, PAC. COM. ADVERTISER (Honolulu), Mar. 28, 1920, § 2, at 1, 5.

68. *Commission Preparing Official Statement in Answer to Criticisms*, PAC. COM. ADVERTISER (Honolulu), Mar. 31, 1920, at 1.

69. H.R. Res. 13500, 66th Cong. (1920).

70. *Id.* § 203.

71. *Id.*

72. *Id.* §§ 201(a)(7), 208(2).

73. *Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the S. Comm. on the Territories*, 66th Cong. 91 (1920) [hereinafter *December Senate Hearings*], <https://www.doi.gov/sites/doi.gov/uploads/HHCA-House-Hearing-Dec-14-1920-for-HR-13500.pdf>.

74. *Id.*

measure as it still provided Kānaka Maoli with marginal lands.⁷⁵ Territorial Representative William Jarrett stated: “They want to give the Hawaiians land that a goat couldn’t live on. This whole thing is a joke. The real purpose of this bill is to cut out homesteading. If you want to cut out homesteading, then pass the bill.”⁷⁶

The proponents urged passage of the bill on several grounds. One of the bases for passage of the bill was that the effort toward native rehabilitation would serve as an “anti-Asian remedy” given the influx of foreign labor in Hawai‘i.⁷⁷ Advocates for passage of the bill sought to highlight the need to rehabilitate and reconcile with Hawaiians for their historical displacement from the land.⁷⁸ As to the issue of reconciliation, Kūhiō recognized:

It is a fact, though, that the constitution granted by Kamehameha III recognized that the common people had the same interest in the lands of the kingdom as the king and the chiefs. In 1845 it was not only again recognized, but recognized to the extent of owning a third interest in these lands.⁷⁹

Kūhiō again explained the importance of the people’s interest in the land:

What we contend is that in the first constitution given by Kamehameha III, the rights of the common people in the lands of the Kingdom were recognized and that later—in 1845—it was again recognized not only as an ownership but a third interest in the lands of the Kingdom. In the division, we claim that the common people did not get their share, and Mr. Wise stated that at that time the Hawaiians believed that the lands which were turned over to the crown were held by the monarch for the benefit of the common people.⁸⁰

75. *Id.*

76. *Rehabilitation Should Be Limited to Hawaiians of Pure Blood, Says Governor*, *supra* note 27, at 7.

77. *See* KAUANUI, *supra* note 50, at 107.

78. *See December Senate Hearings*, *supra* note 73, at 54, 91, 94.

79. *Id.* at 91.

80. *Id.* at 94.

Reverend Akaiko Akana, a pastor of Kawaiaha‘o Church in Honolulu, testified on behalf of Ahuhui Pu‘uhonua and argued: “The bill before us does not ask others to help us. The land involved is our own, by moral equity, and the money with which to finance the project comes from the rental of this land.”⁸¹

In its report, which was sympathetic to the Kānaka politicians’ view, the U.S. House Committee on Territories concluded that

(1) the Hawaiian must be placed upon the land in order to insure [sic] his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; and (4) the Hawaiian must be financially aided until his farming operations are well under way.⁸²

Chair Curry noted the significance of the Māhele and the importance of the history of the Crown lands: “There is an equity and justice in saying that these crown lands belonged to the Hawaiian people.”⁸³ The Committee Report acknowledged the continuing claim Native Hawaiians had to the land:

But having been recognized as owners of a third interest in the lands of the kingdom, the common people, believing that in the future means were to be adopted to place them in full possession of these lands, assumed that the residue was being held in trust by the Crown for their benefit. However, the lands were never conveyed to the common people and, after a successful revolution, were arbitrarily seized, and by an article in the Hawaiian constitution became the public lands of the Republic of Hawaii.⁸⁴

But the proposal failed to pass in the U.S. Senate given the business on the congressional calendar at the time.⁸⁵

81. *Id.* at 54.

82. H.R. REP. NO. 66-839, at 7.

83. *See February House Hearings*, *supra* note 39, at 32.

84. H.R. REP. NO. 66-839, at 5.

85. *See KAUANUI*, *supra* note 50, at 150 (“Though the Bill itself died with the passing of the last Congress on March 4, I am able to state to you that many of its provisions met no opposition and that the much discussed sections opening the way for the Hawaiians to return to the land were looked upon favorably by the members of both Houses of Congress. . . .

At home in Hawai‘i, Delegate Kūhiō faced a community still angered at the prospect of providing Hawaiians with the worst agricultural land while ensuring prime agricultural lands for the plantations. Kūhiō, believing that Congress would never support the homesteading of prime agricultural land, defended his selection of homesteading land as good for diversified agriculture and enterprise and to encourage Kānaka Maoli to work hard on the land:

“Much has been said that the Hawaiians are not getting the best lands,” [Kūhiō] continued. “I have told the committee that they don’t want the sugar lands, but the lands on which they can diversify the industries. This bill provides for means to education the people, to tell you what best to plant on certain lands, and where cattle and hogs can be best raised and so on.”

....

“I want to tell you that Congress does not believe and never will believe as a policy in homesteading land worth from \$500 to \$1000 an acre. That is not the American way. What made the American people great was the work of its pioneers in developing that which was worth nothing.

....

“Too many Hawaiians have said in effect: ‘Give us the best land you’ve got, give us all the money you can, feed us on poi and fish, and we’ll be happy.’ I want to tell you that you never will succeed unless you get out and hustle.”⁸⁶

In a later speech, Kūhiō acknowledged the sugar interests’ political power being wielded in Washington, D.C., and explained the rationale of the bill:

“This rehabilitation bill is the first opportunity given the poor man to go on the land with funds to help him make a living. . . .

“They say that the lands to be set aside under this bill are no good. If I were to attempt in Congress to take away cane lands for the Hawaiian people there would be a terrible row; one would never hear the last about.

Yes, the Bill is dead; but it failed at the last movement in the Senate owing to the congestions of business at the short session of Congress.”) (quoting Delegate Kalamiana‘ole).

86. *Delegate Kuhio Tells Hawaiians They Must Get Out and Hustle*, PAC. COM. ADVERTISER (Honolulu), June 26, 1920, at 6.

“They say the bill will kill homesteading. Nothing of the kind. The money from the first-class agricultural lands will go to supporting the Hawaiians on the other lands. . . .

. . . .

“This will save the Hawaiian people from being a dead race”⁸⁷

According to Kūhiō, Congress believed that withholding homesteading on prime agricultural lands and allowing them to continue to be leased by sugar interests benefitted the homesteading program because a part of the income derived from sugar leases would be used to support the rehabilitation program.⁸⁸

The bill nevertheless went back to the territorial legislature and was further amended by Senator Wise, who sought to compromise with the business interests that were opposing the measure. The result of these negotiations was territorial Senate Concurrent Resolution 8, which amended the language of House Resolution 13500 to: (1) require a five-year trial program before permanent implementation; (2) repeal the 1,000-acre limit on corporate ownership in public lands available for leasing; and (3) require beneficiaries to have one-half Hawaiian blood.⁸⁹ The change in the blood quantum requirement, as discussed below, caused concern for many Hawaiian and part-Hawaiian legislators.⁹⁰ Regardless, the territorial legislature approved the changes and a final push was made in Washington, D.C. to pass the revised proposal.

The result of this effort was the 1921 enactment of the HHCA, which authorized the United States to lease certain lands, the former Government and Crown lands of the Hawaiian Kingdom, as homestead plots, to native Hawaiians for a nominal fee.⁹¹ Wise and Kūhiō achieved their goal of

87. *Kakaako Hears Kalanianaʻole on Hawaiian Rehabilitation*, PAC. COM. ADVERTISER (Honolulu), Sept. 24, 1920, § 2, at 1, 2.

88. PRINCE JONAH KŪHIŌ KALANIANAʻOLE, REPORT TO THE LEGISLATURE OF HAWAII 4–5 (1921) [hereinafter KŪHIŌ REPORT] (available at the Hawaiʻi State Archives); Letter from Prince Jonah Kūhiō Kalanianaʻole to Governor Charles J. McCarthy 2 (Mar. 7, 1921) (available at the Hawaiʻi State Archives).

89. S. Con. Res. 8, 11th Leg., Reg. Sess. (Terr. of Haw. 1921), *reprinted in* S. JOURNAL, 11th Leg., Reg. Sess. 670 (Terr. of Haw. 1921), <https://babel.hathitrust.org/cgi/pt?id=umn.31951002253163a&view=1up&seq=686&skin=2021>.

90. *See* KAUANUI, *supra* note 50, at 152–57.

91. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, §§ 207-208, 42 Stat. 108, 110–11 (1921).

putting Hawaiians (at least some) back on the land. The HHCA, thus, required the United States to set aside approximately 203,500 acres to provide homestead leases of land for residential and agricultural purposes for native Hawaiians, defined as “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”⁹²

The sugar interests had their say and successfully marshalled language that excluded prime sugarcane lands from being placed in the hands of native Hawaiians. The HHCA specifically defined “available lands” as: “All public lands of the description and acreage as follows, excluding (a) all lands within any forest reservation; (b) all cultivated sugar-cane lands, and (c) all public lands held under certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement.”⁹³ Thus, by excluding “all cultivated sugarcane lands” from the definition of “available lands” for use in the homesteading scheme, Congress capitulated to the capitalist pressure of the wealthy sugar interests in Hawai‘i and undercut the purpose of returning Native Hawaiians to a more agrarian lifestyle.⁹⁴ Instead, native Hawaiians were left with lands “in remote locations far from urbanized areas, on the dry, leeward side of each island, generally with poor soils and rough terrain[.]”⁹⁵ The “available lands” were lands that lacked water for irrigation or domestic use. Over a quarter of the lands set aside under the HHCA were barren lava fields with another 7,800 acres consisting of the slopes of steep mountains.⁹⁶

92. *Id.* § 201, 42 Stat. at 108.

93. *Id.* § 203, 42 Stat. at 109.

94. See VAN DYKE, *supra* note 38, at 246 (“The [HHCA] preserved ‘only a very small part . . . of the domain’ the Hawaiians were entitled to because of the pressure from the Western sugar interests in the Islands. Because the Western elites wanted to keep the best lands available for lease by their sugar plantations, the lands eventually chosen for the homestead program had only marginal agricultural potential.”).

95. OFFICE OF THE GOVERNOR, REPORT ON THE HAWAIIAN HOME LANDS PROGRAM: PROGRESS REPORT ON THE IMPLEMENTATION OF RECOMMENDATIONS OF THE FEDERAL-STATE TASK FORCE III-4 (Jan. 1992).

96. Davianna Pomaika‘i McGregor, *Kupa‘a I Ka ‘Āina: Persistence on the Land* 297 (1989) (unpublished Ph.D. dissertation, University of Hawai‘i) (on file with the University of Hawai‘i Hamilton Library, University of Hawai‘i—Mānoa) (“Almost all of the lands lacked water for irrigation or domestic use. Most of the lands were rough, rocky and dry, 55,000 acres were covered with barren lava. Another 7,800 acres were the steep parts of mountains.”); see also *Trust Land Maps*, U.S. DEP’T OF INTERIOR: OFF. OF NATIVE HAWAIIAN RELATIONS, <https://www.doi.gov/hawaiian/home-land-maps> (last visited Oct. 11, 2021).

Importantly, the HHCA provided an opportunity for the United States to give some Kānaka Maoli an interest in land that they were denied during the Māhele and thereby “reconcile” for the subsequent theft of Crown and Government lands of the Kingdom. Under the guise of rehabilitation, in providing these leases, the United States arguably clouded the legal rights that Kānaka had in the land following the Māhele to one of a moral gift from a benevolent (and “legitimate”) government to rehabilitate the dying Hawaiian population. The passage of the HHCA, therefore, represented another opportunity for the United States to claim legal rights and title to stolen Kingdom lands. The clear victors in passage of the legislation was Hawai‘i’s sugar and ranching elite and the United States who solidified and legitimized the seizure of Hawaiian lands. Is this what Kūhiō envisioned as justice?

B. Racialization and the Division of Hawaiians

*The part-Hawaiian . . . are a virile, prolific, and enterprising lot of people. They have large families and they raise them—they bring them up. These part Hawaiians have had the advantage, since annexation especially, of the American viewpoint and the advantage of a pretty good public school system, and they are an educated people. They are not in the same class with the pure bloods*⁹⁷

– Attorney A.G.M. Robertson, 1920

Simply obtaining the best land at the expense of the indigenous population was not enough. The HHCA also provided an opportunity for the ugliness of America’s poisonous obsession with race to penetrate Hawai‘i and divide Hawaiians. The issue of who would benefit from the Hawaiian homesteading program, as briefly discussed above, was ever present during the debates and negotiations leading to passage of the HHCA. The Hawaiian politicians, based on discussions in the Ahahui Pu‘uhonua, believed that all Hawaiians as the indigenous population were entitled to participation in the homesteading program given the history of land dispossession and the interest held by Kānaka in land following the Māhele. By 1921, the Hawaiian politicians—in response to the business elite’s strident opposition—conceded to the idea of limiting the beneficiary class.⁹⁸ The debates and private conversations surrounding passage of the

97. *December Senate Hearings*, *supra* note 73, at 15.

98. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 27; Vause, *supra* note 44, at 85–87. In order to achieve passage of the bill, the proposed HHCA was also portrayed

bill highlight the way in which Hawai‘i’s sugar and ranching interests forced this shift from defining Hawaiian identity by indigeneity to a definition based on race. These interests first weaponized race in an attempt to stop passage of the HHCA by claiming reverse racism against the white American population in Hawai‘i.⁹⁹ Second, Hawai‘i’s business elite argued that there were distinctions among Hawaiians that justified narrowing the class of beneficiaries by imposing higher blood quantum requirements.¹⁰⁰

The initial proposal for the Hawaiian rehabilitation bill sent from territorial Senator John H. Wise provided “that from time to time there may be set aside suitable portions of the public lands of the Territory of Hawaii by allotments to or for associations, settlements, or individuals of Hawaiian blood in whole or in part”¹⁰¹ Although the proposal sought to make lands available to all Hawaiians, Representative Cassius C. Dowell of Iowa, as a member of the U.S. House Committee on Territories, questioned Wise about the beneficiaries of this program:

Mr. DOWELL. One other matter. I notice in the resolution that you provide for those of Hawaiian blood.

Mr. WISE. Yes.

Mr. DOWELL. How far do you go with that?

Mr. WISE. Anybody with Hawaiian blood.

Mr. DOWELL. How much do you consider to be within the resolution; what is your plan?

Mr. WISE. I content that anybody, even to the thirty-second degree should be included.

as an Anti-Asian law that would prevent individuals of Asian descent from acquiring lands in the United States and from being more successful than Hawaiians. *See* KAUANUI, *supra* note 50, at 107–08 (noting that congressional leaders and judges had unfavorable and racist views of Asians).

99. *See, e.g., December Senate Hearings, supra* note 73, at 14 (transcribing arguments of an attorney representing the business elite in Hawai‘i).

100. *See id.* at 15.

101. S. Con. Res. 2, 10th Leg., Reg. Sess. (Terr. of Haw. 1919), *reprinted in* S. JOURNAL, 10th Leg., Reg. Sess. 25–26 (Terr. of Haw. 1919), <https://babel.hathitrust.org/cgi/pt?id=umn.31951002253161e&view=1up&seq=48&skin=2021>.

Mr. DOWELL. And the thirty-second degree—

Mr. WISE. If he had Hawaiian blood in him.

Mr. DOWELL. Would he be entitled to homestead the same as a full-blood Hawaiian?

Mr. WISE. Yes, sir.¹⁰²

Committee Chairman Curry apparently extrapolated a blood requirement from this colloquy: “This land is to be homesteaded for the preservation of the Hawaiian race, for the Hawaiian people, the Hawaiian blood pure and to the 32d degree.”¹⁰³ The committee thus amended the bill to include a definition of native Hawaiian as a person of at least one thirty-second Hawaiian blood.¹⁰⁴ While the U.S. House sympathized with the need for providing the rehabilitation program to more Hawaiians, witnesses before the U.S. Senate questioned the validity of the entire program.

At a December 14, 1920 hearing of the U.S. Senate Committee on Territories on House Resolution 13500, Alexander George Morison Robertson, retired territorial Supreme Court Chief Justice and now-attorney for Parker Ranch, claimed that the bill separated “whites from Hawaiians and Part-Hawaiians, taxing one for the benefit of the other, discriminating against the one and favoring the other according to the color of his skin and the kind of blood that God has put in his veins.”¹⁰⁵ Robertson was a former staffer of overthrow plotter and Republic President Sanford B. Dole and a judge advocate at the trials of the Hawaiian military commission, which tried Wise and Kūhiō following the 1895 rebellion.¹⁰⁶ He was joined in Washington, D.C. by a new crop of territory representatives, including George M. McClellan, the head of the Honolulu Chamber of Commerce;

102. See *February House Hearings*, *supra* note 39, at 45.

103. *Id.* at 79.

104. H.R. Res. 13500, 66th Cong. (1920); see VAN DYKE, *supra* note 38, at 247 n.56 (“A 1/32 blood requirement would include everyone with a Hawaiian ancestry within the past five generations, and Senator Wise may have thought that it would essentially include everyone with some Hawaiian blood.”).

105. See *December Senate Hearings*, *supra* note 73, at 14.

106. 1 MEN OF HAWAII: BEING A BIOGRAPHICAL REFERENCE LIBRARY, COMPLETE AND AUTHENTIC, OF THE MEN OF NOTE AND SUBSTANTIAL ACHIEVEMENT IN THE HAWAIIAN ISLANDS 225 (John William Siddall ed., 1917) [hereinafter MEN OF HAWAII] (noting that Robertson was on Sanford B. Dole’s staff and was a Judge Advocate for the Hawaiian Military Commission for the trial of prisoners in 1895). Sanford B. Dole was an Associate Justice of the Kingdom of Hawai‘i’s Supreme Court before helping to lead the overthrow of the Kingdom. See Andrade, *American Overthrow*, *supra* note 37, at 8–9.

W.B. Pittman, a representative of Raymond Ranch and brother of Nevada Senator Key Pittman; B.G. Rivenbaugh, a former public lands commissioner; and Reverend Akaiko Akana.¹⁰⁷

For attorney Robertson, who “absolutely opposed” the bill, “[t]here are hundreds of white men out there who feel they are absolutely against this bill and that they are being discriminated against by it who can not send representatives to Washington.”¹⁰⁸ In a discussion regarding the appropriation of territorial funds for bringing water to trust lands, Robertson again voiced his strident opposition: “These moneys, mind you, come out of the pockets of the white taxpayers of the Territory and are handed over to or are used for the benefit of the Hawaiian population—as we find it stated in the bill here—of one thirty-second Polynesian blood.”¹⁰⁹ Kūhiō attempted to rebut Robertson’s argument by arguing that the bill was designed to be paid for by a share of the revenue from sugar and water leases.¹¹⁰ Robertson never conceded. In his opposition, perhaps the first in what would become a consistent attack on Hawaiian programs for generations, Robertson cleverly sidestepped the reality that white Americans and Hawaiians were not similarly situated in Hawai‘i because of the history of and destruction from colonization, and instead argued that the white population in Hawai‘i was being discriminated against.¹¹¹

Commissioner McClellan, the head of the Honolulu Chamber of Commerce, furthered Robertson’s reverse racism argument:

107. *December Senate Hearings, supra* note 73, at 5.

108. *Id.* at 12.

109. *Id.* at 10.

110. *Id.* at 73–74, 129 (“[F]rom the statement [Robertson] has been making he is trying to lead you to believe that he is representing the white people. In Hawaii we do not know of such a thing as the white people. All we know is, we are all Americans. My belief is that the majority of the so-called white people are back of this bill. . . . Judge Robertson objects to the bill for reasons that are not well founded. He strains the point that the money to be raised for the purpose of carrying out this bill will be by taxation . . . and that the Americans or whites, as he calls them, would be subject to increased taxation for the benefits of the Hawaiian, discriminating against the whites for the benefit of the Hawaiian. This statement is absolutely untrue. . . . Section 213 of this bill provides for the creation of a revolving fund to be derived from 30 per cent of the Territorial receipts derived from the leasing of the cultivated sugar-cane lands and water licenses.”).

111. *Id.* at 10.

There are grave reasons why Congress should provide for the rehabilitation of the Caucasian race in Hawaii. The country is deeply interested in the maintaining of a real American community in the Hawaiian Islands. They are interested in that because the maintenance of an American population is absolutely essential to the holding of Hawaii as a strategic military and naval base. Without a population which is reasonably American, it will be impossible to maintain Hawaii as a real American outpost.¹¹²

For McClellan, empowering Kānaka through the homesteading program ensured Hawaiian stability and progress, which thereby posed a direct threat to American imperialist interests in the islands. McClellan then made clear that white American superiority was his paramount concern: “It may be summed up by saying that this is the first time in all the history of the United States that any legislation ever came before Congress and was seriously considered which gave rights to a dark race above and against the rights of the white race.”¹¹³ By invoking a violation of the civil rights of white Americans in Hawai‘i, the business elite successfully shifted the debate in Congress from one of Hawaiians being entitled to land to one of blood. The question remained: how much blood was enough?

While arguing that the legislation would discriminate against white Americans in Hawai‘i, Robertson simultaneously suggested that there was a clear distinction between a pure blooded Hawaiian and a part-Hawaiian.¹¹⁴ He described the demographic shift in population, with the number of pure Hawaiians dropping and the population of part-Hawaiian increasing.¹¹⁵ According to Robertson, the part-Hawaiian was far more competent than the pure Hawaiian and therefore undeserving of assistance:

[T]he part-Hawaiian . . . are a virile, prolific, and enterprising lot of people. They have large families and they raise them—they bring them up. These part Hawaiians have had the advantage, since annexation especially, of the American viewpoint and the advantage of a pretty good public school system, and they are an

112. *Id.* at 88.

113. *Id.* at 112.

114. *Id.* at 15 (“The part-Hawaiian race must be differentiated from the Hawaiians of the pure blood . . .”).

115. *Id.*

educated people. They are not in the same class with the pure bloods¹¹⁶

Instead, the part-Hawaiians “are able to stand on their own feet.”¹¹⁷ In a stunning move and, again, in an attempt to shift the narrative away from Kānaka entitlement to land, Robertson then targeted fellow witness Reverend Akaiko Akana: “Here is the Rev. Akaiko Akana—part Hawaiian and part Chinese, why should I be taxed for his rehabilitation? Yet the bill proposes that.”¹¹⁸ As scholar Kēhaulani Kauanui described: “Robertson’s rhetorical question as to why he should be taxed for Akana’s rehabilitation worked to register a dismissal for all part-Hawaiians.”¹¹⁹

Nevertheless, Robertson continued to assert that the predicament of the Hawaiian could not be solved with legislation, but was more appropriately solved by the American notion of picking oneself up by their bootstraps. Robertson argued: “I think that the remedy is psychological rather than legislative. But, be that as it may, the part Hawaiian people, as I say, are virile, prolific, increasing, enterprising, intelligent people, and cannot be said to need any rehabilitation”¹²⁰ W.B. Pittman, who was also sent as part of the territory’s delegation to the hearing, agreed:

A few Hawaiians of pure blood who might be entitled to governmental assistance would not in any manner be benefited by the passage of the present bill, because all of the lands would be taken up by the part-Hawaiians who do not need any rehabilitating and are amply able to take care of themselves, as they are intelligent, industrious and prolific.¹²¹

Echoing the sentiment in Hawai‘i, Governor McCarthy addressed the territorial House and stated: “If the native Hawaiian would get out and work, and make a good living for himself and his family by the sweat of his brow, the race would flourish. That is what the rehabilitation project aims at—not sitting on the fence and playing the ukulele.”¹²²

116. *Id.*

117. *Id.*

118. *Id.*

119. See KAUANUI, *supra* note 50, at 128.

120. See *December Senate Hearings*, *supra* note 73, at 15.

121. Letter from W.B. Pittman to Senator Reed Smoot 2 (Jan. 10, 1921) (available at the Hawai‘i State Archives).

122. *Rehabilitation Should Be Limited to Hawaiians of Pure Blood, Says Governor*, *supra* note 27, at 7.

The racist views of the white business elite from the territory successfully set the stage for the U.S. Senate to debate the imposition a blood quantum requirement. The U.S. Senate began considering proposals to amend the blood quantum. Senator Key Pittman of Nevada, the brother of W.B. Pittman, stated:

In other words, that this shall apply only to Hawaiians who are of the full blood; and that will rehabilitate only a very few of them, because there are only about 22,000 full-blooded Hawaiians, and there can be only two or three hundred homesteads. I do not believe the Delegate will object to that, that it be confined to the full blood instead of the half blood, because he knows and everybody knows that any part Hawaiian is capable of taking care of himself and does not need any rehabilitation.¹²³

McClellan and W.B. Pittman, thus, proposed that the U.S. Senate define “native Hawaiian” as “any citizen of the Territory being of the Polynesian race and of the full blood.”¹²⁴ Robertson added his support: “The privileges conferred by the bill, clearly, should be limited to Hawaiians of the pure blood who alone arquire [sic], deserve, or are entitled in the slightest degree to rehabilitation at the expense of the tax payers of the Territory.”¹²⁵

U.S. Senator Harry New, chair of the Senate Committee on the Territories, expressed his reservations about the bill as drafted. Senator New, adhering to the arguments and proposals from Robertson, McClellan, and W.B. Pittman, specifically doubted the constitutionality of the bill because “it taxes an element of the population of the Island for the exclusive benefit of another[,]” objected to the one thirty-second blood quantum language of the bill, and instead urged that the homesteading program “should be limited to full-blooded Hawaiians.”¹²⁶

123. See *December Senate Hearings*, *supra* note 73, at 124.

124. W.B. Pittman, Amendments to Hawaiian Rehabilitation Bill (1921) (available at the Hawai‘i State Archives); George McClellan, Suggested Amendments to H.R. 13500 by George McClellan (1921) (available at the Hawai‘i State Archives).

