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TO EXPRESS THE POLICY OF THE UNITED STATES REGARDING THE UNITED STATES' RELATIONSHIP WITH NATIVE HAWAIIANS, AND FOR OTHER PURPOSES

SEPTEMBER 27 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2899]

The Committee on Indian Affairs, to which was referred the bill (S. 2899) to express the policy of the United States regarding the United States' relationship with Native Hawaiians, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE AND BACKGROUND

The purpose of S. 2899 is to authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

On January 17, 1893, with the assistance of the United States Minister and U.S. marines, the government of the Kingdom of Hawaii was overthrown. One hundred years later, a resolution extending an apology on behalf of the Untied States to Native Hawaiians of the illegal overthrow of the Native Hawaiian government and calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law (Public Law 103–150). The Apology Resolution acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States an further acknowledges that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national

lands to the United States, either through their government or through a plebiscite or referendum.

In December of 1999, the Departments of Interior and Justice initiated a process of reconciliation in response to the Apology Resolution by conducting meetings in Native Hawaiian communities on each of the principal islands in the State of Hawaii and culminating in two days of open hearings. In each setting, members of the native Hawaiian community identified what they believe are the necessary elements of a process to provide for the reconciliation of the relationship between the United States and the Native Hawaiian people. A draft report, entitled "From Mauka to Makai: The River of Justice Must Flow Freely," was issued by the two departments on August 23, 2000. A 30-day comment period on the report expires on September 23, 2000. The principal recommendation contained in the draft report is set forth below:

> Recommendation 1. It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103–150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

S. 2899 provides a process for the reorganization of a Native Hawaiian government, and upon certification by the Secretary of the Interior that the organic governing documents of the Native Hawaiian government are consistent with Federal law and the trust relationship between the United States an the indigenous, native people of the United States, S. 2899 provides for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship with the Native Hawaiian government.

NEED FOR LEGISLATION

With the loss of their government in 1893, Native Hawaiians have sought to maintain political authority within their community. In 1978, the citizens of the State of Hawaii recognized the long-standing efforts of the native people to give expression to their rights to self-determination and self-governance by amending the State constitution to provide for the establishment of a quasi-sovereign State agency, the Office of Hawaiian Affairs. The State con-

stitution, as amended, provides that the Office is to be governed by nine trustees who are Native Hawaiian and who are to be elected by native Hawaiians. The Office administers programs and services with revenues derived from lands which were ceded back to the State of Hawaii upon its admission into the Union of States. The dedication of these revenues reflects the provisions of the 1959 Hawaii Admissions Act, which provides that the ceded lands and the revenues derived therefrom should be held by the State of Hawaii as a public trust for five purposes—one of which is the betterment of the conditions of Native Hawaiians. The Admissions Act also provides that the new State assumes a trust responsibility for approximately 203,500 acres of land that had previously been set aside under Federal law in 1921 for Native Hawaiians in the Hawaiian Homes Commission Act.

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice* v. *Cayetano*, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). The Supreme Court held that because the Office of Hawaiian Affairs is an agency of the State of Hawaii that is funded in part by appropriations made by the State legislature, the election for the trustees of the Office of Hawaiian Affairs must be open to all citizens of the State of Hawaii who are otherwise eligible to vote in statewide elections.

The nine Native Hawaiian trustees of the Office of Hawaiian Affairs have subsequently resigned their positions, and the Governor of the State of Hawaii has appointed interim trustees to fill the positions vacated by the Native Hawaiian trustees, until new trustees can be elected in elections scheduled to be held on November 7, 2000. By order of the U.S. District Court for the District of Hawaii, the candidates for the Office of Hawaiian Affairs trustees may be either Native Hawaiian or non-Native Hawaiian, and all citizens of the State of Hawaii may vote for the 97 candidates that have registered to run for the mine trustee positions.

The native people of Hawaii have thus been divested of the mechanism that was established under the Hawaii State Constitution that, since 1978, has enable them to give expression to their rights as indigenous, native people of the United States to self-determination and self-governance. S. 2899 is designed to address these developments by providing a means under Federal law, consistent with the Federal policy of self-determination and self-governance for America's indigenous, native people, for Native Hawaiians to have a status similar to that of the other indigenous, native people of the United States.

FEDERAL DELEGATION OF AUTHORITY TO THE STATE OF HAWAII

For the past two hundred and ten years, the United States Congress, the Executive, and the U.S. Supreme Court have recognized certain legal rights and protections for America's indigenous peoples. Since the founding of the United States, Congress has exercised a constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. This has been done in recognition of the sovereignty possessed by the native people—a sovereignty which pre-existed the formation of the United States. The Congress' constitutional authority is also premised upon the status of the indigenous people as the original inhabitants of this nation who occupied and exercised dominion

and control over the lands to which the United States subsequently acquired legal title.

The United States has recognized a special political relationship with the indigenous people of the United States. As Native Americans—American Indians, Alaska Natives, and Native Hawaiians—the United States has recognized that they are entitled to special rights and considerations. The Congress has enacted laws to give expression to the respective legal rights and responsibilities of the Federal government and the native people.

From time to time, with the consent of the affected States, the Congress has sought to more effectively address the conditions of the indigenous people by delegating Federal responsibilities to various States. In 1959, the State of Hawaii assumed the Federally-delegated responsibility of administering 203,500 acres of land that had been set aside under Federal law for the benefit of the native people of Hawaii. [Haw.Const. Art. XVI, § 7.] In addition, the State agreed to the imposition of a public trust upon all of the lands ceded to the State upon admission. [Hawaii Admission Act, Pub. L. No. 8603, § 5(f), 73 Stat. 4, 5 (1959)] One of the five purposes for which the public trust is to be carried out is for the "betterment of the conditions of Native Hawaiians". Id. the Federal authorization for this public trust clearly anticipated that the State's constitution and laws would provide for the manner in which the trust would be carried out. Id. §§ 4 & 5 (f).

In 1978, the citizens of the State of Hawaii exercised the Federally-delegated authority by amending the State constitution in furtherance of the special relationship with Native Hawaiians. The delegates to the 1978 constitutional convention recognized that Native Hawaiians had no other homeland, and thus that the protection of Native Hawaiian subsistence rights to harvest the ocean's resources, to fish the fresh streams, to hunt and gather, to exercise their rights to self-determination and self-governance, and the preservation of Native Hawaiian culture and the Native Hawaiian language could only be accomplished in the State of Hawaii.

Hawaii's adoption of amendments to the State constitution to fulfill the special relationship with Native Hawaiians is consistent with the practice of other States that have established special relationships with the native inhabitants of their areas. Fourteen States have extended recognition to Indian tribes that are not recognized by the Federal government, and thirty-two States have established commissions and offices to address matters of policy affecting the indigenous citizenry.

HISTORY

There is a history, a course of dealings and a body of law which informs the special status of the indigenous, native people of the United States. It is a history that begins well before the first European set foot on American shores—it is a history of those who occupied and possessed the lands that were later to become the United States—the aboriginal, indigenous native people of this land who were America's first inhabitants.

The indigenous people did not share similar customs of traditions. Their cultures were diverse. Some of them lived near the ocean and depended upon its bounty for their sustenance. Others made their homes amongst the rocky ledges of mountains and can-

yons. Some native people fished the rivers, while others gathered berries and roots from the woodlands, harvested rice in the lake areas, and hunted wildlife on the open plains. Their subsistence lifestyles caused some to follow nomadic ways, while others established communities that are well over a thousand years old.

Those who later came here called them "aborigines" or "Indians" or "natives" but the terms were synonymous. Over time, these terms have been used interchangeably to refer to those who occupied and possessed the lands of America prior to European contact.

Although the differences in their languages, their cultures, their belief systems, their customs and traditions, and their geographical origins may have kept them apart and prevented them from developing a shared identity as the native people of this land—with the arrival of western "discoverers" in the United States, their histories are sadly similar. Over time, they were dispossessed of their homelands, removed, relocated, and thousands, if not millions, succumbed to diseases for which they had no immunities and fell victim to the efforts to exterminate them.

In the early days of America's history, the native people's inherent sovereignty informed the course of the newcomers' dealings with them. Spanish law of the 1500's and 1600s presaged how the United States would recognize their aboriginal title to land, and treaties became the instruments of fostering peaceful relations. Felix S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, 31 Geo. L.J. 1 (1942).

As America's boundaries expanded, new territories came under the protection of the United States. Eventually, as new States entered the Union, there were other aboriginal, indigenous, native people who became recognized as the "aborigines" or "Indians" or "natives" of contemporary times—these included the Eskimos, and the Aleuts, and the other native people of Alaska, and later, the indigenous, native people of Hawaii.

For nearly a century, Federal law has recognized these three groups—American Indians, Alaska Natives, and Native Hawaiians—as comprising the class of people known as Native Americans. Well before there was a history of discrimination in this country which the Foutheenth and Fifteenth Amendments were designed to address, the Supreme Court had recognized the unique status of America's native people under the Constitution and laws of the United States.

Hawaiians are the indigenous or aboriginal people of the island group that is today the State of Hawaii. Hawaii was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawaii perhaps as early as 300 A.D. The originally Hawaiians were thus part of the Polynesian family of peoples, which includes the Maori, Samoans, Tongans, Tahitians, Cook Islanders, Marquesans, and Eastern Islanders. 1 Ralph S. Kuykendall, "The Hawaiian Kingdom" 3 (1938). Hundreds of years of Hawaiian isolation followed the end of the era of "long voyages." Id. During these centuries, the Polynesians living in Hawaii evolved a unique system of self-governance and a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution at 1510.

