TO: Interested Parties
FR: Office of Senator Mazie K. Hirono
RE: What Brett Kavanaugh Got Wrong on Native Hawaiians

Judge Brett Kavanaugh, President Donald Trump's nominee for the Supreme Court, has a troubling record of attacking and making factually inaccurate statements about the Native Hawaiian Community.

In both an amicus brief with Robert Bork, and a separate op-ed for the Wall Street Journal titled "Are Hawaiians Indians?," Judge Kavanaugh drew specific conclusions about whether Native Hawaiians are an indigenous people of the United States entitled to the same protections as American Indians and revealed a profound ignorance based on factually inaccurate information.

1. **Kavanaugh: "There are Hawaiians, and then there are *real* Hawaiians."** **WRONG.** Kavanaugh kicks off his op-ed by confusing the term Hawaiian, which is an anglicized term for the Native Hawaiian community, ***not*** all residents of the State of Hawaii. Hawaiian is not comparable to calling someone a "Californian," or "New Yorker."

2. **Kavanaugh: "After all, Hawaiians originally came from Polynesia, yet the [Department of Justice] calls them indigenous."** **WRONG.** In fact, Hawaii is the northern tip of the Polynesian Triangle. Hawaiians never left Polynesia, the United States came to them.

3. **Kavanaugh: Native Hawaiians "don't have their own government…don't have their own system of laws…[and] don't have their own elected leaders."** **WRONG.** This statement completely ignores the history of Hawaii. The Native Hawaiian community existed as a self-sustaining, self-governing community for a thousand years before Hawaii was "discovered" by Captain Cook, and existed as a sovereign, independent kingdom before the illegal overthrow of 1893.

4. **Kavanaugh: "Any racial group with creative reasoning can qualify as an Indian tribe."** **WRONG.** This is patently false. Only indigenous communities can avail themselves of the special political, trust relationship between the United States and its indigenous communities – one that takes multiple shapes and contours beyond Kavanaugh's outdated, limited, European view of an Indian tribe.

Throughout his op-ed and amicus brief, Kavanaugh asserts false claims and ignores truths that cut against his argument to reach his political, and ideological conclusion that Native Hawaiians are not an indigenous community. To Kavanaugh, "If Hawaii can enact special legislation for native Hawaiians…why can't a state do the same for African-Americans? Or for Croatian-Americans? Or Irish-Americans?"

By questioning the constitutionality of programs that benefit the U.S.' indigenous communities, as well as those of ethnic minorities, Judge Kavanaugh reveals the right wing, political ideology he would bring to the Court. Quoting from the late Justice Antonin Scalia, Judge Kavanaugh argues that "in the eyes of the government, we are just one race here."

Judge Kavanaugh's expressed views on Native Hawaiians raise serious concerns about his view on the constitutionality of programs benefitting Alaska Natives.

ADDITIONAL BACKGROUND

For nearly 20 years, Judge Brett Kavanaugh's writings in connection with *Rice v. Cayetano* have stood as testament to his negative views and treatment of Hawaii's indigenous, Native Hawaiian community. By ignoring the history and context in which federal protections for Native Hawaiians were put in place, Kavanaugh's arguments in *Rice* demonstrates a deeply flawed understanding of the unique legal and political relationship between the United States and its indigenous people. This goes beyond solely the Native Hawaiian community. His dismissive treatment of Hawaii's indigenous community in his writings are based on erroneous "facts" and a willingness to completely ignore truths that cut against his arguments. His narrow view and understanding of the nature of indigenous communities and their relationship with the United States suggests he will be hostile to the protections and rights of all indigenous Americans.

The Native Hawaiian Community

The history between the Native Hawaiian community and the United States shares many similarities with our nation's other indigenous peoples. In 1778, British Captain James Cook "discovered" the Hawaiian Islands, and anywhere between 300,000 and 800,000 people residing in a self-sustaining, self-governing community. Through the creation of the Hawaiian Monarchy in 1810 and until its illegal overthrow (supported by the United States and Hawaiian Kingdom citizens with ties to the U.S.) in 1893, the Native Hawaiian community governed itself as an independent kingdom and entered into treaties and agreements with other nations, including the United States. When Hawaii was annexed as a territory of the United States in 1898, the U.S. took as its own 1.8 million acres of formerly designated "crown lands," lands which were held by the sovereign for the benefit of the people.

Upon its admission to the Union in 1959, its Admissions Act ceded title to the balance of those crown lands to the State of Hawaii, to be held as "a public trust" for various purposes, including the betterment of the conditions of Native Hawaiians. This was in keeping with Congress' prior recognition of its trust responsibilities with the Native Hawaiian community. These trusts were created in recognition of Native Hawaiians as an indigenous community, to promote and protect the rights of the Native Hawaiian community, and address the on-going health and socio-economic disparities between Native Hawaiians and other citizens of Hawaii.