125. Letter from A.G.M. Robertson to Senator Reed Smoot (Jan. 10, 1921) (available at the Hawai‘i State Archives).

126. Harry S. New, Letter to Prince J. Kuhio Kalaniana‘ole (Feb. 23, 1921) (available at the Hawai‘i State Archives).

At home in Hawai'i, Kūhiō reported to the territorial legislature about the changes to the bill being proposed in Congress, including acknowledging that U.S. Senators wanted to amend the blood quantum requirement as they believed "the special rights should be accorded only to persons of one-half, one-fourth, or at most one-eighth Hawaiian blood."¹²⁷ Around the same time, territorial Senator John Wise met with the territorial governor, the territorial attorney general, and territorial Senators Harry Baldwin and Harold Rice.¹²⁸ Both Senators Baldwin and Rice were ardent supporters of the sugar and ranching industries.¹²⁹ These private meetings resulted in Wise's introduction of Senate Concurrent Resolution 6, which authorized the governor to extend sugar leases to planters until Congress resolved the rehabilitation bill.¹³⁰ Senate Concurrent Resolution 6 quickly passed and, according to reporting at the time, helped prove to the business elite that Senator Wise was serious about appeasing them to gain their support for the Hawaiian rehabilitation program.¹³¹

Private negotiations were held the following day between Kūhiō, the governor, Senator Charles Rice, Senator Harold Rice, Senator Harry Baldwin, Senator Charles Chillingworth, and key members of the territorial House.¹³² The secret negotiations led to Wise's introduction of Senate Concurrent Resolution 8, which set forth the new limitations to the Hawaiian rehabilitation program, including adding language limiting the program to those of one-half Hawaiian blood.¹³³ With the support of the sugar and ranching faction, Senate Concurrent Resolution 8 passed easily in the territorial Senate.¹³⁴ Despite an attempt in the territorial House, which was comprised of many part-Hawaiian men, to amend the word "one-half" and replace it with "one eighth," the representatives ultimately capitulated to the one-half blood definition of native Hawaiian.¹³⁵ The deal was struck when the representatives obtained additional concessions from the opposing

127. See KŪHIŌ REPORT, *supra* note 88, at 11.

128. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 27.

129. See MEN OF HAWAII, *supra* note 106, at 31, 223.

130. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 27.

131. See Vause, *supra* note 44, at 86.

132. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 27; Vause, *supra* note 44, at 85–87.

133. S. Con. Res. 8, 11th Leg. (Terr. of Haw. 1921), *reprinted in* SENATE J., 11th Leg., at 670 (Terr. of Haw. 1921).

134. See McGregor, *Hawaiian Homesteading*, *supra* note 29, at 29.

135. S. Con. Res. 8, 11th Leg. (Terr. of Haw. 1921), *reprinted in* HOUSE J., 11th Leg., at 1488 (Terr. of Haw. 1921).

faction, such as increasing the number of Hawaiians on the Hawaiian Homes Commission that would administer the rehabilitation program.¹³⁶

A new delegation from the Territory pitched the revised definition of native Hawaiian to Congress. At a hearing before the U.S. House Committee on Territories—the committee sympathetic to Kūhiō’s initial contention that Hawaiians were entitled to the rehabilitation program—territorial Attorney General Harry S. Irwin outlined the “rationale” for the change in blood quantum:

It was said by the opponents of the bill that a person of one-thirty-second Hawaiian blood was to all intents and purposes a white person; that as a matter of fact you could not tell the difference between a person having one-thirty-second part of Hawaiian blood and a white person.¹³⁷

Territorial Senator Wise was more blunt:

Some people objected to [the one-thirty-second blood quantum] because it was hard to distinguish between one-thirty-second Hawaiian and wanted one-half part Hawaiian. Of course, I do not agree with that part of the amendment, but still, in order to put the [bill] through, I had to agree to it.¹³⁸

Representative James G. Strong of Kansas questioned Wise on what would happen if the committee restored the one thirty-second blood provision.¹³⁹ Wise stated, “Why, I think the Hawaiians, so far as they Hawaiians are concerned, they would bless you.”¹⁴⁰ Chairman Curry of California then asked whether the “Hawaiians themselves consider[ed] it to be a good scheme to limit [the program] to full-bloods, or half-bloods[.]”¹⁴¹ Clearly torn between his own desire to lower the blood quantum requirement and the deal struck with the plantation elite,¹⁴² Wise responded: “Yes; a large

136. See KAUANUI, *supra* note 50, at 155–56.

137. *Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings on H.R. 7257 Before the H. Comm. on the Territories*, 67th Cong. 15 (1921), <https://www.doi.gov/sites/doi.gov/files/uploads/HHCA-House-Hearing-June-9-and-10-1921-for-HR-7257.pdf>.

138. *Id.* at 79.

139. *Id.*

140. *Id.* at 80.

141. *Id.*

142. *Id.* at 140 (“And I am part-Hawaiian; and I believe that the only salvation of our people is to intermarry the part Hawaiians with the full-blood Hawaiians. . . . And if the Hawaiians have a moral right, a legal right, an equitable right, to these lands, I can not see,

part seem to agree to that.”¹⁴³ Kūhiō interjected that the change in the blood quantum requirement was made to appease the objections from the U.S. Senate: “I called on the [territorial] legislature to ratify just what the Senate wanted, so that we would have easy going in the Senate.”¹⁴⁴ Instead of advocating for decreasing or eliminating the one-half blood quantum, and perhaps in recognition of the political writing on the wall, Wise conceded: “But, as I said, we came over here as beggars, and so we took what we could get. I was told a long time ago that one of your proverbs was never to look a gift horse in the mouth, so we took what we could get.”¹⁴⁵

The Hawaiian politicians and the U.S. Congress bowed to the power of the Big Five, and the one-half Hawaiian blood requirement became law. The push for a high blood quantum requirement was no doubt an effort to ensure that, with the continued decline in the full blood Hawaiian population, the HHCA would cease to exist and lands would be returned to the United States.¹⁴⁶

But even more sinister, the arbitrary one-half Hawaiian blood requirement has permeated for the last century and has been weaponized by some to effectively discount the authenticity of claims to being Hawaiian and to selfishly argue for additional resources.¹⁴⁷ In 2000, for example, the U.S. Supreme Court issued a decision in *Rice v. Cayetano* in which a white rancher descended from two of the territorial senators, who fought to maximize the blood requirement for the HHCA, filed a constitutional challenge against the State of Hawai‘i for holding a Hawaiian-only election for trustees of the Office of Hawaiian Affairs (“OHA”)—a state entity created to better the conditions of Kānaka Maoli.¹⁴⁸ The five conservative Supreme Court justices struck down the voting scheme and were joined in a

gentlemen, why the part Hawaiians, the three-quarters blood, the one-quarter blood, or the two-sixteenths blood, should be cut out and only the people of the full blood or the half blood get the benefit of it; I can not see why.”).

143. *Id.* at 80.

144. *Id.*

145. *Id.*

146. *See* VAN DYKE, *supra* note 38, at 247 (“Those unenthusiastic about the program pressed for this high percentage because they hoped that, with the rapid decline of the Hawaiian population, the program could be phased out and the lands could be released to others in a relatively short period of time.”).

147. *See* Day v. Apoliona, 616 F.3d 918, 924–28 (9th Cir. 2010); Kealoha v. Machado, 315 P.3d 213, 225–30 (Haw. 2013); *see* KAUANUI, *supra* note 50, at 171–96 (exploring “how the colonial legacies of blood quantum politics continue to impact contemporary Native Hawaiian struggles for land and recognition”).

148. *Rice v. Cayetano*, 528 U.S. 495, 498–99 (2000).

concurring opinion by Justice Stephen Breyer, who despite being a consistent liberal voice on the highest court, supported the notion of imposing a “limit” to who should be considered Hawaiian:

There must . . . be . . . some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit.¹⁴⁹

As another example of the divisiveness of blood quantum, some fifty percent native Hawaiians have challenged programs benefiting all Hawaiians. In 2005, in an attempt to maximize funding and resources for native Hawaiians, several native Hawaiian men filed suit against OHA alleging that the entity violated its legal responsibilities when expending funds to cultural, language, and self-determination programs and initiatives that benefitted all Hawaiians at the expense of supporting only native Hawaiians as defined by the HHCA.¹⁵⁰

The fifty percent rule has clearly served as a tool to further divide Hawaiians. As aptly articulated by others, the HHCA was inherently flawed because it was “rooted in racism and shot through with paternalism.”¹⁵¹ In the words of Professor Kauanui: “Blood quantum is a manifestation of settler colonialism that works to deracinate—to pull out by the roots—and displace indigenous peoples.”¹⁵² The racialization of Hawaiians through the imposition of a blood quantum requirement has limited those that can

149. *Id.* at 527 (Breyer, J., concurring).

150. *Day v. Apoliona*, 451 F. Supp. 2d 1133 (D. Haw. 2006); *see also* Brief for The Hou Hawaiians and Maui Loa, Native Hawaiian Beneficiaries as Amici Curiae at 10, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 U.S. S. Ct. Briefs LEXIS 667, at *13–14 (May 27, 1999) (“OHA is doing the same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese, one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be given the same benefits as a person who is one-half Hawaiian. How can such a person make a claim to participate as an equal beneficiary with a person who is one-half Hawaiian?”).

151. Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 UNIV. HAW. L. REV. 519, 563 (1992). Paternalism was reflected in the HHCA because native Hawaiians become wards of the government by having to pay rent for the lands, instead of being given lands fee simple. This was the same scheme implemented against Native Americans by the federal government through the Dawes Act.

152. *See* KAUANUI, *supra* note 50, at 9.

obtain a homestead and has divided the community.¹⁵³ Is this what Kūhiō envisioned as justice?

*III. Enough Is Enough: Analyzing the Government's
Continued Breaches of Trust*

*WE THE HAWAIIAN PEOPLE have waited too long. What good is filling out an application when land is not made available for homesteading. . . . I must defy the law and I trust in doing so I will expose the foibles and failings of an institution which for too long as been a slave to big money and big business and seemingly forgotten who its real beneficiaries are.*¹⁵⁴

– Sonny A. Kaniho, 1974

153. Although inherently racist, the irony of the HHCA is that it provided an important acknowledgment of the trust responsibility that the United States has toward native Hawaiians, which is akin to that of Native Americans. Following the United States Supreme Court's decision in *Morton v. Mancari*, and the constant threat of reverse racism challenges, the HHCA has been the linchpin law that advocates have trumpeted to highlight how the federal government has recognized a unique trust relationship that entitles all laws uniquely dealing with Kānaka Maoli as subject to rational basis review as opposed to strict scrutiny. 417 U.S. 535, 555 (1974). Under this argument, native Hawaiians are a recognized political classification given the recognition under the HHCA and other laws and not a racial classification. See Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273, 311–16 (2017); see also Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50) (noting that native Hawaiian beneficiaries play a significant role in President Barack Obama's Rule that provides a process for federal recognition of a Hawaiian Governing Entity). Were the federal government to provide federal recognition for a native Hawaiian governing body, an important question of who could participate in such a governing body would need to be decided. The current administrative rules require the "Native Hawaiian community" to determine for itself who would be eligible to vote to ratify a governing document; this list of voters to ratify the governing document must include beneficiaries of the HHCA. See 43 C.F.R. § 50.12 (2020). The "Native Hawaiian community" is defined as "the distinct Native Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship." 43 C.F.R. § 50.4 (2020).

154. Sonny A. Kaniho, *Homestead Land Is Claimed*, ANOTHER VOICE..., May 9, 1974, at 1, reprinted in IAN LIND, SONNY KANIHO: HOMESTEADER, LEADER, HAWAIIAN 4 (2009), <https://hawaiianhomesteads.org/wp-content/uploads/2019/11/SonnyKanihoBook.pdf>.

*Both the length of the list and the length of the wait make the vast majority of Native Hawaiian people despair of ever receiving an award of land.*¹⁵⁵

– Senator Michael Crozier, 1999

*Enough is enough. We have been in court for over 20 years—December 1999, lawsuit filed, seven judges—and we’re not pau yet. Let’s get this resolved before more kupuna hala (die), including myself.*¹⁵⁶

– Leona Kalima, 2019

For thirty-eight years following the creation of the rehabilitation program, the United States assumed duties of trustee of the Hawaiian Home Lands program. In 1959, as a condition of statehood, the United States transferred most of its administrative obligations under the HHCA to the newly formed State of Hawai‘i.¹⁵⁷ The federal government, however, retained oversight responsibilities over certain aspects of the HHCA, including approving any amendments to the HHCA that the state legislature enacted to alter the blood quantum qualifications of lessees.¹⁵⁸ The state nevertheless accepted and even incorporated these trust responsibilities toward homestead beneficiaries into its Constitution.¹⁵⁹

Today, the day-to-day management of the HHCA rests with the State Department of Hawaiian Home Lands (“DHHL”), which is governed by the

155. *Kalima v. State (Kalima II)*, 468 P.3d 143, 146 (Haw. 2020) (citation omitted) (quoting Sen. Michael Crozier, Testimony Before the Hawai‘i Advisory Comm., U.S. Comm’n on Civil Rights (Aug. 2, 1990)).