At the pinnacle of the political, economic and social structure of each of the major Hawaiian islands was a mo'i, a king. Below the king, individuals occupied three major classes. The highest class, the ali'i, were important chiefs. Next in rank were members of the kahuna class, who advised the ali'i as seers, historians, teachers, priests, astronomers, medical practitioners, and skilled workers. Third, the maka'ainana were the "people of the land," who fished and farmed and made up the bulk of the population. Lawrence H. Fuchs, "Hawaii Pono: An Ethnic and Political History" 5 (1961); "Native Hawaiian Rights Handbook" 5 (Melody K. MacKenzie ed., 1991).

The political, economic and social structures were mutually supportive. The kings held all land and property which they subdivided among the chiefs. Substantial chiefs supervised large land areas (ahupua'a), which extended from the sea to the mountains so that they could fish, farm, and have access to the products of the mountain forest. They in turn, divided the ahupua'as into 'ilis, run by lesser chiefs whose retainers cultivated the land. The commoners worked the land and fished, exchanging labor for protection and some produce from their own small plots. Agriculture was highly diverse, including taro, bananas, yams, sugar cane and breadfruit. The taro plant, whose starchy root is pounded into poi, requires substantial moisture so Hawaiians developed a superior system of irrigation. See Jon J. Dhien, "The Great Mahele" 3–4 (1958); Fuchs, supra at 5–7; MacKenzie, supra at 3–5.

The Hawaiian economy was also dependent upon many skilled artisans. For example, special skills were necessary for the building of outrigger canoes, the making of tapa (a paper-like material used for clothing and bedding), the drying of fish, the construction of irrigation systems and fishponds, the catching of birds (whose feathers were worn in chiefs' cloaks and helmets), and the sharpening of stones for building and fighting. MacKenzie, supra at 4.

"The concept of private ownership of land had no place in early Hawaiian thought." Id. The mo'i's or king's authority was derived from the gods, and he was a trustee of the land and other natural resources of the island. Id. Chiefs owned military service, taxes, and obedience to the king, but neither chiefs, nor skilled laborers, nor commoners were tied to a particular piece of land or master. All lands conferred by the king or chief were given subject to revocation. In turn, neither commoners nor skilled laborers were required to stay with the land; if maltreated or dissatisfied, an individual could move to another ahupua'a or 'ili. Id.; see also Fuchs, supra at 5.

Hawaiians also had a complex religion, focused on several major gods—most notably Kane, god of life and light, Lono, god of the harvest and peace, Ku, god of war and government, and Pele, goddess of fire. The religion generated a detailed system of taboos (kapu), enforced by priests, which supported the political, economic and social systems of the islands. See Ralph S. Kuykendall & A. Grove Day, "Hawaii: A History" 11 (1964).

The language and culture of the Hawaiian people were rich and complex. Hawaiians possessed an "extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth. It consisted of meles (songs) of various kinds, genealogies and honorific stories * * * [much of which] was

used as an accompaniment to the hula." 1 Kuykendall, surpra at 10–11. Hawaiians also has a "rich artistic life in which they created colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surfboards, weapons of war, and dramatic and whimsical dances." Jon W. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95, 95 (1998) (citing, e.g., Joseph Fehrer, "Hawaii: A Pictorial History" 36–132 (1969)).

The communal nature of the economy and the caste structure of the society resulted in values striking different from those prevalent in more competitive western economies and societies. For example, Hawaiian culture stressed cooperation, acceptance, and generosity, and focused primarily on day-to-day living. See, e.g., Fuchs, supra at 74–75.

Hawaii was not Utopia. There were wars between the island chiefs and among other ali'i. Natural disasters, such as tidal waves and volcanic eruptions, often killed or displaced whole villages. But Hawaii's social, economic, and political system was highly developed and evolving, and its population, conservatively estimated to be at least 300,000,[1] was relatively stable before the arrival of the first westerners.

Hawaii was "discovered" by the west in 1778, when the first haole or white foreigner, English sea captain James Cook, landed. Because he arrived during a festival associated with Lono in a ship whose profile resemble Lono's symbol, he was greeted as the long-departed god. Other western ships soon followed on journeys of exploration or trade. E.S. & Elizabeth G. handy, "Native Painters in Old Hawaii" 331 (1972).

In the years that followed the arrival of Cook and other westerners, warring Hawaiian kings, now aided by haole weapons and advisers, fought for control of Hawaii. King Kamehameha I won control of the Big Island, Hawaii, and then successfully invaded Maui, Lana'i, and Molika'i and O'ahu. By 1810, he also gained the allegiance of the King of Kaua'i. Despite the political unification of the islands, Kamehameha I's era saw the first steps toward the devastation of the Hawaiian people.

The immediate, brutal decimation of the population was the most obvious result of contact with the west. Between Cook's arrival and 1820 disease, famine, and war killed more than half of the Hawaiian population. By 1866, only 57,000 Hawaiians remained from the basically stable pre-1778 population of at least 300,000. The impact was greater than the numbers can convey; old people were left without the young adults who supported them; children were left without parents or grandparents. The result was a rending of the social fabric.

This devastating population loss was accompanied by cultural, economic, and psychological destruction. Western sailors, merchants, and traders did not respect Hawaiians kapus or religion and were beyond the reach of the priests. The chiefs began to imitate the foreigners, whose ships and arms were so superior to their own. The kapus were abolished soon after Kamehameha I died. See Fuchs, supra at 8–9. Christianity, principally in the person of

[1] This estimate is conservative; other sources place the number at one million. David E. Stannard, "Before the Horror; the Population of Hawaii on the Eve of Western Contact" 59 (1989).

American missionaries, quickly flowed into the breach. Christianity condemned not only the native religion, but the worldview, language, and culture that were intertwined with it. The loss of the old gods, along with the law and culture predicated on their existence, resulted in substantial social conflict and imbalance. Id. At 9: Kuykendall & Day, supra at 40–41.

Western merchants also forced rapid change in the islands' economy. Initially, Hawaiian chiefs sought to trade for western goods and weapons, taxing and working commoners nearly to death to obtain the supplies and valuable sandalwood needed for such trades and nonetheless becoming seriously indebted. As Hawaii's stock of sandalwood declined, so too did that trade, but it was replaced by whaling and other mercantile activities. See Fuchs, supra at 10–11; Kuykendall & Day, supra at 41–43; Mackenzie, supra at 5. More than four-fifths of Hawaii's foreign commerce was American; the whaling services industry and mercantile business in Honolulu were almost entirely in American hands. See Fuchs, supra at 18–19, Mackenzie, supra at 6, 9–10. What remained to the Hawaiian people was their communal ownership and cultivation of land; but, as described infra, that, too was soon replaced by a western system of individual property ownership.

As the middle of the 19th century approached, the islands' small haole population wielded an influence far in excess of its size. See Felix S. Cohen, "Handbook of Federal Indian Law" 799 (2d ed. 1982) ("[a] small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence"). These influential haoles sought to limit the absolute power of the Hawaiian king over their legal rights and to implement western property law so that they could accumulate and control land.

By dint of foreign pressure, these goals were achieved. See, e.g., MacKenzie, supra at 6; 1 Kyukendall, supra at 206–26. In 1840, Kamehameha III promulgated a new constitution, establishing a hereditary House of Nobles and an elected House of Commons. And in 1842, the King authorized the Mahele of 1848; the beginning of the division of Hawaii's communal land which led to the transfer of substantial amounts of land to western hands.

In the Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the main chiefs; he reserved about 1 million acres for himself and his successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawaii ("Government Lands"). All land remained subject to the rights of native tenants. In 1850, after the division was accomplished, an act was passed permitting aliens to purchase land in fee simple. The expectation was that commoners would receive a substantial portion of the distribution to the chiefs because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.[2]

Soon after the Mahele, a dramatic concentration of land ownership in haole plantations, estates, and ranches occurred. Ulti-

[2] Many maka 'ainana did not secure their land because they did not know of or understand the law, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the chief, were unable to farm without the traditional common cultivation and irrigation of large areas, were killed in epidemics, or migrated to cities. Mackenzie, supra at 8.

mately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs.

These economic changes were devastating for the Hawaiian people. The communal land system of subsistence farming and fishing was at an end. Large land estates owned by haoles controlled virtually all arable land. Hawaiians were not considered sufficiently cheap, servile labor for the backbreaking plantation work, and, indeed, did not seek it. Unable successfully to adjust either to the new economic life of the plantation or to the competitive economy of the city, many Hawaiians became part of "'the floating population crowding into the congested tenement districts of the larger towns and cities of the Territory' under conditions which many believed would 'inevitably result in the extermination of the race.'" (quoting S. Con. Res. 2, 10th Leg. Of the Territory of Hawaii, 1919 Senate Journal 25–26). Hawaiians developed a debilitating sense of inferiority, and descended to the bottom tier of the economy and the society of Hawaii.

The mutual interests of Americans living in Hawaii and the United States became increasingly clear as the 19th century progressed. American merchants and planters in Hawaii wanted access to mainland markets and protection from European and Asian domination. The United States developed a military and economic interest in placing Hawaii within its sphere of influence. In 1826, the United States and Hawaii entered into the first of the four treaties the two nations signed during the 19th century. Americans remained concerned, however, about the growing influence of the English (who briefly purported to annex Hawaii in 1842) and the French (who forced an unfavorable treaty on Hawaii in 1839 and landed troops in 1849). American advisors urged the King to pursue international recognition of Hawaiian independence, backed up by an American guarantee.

In pronouncements made during the 1840s, the administration of President John Tyler announced the Tyler Doctrine, an extension of the Monroe Doctrine. It asserted that the United States had a paramount interest in Hawaii and would not permit any other nation to have undue control or exclusive commercial rights there. Secretary of State Daniel Webster explained:

> The United States * * * are more interested in the fate of the islands, and of their government, than any other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the * * * Islands ought to be respected; that no power ought either to take possession of the islands as conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences in matters of commerce. [S. Exec. Doc. No. 52–77, 40–41 (1893) (describing 1842 statement).]