In 1978, the citizens of Hawaii, through a State Constitutional Convention, established the Office of Hawaiian Affairs, which was responsible for administering a share of the revenue from these lands for the betterment of Native Hawaiians. OHA would be governed by elected officials representing the Native Hawaiian community from the entire State of Hawaii. In order to ensure that OHA trustees were elected by the beneficiaries of these trust lands and accountable to them, voting for OHA trustees was limited to the Native Hawaiian community. This voting structure was challenged by Harold "Freddy" Rice in 1996. Mr. Rice sued then Governor Benjamin Cayetano, and the resultant case wound its way to the Supreme Court.

Rice v. Cayetano

In an often misquoted and misconstrued decision, the United States Supreme Court decided in *Rice v. Cayetano*, 528 U.S. 495 (2000), that Hawaii's voting structure for the Office of Hawaiian Affairs violated the 15th Amendment's voting rights guarantees. Those who would call into question the status of the Native Hawaiian community often cite *Rice* for the proposition that it found the Native Hawaiian community to be an unconstitutional, race-based classification. While the Court had an opportunity to broaden its holding to this question, the Court declined, reiterating that "Congress [could] not authorize a State to create a voting scheme" of the sort created for OHA.

Ignoring the Facts for a Political Agenda

In 1999. Kavanaugh co-authored a friend of the court brief in support of Freddy Rice with highly conservative legal advocates, including Robert Bork – a harsh critic of the Civil Rights Act of 1964 when it was proposed. He separately wrote an op-ed for the Wall Street Journal titled "Are Hawaiians Indians?"

For Kavanaugh and others of a similar political view, a "fundamental constitutional principle" is that "[i]n the eyes of government, we are just one race here." In his op-ed and amicus brief, Kavanaugh relied on incorrect facts and misstatements, as well as whole sale ignorance of truths that contradict his position, to reach his political conclusion that Native Hawaiians, and arguably other indigenous communities who do not fit his limited view of tribal structure, are not afforded any special protection by a colorblind Constitution.

In describing the Native Hawaiian community, he went out of his way to ignore their history, cobble together facts, and call into question their status as an indigenous people – all with the political purpose of ensuring that there is "just one race here."

His op-ed makes clear another political calculation: *Rice* presented an opportunity to attack the Clinton administration. To his mind, this was just an opportunity for Democrats in the White House to support Democrats in Hawaii.

Kavanaugh demonstrates that he is willing to fit together some facts and ignore others to reach a desired political outcome – a dangerous tendency for a would-be Supreme Court Justice.

Limited Understanding of Indigeneity

His arguments demonstrated an extreme lack of understanding or willful ignorance of the history of Hawaii and the Native Hawaiian community. Among other things, Kavanaugh argued that Native Hawaiians are no more than any other ethnic minority because, "after all, Hawaiians originally came from Polynesia," glibly ignoring that Hawaiians never left Polynesia. Instead, the United States came to Hawaii. His op-ed goes on to state that Native Hawaiians couldn't qualify as an Indian tribe because "They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii."

He goes on to make a tortured argument that equates tribal status with indigeneity, arguing that if an indigenous community is not constructed in keeping with his limited understanding of a tribe, they are no more than any other ethnic minority in this country. Thus, as Kavanaugh asks, "If Hawaii can enact special legislation for native Hawaiians by analogizing them to Indian tribes, why can't a state do the same for African-Americans? Or for Croatian-Americans? Or for Irish-Americans?"

Narrow Definitions

Tellingly, in both his op-ed and amicus brief, Kavanaugh avoided any mention of the similarities between America's indigenous groups and the different ways in which the United States' trust responsibilities to those groups take shape. Notably, he completely avoided mentioning any structure that was not in line with the traditional, anglicized view of a "tribe," a narrow limitation that does not culturally fit all indigenous communities in this country. Indeed, to Judge Kavanaugh's mind: "Native Hawaiians couldn't possibly qualify" for the legal protections that apply to Indian tribes because that would mean "any racial group with creative reasoning can qualify as an Indian tribe." The same could be said of any other indigenous group in the United States.

His argument requires that an indigenous community have its own government, its own system of laws, its own elected leaders, and live together on a reservation to be considered indigenous – in short, *solely* federally recognized tribes in the lower 48 states are afforded any protections in Judge Kavanaugh's eyes. Notably, Judge Kavanaugh completely avoided any reference to the Alaska Native Claims Settlement Act. Under ANCSA, Alaska Natives organized themselves not as a "tribe" in Kavanaugh's understanding of the word, but as village and regional corporations with shares that individual Alaska Natives hold. This is a novel and unique system for facilitating the United States' trust responsibilities, and arguably not at all in keeping with what Judge Kavanaugh believes deserves constitutional protection.