156. Vicki Viotti, *Name in the News: Leona Kalima*, HONOLULU STAR-ADVERTISER, Nov. 22, 2019, at A17 (quoting Leona Kalima).

157. An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959).

158. *Id.* §§ 4–5, 73 Stat. at 5–6. In making this transfer, the United States “reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the exclusive power to enforce the [Hawaiian Homes] trust, including the power to approve land exchanges, and legislative amendments affecting the rights of beneficiaries under such Act.” 2 U.S.C. § 11701(15); *see Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) (“Even though the United States granted Hawaii title to the HHCA lands, it reserved to itself a right of consent to any changes in the homestead lease qualifications.”); *see also* HAW. CONST. art. XII, §§ 1, 3 (“[A]ny amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for state legislation, but the qualifications of lessees shall not be changed except with the consent of the United States . . .”).

159. HAW. CONST. art. XII, §§ 1-3.

Hawaiian Homes Commission (“Commission”).¹⁶⁰ The Commission is comprised of nine members appointed by the governor and confirmed by the senate.¹⁶¹ Eight of those members represent the islands for which there are trust lands.¹⁶² The ninth member of the Commission is the chairperson, who also serves as the director of DHHL and as a member of the governor’s cabinet.¹⁶³ Based on the HHCA, as revised, the Commission awards qualified native Hawaiian beneficiaries homestead leases for residential, agricultural, pastoral, or aquacultural use for up to a 199-year term at a rate of \$1.00 per year.¹⁶⁴

For most of its century-long existence, the administration of the HHCA received little to no scrutiny and the financial support from the federal and state governments was abysmal. In addition, while the State has made efforts to expand the reach of the HHCA to beneficiaries of less blood quantum, the federal government has been unwilling to consent to these basic changes.¹⁶⁵ When combined with a poor land base, insufficient water resources, and illegal transfers of trust land for little or no compensation, the admirable goals of the Hawaiian Home Lands program have been severely undercut. In the years following statehood, the program suffered from serious structural problems and was historically underfunded, which

160. HAW. REV. STAT. § 202(a) (2013).

161. *Id.*

162. *Id.* The HHCA provides that the HHC be composed of three members from O‘ahu, one member from West Hawai‘i, one member from East Hawai‘i, one member from Moloka‘i, one member from Maui, and one member from Kaua‘i. *See id.*

163. HAW. REV. STAT. § 26-17 (2013). Four of the nine Commission members must be at least one-quarter Hawaiian ancestry. HAW. REV. STAT. § 202(a).

164. The state legislature passed in 1990 and Congress approved in 1992 a modification of the lease terms to extend the lease period for another 100 years. Act of July 3, 1990, No. 305, 1990 Haw. Sess. Laws 954, https://www.capitol.hawaii.gov/slh/Years/SLH1990/SLH1990_Act305.pdf (amending section 208 of the HHCA to extend the initial ninety-nine year lease term to not more than one hundred ninety-nine years); Hawaiian Home Commission Amendments, Pub. L. No. 102-398, 106 Stat. 195 (1992).

165. Act of Apr. 5, 2002, No. 12, 2002 Haw. Sess. Laws 58, https://www.capitol.hawaii.gov/slh/Years/SLH2002/SLH2002_Act12.pdf (amending section 208(5) of the HHCA by authorizing a homestead lessee who is at least one-quarter Hawaiian and who has received an interest in the tract through succession or transfer to transfer his or her leasehold interest to a brother or sister who is at least one-quarter Hawaiian); Act of Apr. 20, 2005, No. 16, 2005 Haw. Sess. Laws 18, https://www.capitol.hawaii.gov/slh/Years/SLH2005/SLH2005_Act16.pdf (amending section 209(1)(a) of the HHCA by authorizing a homestead lessee to designate a brother or sister who is at least one-quarter Hawaiian to succeed to the leasehold interest upon the death of the lessee).

forced it to lease the best lands to non-Hawaiians to generate basic operating funds.¹⁶⁶

For example, Parker Ranch, the same entity that sent former Territorial Chief Justice Robertson to advocate against passage of the HHCA, received significant parcels of leased lands to continue its ranching operations.¹⁶⁷ In the early 1970s, and as alluded to at the beginning of this Article, a group called The Hawaiians led protests throughout the state challenging DHHL's failure to rehabilitate native Hawaiians through the Hawaiian Home Lands program.¹⁶⁸ Pae Galdeira, the leader of The Hawaiians, organized an occupation of Parker Ranch with Hawai'i Island rancher Sonny Kaniho, and others including Francis Kauhane, Chris Yuen, Ian Lind, Mary Mae Unea, Joe Tassil and Moanikeala Akaka, to call attention to the State's failed effort to house more than 2,000 native Hawaiian families that awaited a homestead.¹⁶⁹ Kaniho argued in 1974:

WE THE HAWAIIAN PEOPLE have waited too long. What good is filling out an application when land is not made available for homesteading. . . . I must defy the law and I trust in doing so I will expose the foibles and failings of an institution which for too long as been a slave to big money and big business and seemingly forgotten who its real beneficiaries are.¹⁷⁰

The group pried open a cattle gate, said a prayer, and sat.¹⁷¹ Law enforcement arrived and arrested the occupiers.¹⁷² The occupation, which received extensive media attention, served as a watershed moment in pushing the State to live up to its obligations.¹⁷³

Although reforms were implemented and strides were made to rehabilitate Hawai'i's indigenous people, the Hawaiian Home Lands program is still criticized by beneficiaries, the public, and the state government. As of December 2020, 9,957 native Hawaiian individuals hold

166. See VAN DYKE, *supra* note 38, at 250–51.

167. Troy J.H. Andrade, *Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs* 24–26 (2016) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with the Hamilton and School of Law Libraries, University of Hawai'i at Mānoa).

168. *Id.*

169. LIND, *supra* note 154, at 2–18.

170. Kaniho, *supra* note 154, at 1, reprinted in LIND, *supra* note 154, at 4.

171. See LIND, *supra* note 154, at 8–17.

172. *Id.* at 18–19.

173. Andrade, *Hawai'i '78*, *supra* note 1, at 110; see Helen Altonn, *Squatting Surprises State Aides*, HONOLULU STAR-BULLETIN, May 21, 1974, at 2.

homestead leases.¹⁷⁴ As of June 30, 2020, there are 28,730 applicants waiting to receive the lands promised by the federal and state governments.¹⁷⁵ Of more than 200,000-acres of land within the program, only approximately 33,000 acres are currently being used for homesteads.¹⁷⁶ The following table illustrates the growing waiting list and the significantly slow pace at which lands were made available for homesteading in the last two decades:¹⁷⁷

174. *2021 Legislative Fact Sheet*, DEP'T OF HAWAIIAN HOME LANDS, <http://dhhl.hawaii.gov/wp-content/uploads/2021/01/2021-DHHL-Legislative-Handout-8.5x11-FINAL.pdf> (last visited Feb. 20, 2022).

175. *Applicant Waiting List Up to June 30, 2020*, DEP'T OF HAWAIIAN HOME LANDS 6, https://dhhl.hawaii.gov/wp-content/uploads/2020/12/2020-6-30_07-Alpha_A-K_Waitlist_279pgs_FINAL.pdf (last visited Apr. 23, 2022).

176. See VAN DYKE, *supra* note 38, at 251.

177. See DEP'T OF HAWAIIAN HOME LANDS, 2020 ANNUAL REPORT 12, 13 (2021), <https://dhhl.hawaii.gov/wp-content/uploads/2021/03/DHHL-Annual-Report-FY-20.pdf>; DEP'T OF HAWAIIAN HOME LANDS, 2019 ANNUAL REPORT 59, 63 (2020), <https://dhhl.hawaii.gov/wp-content/uploads/2020/12/2019-DHHL-AnnualReport-ICRO-FINAL-with-COVER.pdf>; DEP'T OF HAWAIIAN HOME LANDS, FISCAL YEAR 2017-2018 ANNUAL REPORT 58, 63 (2019), <https://dhhl.hawaii.gov/wp-content/uploads/2019/10/2018-DHHL-AnnualReport-ICROv3.pdf> (for 2018 numbers); DEP'T OF HAWAIIAN HOME LANDS, 2017 ANNUAL REPORT 59, 63 (2018), <https://dhhl.hawaii.gov/wp-content/uploads/2019/08/DHHL-Annual-Report-2017-FINAL.pdf>; DEP'T OF HAWAIIAN HOME LANDS, 2016 ANNUAL REPORT 48, 52 (2017), <https://dhhl.hawaii.gov/wp-content/uploads/2019/03/AnnualReport2016DHHL.pdf>; DEP'T OF HAWAIIAN HOME LANDS, 2015 ANNUAL REPORT 44, 48 (2016), <https://dhhl.hawaii.gov/wp-content/uploads/2019/01/DHHL-AnnualReport2015-Interior-011119-FINAL-Upload.pdf>; DEP'T OF HAWAIIAN HOME LANDS, ANNUAL REPORT 2014, at 42, 46 (2015), <https://dhhl.hawaii.gov/wp-content/uploads/2011/11/DHHL-Annual-Report-2014-Web.pdf>; DEP'T OF HAWAIIAN HOME LANDS, ANNUAL REPORT 2013, at 38, 42 (2014), <https://dhhl.hawaii.gov/wp-content/uploads/2011/11/DHHL-Annual-Report-2013-Web.pdf>; HAWAIIAN HOME LANDS, ANNUAL REPORT 2012, at 51, 56 (2013), <https://dhhl.hawaii.gov/wp-content/uploads/2011/11/DHHL-Annual-Report-2012-Web.pdf>; HAWAIIAN HOME LANDS TRUST, ANNUAL REPORT 2010-2011, at 47, 52 (2012), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2011.pdf (for 2011 numbers); DEP'T OF HAWAIIAN HOME LANDS, 2010 ANNUAL REPORT 55, 61 (2011), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2010.pdf ; DEP'T OF HAWAIIAN HOME LANDS, 2009 ANNUAL REPORT 29 (2010), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2009.pdf; *Applicant Waiting List Up to December 31, 2009*, DEP'T OF HAWAIIAN HOME LANDS 5, https://web.archive.org/web/20101209141222/http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_07-Alpha_A-K_Waitlist_245pgs.pdf (last visited Apr. 23, 2022); DEP'T OF HAWAIIAN HOME LANDS, 2008 ANNUAL REPORT 12, 14 (2009), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2008.pdf; DEP'T OF HAWAIIAN HOME LANDS, 2007 ANNUAL REPORT 13, 15 (2008), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2007.pdf; DEP'T OF HAWAIIAN HOME LANDS, 2006 ANNUAL REPORT 13, 16 (2007), <https://dhhl.hawaii.gov/wp-content/uploads/2011/>

TABLE A. Total “native Hawaiians” on the Waiting List and Total Lessees

Fiscal Year	Number on Waiting List	Total Number of Lessees
2000	19,302	6,927
2001	19,600	7,192
2002	20,000	7,292
2003	20,489	7,350
2004	21,000	7,418
2005	21,738	7,827
2006	22,893	8,418
2007	23,668	9,110
2008	24,296	9,539
2009	25,244	9,748
2010	25,564	9,836
2011	26,170	9,922
2012	26,550	9,849
2013	26,926	9,850
2014	27,341	9,838
2015	27,616	9,821
2016	27,855	9,813
2017	28,123	9,876
2018	28,306	9,877
2019	28,590	9,898
2020	28,788	9,933

11/HHL_AR_2006.pdf; DEP’T OF HAWAIIAN HOME LANDS, 2005 ANNUAL REPORT 11, 13 (2006), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2005.pdf; DEP’T OF HAWAIIAN HOME LANDS, 2004 ANNUAL REPORT 12 (2005), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2004.pdf; DEP’T OF HAWAIIAN HOME LANDS, 2003 ANNUAL REPORT 6, 8 (2004), https://dhhl.hawaii.gov/wp-content/uploads/2011/11/HHL_AR_2003.pdf; DEP’T OF HAWAIIAN HOME LANDS, ANNUAL REPORT FY 2001-02, at 6, 10 (2003), <https://dhhl.hawaii.gov/wp-content/uploads/2011/11/DHHL-Annual-Report-2002.pdf> (for 2002 numbers); DEP’T OF HAWAIIAN HOME LANDS, ANNUAL REPORT FY 2000-01, at 5, 9 (2002), https://web.archive.org/web/20040117091538fw_/http://www.hawaii.gov/dhhl/annualrpt01.pdf (for 2001 numbers); DEP’T OF HAWAIIAN HOME LANDS, ANNUAL REPORT FY 1999-00, at 6, 10 (2001), <https://dhhl.hawaii.gov/wp-content/uploads/2020/02/01-DHHL-ANNUAL-RPT-1999-2000.pdf> (for 2000 numbers).