America's already ascendant political influence in Hawaii was heightened by the prolonged sugar boom which followed the Mahele. Sugar planters were eager to eliminate the United States' tariff on their exports to California and Oregon. The mainland sugar growers strongly resisted the lifting of the tariff, but the

United States' fear of "incipient foreign domination of the Islands" near its coast was stronger than the mainland growers' lobby. The 1875 Convention on Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw., 19 Stat. 625 (1875) ("Reciprocity Treaty"), eliminated the American tariff on sugar from Hawaii and virtually all tariffs that Hawaii had placed on American products. Critically, it also prohibited Hawaii from giving political, economic, or territorial preferences to any other foreign power. Finally, when the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

Americans were determined to ensure that the Hawaiian government did nothing to damage Hawaii's growing political and economic relationship with America. But the Hawaiian King and people were bitter about the loss of their lands to foreigners and were hostile both to the tightening bond with the United States and the increasing importation of Asian labor by haole plantations.

Matters came to a head in 1887, when King Kalakaua appointed an anti-haole prime minister. The prime minister, with the strong support of the Hawaiian people, opposed granting a base at Pearl Harbor as a condition for extension of the Reciprocity Treaty, and took other measures that were considered anti-western. The business community, backed by the all-haole military group, the Honolulu Rifles, forced the prime minister's resignation and the enactment of a new constitution. The new constitution—often referred to as the Bayonet Constitution—reduced the king to a figure of minor importance. It extended the right to vote to western males whether or not they were citizens of the Hawaiian Kingdom, and disenfranchised almost all native voters by giving only residents with a specified income level or amount of property the right to vote for members of the House of Nobles. The representatives of propertied haoles took control of the legislature. A suspected native revolt in favor of the King's younger sister, Princess Lili'uokalani, and new constitution were quelled when the American minister summoned Marines from an American warship at Honolulu. Haoles remained firmly in control of the government until the death of the King in 1891, when Queen Lili'uokalani came to power.

On January 14, 1893, the Queen was prepared to promulgate a new constitution, restoring the sovereign's control over the House of Nobles and limiting the franchise to Hawaiian subjects. See MacKenzie, supra at 11; 3 Kuykendall, supra at 585–86. She was, however, forced to withdraw her proposed constitution. See Fuchs, supra at 30.

Despite the Queen's apparent acquiescence, the majority of haoles recognized that the Hawaiian monarchy posed a continuing threat to the unimpeded pursuit of their interests. They formed a Committee of Public Safety to overthrow the Kingdom. Mercantile and sugar interests also favored annexation by the United States to ensure access on favorable terms to mainland markets and protection from Oriental conquest.

A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison had authorized him to say that "if conditions in Hawaii compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find

an exceedingly sympathetic administration here." L.A. Thurston, "Memoirs of the Hawaiian Revolution" 230–32 (1936). The American annexation group closely collaborated with the American Minister in Hawaii, John Stevens.

On January 16, 1893, at the order of Minister Stevens, American soldiers marched through Honolulu, to a building known as Arion Hall, located near both the government building and the palace. The next day, local revolutionaries seized the government building and demanded that Queen Lili'uokalani abdicate. Stevens immediately recognized the rebels' provisional government and placed it under the United States' protection.

President Harrison promptly sent an annexation treaty to the Senate for ratification and denied any United States' involvement in the revolution. Before the Senate could act, however, President Cleveland, who had assumed office in March of 1893, withdrew the treaty. An investigator reported that the revolution had been accomplished by force with American assistance and against the wishes of Hawaiians. See Kuykendall & Day, supra at 179. To Congress, President Cleveland declared:

> [I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation. [3 Kuykendall, supra at 364.]

He demanded the restoration of the Queen. But the Senate Foreign Relations Committee issued a report ratifying Stevens' actions and recognizing the provisional government, explaining that relations between the United States and Hawaii are unique because *"Hawaii has been all the time under a virtual suzerainty of the United States."* S. Rep. No. 53–277, at 21 (1894) (emphasis added).

As a result of this impasse, the United States government neither restored the Queen nor annexed Hawaii. The provisional government thus called a constitutional convention whose composition and members it controlled. See Kuykendall & Day, supra at 183. The convention promulgated a constitution that imposed property and income qualification as prerequisites for the franchise and for the holding of elected office. Id. At 184; MacKenzie, supra at 13. "Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic." W.A. Russ, "The Hawaiian Republic (1894–1898)" 33–34 (1961). The Republic also claimed title to the Government Lands and Crown Lands, without paying compensation to the monarch. See MacKenzie, supra at 13. In 1894, Sanford Dole was elected President of the Republic of Hawaii, and the United States gave his government prompt recognition.[3]

The election of President McKinley in 1896 gave the annexation movement new vigor. Another annexation treaty was sent to the

[3] A short-lived counter-revolution commenced on January 7, 1895. Republic police discovered it, arrested many royalist leaders, and imprisoned the Queen. Eventually, she was forced to swear allegiance to the new Republic in exchange for clemency for the revolutionaries. "Native Hawaiian Rights Handbook 13" (Melody K. MacKenzie ed., 1991); Lawrence H. Fuchs, "Hawai'i Pono: An Ethnic and Political History" 34–35 (1961).

Senate. Simultaneously, the Hawaiian people adopted resolutions sent to Congress stating that they opposed annexation and wanted to be an independent kingdom. Russ, supra at 198, 209.[4] The annexation treaty failed in the Senate. But, to avoid the constitutional treaty procedure, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation which needed only a majority in each House of Congress. The balance was tipped at this moment by the United States' entry into the Spanish-American War. American troops were fighting in the Pacific, particularly in the Philippines, and the United States needed to be sure of a Pacific base. See Kuykendall & Day, supra at 188; MacKenzie, supra at 14. In July 1898, the Joint Resolution was enacted—"the fruit of approximately seventy-five years of expanding American influence in Hawaii." Fuchs, supra at 36.

On August 12, 1898, the Republic of Hawaii ceded sovereignty and conveyed title to its public lands, including the Government and Crown Lands, to the United States. Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) ("Annexation Resolution"). In 1900, Congress passed the Organic Act, Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) ("Organic Act"), establishing Hawaii's territorial government. And, in 1959, Congress admitted Hawaii to the Union as the 50th state. Admission Act of 1959, Pub. L. No. 86–3, 73 Stat. 4 (1959) ("Admission Act").

Commencing with the Joint Resolution for Annexation, the United States has repeatedly recognized that, as a result of the above-recited history, it has a special relationship with the Hawaiian people and a trust obligation with respect to the public lands of Hawaii.[5]

The special or trust relationship between the Hawaiian people and the United States was most explicitly affirmed in the Hawaiian Homes Commission Act of 1920, Pub. L. No. 76–34, 42 Stat. 108 (1921).

In 1826 it was estimated that there were 142,650 full-blooded Hawaiians in the Hawaiian Islands. By 1919 their numbers had been reduced to 22,600. Historically, the Hawaiian's subsistence lifestyles required that they live near the ocean to fish and near fresh water streams to irrigate their staple food crop (taro) within their respective ahupua'a. Beginning in the early 1800's, more and more land was being made available to foreigners and was eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Hawaiians were forced off the lands that they had traditionally occupied. As a result, they moved into the urban areas, often lived in severely-overcrowded tenements and rapidly contracted diseases for which they had no immunities.

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[4] The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population in Hawaii at that time. See Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95, 103 & n.48 (1998) (citing Dan Nakaso, Anti-Annexation Petition Rings Clear, Honolulu Advertiser, Aug. 5, 1998, at 1).

[5] The Joint Resolution stated that "[t]he existing land laws of the United States relative to public lands shall not apply to such [public] land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition" and that revenues from the lands were to be "used solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes." Annexation Resolution at 750. Section 73 of the Organic Act of 1900 returned control of most of the lands to the territory, but it, too, required the revenues be devoted to "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation." Organic Act at 155 (§ 73).

By 1920, there were many who were concluding that the native people of Hawaii were a "dying race," and that if they were to be saved from extinction, they must have means of regaining their connection to the land, the 'aina.

In hearings on the matter, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised:

> One thing that impressed me * * * was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty. [H.R. Rep. No. 66–839, at 4 (1920).]

He explicitly analogized the relationship between the United States and native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[6]

Senator John H. Wise, a member of the Legislative Commission of the Territory of Hawaii, testified before the United States House of Representatives:

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes . . . 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.[7]

Prince Jonah Kuhio Kalaniana'ole ("Prince Kuhio"), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."[8] Secretary of Interior Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded that the Nation must provide similar remedies.[9]

The effort to "rehabilitate" this dying race by returning Native Hawaiians to the land led Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside 203,500 acres of public lands (former Crown and Government lands acquired by the United States upon Annexation) for homesteading by Native Hawaiians. Hawaiian Homes Commission Act, 1920, § 203, 42 Stat.

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[6] See H.R. Rep. No. 66–839, at 129–30 (statement of Secretary Lane) ("[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world").

[7] Id. At 3–4. Wise's testimony was quoted and adopted in the House Committee on the Territories' report to the full U.S. House of Representatives.

[8] 59 Cong. Rec. 7453 (1920) (statement of Prince Jonah Kuhio Kalanian'ole).

[9] H.R. Rep. 839, 66th Cong., 2d Sess. 5 (statement of Secretary of Interior Lane).

At 109. Congress compared the Act to "previous enactments granting Indians * * * special privileges in obtaining and using the public lands." H.R. Rep. No. 66–839, at 11 (1920).

In support of the Act, the House Committee on the Territories recognized that, prior to the Mahele, Hawaiians had a one-third interest in the land. The Committee reported that the Act was necessary to address the way Hawaiians has been short-changed in prior land distribution schemes. Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest in the unregistered land that reverted to the Crown before being taken by the Provisional Government and, subsequently, the Territorial Government:

> [T]hese lands, which we are now asking to be set aside for the rehabilitation of the Hawaiian race, in which a one-third interest of the common people had been recognized, but ignored in the division, and which reverted to the Crown, presumably in trust for the people, were taken over by the Republic of Hawaii. . . . By annexation these lands became a part of the public lands of the United States, and by the provisions of the organic act under the custody and control of the Territory of Hawai'i * * * We are not asking that what your are to do be in the nature of a largesse or as a grant, but as a matter of justice.

The Act provides that the lessee must be a native Hawaiian, who is entitled to a lease for a term of ninety-nine years, provided that the lessee occupy and use or cultivate the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the General Allotment acts affecting Indians, 25 U.S.C. §§ 331–334, 339, 342, 348, 349, 354, 381 (1998), the leases were intended to encourage rural homesteading so that Native Hawaiians would leave the urban areas and return to rural subsistence or commercial farming and ranching. In February, 1923, the Congress amended the Act to permit one-half acre residence lots and to provide for home construction loans. Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots. Office of State Planning, Office of the Governor, Pt. I, 1 Report on Federal Breaches of the Hawaiian Home Lands Trust, 4–6 (1992).

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. There was little income remaining for the development of infrastructure or the settlement of Hawaiians on the home lands. The lack of resources—combined with questionable transfers and exchanges of Hawaiian home lands, and a decades-long waiting list of those eligible to reside on the home lands—rendered the home lands program a tragically illusory promise for most native Hawaiians. *Id.* At 12. While the Act did not succeed in its purpose, its enactment has substantial importance, however, because it consists an express affirmation of the United States' trust responsibility to the Hawaiian people.

Hawaiian Admission Act

As a condition of statehood, the Hawaii Admission Act required the new State to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded to the State. The 1959 Compact between the United States and the People of Hawaii by which Hawaii was admitted into the Union expressly provides that:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, *shall be adopted* as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, *subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided,* That (1) * * * the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund *shall not be reduced or impaired* by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, *shall not be increased, except with the consent of the United States;* (2) that *any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required by State legislation,* but the *qualifications of lessees shall not be changed except with the consent of the United States;* and (3) that all proceeds and income from "available lands," as defined by said Act, *shall be used only in carrying out the provisions of said Act.*

Hawaii Admission Act, § 4, 73 Stat. At 5 (emphasis added).

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds form the sale or other disposition of any such lands and the income therefore, *shall be held by said State as a public trust* for the support of public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiian,* as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provisions of lands for public use. *Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States States.*

Id. § 5(f), 73 Stat. At 6 (emphasis added).

These were explicit delegations of Federal authority to be assumed by the new State. They were not discretionary. The language is not permissive. The United States did not absolve itself

from any further responsibility in the administration or amendment of the Hawaiian Homes Commission Act. Nor did the United States divest itself of any ongoing role in overseeing the use of ceded lands or the income or proceeds therefrom. Rather, as the Federal and State courts have repeatedly held, the United States retains the authority to bring an enforcement action against the State or Hawaii for breach of section 5(f) trust. *Han, et al.* v. *United States,* 45 F3d 333 (9th Cir. 1995); *Pele Defense Fund* v. Paty, 837 P.2d 1247 (1992).

Despite the overthrow and annexation of the Hawaiian Nation, Hawaiian culture has survived, and the Hawaiian people have a unique culture that continues today.

Love of the Land (aloha 'aina)—Native Hawaiians honored their bond with the land (aloha 'aina) by instituting one of the most sophisticated environmental regulatory systems on earth, the kapu system. For Hawaiians, the life of the land depended on the righteousness of the people.[10] This concept motivated three decades of effort by Hawaiian leaders to regain Kaho'olawe, an island with deep spiritual significance. Once a military bombing practice target, Kaho'olawe is now listed in the National Historic Register, and is the subject of a massive federal clean-up project.[11]

Subsistence—Ancient Hawaiians supplemented the produce of their farms and fishponds by fishing, hunting and gathering plants. These subsistence activities became increasingly more difficult to pursue as changing land ownership patters barred access to natural resources. Nonetheless, in predominantly Hawaiian rural areas such as Hana, Puna, and the island of Moloka'i, Native Hawaiians continue to feed their families as their ancestors did before them.[12] Hawaii law has always guaranteed subsistence gathering rights to the people so they may practice native customs and traditions.[13]

Taro Cultivation (Kalo)—In Hawaiian legend, the staple crop of kalo (taro) was revered as the older brother of the Hawaiian peo-

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[10] The State's motto reflects this concept: "Ua mau ea o ka 'aina i ka pono." (The life of the land is perpetuated in righteousness.) Haw. Const. Art. XV, § 5 (1978).

[11] Kaho'olawe Island: Restoring a Cultural Treasure. Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States 2 (March 31, 1993) ("This report calls upon the United States government to return to the people of Hawaii an important part of their history and culture, the island of Kaho'olawe. The island is a special place, a sanctuary, with a unique history and culture contained in its land, surrounding waters, ancient burial places, fishing shrines, and religious monuments"). Title X of the Fiscal Year 1994 Department of Defense Appropriations Act, Pub. L. No. 103–139, 107 Stat. 1418 (1994) was enacted on November 11, 1993, Section 10001(a) of Title X states that the island of Kaho'olawe is among Hawaii's historic lands and has a long, documented history of cultural and natural significance to the people of Hawaii. It authorized $400,000,000 to be spent for the clean-up of military ordnance from portions of the island. *Id.* See Haw. Rev. Stat. Chap. 6k (1993). The state of Kaho'olawe Island Reserve Commission holds the resources and waters of the island of Kaho'olawe in trust until such time as the State of Hawaii and the federal government recognize a sovereign Hawaiian entity. *Id.* At § 6K–9.

[12] See Davianna McGregor, et al., "Contemporary Subsistence Fishing Practices Around Kaho'olawe: Study Conducted for the NOAA National Marine Sanctuaries Program" (May 1997). See also Jon K. Matsuoka, et Al., Governor's Moloka'i Subsistence Task Force Report (1993); Andrew Lind, "An Island Community: Ecological Succession in Hawaii" 102–03 (1968 ed.). (observing, in 1938, that traditional and customary practices survived in rural "havens where the economy of life to which they are best adapted can survive."). Hawaiian homestead tracts provide such rural havens.

[13] Haw. Const. Art. XII, § 7 (1978). Hawaiian usage supersedes other sources of common law in Hawaii. Haw. Rev. Stat. § 1–1 (1993); *Branca* v. *Makuakane,* 13 Haw. 499, 505 (1901) ("The common law was not formally adopted until 1893 and then subject to precedents and Hawaiian national usage."). See also Haw. Rev. Stat. § 7–1 (1993); *Kalipi* v. *Hawaiian Trust Co.,* 656 P.2d 745 (Haw. 1982).

ple.[14] Taro cultivation was not only a means of sustenance, but also a sacred duty of care to an older sibling. As land tenure changed, however, the ancient, stream-irrigated taro paddies (lo'i) were lost to newer crops, encroaching development, and the diversion of rivers and streams.[15] In recent years, Hawaiians reclaimed and restored ancient taro fields, and formed a statewide association of native planters, 'Onipa'a Na Hui Kalo.

Extended Family ('Ohana)—In the earliest era of Hawaiian settlement, governance was a function of the family.[16] For Hawaiians, family included blood relatives, beloved friends (hoaloha) and informally adopted children (hanai).[17] Family genealogies were sacred, and passed down in the form of oral chants only to specially chosen children—when those children were barred from learning their language, many of these ancient genealogies were lost. Nevertheless, family traditions of respect for elders, mutual support for kin and the adoption of related children have continued over the past two centuries.

The 'ohana beliefs, customs, and practices predated the ali'i; coexisted under the rule of the ali'i; and have continued to be practiced, honored and transmitted to the present. The 'ohana continued to honor their 'aumakua (ancestral deities). Traditional kahuna la'au lapa'au (herbal healers) continue their healing practices using native Hawaiian plants and spiritual healing arts. Family burial caves and lava tubes continue to be cared for. The hula and chants continue to be taught, indistinctly private ways, through 'ohana lines.[18]

Today, there is an extensive and growing network of reclaimed family genealogies, one of which is formally maintained by the Office of Hawaiian Affairs (Operation 'Ohana). Huge Hawaiian family reunions are routinely held throughout the islands, in every week of the year. In honor of a cultural tradition that reveres the taro root as the older brother of the Hawaiian race, these modern activities are called "ho'i kou i ka mole," or "return to the tap-root."

Human Remains ('Iwi)—In Hawaiian culture, the remains of the deceased carried the mana (spiritual power) of the decedent. These remains were treated with great reverence, and fearful consequences were sure to befall any who desecrated them. The protection of the bones of their ancestors remains a solemn responsibility for modern day Hawaiians. The State of Hawaii has recognized the importance of protecting Hawaiian burial sites, and es-

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[14] Lilikala Kame'elehiwa, "Native Land and Foreign Desires: Pehea La E Pono Ali?" 23–33 (1992). Hawaiian legend traces the ancestry of Hawai'i islands and people to the sky god, Wakea, and the earth goddess, Papa. Their first-born child, Haloa naka, was stillborn and his small body, when buried, became the first taro root. Their second child Haloa, named for the first, was the first Hawaiian. 6 A. Fornander, Collection of Hawaiian Antiquities and Folklore 360 (1920); David Malo, Hawaiian Antiquities 244 (1951).

[15] See, e.g., *Reppun* v. *Board of Water Supply,* 656 P.2d 57 (Haw. 1982) (in this case, taro growers prevailed against water diversions that would have adversely affected their crops), cert. denied, 471 U.S. 1040 (1985).

[16] See generally, E.S. Craighill Handy and Mary Kawena Pukui, "The Polynesian Family System in Ka'u" (1952); 1 Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, "Nana I Ke Kumu" 49–50 (6th pag. 1983) (explaining Hawaiian concepts of adoption and fostering).