As discussed further below, these jarring statistics first reflect an agency historically devalued and marginalized. Second, these numbers highlight two interrelated problems that have plagued DHHL: a lack of funding and a burgeoning waiting list for a homestead.

A. Resolving Breaches of Trust

In 1983, following a beneficiary lawsuit, a Joint Federal and State Task Force issued a report that identified decades of mismanagement and breaches of trust.¹⁷⁸ The state's trust duties owed to native Hawaiians are, according to the Supreme Court of Hawai'i, evaluated using "the most exacting fiduciary standards," which are "determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, i.e., American Indians, Eskimos, and Alaskan natives."¹⁷⁹ These trust duties included: (1) the obligation to administer the trust solely in the interest of the beneficiary; and (2) the use of reasonable skills and care to make trust property productive.¹⁸⁰ Nevertheless, the Task Force identified many challenges DHHL faced, including, but not limited to, "substantial problems" with the State meeting its fiduciary obligations to the beneficiaries, the "slow" distribution of leases, inadequate staffing, "grossly insufficient" information management systems, the unauthorized transfer of over 30,000 acres of land by the State to benefit other agencies, departments, and individuals, and the misuse of Hawaiian Home Lands to benefit the general public rather than beneficiaries with little or no compensation to DHHL.¹⁸¹

The Task Force also made recommendations to address these breaches of trust. The State took action. The governor, for example, unilaterally cancelled gubernatorial executive orders and proclamations that removed land from the trust to be used for other public purposes.¹⁸² In 1988, the

178. FEDERAL-STATE TASK FORCE ON THE HAWAIIAN HOMES COMMISSION ACT, REPORT TO THE UNITED STATES SECRETARY OF THE INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII (1983) [hereinafter FEDERAL-STATE TASK FORCE REPORT].

179. *Ahuna v. Dep't of Hawaiian Home Lands*, 640 P.2d 1161, 1168–69 (Haw. 1982).

180. *Id.* at 1169.

181. FEDERAL-STATE TASK FORCE REPORT, *supra* note 178, at 21–22, 26–27.

182. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, NO. 92-I-641, AUDIT REPORT: HAWAIIAN HOMES COMMISSION, OFFICE OF THE SECRETARY 9 (Mar. 1992), <https://www.doi.gov/sites/doi.gov/files/hhl-ig-audit-report-march-1992.pdf> ("For example, the Governor of Hawaii in December 1984 canceled and withdrew 19 of the 34 Executive orders and withdrew 8 of the 9 proclamations. This action returned to the Homes Commission approximately 27,854 of the 30,166 total acres previously transferred to

Hawai'i state legislature passed the Native Hawaiian Trusts Judicial Relief Act.¹⁸³ This law provided beneficiaries with the right to file a lawsuit against the State to enforce the provisions of the HHCA for breaches that occurred after July 1, 1988.¹⁸⁴ The Act also required the governor to create an action plan to resolve beneficiary claims for past breaches of trust from 1959 to 1988.¹⁸⁵ The governor's failure to create a plan resulted in the beneficiaries having a right to file suit retroactively for all past breach of trust claims since the State assumed responsibility of the program in 1959.¹⁸⁶

In accordance with the law, in 1991 the legislature adopted then-Governor John Waihe'e's Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust.¹⁸⁷ The Action Plan recommended two parallel processes to resolve the past breaches of trust from 1959 to 1988: (1) establishing a gubernatorial task force to settle breach of trust claims impacting the entire trust; and (2) creating a claims panel to resolve individual beneficiary claims of losses due to the State's breaches of trust.¹⁸⁸

1. Settling the State's Pre-1988 Misuse of Trust Lands

For the first process, and to investigate DHHL land and title claims, Governor Waihe'e convened a task force comprised of representatives from DHHL, the state Department of Land and Natural Resources, the state Department of the Attorney General, and the Office of State Planning.¹⁸⁹ This task force, with no beneficiary representation, proposed a onetime \$39 million settlement for the State's misuse of 29,633 acres of land in

nonbeneficiaries."); OFF. OF THE GOVERNOR OF THE STATE OF HAW., AN ACTION PLAN TO ADDRESS CONTROVERSIES UNDER THE HAWAIIAN HOME LANDS TRUST AND THE PUBLIC LAND TRUST 35 (1991) (available at the Hawai'i State Archives) [hereinafter ACTION PLAN].

183. Act of Jun 17, 1988, No. 395, 1988 Haw. Sess. Laws 942 (codified at HAW. REV. STAT. § 673-1 to -10), https://www.capitol.hawaii.gov/slh/Years/SLH1988/SLH1988_Act395.pdf.

184. HAW. REV. STAT. § 673-2 (2013).

185. Act of June 17, 1988, No. 395, § 5, 1988 Haw. Sess. Laws at 945.

186. *Id.*

187. *See* ACTION PLAN, *supra* note 182.

188. *Id.*

189. Act of June 29, 1995, No. 14, 1995 Haw. Sess. Laws 696, https://www.capitol.hawaii.gov/slh/Years/SLH1995/SLH1995SS_Act14.pdf.

exchange for DHHL's agreement to waive the rights of beneficiaries to all past and future claims.¹⁹⁰

Native Hawaiian beneficiaries filed suit challenging the validity of the settlement.¹⁹¹ The court in *Ka'ai'ai v. Drake* granted the beneficiaries a preliminary injunction, which halted the settlement process, appointed an "independent representative" for the beneficiaries, and ordered a reappraisal of the breach of trust claim.¹⁹² The legislature subsequently approved the new reappraisal settlement through the passage of Act 14 in 1995.¹⁹³

Act 14, which settled claims for the illegal conveyance or use of trust lands between 1959 and 1988, created a trust fund for DHHL to support its infrastructure and capital development projects, and transferred 16,518 acres of state land to the trust, bringing the land corpus to its original acreage of approximately 203,500 acres.¹⁹⁴ The new settlement amount, as approved by the legislature, for the past breaches totaled \$600 million—a far cry of the initial \$39 million offered.¹⁹⁵ Over the next twenty years, DHHL would be provided with \$30 million annually to compensate for the State's breaches to the whole trust.¹⁹⁶ Importantly, the legislature expressly stated that this settlement payment would "not diminish the funds the department is entitled to under Article XII, section 1" of the Hawai'i Constitution—those "sufficient sums" necessary to administer the program.¹⁹⁷

2. 1991 Individual Claims Resolution Under the Hawaiian Home Lands Trust Act

The second process under the governor's Action Plan addressed the way in which individuals could seek and potentially receive redress for personal losses or harm suffered through breaches of the State's fiduciary obligations. In 1991, the legislature passed Act 323, which was codified as Hawaii Revised Statutes chapter 674, and created a process by which a

190. Elizabeth Ann Ho'oipo Kala'ena'auao Pa Martin, David Lynn Martin, David & Campbell Penn, and Joyce E. McCarty, *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 178 (1996) [hereinafter Martin et al., *Cultures in Conflict*].

191. *Ka'ai'ai v. Drake*, Civ. No. 92-3642-10 (Haw. 1st Cir. Ct. Oct. 7, 1992).

192. See Martin et al., *Cultures in Conflict*, *supra* note 190, at 178–79.

193. Act of June 29, 1995, No. 14, 1995 Haw. Sess. Laws 696, https://www.capitol.hawaii.gov/slh/Years/SLH1995/SLH1995SS_Act14.pdf.

194. *Id.* § 2.

195. *Id.* § 6.

196. *Id.*

197. HAW. CONST. art. XII, § 1.

newly established Individual Claims Review Panel (“Panel”) would review all individual beneficiaries’ claims and submit a final report for all claims to the 1993 and 1994 legislatures.¹⁹⁸ The Panel’s final report needed to provide “a summary of each claim brought before the panel, the panel’s findings and advisory opinion regarding the merits of each claim, and an estimate of the probable compensation or recommended corrective action by the State.”¹⁹⁹ Once received and reviewed, the legislature could choose to adopt the recommendations and award compensation or require corrective action.²⁰⁰ If an individual claimant was not satisfied with the legislature’s decisions regarding their breach of trust claim, the claimant would be provided with a right to sue in the state circuit court for actual damages.²⁰¹

Because of delays in creating the Panel, the legislature extended the deadline for beneficiaries to file claims with the Panel and the deadline for the Panel to file its report.²⁰² The legislature also provided claimants with three additional years to notify that Panel that they did not accept the legislative action and an additional three years for filing an action in court.²⁰³ In 1997, the Panel submitted its first report, which concluded that 2,752 claimants filed 4,327 claims against the State.²⁰⁴ Of those claims submitted, 67 percent involved claimants who “had been waiting an unreasonable amount of time for a homestead award” or claimants with “waiting list claims with other issues.”²⁰⁵ The Panel determined that 165 claims of the 172 reviewed by that time were meritorious, and recommended the legislature award \$6.7 million in damages to those meritorious claimants.²⁰⁶

198. Individual Claims Resolution Under the Hawaiian Homes Trust Act, Act of July 2, 1991, No. 323, 1991 Haw. Sess. Laws 990 (codified as amended at HAW. REV. STAT. §§ 674-1 to -21 (2013)), https://www.capitol.hawaii.gov/slh/Years/SLH1991/SLH1991_Act323.pdf.

199. *Id.* sec. 1, § 14, 1991 Haw. Sess. Laws at 995.

200. *Id.* sec. 1, § 1, 1991 Haw. Sess. Laws at 991.

201. *Id.* sec. 1, § 17, 1991 Haw. Sess. Laws at 995.

202. Act of July 1, 1993, No. 351, 1993 Haw. Sess. Laws 991, https://www.capitol.hawaii.gov/slh/Years/SLH1993/SLH1993_Act351.pdf.

203. *Id.* sec. 11, § 674-17, 1993 Haw. Sess. Laws at 994–95.

204. *Kalima v. State (Kalima I)*, 137 P.3d 990, 997 (Haw. 2006).

205. *Id.*

206. *Id.*

The legislature took issue with the Panel's formula for calculating the award amounts and insisted that all claims be reviewed at one time.²⁰⁷ The legislature, therefore, denied the Panel's recommendations on the claims, but provided the Panel with two more years to report on all of the claims.²⁰⁸ In addition, and in what appeared to be an attempt to undermine the Panel's determinations, the legislature created a working group of state administrators to determine "a formula and any criteria necessary to qualify and resolve all claims" for the State's breaches of trust.²⁰⁹ Unsurprisingly, the working group's criteria for resolving these individual claims differed substantially from the Panel's criteria. The new working group's criteria also resulted in the elimination of approximately sixty percent of the individualized claims.²¹⁰

Beneficiaries filed suit against the State arguing that the working group was "biased and its proposed formula, inter alia, violated their right to due process of the law."²¹¹ The court agreed that concluded that "the members of the Working Group appeared to be biased as a result of (1) their official positions and (2) the fact that several of them had testified before the legislature against the types of claims they later found to be non-compensable"²¹² The court, thus, enjoined "the members of the Working Group from taking any further action in determining the formula for compensation."²¹³

In 1999, the Panel submitted another report to the legislature indicating the Panel had "either closed or issued recommendation on 2,050 claims, representing 47% of the total number of claims" and recommending damages for those meritorious claims totaling \$16,434,675.75.²¹⁴ The Panel also sought an extension to complete the remaining fifty-three percent of the claims.²¹⁵ While the legislature agreed to another year extension for the Panel to review the individualized claims, Governor Benjamin Cayetano—a politician with a record critical of Hawaiian issues²¹⁶—vetoed the bill.²¹⁷

207. Act of July 8, 1997, No. 382, 1997 Haw. Sess. Laws 1208, https://www.capitol.hawaii.gov/slh/Years/SLH1997/SLH1997_Act382.pdf.

208. *Id.* sec. 4, § 674-4, 1997 Haw. Sess. Laws at 1209-10.

209. *Id.* § 2, 1997 Haw. Sess. Laws at 1209.

210. *Kalima I*, 137 P.3d at 998.

211. *Apa v. Cayetano*, Civ. No. 97-4641-11 (Haw. 1st Cir. Ct. Dec. 30, 1998).

212. *Kalima I*, 137 P.3d at 998.

213. *Id.*

214. *Id.* at 999.

215. *Id.*

216. *See Andrade, Hawai'i '78, supra* note 1, at 131-44.