[17] 'Ohana is a concept that has long been recognized by Hawaii courts. See, e.g., *Leong* v. *Takasaki,* 520 P.2d 758, 766 (Haw. 1976); *Estate of Emanuel S. Cunha,* 414 P.2d 925, 928–129 (Haw. 1966); *Estate of Farrington,* 42 Haw. 640, 650–651 (1958); *O'Brien* v. *Walker,* 35 Haw. 104, 117–36 (1939), aff'd. 115 F.2d 956 (9th Cir. 1940), cert. denied, 312 U.S. 707 (1941); *Estate of Kamauoha,* 26 Haw. 439, 448 (1922), *In re: Estate of Nakuapa,* 3 Haw. 342, 342–43 (1872).

[18] Davianna Pomaika'i McGregor, An Introduction to "Hoa'aina" and Their Rights, 30 Hawaiian Journal of History at 9 (1996).

tablished a Hawaiian Burial Council to ensure the ʻiwi of Hawaiian ancestors are tread with proper respect.[19]

Sacred Places (Wahi Kapu)—Ancient Hawaiians also recognized certain places as sacred, and took extraordinary measures to prevent their desecration. A modern day example of this concept is found at Mauna ʻAla on the island of Oʻahu, where the remains of Hawaii's aliʻi (monarchs) are interred. This royal mausoleum is cared for by a kahu (guardian), who is the lineal descendant of the family charged since antiquity with protecting the bones of this line of chiefs.

Hawaiian Language (ʻOlelo Hawaii)—"I ka ʻolelo no ke ola; i ka ʻolelo no ka make. With language tests life, with language rests death."[20] The Hawaiian language was banned from the schools in 1896.[21]

During the republic and Territory, Hawaiian was strictly forbidden anywhere within schoolyards or buildings, and physical punishment for using it could be harsh. Teachers who were native speakers of Hawaiian (many were in the first three decades of the Territory) were threatened with dismissal for using Hawaiian in school. Some were even a bit leery of using Hawaiian place names in class. Teachers were sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.[22]

The language was kept alive in rural Hawaiian families and in the mele and oli (songs and chants) of native speakers.[23] In 1978, the Hawaii State Constitution was finally amended to make Hawaiian one of the two official languages of the state.[24] In the two decades since, Hawaiian language has become a required offering in the state Department of Education curriculum, and private nonprofit Hawaiian language schools have been established in all major islands, with the assistance of federal funds.[25] In 1997–1998, 1,351 students were enrolled in fourteen Hawaiian language immersion programs throughout the State, from pre-school through

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[19] Haw. Rev. Stat. § 6E–43.5 (1993). This provision requires consultation with appropriate Hawaiian organizations, like Hui Malama I Na Kupuna O Hawaii Nei. See http://www.pixi.com/~huimalam.

[20] Kaʻu: University of Hawaii Hawaiian Studies Task Force Report, 23 (Dec. 1986). These anti-Hawaiian language efforts, which were falsely cast in terms of assimilation and societal unity. Nevertheless, the core issues of sovereignty and self-determination remained—for, "to destroy the language of a group is to destroy its culture." Adeno Addis, Individualism, Communitarianism, and the Rights of Ethnic Minorities, 66 Notre Dame L. Rev. 1219, 1270 (1991).

[21] 1 Revised Laws of Hawaii § 2, at 156 (1905). As a direct result of this law, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902. Albert J. Schutz, "The Voices of Eden: A History of Hawaiian Language Studies" 352 (1994) [hereinafter Schutz]. Hawaiian language newspapers, which were the primary medium for communication in Hawaii at that time, declined from a total of twelve (nine secular and three religious) in 1910 to one religious newspaper in 1948. Id. At 362–63.

[22] Larry K. Kimura and William Wilson, 1 Native Hawaiians Study Commission Minority Report, 196 (U.S. Dept. of Interior 1983). See also Davianna McGregor-Alegado, Hawaiians: Organizing in the 1970s. 7 Amerasia Journal 29, 33 (1980) ("Through a systematic process of assimilation in the schools, especially restricting the use of the native language, Hawaiians were taught to be ashame of their cultural heritage and feel inferior to the haole American elite in Hawaii.").

[23] "[T]he renewal of interest in the Hawaiian language and culture in the 1970s did not relight an extinguished flame, but fanned and fed the embers(.)" Schutz, supra note 23, at 361.

[24] Haw. Const. Art. XV, sec. 4 (1978). See also Haw. Const. Art. X, sec. 4 (1978) (requiring the State to "promote the study of Hawaiian culture, history and language * * * [through] a Hawaiian education program * * * in the public schools.") Restrictions on the use of Hawaiian language in public schools were not actually lifted until 1986. See Haw. Rev. Stat. § 298–2(b) (1993).

[25] Native Hawaiian Education Act, Pub. L. No. 103–382, § 101, 108 Stat. 3518 (Oct. 20, 1994).

high school.[26] Hawaiian remains the first language of the native community located on the isolated island of Ni'ihau, which was spared the effects of the 1896 ban.[27]

Conflict Resolution (Ho 'oponopono)[28]—This ancient Hawaiian tradition of problem solving resembles the Western practice of mediation, but with the addition of a deeply spiritual component. It was and is traditionally practiced within families, and used to resolve disputes, cure illnesses, and reestablish connections between family members and their akua (gods). Today, trained practitioners are formally teaching the ho'oponopono methods, and there has been a resurgence of its use. The state courts have implemented a formal ho 'oponopono program that is designed to help families to resolve their problems outside the courtroom.

Civic Association—Prior to Annexation, Native Hawaiians were active participants in the political life of the Islands. Politicla associations were organized to protest against the Bayonet Constitution of 1887 and subsequent annexation efforts.[29] Hawaiian Civic Clubs were established at the turn of the century to campaign against the destitute and unsanitary living conditions of Hawaiians in the city of Honolulu and its outskirts.[30] These associations still exist, and count among their membership many of Hawaii's most distinguished native leaders. In addition, Hawaiians living on Hawaiian Home Lands have, from the program's beginning in 1921, established homestead associations.

Hawaiian Healing (La'au Lapa'au)—Quietly practiced over the past two centuries following European contact, Hawaiian medicine has always been an important alternative to Western medical care. Today, it is credible form of treatment for many.[31] Practitioners use Hawaiian medicinal plants (la'au) massage (lomilomi), and spiritual counseling to heal. Hawaiian health centers, established with Federal financial support[32] now incorporate traditional Hawaiian healing methods into their regiments of care.

Hula Academies (Halau Hula)—Once banned by missionaries as sacrilege, the ancient art of hula[33] accompanied by chanting in the

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[26] Office of Hawaiian Affairs, Native Hawaiian Data Book 244–45 (1998) (Table/Figure 4.22). Projected enrollment for the 2005–2006 school year is 3,397. Id. Dramatic increases in the enrollment of Hawaiians at the University of Hawaii took place shortly after adoption of the 1978 Constitutional Amendments and again after statutory restrictions were lifted in 1986 on use of the Hawaiian language in schools. Id. at 216–17 (Table/Figure 4.7). According to the 1990 Census, Hawaiian is spoken in 8,872 households. Id. at 240–41 (Table/Figure 4.20).

[27] Karen Silva, Hawaiian Chant: Dynamic Cultural Link or Atrophied Relic?, 98 Journal of the Polynesian Society 85, 86–87 (1989) cited in Schutz, supra note 27, at 357.

[28] See generally Victoria Shook, Ho'oponopono, "Contemporary Uses of a Hawaiian Problem-Solving Process" (1985).

[29] Hui Kalai'aina, a Hawaiian political organization, lobbied for the replacement of the 1887 Bayonet Constitution, and led mass, peaceful protests that stalled negotiations for a new Treaty of Reciprocity, Kuykendall, supra note 5, vol. III, at 448; Noenoe K. Silva, Kanaka Maoli Resistance to Annexation, 1 'O'iwi: A Native Hawaiian Journal at 45 (1998).

[30] Davianna Pomaika'i McGregor, 'Aina Ho 'opulapula: Hawaiian Homesteading, 24 The Hawaiian Journal of History 1, 4–5 (1990).

[31] Isabella Aiona Abbott, "La'au Hawaii: Traditional Uses of Hawaiian Plants" 135 (1992); Nanette L. Kapulani Mossman Judd, La'au Lapa'au: Herbal healing among contemporary Hawaiian healers. 5 Pacific Health Dialog Journal of Community Mental Health and Clinical Medicine for the Pacific: The Health of Native Hawaiians 239–45 (1998).

[32] These traditional methods of healing are recognized and financed through appropriations under the Native Hawaiian Healthcare Act of 1988, Pub. L. No. 100–579, 102 Stat. 2916 (now codified at 42 U.S.C. §§ 11701, et seq.).

[33] "[A] few chanters, dancers, and teachers among the po'e hula [hula people] kept alive the more traditional forms, and with the flowering of the "Hawaiian Renaissance" in the 1970's their knowledge and dedication became a foundation for revitalizing older forms." Dorothy B. Barrere, Mary Kawena Pukui & Marion Kelly, "Hula Historical Perspectives" 1–2 (1980). Hula

Continued

native tongue, flourishes today. Halau exist throughout the islands, and hula and chants are now regularly incorporated into public ceremonies.

Voyaging/Celestial Navigation—Ancient Hawaiians were skilled navigators, finding their way thousands of miles across the open Pacific using only the stars and the currents as guides. In the 1970's, a group of Hawaiians formed the Polynesian Voyaging Society. The Society researched Polynesian canoe-making and navigating traditions, and commissioned and construction of an historically authentic double-hulled voyaging canoe, the Hokule'a ("Star of Gladness"). A Native Hawaiian crew was trained to sail the canoe, and a Native Hawaiian navigator was chosen to learn the art of celestial navigation from one of its few remaining Polynesian practitioners. The canoe's first voyage to Tahiti in 1976 was tremendously successful. It confirmed the sophisticated navigational skills of ancient Polynesians and also instilled a sense of pride in Hawaiian culture.[34] Other canoes have been built, and more voyages made since (the Hokule'a is currently sailing to the tiny island of Rapa Nui—Easter Island).[35] The art of voyaging is alive and well in modern Hawaii, a testament to the skill and courage of the ancient navigators who first settled these islands.

Hawaiians today live in a markedly different world from the one that shaped their ancient practices. Yet they struggle to perpetuate a culture passed down to them through two millennia.

FEDERAL ACTIONS WITHIN THE CONTEXT OF FEDERAL INDIAN POLICY

The two significant actions of the United States as they relate to the native people of Hawaii must be understood in the context of the Federal policy towards America's other indigenous, native people at the time of those actions.

In 1921, when the Hawaiian Homes Commission Act was enacted into law, the prevailing Federal policy was premised upon the objective of breaking up Indian reservations and allotting lands to individual Indians. Those reservation lands remaining after the allotment of lands to individual Indians were opened up to settlement by non-Indians, and significant incentives were authorized to make the settlement of former reservation lands attractive to non-Indian settlers. Indians were not to be declared citizens of the United States until 1924, and it was typical that a twenty-year restraint on the alienation of allotted lands was imposed. This restraint prevented the lands from being subject to taxation by the states, but the restraint on alienation could be lifted if an individual Indian was deemed to have become "civilized." However, once the restraint on alienation was lifted and individual Indian lands became subject to taxation, Indians who did not have the wherewithall to pay the taxes on the land, found their lands seized and put up for sale. This allotment era of Federal policy was responsible for the alienation of nearly half of all Indian lands nationwide—hundreds of

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was recently designated the state dance. Act 83, Relating To Hula (June 22, 1999) (to be codified at Haw. Rev. Stat. Chapter 5).

[34] Ben Finney, "Voyage of Rediscovery: A Cultural Odyssey through Polynesia" (1995). In 1995, the Hokule'a and Hawaiiloa sailed to the Marquesas Islands. PBS recently broadcast an hour-long documentary of this voyage entitled Wayfinders—A Pacific Odyssey. See http://pbs.org/wayfinders.

[35] Hokule'a left Hawaii on June 15, 1999 for Rapa Nui. See http://www.leahi.kcc.hawaii.edu/org/pvs for reports on the voyage's progress and educational programs and materials.

millions of acres of lands were no longer in native ownership, and hundreds of thousands of Indian people were rendered not only landless but homeless.

The primary objective of the allotment of lands to individual Indians was to "civilize" the native people. The fact that the United States thought to impose a similar scheme on the native people of Hawaii in an effort to "rehabilitate a dying race" is thus readily understandable in the context of the prevailing Federal Indian policy in 1921.

In 1959, when the State of Hawaii was admitted into the Union, the Federal policy toward the native peoples of America was designated to divest the Federal government of its responsibilities for the indigenous people and to delegate those responsibilities to the several states. A prime example of this Federal policy was the enactment of Public Law 83–280, an Act which vested criminal jurisdiction and certain aspects of civil jurisdiction over Indian lands to certain states. In similar fashion, the United States transformed most of its responsibilities related to the administration of the Hawaiian Homes Commission Act to the new State of Hawaii, and in addition, imposed a public trust upon the lands that were ceded back to the State for five purposes, one of which was the betterment of conditions of Native Hawaiians.

CONSTITUTIONAL SOURCE OF CONGRESSIONAL AUTHORITY

The United States Supreme Court has so often addressed the scope of Congress' constitutional authority to address the conditions of the native people that it is now well-established.[36] Although the authority has been characterized as "llenary," *Morton* v. *Mancari,* 427 U.S. 535 (1974), its exercise is subject to judicial review. *Delaware Tribal Bus. Comm.* v. *Weeks,* 430 U.S. 73 (1977); *United States* v. *Sioux Nation,* 448 U.S. 371 (1980).[37] It has been held to encompass not only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired. *United States* v. *Sandoval,* 231 U.S. 28 (1913).

The ensuing course of dealings with the indigenous people has varied from group to group, and thus, the only general principles that apply to relations with the first inhabitants of this nation is that they were dispossessed of their lands, often but not always relocated to other lands set aside for their benefit, and that their sub-

[36] "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *United States* v. *Kagama,* 118 U.S. 375 (1886).

[37] The rulings of this Court make clear that neither the conferring of citizenship upon the native people, the allotment of their lands, the lifting of restrictions on alienation of native land, the dissolution of a tribe, the emancipation of individual native people, the fact that a group of natives may be only a remnant of a tribe, the lack of continuous Federal supervision over the Indians, nor the separation of individual Indians from their tribes would divest the Congress of its constitutional authority to address the conditions of the native people. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902); *United States* v. *Celestine,* 215 U.S. 278 (1909); *Tiger* v. *Western Inv. Co.,* 221 U.S. 286 (1911); *United States* v. *Nice,* 241 U.S. 591 (1916); *Chippewa Indians* v. *United States,* 307 U.S. 1 (1939); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85–90 (1977); *United States* v. *John* 437 U.S. 634 (1978).

sistence rights to hunt, fish, and gather have been recognized under treaties and laws, but not always protected nor preserved.

Some commentators have suggested that no other group of people in America has been singled out so frequently for special treatment, unique legislation, and distinct expressions of Federal policy. Although the relationship between the United States and its native people is not a history that can be said to have followed a fixed course, it is undeniably a history that reveals the special status of the indigenous people of this land. American laws recognize that the native people do not trace their lineage to common ancestors, and from time to time, our laws have in fact discouraged the indigenous people from organizing themselves as "tribes." But this much is true—that for the most part, at any particular time in our history, the laws of the United States have attempted to treat the native people, regardless of their genealogical origins and their political organization, in a consistent manner.

In one legal action, a petitioner asserted that the scope of constitutional authority vested in the Congress is constrained by the manner in which the native people organize themselves. The petitioner contended that if the native people are not organized as tribes, then the Congress lacks the authority to enact laws and the President is without authority to establish policies affecting the native people of the United Stats. However, the original language proposed for inclusion in the constitution made no reference to "tribes" but instead proposed that the Congress be vested with the authority "to regulate affairs with the Indians as well within as without the limits of the United States". [The Records of the Federal Convention of 1787, Volume II, Journal Entry of August 18, 1787, p. 321.] A further refinement suggested that the language read, "and with Indians, within the Limits of any State, not 'subject to the laws thereof'" [The Records of the Federal Convention of 1787, Volume II, Journal Entry of August 22, 1787, p. 367.]

The exchanges of correspondence between James Monroe and James Madison concerning the construction of what was to become Article I, Section 8, Clause 3 of the Constitution make no reference to Indian tribes, but they do discuss Indians.[38] Nor is the term "Indian tribe" found in any dictionaries of the late eighteenth century, although the terms "aborigines" and "tribe" are defined.[39]

Whether the reference was to "aborigines" or to "Indians," the Framers of the Constitution did not import a meaning to those terms as a limitation upon the authority of the Congress, but as descriptions of the native people who occupied and possessed the lands that were late to become the United States—whether those

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[38] In his letter to James Monroe of November 27, 1784, James Madison observes, "The federal articles give Congs. The exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority, of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws. In the case of Indians of this description the only restraint on Congress is imposed by the Legislative authority of the State." The Founders' Constitution, Volume Two, Preamble through Article 1, Section 8, Clause 4, p. 529, James Madison to James Monroe, 27 Nov. 1784, Papers 8:156–57; See also, James Monroe to James Madison, 15 Nov. 1784, Madison Papers 8:140.

[39] The term "aborigines" is defined as "the earliest inhabitants of a country, those of whom no original is to be traced," and the term "tribe" is defined as "a distinct body of the people as divided by family or fortune, or any other characteristic." [A Dictionary of the English Language (Samuel Johnson ed., 1755).] The annotations accompanying the term "Indian" in the 1901 Oxford dictionary indicates the use of the term as far back as 1553. [Oxford English Dictionary (James A. H. Murray ed., 1901)]

lands lay within the boundaries of the original thirteen colonies, or any subsequently acquired territories. This more logical construction is consistent with more than two hundred Federal statutes which establish that the aboriginal inhabitants of America are a class of people known as "Native Americans" and that this class includes three groups—American Indians, Alaska Natives, and Native Hawaiians.

The unique native peoples of Alaska have been recognized as "Indian" "Tribes" for four hundred years. The Founders' understanding of the "Eskimaux" as Indian Tribes, and Congress' recognition of its power over Alaska Natives even since the passage of the Fourteenth Amendment and the acquisition of the Alaskan territory, help illuminate Congress' power over, and responsibility for, all Native American peoples.

The treatment of Alaskan Eskimos is particularly instructive because the Eskimo peoples are linguistically, culturally, and ancestrally distinct from other American "Indians." Many modern scholars do not use the word "Indian" to describe Eskimos or the word "tribe" to describe their nomadic family groups and villages. The Framers, however, recognized no such technical distinctions. In the common understanding of the time, Eskimos, like Hawaiian Natives, were aboriginal peoples; they were therefore "Indians." Their separate communities of kind and kin were "Tribes." Congress' special power over these aboriginal peoples is beyond serious challenge.

During the Founding Era, and during the Constitutional Convention, the terms "Indian" and "Tribe" were used to encompass the tremendous diversity of aboriginal peoples of the New World and the wide range of their social and political organizations. The Founding generation knew and dealt with Indian Tribes living in small, familial clans and in large, confederated empires. Native Alaska villages and Native Hawaiians residing in their aboriginal lands (i.e., the small islands that comprise the State of Hawaii) are "Indian Tribes" as that phrase was used by the Founders. The Framers drafted the Constitution not to limit Congress' power over Indians, but to make clear the supremacy of Congress' power over Indian affairs. The Congress has retained the power to promote the welfare of all native American peoples, and to foster the ever-evolving means and methods of native American self-governance.