Thus, the Panel submitted its final report to the legislature at the end of 1999, adding sixty more meritorious claims totaling \$1,536,146.99.²¹⁸

On December 29, 1999, 2,721 plaintiff-claimants filed a class action lawsuit against the State.²¹⁹ Of these 2,721 claimants, the Panel adjudicated and presented claims of 418 claimants to the legislature.²²⁰ The legislature did not award any money or relief to these plaintiffs, who were represented in the lawsuit by class representative Raynette Nalani Ah Chong, Special Administrator of the Estate of Joseph Ching.²²¹ The other class of fifty-three plaintiffs, represented by Dianne Boner, had their claims considered by the Panel, but the claims were not presented to the legislature.²²² The final class of 2,250 plaintiff-claimants timely filed their claims, but the Panel failed to render an opinion, so the legislature did not make a decision on those claims. Leona Kalima represented this final class of plaintiffs.²²³

In their lawsuit, the plaintiffs asserted that the State breached its trust to beneficiaries of the HHCA between 1959 and 1988 because of its: “(1) mismanagement of the extensive waiting list; (2) mishandling of the plaintiff’s applications; (3) preference policies regarding eligibility requirements; and (4) the awarding of raw lands lacking infrastructure.”²²⁴ The State, however, argued that the plaintiffs were not entitled to pursue their dispute in court because they were not “aggrieved individual claimants” and therefore, never completed the administrative process required by law.²²⁵ Under the State’s rationale, the plaintiffs’ claims were barred because they failed to obtain an advisory opinion from the Panel following a review of a claim, they failed to receive affirmative action from the legislature, and they failed to file a written notice rejecting the legislature’s action.²²⁶

217. Benjamin Cayetano, Governor’s Message No. 241, Statement of Objections to House Bill No. 1675 (Haw. June 10, 1999), *reprinted in* H.R. JOURNAL, 20th Leg., Reg. Sess. 882 (Haw. 1999).

218. *Kalima I*, 137 P.3d at 999.

219. *Id.*

220. *Id.* at 1000.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 992.

225. *Id.* at 1007–08.

226. *Id.* (noting that the State argued that: “(1) the beneficiary had to file a claim with the Panel by August 31, 1995 (or it would “forever be barred”); (2) the Panel had to render an advisory opinion on the claim and send it to the [l]egislature for action; (3) the [l]egislature had to take action on the Panel’s opinion; and (4) the beneficiary must [have] file[d] a

The Supreme Court of Hawai‘i in *Kalima I* (2006) disagreed. Writing for a unanimous court, Chief Justice Ronald T.Y. Moon determined that the plaintiffs were “aggrieved individual claimants” for purposes of Hawai‘i Revised Statutes chapter 674, which required Panel review and legislative action on each claim.²²⁷ The Court first held that the Panel “reviewed” all of the claims when each claim was (1) accepted or rejected for further investigation, and then (2) submitted to the legislature.²²⁸ Second, the Court concluded that the legislature’s failure to fund claims constituted legislative “action.”²²⁹ The Court ultimately remanded the case to allow the claimants to pursue their individualized breach of trust claims against the State.²³⁰

On November 3, 2009, a decade after the lawsuit was filed, the trial court issued a liability order concluding that the State breached the following four duties as trustee from 1959 to 1988: “(1) the duty to keep and render accounts; (2) the duty to exercise reasonable care and skill; (3) the duty to administer the trust; and (4) the duty to make the trust property productive.”²³¹ The trial court specifically concluded:

Plaintiffs have proven by clear and convincing evidence breaches of trust by Defendants State and DHHL during the claims period and that the individual and/or cumulative effects of such breaches caused by acts or omission by employees of the State in the management and disposition of trust resources were a legal cause of harm to the Plaintiffs herein which are compensable . . . thus necessitating further proceedings to determine the amount of damages, if any, each subclass member proves s/he sustained as a result of the breaches during the claim period.²³²

The plaintiffs and the State filed simultaneous motions that proposed distinct methods for calculating damages.²³³ The trial court ultimately adopted a Fair Market Rental Value (“FMRV”) model to estimate the actual loss each individual beneficiary incurred.²³⁴ The State, again, appealed. For

written notice rejecting the [l]egislature’s action, by October 1, 1999”).

227. *Id.*

228. *Id.* at 1008–09.

229. *Id.* at 1010–11.

230. *Id.* at 1018–19.

231. *Kalima II*, 468 P.3d 143, 150 (Haw. 2020).

232. *Id.*

233. *Id.*

234. *Id.* at 151.

lead plaintiff Kalima, the prolonged litigation process was becoming unbearable: “Enough is enough. We have been in court for over 20 years—December 1999, lawsuit filed, seven judges—and we’re not pau [done] yet. Let’s get this resolved before more kupuna hala [die], including myself.”²³⁵

In 2020, in another unanimous decision, the Hawai‘i Supreme Court delivered a victory to the claimants. Writing for the Court, Associate Justice Paula A. Nakayama, who was the last remaining justice from the Court that decided *Kalima I* fourteen years earlier, framed the decision as one of righting an unnecessarily delayed wrong:

In 1990, Senator Michael Crozier observed, “[b]oth the length of the list and the length of the wait make the vast majority of Native Hawaiian people despair of ever receiving an award of land.” In the thirty years since Senator Crozier’s statement, the State of Hawaii has done little to address the ever-lengthening waitlist for lease awards of Hawaiian home lands.²³⁶

In this appeal, the central issue before the Court was whether the trial court’s FMRV damages model calculates individual damages in a method permitted by Hawaii Revised Statutes chapter 674.²³⁷ Justice Nakayama highlighted the State’s complicity in this litigation:

It is undisputed that the State breached its duties to keep and render accounts, to exercise reasonable care and skill, to administer the trust, and to make the trust property productive, to the significant detriment of the Native Hawaiian people for whom the Trust was created. The State’s decision to continue to litigate this case for decades has compounded the challenges resultant from its own failure to keep adequate records²³⁸

Justice Nakayama then acknowledged that the FMRV model was not “a perfectly accurate measure of actual damages,” but criticized the State: “However, the State has failed to supply a more accurate model. Moreover, the State’s own wrongful acts, most notably the State’s failure to keep adequate records, have brought about the uncertainty of the actual damages

235. Viotti, *supra* note 156 (quoting Leona Kalima).

236. *Kalima II*, 468 P.3d at 146 (citation omitted) (quoting Sen. Michael Crozier, Testimony Before the Hawai‘i Advisory Comm., U.S. Comm’n on Civil Rights (Aug. 2, 1990)).

237. *Id.* at 156.

238. *Id.* at 157.

caused by its breaches.”²³⁹ Furthermore, Justice Nakayama was clear that the Court would liberally interpret the individual claims resolution scheme:

It is in the interests of justice to construe [Hawaii Revised Statutes] Chapter 674 in a manner that permits the advancement of this case to the final stages of its resolution and to thereby afford a fair remedy to the beneficiaries who have for decades been deprived of the opportunity to lease their native land from the State.²⁴⁰

By affirming the FMRV model, the Court approved the path for claims to be processed and claimants—beneficiaries of the HHCA—to be paid.

After the decision, lead plaintiff Kalima rejoiced, “I think it’s monumental for Native Hawaiians. We got such a great victory, one that will result in something that is payable.”²⁴¹ One of Kalima’s attorneys, Carl Varady, who along with Tom Grande fought for decades to provide justice for these beneficiaries, called the decision “a monumental testament to justice as a general matter and fairness for Native Hawaiians in this process.”²⁴² Striking a pessimistic tone, plaintiff Raynette Ah Chong expected the State to prolong the process: “Every time we go two steps forward, they appeal. . . . It’s been a long trek. I don’t know if this is the beginning of the end. Is it?”²⁴³ Ah Chong’s reluctance was understandable given the State’s documented and acknowledged record of renegeing on its promises. But perhaps the cautionary note reflected the reality that Ah Chong was a plaintiff as the administrator of the estate of Joseph Ching, who passed away during the pendency of this litigation. Like Ching, Joseph Damian Delaginte, Sr., Lucille Oiliokalani Waikiki, William Ekau Lanai, Ellen Kapaki Kalikikane, Louise Frida Mahelona, Ethel Makahala Christensen, Robert Kamakauliuli Kanahale, Sr., and nearly 400 other claimants died waiting for the State to make amends.²⁴⁴ Is this what Kūhiō envisioned as justice? As of the writing of this Article, the State has yet to pay the individual claims in the *Kalima* litigation. In addition, although the

239. *Id.*

240. *Id.* at 156.

241. Rob Perez, *Breach of Trust*, HONOLULU STAR-ADVERTISER, July 1, 2020, at A1, A8.

242. *Id.*

243. *Id.*

244. *Kalima I*, 137 P.3d 990, 1000 n.14 (Haw. 2006); see also Anita Hofschneider, *Court: Hawaiians Deserve Compensation for State’s Poor Oversight of Homelands*, HONOLULU CIVIL BEAT (July 2, 2020), <https://www.civilbeat.org/2020/07/court-hawaiians-deserve-compensation-for-states-poor-oversight-of-homelands/>.

Kalima litigation made it possible for native Hawaiian beneficiaries to pursue damages against the State for, among other things, prolonging their status on the waiting list, the lawsuit has yet to solve the issue that most of the beneficiaries do not have land for residential or agricultural use.

B. Insufficient Funding

While the State appears to be nearing the end of a three-decade process to resolve some of its breaches of trust from statehood to 1988, the problems of DHHL—such as an ever-growing waiting list of beneficiaries and a prolonged period of time for leases to be awarded—persist.²⁴⁵ The most significant problem is that the state and federal governments have not provided DHHL with adequate funds to support the department and develop the lands given under the HHCA. Indeed, the federal government provided no funding mechanism to support the program during the territorial period, and, for thirty years following statehood, the state provided no general funding for the administration of DHHL and left it up to the department to pay its own operating costs.²⁴⁶ Under this structure, the state forced DHHL to lease trust lands to non-beneficiaries to raise these necessary operating funds.²⁴⁷ This general leasing practice diverted potentially valuable homestead lands to non-Hawaiians and left DHHL with the remaining lands, with location and topographic characteristics that made developing them more expensive.²⁴⁸

245. See HAWAI‘I ADVISORY COMM., U.S. COMM’N ON CIVIL RIGHTS, A BROKEN TRUST—THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS 23 (1991) [hereinafter HAWAI‘I ADVISORY COMMITTEE REPORT] (reporting that lack of infrastructure and the impossibility of “securing adequate financing” are major causes of the extensive waiting list).

246. From 1967 to 1973, the state provided some general funds to DHHL for educational programs but not for operating expenses. See, e.g., Act of May 11, 1967, No. 54, § 2, 1967 Haw. Sess. Laws 40, 56, https://www.capitol.hawaii.gov/slh/Years/SLH1967/SLH1967_Act54.pdf; Act of June 30, 1970, No. 175, § 2, 1970 Haw. Sess. Laws 326, 346, https://www.capitol.hawaii.gov/slh/Years/SLH1970/SLH1970_Act175.pdf.

247. S. REP. NO. 107-66, at 14 (2001) (“For the next forty years, during the Territorial period (1921–1959) and the first two decades of statehood (1959–1978), inadequate funding forced the Department of Hawaiian Home Lands to lease its best lands to non-Hawaiians in order to generate operating funds.”).

248. See Rod Ohira, *Homestead Improvement: New Community Has Costlier Housing but Retains Neighborliness of Old Hawai‘i*, HONOLULU ADVERTISER, Jan. 28, 2001, at A1, A5 (describing the difficulty of designing and constructing on Kalawahine Valley homestead land because of the topography).

In 1978, delegates to the state constitutional convention sought to enshrine in the highest law of the land a requirement to adequately fund DHHL to address issues that even as of that time plagued progress of the homesteading program.²⁴⁹ The delegates proposed amending the Hawai‘i Constitution to include a provision, article XII, section 1, for the administration of the HHCA:

The legislature *shall* make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of [DHHL]; in furtherance of (1), (2), (3), and (4) herein, by appropriating the same in the manner provided by law.²⁵⁰

The framers believed that this constitutional mandate was necessary to “no longer allow” legislative discretion in funding DHHL. Fed up with the State’s inaction, the framers noted:

[I]n the 57 years since passage of the Act, less than 12-1/2 percent (25,000 acres) of the total “available lands” (200,000 acres) have actually been disposed of to native Hawaiians. This averages about 435 acres of Hawaiian home lands per annum. At that rate, it would take over 400 years to lease the remaining 175,000 acres to native Hawaiians; by the year 2378 the last square foot of available land will be awarded to a native Hawaiian. Nearly 25 generations will have passed before the goal of the HHCA is fully realized.

The department was established by the [HHCA] to provide a means to rehabilitate its beneficiaries through a series of projects

249. Delegates to the 1978 Hawai‘i constitutional convention approved, and voters ratified, a series of constitutional amendments that advanced Native Hawaiian rights, culture, and language. See Andrade, *Hawai‘i ‘78*, *supra* note 1, at 130 n.361. Ratified constitutional amendments included a mandate all public school students have access to a curriculum that includes an understanding of Hawaiian culture, history, and language, a law requiring that the Hawaiian language be made an official language of the state, and the creation of the Office of Hawaiian Affairs—a state agency charged with bettering the conditions of Hawai‘i’s indigenous people. See, e.g., HAW. CONST. art. X, § 4; HAW. CONST. art. XII, §§ 5–7; HAW. CONST. art. XV, § 4.

250. HAW. CONST. art. XII, § 1 (emphasis added).

and yet was given very little financial assistance to perfect its mandate.²⁵¹

Delegate and Chairwoman of the Hawaiian Affairs Committee, Aunty Frenchy DeSoto, put it succinctly: “The identifiable problem areas were—first, that [DHHL]—which provides a land base, has a monumental and eternal dilemma in funding[.]”²⁵² Compounding the problem, DHHL was the only state department of seventeen that needed to lease its own land “to generate revenues to support its administrative and operating budget.”²⁵³

Thus, the framers envisioned article XII, section 1, as providing DHHL with monies for administrative and program costs, thereby “releasing” DHHL from the need to lease lands to raise department operating costs and allowing DHHL to focus on leasing to beneficiaries.²⁵⁴ The amendment, which was ratified by the multi-ethnic voters of Hawai‘i, also mandated that the legislature provide “sufficient sums” for DHHL to develop land, create and manage rehabilitation projects, and to cover administrative costs.²⁵⁵

The constitutional mandate, however, was still not enough for policymakers to act. For nearly a decade following the 1978 constitutional convention, the State “failed to appropriate a single dollar of general fund revenues, generated from its various general and special tax revenue sources, to pay for the operation and programs of [DHHL] and its homesteading program.”²⁵⁶ The legislature did not appropriate approximately \$1.2 million to cover half of DHHL’s budget for administrative staffing until 1987.²⁵⁷ The following table details the

251. Hawaiian Affairs Comm., Standing Committee Report No. 56, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 628, 631 (Honolulu: State of Haw. 1980) [hereinafter CONSTITUTIONAL CONVENTION PROCEEDINGS], <https://digitalcollections.hawaii.gov/docs/concon/1978/1978%20Con%20Con%20Journal%20Vol-1%20Journal.pdf>.

252. *Nelson v. Hawaiian Homes Comm’n* (*Nelson I*), 277 P.3d 279, 293 (Haw. 2012) (quoting Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, in 1 Proceedings at 410); *see also id.* (statement of Delegate Ontai) (“[DHHL] was woefully lacking in funds at its inception, and for the past 50 years and even today, it lacks funds to run the department properly, lacks funds to construct homes and facilities necessary to service existing and future applicants.”) (quoting Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, *supra*, at 422).

253. *See* CONSTITUTIONAL CONVENTION PROCEEDINGS, *supra* note 251, at 631.

254. *Id.* at 632.

255. HAW. CONST. art. XII, § 1.

256. *Nelson v. Hawaiian Homes Comm’n*, 246 P.3d 369, 371 (Haw. Ct. App. 2011).

257. *See* DEP’T OF HAWAIIAN HOME LANDS, 1989 ANNUAL REPORT 17–20 (1989).

legislative general funds appropriations for DHHL between 1991 and 2013.²⁵⁸

TABLE B. DHHL Appropriated Funds 1991-2013

Fiscal Year	Legislative General Funds Appropriation
1991-1992	\$4,278,706
1992-1993	\$3,850,727
1993-1994	\$3,251,162
1994-1995	\$3,251,162
1995-1996	\$2,565,951
1996-1997	\$1,569,838
1997-1998	\$1,493,016
1998-1999	\$1,347,684
1999-2000	\$1,298,554
2000-2001	\$1,298,554
2001-2002	\$1,359,546
2002-2003	\$1,196,452
2003-2004	\$1,297,007
2004-2005	\$1,277,007
2005-2006	\$817,559
2006-2007	\$1,067,559
2007-2008	\$1,169,174
2008-2009	\$883,699
2009-2010	\$0
2010-2011	\$0
2011-2012	\$0
2012-2013	\$0

As shown above, in 2009, and for the next four years, Republican governor Linda Lingle, Democratic governor Neil Abercrombie, and the legislature provided no general funds for DHHL's operating and

258. Findings of Fact, Conclusions of Law, and Order at 9–10, *Nelson v. Hawaiian Homes Comm'n*, No. 07-1-1663-08 (JHC) (Nov. 27, 2015), https://dhhl.hawaii.gov/wp-content/uploads/2016/03/FOF_COL_-_Decision.pdf.

administrative costs. DHHL thereby covered its operating and administrative costs from its general leasing program.²⁵⁹

Given the abysmal record of funding, native Hawaiian beneficiaries Richard Nelson III, Kaliko Chun, James Akiona, Sr., Sherilyn Adams, Kelii Ioane, Jr., and Charles Aipia filed suit against DHHL and the State.²⁶⁰ They were represented by the Native Hawaiian Legal Corporation, an organization created during the height of the Hawaiian renaissance and the work of community advocates like Pae Galdeira and many others.²⁶¹ Through their suit, these beneficiaries sought to hold the State accountable for its failure to provide “sufficient sums” to support, as articulated in the constitution: (1) the development of home, agriculture, farm, and ranch lots; (2) home, agriculture, aquaculture, farm, and ranch loans; (3) rehabilitation projects; and (4) DHHL’s administration and operating budget.²⁶² The State argued that it had no trust obligation to fund DHHL and that the beneficiaries’ claim to obligate the legislature to provide “sufficient sums” to DHHL was barred by the political question doctrine, a judicial tool that allows a court to punt on making a decision in a legal dispute if that court’s decision encroached on powers of the other political branches.²⁶³ The State further argued that the court had no standards to determine what constituted “sufficient sums” for the aforementioned purposes—a determination that could only be made by the legislative branch.²⁶⁴ The trial court ruled in favor of the State and the beneficiaries appealed to the Hawai‘i Intermediate Court of Appeals (“ICA”).²⁶⁵

259. See Act of June 29, 2009, No. 162, § 3, 2009 Haw. Sess. Laws 494, 510, https://www.capitol.hawaii.gov/slh/Years/SLH2009/SLH2009_Act162.pdf (showing appropriations to DHHL to come from special funds, the general obligation bond fund, other federal funds, and trust funds).

260. *Nelson I*, 277 P.3d 279, 285 (Haw. 2012).

261. Andrade, *Hawai‘i ‘78*, *supra* note 1, at 109 n.175.

262. *Nelson I*, 277 P.3d at 285.

263. *Id.* at 285–86.

264. See Motion for Summary Judgment, *Nelson v. Hawaiian Homes Comm’n*, No. ICC07166308 (Haw. Cir. Ct. Sept. 9, 2008), 2008 WL 11415909 (“As explained in detail below, there are no judicially discoverable or manageable standards for evaluating whether a particular level of legislative funding to DHHL satisfies any obligation imposed by Article XII, Section 1, and any attempt to resolve that question would require resort to non-judicial policy determinations.”); *Nelson I*, 277 P.3d at 286 n.5 (“The State and DHHL defendants continued to counter-argue that what constituted ‘sufficient sums’ remained a political question; they also argued that the holding of the Hanabusa case is limited to the context of gubernatorial appointments. The circuit court denied Plaintiff’s Motion to Reconsider by order dated March 17, 2009.”).

265. *Id.* at 286.

In its January 2011 decision, the ICA reversed the decision and concluded that the determination of “sufficient sums” was a not a political question.²⁶⁶ The ICA further found that, among other things, DHHL’s 1976 General Plan “provided ‘initial policy determinations’ and set forth ‘judicially discoverable and manageable standards’ by which ‘sufficient sums’ can be determined[.]”²⁶⁷ The State appealed to the Hawai‘i Supreme Court.

In a damning condemnation of the State, Associate Justice Sabrina S. McKenna, writing for a unanimous Court, declared in *Nelson I* that:

The State has failed, *by any reasonable measure*, under the undisputed facts, to provide sufficient funding to DHHL. The State’s track record in supporting DHHL’s success is poor, as evidenced by the tens of thousands of qualified applicants on the waiting lists and the decades-long wait for homestead lots. With the benefit of 35–90 years of hindsight, *it is clear that DHHL is underfunded* and has not been able to fulfill all of its constitutional purposes.²⁶⁸

The Court affirmed the ICA’s decision in part and concluded that “the 1978 Constitutional Convention history provides judicially discoverable and manageable standards, as well as initial policy determinations, as to what constitutes ‘sufficient sums’ for DHHL’s administrative and operating expenses only[.]”²⁶⁹ According to the Court, the constitutional framer’s intent was “clear” to “require appropriation of ‘sufficient sums’ to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds”²⁷⁰ The Court held, however, that the judicial branch could not determine “sufficient funds” for the “development of home, agriculture, farm and ranch lots” unless it could determine how many lots needed to be developed in a certain period of time.²⁷¹ In a separate ruling on attorneys’ fees, Justice McKenna again clarified that “the State now must fund DHHL’s administrative and operating expenses. As a result, DHHL will be able to shift the funds it was spending on administrative and operating expenses towards fulfilling its trust duties to its beneficiaries.”²⁷²

266. *Nelson v. Hawaiian Homes Comm’n*, 246 P.3d 369, 377–79 (Haw. Ct. App. 2011).

267. *Id.* at 377–78.

268. *Nelson I*, 277 P.3d at 299 (emphases added).

269. *Id.* at 282.

270. *Id.* at 297.

271. *Id.* at 299.

272. *Nelson v. Hawaiian Homes Comm’n*, 307 P.3d 142, 147 (Haw. 2013).

In a victory for the beneficiaries, the state's highest court sent the case back to the trial court to address the justiciable issue of determining what constituted "sufficient sums" for DHHL's administrating and operating costs.²⁷³

The case, on remand, returned to trial judge Jeannette H. Castagnetti.²⁷⁴ After briefing and arguments by the parties, an eight-day non-jury trial, and the collection of extensive testimony of multiple witnesses, on November 27, 2015, Judge Castagnetti issued a Findings of Fact, Conclusion of Law, and Order. She concluded:

[T]he Hawaiian Homes Commission and [DHHL] owe a fiduciary duty to the beneficiaries of the [HHCA] to pursue the funding that [DHHL] needs for its administrative and operating expenses, and prior to 2012, [DHHL] and the Commission failed to pursue adequate funding from the legislature, thereby breaching their fiduciary duty owed to Plaintiffs, as beneficiaries of the [HHCA].²⁷⁵

Judge Castagnetti determined that the State must "fulfill their constitutional duties and trust responsibilities" and that "sufficient sums" of approximately \$28 million were necessary to fund the administrative and operating costs of DHHL for fiscal years 2015-2016.²⁷⁶

While celebrated by the beneficiaries, Judge Castagnetti's decision was rebuked by the state's governor, Senate president, and House speaker—all of whom believed that the judiciary had exceeded its authority and could not order the political branches of the government to make a specified appropriation.²⁷⁷ The legislature intervened in the lawsuit and sought to make clear that Judge Castagnetti's decision "impinge[d] on the legislative prerogative over the passage of laws and the power to appropriate by bypassing the legislative branch and process and ordering the appropriation of funds to [DHHL] for its administrative and operating budget."²⁷⁸ Judge Castagnetti denied the request to reconsider her decision and stated: "The

273. *Nelson I*, 277 P.3d at 299.

274. Findings of Fact, Conclusions of Law, and Order, *supra* note 258, at 1.

275. *Id.* at 3.

276. *Id.* at 39.

277. Chad Blair, *Judge: State Must Fund Hawaiian Home Lands*, HONOLULU CIVIL BEAT (Mar. 2, 2016), <https://www.civilbeat.org/2016/03/judge-state-must-fund-hawaiian-home-lands/>.

278. Memorandum of the Hawaii Legislature as Amicus Curiae in Support of Motion for Reconsideration of, or to Alter or Amend, the Judgment and Order at 3, *Nelson v. Hawaiian Homes Comm'n*, No. 1CC07166308 (Haw. Cir. Ct. Feb. 16, 2016), 2016 WL 11201224.

Hawaii Constitution mandates or requires the State, the Legislature, to act to make sufficient sums available to DHHL for its administrative and operating budget by appropriating same in the manner provided by law. There's no discretion”²⁷⁹ To address the legislature’s attempt to silence the judiciary, Judge Castagnetti bravely remarked that the court “takes seriously a claim of a constitutional foul or the [c]ourt overstepping its bounds by any co-equal branch of government, just as I would hope that any other co-equal branch of government would take seriously courts stating that the State has not lived up to its constitutional duties.”²⁸⁰ The State appealed the decision.²⁸¹

While the appeal was pending before the Hawai‘i Supreme Court, legislators in the 2017 session curiously began introducing legislation that directly impacted state judges. One proposal sought to revise the judicial retention process, which was considered the “gold standard” of judicial merit-selection processes in the country.²⁸² Another bill sought to reduce pension benefits for judges.²⁸³ These bills were widely seen as political retaliation against the judiciary for Judge Castagnetti’s decision in *Nelson*.²⁸⁴ The legislature was, according to an attorney, “exert[ing] inordinate and unprecedented pressure over the Judiciary to rule on cases in a certain way.”²⁸⁵

The pressure apparently worked. In 2018, the Hawai‘i Supreme Court issued its decision in *Nelson II*. Justice McKenna, writing for the majority,

279. Transcript at 10, *Nelson*, No. 1CC07166308 (Haw. Cir. Ct. Feb. 16, 2016).

280. *Id.* at 11.