This history is accurately reflected in two centuries of U.S. Supreme Court jurisprudence. Beginning with Chief Justice Marshall, the Supreme Court has recognized the power of the United States to provide for the welfare, and to promote the self-governance, of Indian peoples. This recognition of the right of the indigenous, native people of the United States to self-determination and self-governance is part of the structure of America's complex multi-sovereign system of governance.

In the language and understanding of the Founders, "tribes" or "peoples" did not lose their identity as such when conquered or ruled by kings. Like other Native American peoples, Hawaiian Natives lived for thousands of years as "tribes," then as confederations of tribes, now as conquered tribes. All aboriginal peoples of the New World were "Indians." That is what it meant to be an "Indian." The Founders knew that Columbus had not landed in India or the Indies; Columbus's navigational error had been corrected,

but his malaprop had survived. And so, in the words of one of the earliest English books about America, the native peoples were "Indians," for the simple reason that "so caule wee all nations of the new founde lands."[40]

The earliest explorers of the New World encountered an extraordinary diversity of aboriginal peoples—from the elaborate Aztec and Inca civilizations of the South to the nomadic "Exquimaux" of the North. These early experiences and the contemporary fascination with these diverse cultures informed the concept of "Indians" in the colonial era.

There was no understanding in the founding generation that Indians constituted a distinct or separate race. Indians were often assumed by the European settlers to be peoples like themselves.

> Before the development of modern dating methods that established beyond doubt the great antiquity of early man in America, it was believed that the Indians were offshoots of known civilizations of the Old World. Some scholars argued that they came from Egypt, others that they had broken away from the Chinese, and still others that they were descendants of Phoenician or Greek seamen * * * Another belief, more legend than theory, held that various light-skinned tribes possessed the blood of Welshmen who had come to America in the remote past * * *[41]

Others theorized the Indians were the "lost tribes" of Israel.[42]

In his popular Notes on the State of Virginia, Thomas Jefferson accepted the plausibility of the popular notion that the Indians had migrated to America from Europe via "the imperfect navigation of ancient times."[43] Jefferson noted, however, that Cook's voyage through the Bering Strait suggested that all the "Indians of America" except the "Eskimaux" migrated from Asia. Jefferson theorized that the Eskimos had come to America via Greenland from "the northern parts of the old continent," i.e., Northern Europe.[44]

Modern scholars might be "puzzled whether they [Eskimos] were Indians, or a separate and somewhat mysteriously distinct people on earth * * *"[45] Other might question whether the native people of Hawaii are "Indians." Such distinctions would themselves have puzzled the Founding generation. The "Indians" were many peoples, with distinct languages, cultures and socio-political organizations. They had diverse origins, perhaps Asia, perhaps Europe, per-

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[40] Gonzalo Fernandez de Oviego Y Valdez, "De la natural hystoria de las Indias" (1526), trans. by R. Eden (1955), in E. Arber, ed., "The First Three English Books on America" (Birmingham, Eng., 1885) (emphasis added).

[41] A.M. Joseph, Jr., "The Indian Heritage of America" at 40 (rev. ed., 1991).

[42] Id. At 40; Letter, Jefferson to Adams, June 11, 1812 (discussing a popular book arguing "all the Indians of America to be descended from the Jews * * * and that they all spoke Hebrew"), in Jefferson, Writings (Library of America, 1984), 1261; Bernal Diaz, "The Conquest of New Spain" at 26 (1568) (J.M. Cohen, tr., 1963) (objects at Indian site attributed "to the Jews who were exiled by Titus and Vespasian and sent overseas").

[43] Jefferson, Notes on the State of Virginia (1787), in Jefferson, Writings, at 226. Jefferson's Notes—which had circulated among several of the Founders for years before the Constitutional Convention—were written in 1781, published in February 1787 and appeared in newspapers during the Convention. Barlow to Jefferson, June 15, 1787, in Papers of Thomas Jefferson (Boyd, ed.), 11:473 ("Your Notes on Virginia are getting into the Gazetts in different States"); see also, e.g., id. 8:147, 9:38, 517, 12:136 (Madison's copy); id. At 10:464, 15:11 (Rutledge's comments on); id. At 8:160, 164 (Adams comments on); id. At 8:147, 229, 245 (Monroe's copy); id. At 21:392–93 (citations re circulation of Notes).

[44] Jefferson, Notes, supra, at 226.

[45] Josephy, supra, at 57; see also Oxford English Dictionary (1 sted.) ("OED"), "Indian" ("The Eskimos * * * Are usually excluded from the term").

haps the lands of the Bible. But from wherever they came, and whatever their distinct cultures and governments, they were all "Indians," for they were aboriginal inhabitants of the New World. The Founding generation had no difficulty thinking of Eskimos as "Indians." They would have had no more difficulty treating as "Indians" native peoples whose origins lay a thousand years ago in the South Pacific. As far as the Founders knew, all the "aboriginal inhabitants" of the New World came from the South Pacific via the "imperfect navigation of ancient times."

The Founding generation used "tribes" to denote peoples of like kind or kin. As used in the Constitution, the word "tribe" does not refer to some specific type of government or social organization. All Native American peoples were "tribes," whether they lived in villages or spread out in vast federations or empires. "Tribe" and "nation" were used to refer not to governments, but to groups of people recognizing a common membership or identity as such. Application of the biblical concept of "tribes" to the "Indians" reflected the understanding that the natives of the New World were not one people, but many "peoples," "nations," or "tribes"—terms used interchangeably well into the Nineteenth Century.[46]

Eskimos lived in small clans or villages that some scholars distinguish from "tribes." The Founding era knew no such technical usage. Notwithstanding the absence of clear government, Eskimo peoples were called "Tribes" and "Nations."[47] More generally, peoples of every sort were "tribes." In Gibbon's already popular Decline and Fall of the Roman Empire (1776), the early inhabitants of Britain were said to live in "Tribes."[48] The early Greeks and Romans were "tribes." Welshmen belonged to Tribes.[49]

For the Founding generation, "tribes" came into the language from the most widely read account of tribal history—the biblical story of the Twelve Tribes of Israel.[50] The Bible gives the history of the Tribes from the birth of the sons of Israel, through the growth of the families to immense "tribes" numbering in the tens of thousands. The Bible follows the tribes into captivity and exodus and into Canaan, where the "tribes" lived in a unified Kingdom under Kings David and Solomon.[51] Even under the reign of Kings, the peoples remained "tribes." When King Solomon dedicated the temple in Jerusalem, he called together the leaders of the "tribes":

> Solomon assembled the elders of Israel, and all the heads of the tribes, the chief of the fathers of the children of Israel, unto King Solomon in Jerusalem, that they

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[46] Robert F. Berkhofer, Jr., "The White Man's Indian" at 16 (1979).

[47] Alexander Fisher, "A Journal of a Voyage of Discovery" (1821) ("all the Esquimaux tribes") (quoted in Oswalt, supra, at 74); "The Private Journal of Captain G.F. Lyon", (1824) (an Eskimo "tribe") (quoted in Oswalt, supra, at 179); George Lyon, "A Brief Narrative of an Unsuccessful Attempt to Reach Repulse Bay" (1825); "Narrative of the Second Arctic Expedition Made by Charles F. Hall" (Nourse, ed., 1879), 63 (describing "tribe" of "Eskimo"); John Murdoch, "Review of The Eskimo Tribes," American Anthropologist, 1:125–133 (1888); Heinrich Rink, "Tales and Traditions of the Eskimo" (1875) 1–5 (describing small and large divisions of Eskimos as "tribes").

[48] Vol. 1, p. 33 (describing the "tribes of Britons" who "took up arms with savage fierceness" and the "love of freedom without the spirit of union.")

[49] OED, "Tribe," def. 2.a–d.

[50] OED, "Tribe" (application of the word "to the tribes of Israel * * * from its biblical use, was the earliest use in English").

[51] Genesis 49:1–28 (Jacob predicts the fate of the twelve tribes); Numbers 1 (God instructs Moses to call heads of each tribe); 2 Samuel 5:1–3 (leaders of tribes form league under King David); 1 Chronicles 11:1–3 (same); Psalm 122 (David expresses joy for the house of God, where tribes give thanks).

might bring up the ark of the covenant of the Lord out of the city of David, which is Zion.[52]

When the Kingdom ended, it divided by tribe. The tribes of Benjamin and Judah fought the other tribes that revolted and were "lost"[53] Throughout all this history, through the unification and monarchical period, through the revolt and diaspora, the Bible taught that the people of Israel remained "tribes," led by their "chief fathers.,"[54] In the New Testament, all the peoples of the earth were "tribes."[55] In the founding generation, "tribes" in the New World, like "tribes" in the Bible, referred not to a form of social organization or government, but to "peoples" who identified themselves by kin, tradition, or faith.

The Founders had seen analogies to the complex tribal history of the Bible. The Founders knew the native peoples evolved, united and divided in ever shifting forms of government. The native peoples had formed "powerful confederac[ies]," tribes united under common chiefs, and federations, of tribes joined with other federations.[56] The colonies and the States under the Articles of Confederation had repeatedly dealt with vast federations of tribes, including the "Six Nations" in the north and the "five civilized tribes" in the south.[57] The Indian peoples were "tribes" not because they formed any particular organization, but because they recognized themselves as distinct peoples, with cultures, languages and societies separate from each other and from the European invaders.

By the Founding era, "Tribe" had expanded from groups of people to the natural division of plants and animals. Milton asked in "Paradise Lost," "Oh flours * * * who now shall reare ye to the Sun, or ranke Your Tribes?" (xi, 279). John Adams wrote, "there is, from the highest Species of animals upon this Globe which is generally thought to be Man, a regular and uniform Subordination of one Tribe to another down to the apparently insignificant animalcules in pepper Water."[58] All creation came in tribes. Mankind was organized in tribes, the Animal Kingdom was organized in "tribes," the "Vegetable Kingdom" was organized in "Tribes."[59] To every kind its tribe.