281. *Nelson v. Hawaiian Homes Comm’n (Nelson II)*, 412 P.3d 917 (Haw. 2018), reconsideration denied, No. SCAP-16-0000496, 2018 WL 1004727 (Haw. Feb. 21, 2018).

282. See Editorial, *Protect Integrity of Judicial Selection*, HONOLULU STAR-ADVERTISER, Feb. 4, 2017, at A6; S.B. 328, 29th Leg. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/SB328_.htm (“Amendment to Article VI, Section 3 of the Constitution of the State of Hawaii to Amend the Timeframe to Renew the Term of Office of a Justice or Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office”); S.B. 673, 29th Leg. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/SB673_.htm (“Amendments to the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented to, and Retained”).

283. S.B. 249, 29th Leg. (Haw. 2017), https://www.capitol.hawaii.gov/session2017/bills/SB249_.HTM (“Relating to Retirement”).

284. Stewart Yerton, *House Speaker: Really, Judges Are My BFFs*, HONOLULU CIVIL BEAT (Jan. 29, 2019) <https://www.civilbeat.org/2019/01/house-speaker-really-judges-are-my-bffs/>; see also Sara Hayden, *Electing the Bench: Analysis of the Possible Negative Effects of Judicial Elections on Hawai‘i’s Legal Community*, 18 ASIAN-PAC. L. & POL’Y J. 114, 142–44 (2016).

285. See Yerton, *supra* note 284.

backpedaled on the clear mandate of *Nelson I*. In *Nelson II*, the majority vacated Judge Castagnetti's decision because she "erred by engaging in a comprehensive inquiry into the amount DHHL actually needed for its administrative and operating expenses."²⁸⁶ According to the majority: "Under *Nelson I*, the only judicially discoverable and manageable standard for determining 'sufficient sums' for DHHL's administrative and operating budget was established by the delegates of the 1978 Constitutional Convention as \$1.3 to 1.6 million, adjusted for inflation."²⁸⁷ Despite *Nelson I*'s thorough analysis of the framer's "clear" intent in 1978 to mandate that the legislature provide sufficient sums to administer DHHL, in the end, all the Court apparently meant in *Nelson I* as reinterpreted in *Nelson II* was that the trial court could "determine the current value of \$1.3 to 1.6 million (in 1978), adjusted for inflation."²⁸⁸ In other words, the only amount the trial court could order had to be based on a funding level (with inflation) of DHHL from 1978, which did not account for such future expenses like addressing the growing waiting list, and the additional staffing necessary to support additional beneficiaries being placed on homesteads. In reality, "sufficient sums" for DHHL's operations, under the rationale in *Nelson II*, covered only approximately one quarter of actual administrative and operating expenses for the agency.²⁸⁹

The Court's delicate balancing act was no doubt a cautious position that sought to balance the need for judicial oversight with the growing political pressure the judicial branch faced from an openly hostile legislature. State Senate Majority Leader J. Kalani English acknowledged the spat between the judicial and legislative branches:

They did some rulings that we thought was stepping into the legislative arena. They were trying to legislate from the bench. We control the purse strings. We said 'no' to a lot of their money. They reversed some of their decisions. We gave them some money. So the tension worked.²⁹⁰

The political pressure, however, did not deter Justice Michael D. Wilson from authoring a blistering dissent that challenged nearly all facets of the majority's reinterpretation of their own decision in *Nelson I*.²⁹¹ For Justice

286. *Nelson II*, 412 P.3d at 918.

287. *Id.*

288. *Id.* at 919.

289. *See id.* at 948 n.21 (Wilson, J., dissenting).

290. *See Yerton, supra* note 284.

291. *Nelson II*, 412 P.3d at 928–51 (Wilson, J., dissenting).

Wilson, “an explicit constitutional command of the people ha[d] gone unheeded[.]” and the majority’s decision narrowly construed *Nelson I* “in a manner inconsistent with the constitutional obligation at stake”²⁹² He concluded that Judge Castagnetti was wholly within her authority to engage in an inquiry into the current administrative and operating expenses of DHHL as set forth in *Nelson I*.²⁹³

Although the Court’s majority undercut its own mandate, the decade-long fight over adequate funding finally appeared to take a turn. The *Nelson* litigation educated the community and policymakers and provided the legislature with the motivation to address some of the funding gaps within DHHL. For example, in each of the fiscal years 2013-2014, 2014-2015, and 2015-2016, the legislature appropriated \$9,632,000 to cover administrative and operating expenses.²⁹⁴ In fiscal year 2020-2021, the legislature appropriated \$18,644,280 to cover DHHL’s administrative and operating expenses. While the state’s injection of funding to support the administration of DHHL will hopefully allow the agency to move forward with homestead development projects and chip away at the waiting list, the amounts still pale in comparison to what is needed. Is this what Kūhiō envisioned as justice?

IV. Belated Justice

At every step along the 100-year journey of the Hawaiian Homes Commission Act, Hawaiians have been fighting for what they are already entitled to under the law. Generation after generation faced new legal challenges and new political realities. From the beginning, a Congress heavily influenced by white sugar and ranching interests in Hawai‘i, created a law that undermined Hawaiian sovereignty and rights in the Crown and Government lands of the Kingdom. Simultaneously, Congress limited who could benefit from these lands by employing racist blood quantum requirements. Although not perfect, the HHCA provided a minimum level of protection for some Hawaiians. Yet, as of this writing, while nearly 10,000 individuals have been lucky enough to obtain a homestead, over 28,000 more wait for the state and federal government to find the political

292. *Id.* at 929.

293. *Id.*

294. The annual amount that would, at a minimum, constitute “sufficient sums” under the majority’s view in *Nelson II* was approximately \$1.6 million adjusted for inflation, or approximately 35% of what the legislature actually appropriated annually to DHHL from 2013 to 2016. *Id.* at 948 n.21.

will to truly implement the rehabilitative purposes of the law. If the pace of providing 10,000 homestead leases in the last 100 years continues, it will be an unacceptable 280 years before the current list is cleared.

The HHCA's centennial is an important opportunity to recalibrate the relationship between the federal government, the State of Hawai'i, and native Hawaiian beneficiaries. While not exhaustive, the following list of proposals may help to frame the next century of the HHCA in a way that will provide the justice that Kūhiō envisioned by returning 'āina to Hawaiians and supporting Hawaiian self-determination.

First, and as a foundation, all stakeholders should be educated about the HHCA, its origins, and the government's trust responsibilities as set forth in the Hawai'i Constitution. For example, in much the same way that state law requires members of certain government boards and commissions to receive training in Native Hawaiian legal issues,²⁹⁵ state and federal lawmakers must also receive training on issues relating to the HHCA.

Second, the federal and state governments must provide the necessary funding and support to ensure the success of the Hawaiian Home Lands program.²⁹⁶ DHHL is in need of long-term funding solutions to, among other things, support the department's operations, to pay for necessary infrastructure to develop more lots, and to provide loans for beneficiaries.²⁹⁷ Relatedly, lawmakers must also address the current funding structure for DHHL that relies too heavily on general leasing. In addition, although the Hawai'i Constitution requires the state legislature to provide sufficient sums to support the program, there is nothing precluding other state agencies from supporting the homesteading goal. The shortcomings of the State in its role as trustee can be remedied if the governor required other

295. See HAW. REV. STAT. §§ 10-41, 10-42 (2015) (requiring certain state councils, boards, and commission to attend a legal training course on Hawaiian customs and rights).

296. DHHL is the designated recipient for annual funds from the Native American Housing Assistance and Self-Determination Act. 25 U.S.C. § 4222(a).

297. In 2021, because the state was not providing adequate funding, DHHL proposed that the government authorize the creation of a casino on Hawaiian Home Lands to address the agencies funding shortfall. H.B. 359, 31st Leg. (Haw. 2021), https://www.capitol.hawaii.gov/session2021/bills/HB359_.htm; S.B. 1321, 31st Leg. (Haw. 2021), https://www.capitol.hawaii.gov/session2021/bills/SB1321_.htm. The revenue generating idea was met with immediate resistance from the state governor and many legislators. In 2022, state legislators introduced a bill that would provide a one-time \$600 million infusion into the Hawaiian Home Lands program. H.B. 2511, 31st Leg. (Haw. 2022), https://www.capitol.hawaii.gov/session2022/bills/HB2511_SD2_.htm. As of the writing of this Article, the bill has not yet become law.

state agencies to fully cooperate with ensuring the success of the DHHL in implementing the HHCA.

Third, the federal government should continue to take a more active role in holding the State to account for its trust failures. In 2016, the U.S. Department of the Interior implemented two additional regulations pertaining to the HHCA that implied that the federal government would be actively involved in ensuring that the trust is properly carried out.²⁹⁸ These administrative rules clarified federal involvement in the Hawaiian Home Lands program and left interesting avenues available for the federal government to interject to either advance or stymie rehabilitation efforts.²⁹⁹ When combined with President Joseph R. Biden, Jr.'s recent executive order advancing equity, justice, and opportunity for native Hawaiians, among others, the federal government seems primed to intervene to assist beneficiaries.³⁰⁰

Fourth, state and federal lawmakers must work together to update the HHCA to conform it to the needs and reality of the twenty first century. These updates could include, but are not limited to, eliminating or modifying the blood quantum requirement for applicants and successors, and upgrading DHHL's information management and record system. Recently, In 2021, U.S. Congressman Kaiuli'i Kahele introduced House Joint Resolution 55, titled the Prince Jonah Kūhiō Kalaniana'ole Protecting Family Legacies Act, which would provide congressional consent for the state's 2017 amendments to the HHCA to lower the blood quantum

298. Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920, 81 Fed. Reg. 29776, 29788 (May 13, 2016) (codified at 43 C.F.R. pt. 47) (providing clear and concise "procedures for conducting land exchanges of Hawaiian home lands authorized by the Hawaiian Homes Commission Act, 1920 (HHCA)"); *id.* at 29791 (codified at 43 C.F.R. pt. 47) (creating procedures for the Secretary of the Department of Interior to review amendments proposed by the State of Hawai'i regarding the HHCA). Before the State of Hawai'i can officially put new amendments into the HHCA, the Department of Interior must approve them first. *Id.*

299. See Lehua Kinilau-Cano & Hokulei Lindsey, *Problems in Interior's Rule on Hawaiian Home Lands*, HONOLULU CIVIL BEAT, (July 11, 2016) <https://www.civilbeat.org/2016/07/problems-in-interiors-rule-on-hawaii-home-lands/> ("What the rule actually does is extend the authority of the federal government in significant ways and at the same time stops short of ensuring the United States fulfills its duty as trustee of public lands transferred to the state at the time of statehood.").

300. Exec. Order No. 14,031, 86 Fed. Reg. 29675 (May 28, 2021) ("The purpose of this order is to build on those policies by establishing the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders and the White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders. Both will work to advance equity, justice, and opportunity for AA and NHPI communities in the United States.").

requirement of successors. With Hawai'i's U.S. Senator Brian Schatz at the helm of the Senate Indian Affairs Committee, the time seems ripe to get federal support for updates to the HHCA.

Finally, and most importantly, solutions to the woes of the HHCA should include consultation with native Hawaiian beneficiaries. The beneficiaries have held the government accountable for years—in the state Capitol during Aloha Week, on the slopes of Parker Ranch, and in courtrooms. Countless reports and successful lawsuits demonstrate the important role that beneficiaries have played and will continue to play in the success of the Hawaiian Home Lands program. To this end, there must be greater beneficiary involvement in the implementation of the law as the HHCA provides a clear vehicle for Hawaiian self-determination.³⁰¹

Now is the time to reimagine what the next century will look like for the HHCA. Now is the time for providing true justice.

301. Indeed, the state legislature passed laws supporting self-sufficiency and self-determination of native Hawaiians. In 1990, Act 349, for example, provided a new section of the HHCA to include the State's "support self-sufficiency . . . and the self determination of native Hawaiians in the administration of [the] Act." Act of July 11, 1990, No. 349, § 1, 1990 Haw. Sess. Laws 1075, 1075, https://www.capitol.hawaii.gov/slh/Years/SLH1990/SLH1990_Act349.pdf. In 2001, the state legislature passed Act 302, which had a policy promoting self-determination among homestead beneficiaries. Act of June 28, 2001, No. 302, 2001 Haw. Sess. Laws 879, https://www.capitol.hawaii.gov/slh/Years/SLH2001/SLH2001_Act302.pdf. Act 302 further provided the Hawaiian Homes Commission the authority to "establish a working relationship with a democratically-elected Hawaiian homestead community self-governance organization to promote community welfare [to HHCA]." *Id.* § 2, 2001 Haw. Sess. Laws at 881; *see also* Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71278, 71291 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50) (establishing a set of procedures to reestablish a government-to-government relationship with the native Hawaiian community and noting that "the Native Hawaiian community's ability to more effectively exercise its inherent sovereignty and self-determination as an additional purpose of the rule").