The Founding generation knew Indian peoples who lived in small, leaderless bands; they also knew Indian peoples organized in complex federations and empires. The Europeans and the American colonists understood that the aboriginal peoples warred with and conquered each other, made agreements and alliances, formed confederations and even kingdoms and empires. Through all this complex and still evolving history, the Indian "peoples" were called "Nations" and "Tribes." The Founding generation would have had

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[52] 1 Kings 8:1 ("King James translation" (1611–1769)); 1 Kings 11:12–13.

[53] See 1 Kings 12; 2 Chronicles 10–11, 36; 2 Kings 17, 25.

[54] Ezra 1:5.

[55] Matthew 24:30 (Christ prophesizes that, at the end of time "then shall all the tribes of the earth mourn, and they shall see the Son of man coming").

[56] Jefferson, Notes on the State of Virginia, supra, at 221.

[57] See, e.g., Treaty with the Six Nations, Oct. 22, 1784 (treaty with the many tribes of Senecas, Mohawks, Onondagas, Cayugas, Oneida and Tuscarora), in C. J. Kappler, ed., "Indian Affairs: Laws and Treaties," 2:5–6; Treaty of Fort McIntosh, Jan. 21, 1785 (treaty with the Wiandot, Delaware, Chippewa, and Ottawa "and all their tribes"), in id. At 2:6–8, Treaty of Hopewell, Nov. 28, 1785 (treaty with all the "tribes" of the Cherokee), in id. At 2:8–11.

[58] John Adams, July 1756 (emphasis added), in L.H. Butterfield, et al., eds., "Diary and Autobiography of John Adams" (Cambridge, Mass., 1961), I:39.

[59] Id.; see also OED, "Tribe," 5.a; Cook, supra, at ch. II, p. 300 (In the west side of America, "[t]he insect tribe seems to be more numerous").

no difficulty conceiving of Indian Tribes who originated in Polynesia, and lived in a "Kingdom" under a "King."

As Jefferson's Notes on the State of Virginia and other contemporary works show, the division of the world into "European settlers" and "Indians" was not essentially racial. The Indians were not a race, they were many peoples, thought to share diverse ancestry with peoples all over the world. The distinction between European and Native American peoples was political. The European settlers (who arrived with Royal charters) recognized the "aboriginal peoples" as separate nations—separate sovereigns with whom they would have to deal as one nation to another. Before and after the Constitution, the new settlers treated the Indian peoples as separate nations, with whom they made war, peace and treaties. The treatment of the aboriginal peoples under the Constitution was systematically and structurally distinct from the inhumane and unendurable treatment accorded to "slaves." This distinctive nation-to-nation relationship survived the settlement of the West, the Civil War Amendments, and two hundred years of Congressional action and judicial construction.

The Articles of Confederation gave the Continental Congress power over relations with the Indians only so long as Congress' dealings with Indians within a State did not "infringe" that State's legislative power. This created constant friction over where the State's power ended and Congress' power began. The sole stated purpose of Indian terms of the new Constitution was to eliminate any uncertainty as to Congress' supremacy. The Framers intended to grant Congress broad, supreme authority to regulate Indian affairs. The two references to "Indians" in the Constitution generated virtually no debate at any time in the Constitutional Convention. That relations with the Indians should be one of the federal powers appears to have been universally accepted. The Framers sought only to make clear that Congress' power here was supreme.

The Articles had given the Continental Congress "sole and exclusive right and power" of regulating relations with Indians who were "not members of any of the states, provided that the legislative right of state within its own limits be not infringed or violated." Articles of Confederation, Art. X, March 1, 1778 (emphasis added). As Madison explained, this language created two major problems. First, no one knew when or whether Indians were "members of states"; second, the grant to Congress of "sole and exclusive power," so long as Congress did not "intrud[e] on the internal right" of States was "utterly incomprehensible." The provision had been a source of "frequent perplexity and contention in the federal councils."[60] Capitalizing on the uncertainty, several states (Georgia, New York and North Carolina) had infringed Congress" power by making their own arrangements with local Indians. As a result, during the Constitutional Convention and Ratification, Georgia was in armed conflict, and on the verge of war, with the powerful Creek Nation.

The only debate on the issue in the Convention focused on the need for federal supremacy over the states. Madison objected early on to the "New Jersey Plan" on the ground that it failed to bar

[60] James Madison, The Federalist 42, in XIV Documentary History of the Ratification of the Constitution (J. Kaminski, ed., 1983), XV:431.

states from encroaching on Congress' power over "transactions with the Indians."[61] In August, Madison proposed that Congress be given the power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."[62] Madison's proposal was submitted to the Committee on Detail without discussion. The Committee on Detail recommended that power over Indians be dealt with in the Commerce clause, which would provide Congress with power over commerce "with the Indians, within the limits of any State, not subject to the laws thereof." The proposal provoked no debate.[63] On August 31st, the Convention referred various "parts of the Constitution" (including the Commerce Clause) to a "Committee of eleven," including Madison.[64] Without recorded discussion, the Committee recommended that the language be simplified to commerce "with the Indian tribes."[65] The Convention accepted the recommendation without debate or dissent.[66]

There is no support for the notion that the reference to "Indian tribes" was intended to narrow Congress' authority over Indian affairs. As noted above, the debate in the Convention focused solely on making clear the supremacy of Congress' power. During the ratification debates, the new Constitution was defended on the ground that it gave Congress power over "Indian affairs" and "trade with the Indians."[67] In the only extended discussion of the issue during Ratification, Madison used the phrases "commerce with the Indian tribes" and "trade with Indians" interchangeably; Madison explained that the purpose of the new provision was to eliminate the limitation on Congress' power over trade with the Indians living within the States.[68] The notion that the reference to "Tribes" was a limit on Congress' ability to deal with the native peoples is without support and is contrary to the only expressions of the Framers' original intent. The Constitution gave Congress power over the Indian peoples, however and wherever it found them.

The First Federal Congress treated the Constitution as granting broad power to regulate "trade and intercourse" with "Indians," "Indian tribes," "nations of Indians," and "Indian country."[69] Congress understood its power to "operate immediately on the persons

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[61] "Notes of James Madison," June 19, 1787, in The Records of the Federal Convention of 1787, at 3:316 (Max Farrand, rev. ed. 1966) [hereafter, "Federal Convention"] ("By the federal articles, transactions with the Indians appertain to Congress. Yet in several instances, the States have entered into treaties & wars with them"); see also, id. At 325–26.

[62] 2 Federal Convention, at 321, 324; see also id. At 143 (Rutledge noted that "Indian affairs" should be added to Congress' powers).

[63] Id. at 367. Similarly, since Indians did not pay tax, the proposal to exclude "Indians not taxed" from the apportionment clause was accepted without discussion.

[64] Id. at 481.

[65] Id. At 493, 496–97, 503 (emphasis added).

[66] See id. at 495. The language appears in the final version. Id. at 569, 595.

[67] James Madison, The Federalist 40, in XIV Documentary History of the Ratification of the Constitution (J. Kaminski, ed., 1983), in Documentary History, XV: 406 (Constitution represents "expansion on the principles which are found in the articles of confederation," which gave Congress power over "trade with the Indians"); Federal Farmer, October 8, 1787, in id. At XIV: 24 (under the new Constitution, federal government has power over "all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs"); Federal Farmer, October 10, 1787, in id. At 30, 35 (federal power over "foreign concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs"). The Federal Farmer Letters are considered "one of the most significant publications of the ratification debate." Id. At 14.

[68] Madison, Federalist 42, in Documentary History XIV: 430–31.

[69] "An Act to regulate trade and intercourse with the Indian tribes," July 22, 1790, ch. 33, § 4, 1 Stat. 137, in 1 Doc. Hist. of the First Federal Congress, 1789–1791 (De Pauw, ed., 1972) ["First Federal Congress"], at 440.

and interests of individual citizens." [70] The actions of the new government also show that even when the Farmers knew nothing about the organization of Indian peoples, they nevertheless intended to assert federal power over those peoples. Shortly after taking office, President Washington gave instructions to Commissioners to negotiate with the Creeks. It was, as noted, the war between the Creeks and Georgia that had fostered the apparently universal conclusion that the new federal government must be given supremacy over Indian affairs. Washington instructed the Commissioners to determine the nature of the Creek's political divisions and governments, including "[t]he number of each division"; "[t]he number of Towns in each District"; "[t]he names, Characters and residence of the most influential Chiefs—and * * * their grades of influence." And, most tellingly, the Commissioners were to learn "[t]he kinds of Government (if any) of the Towns, Districts, and Nation." [71] Washington, like other Founders, did not know how the Creek lived and how (if at all) they governed themselves. But however the Indian peoples lived, and however (if at all) they governed themselves, they were still Indian peoples and they were still subject to the supreme power of the Federal Government over Indian Tribes.

President Jefferson gave similar instructions to Lewis and Clark. When they encountered unknown Indian peoples, the explorers were to learn the "names of the nations"; "their relations with other tribes or nations"; their "language, traditions, monuments"; and the "peculiarities in their laws, customs & dispositions." [72] Like Washington, Jefferson knew there was much he and his fellow citizens did not know about the "Indian" peoples; but he intended to find out and to assert federal authority over whatever he found.

It is inconceivable anyone thought that if Washington's Commissioners or Lewis and Clark found a native people living without "chiefs," like many Eskimo, or under a King like Montezuma or Kamehameha, these people would be beyond Congress' power over Indian "tribes" or nations.

Nor did the Framers of the Fourteenth Amendment intend to eliminate Congress' special power to adopt legislation singling out and favoring Indians; they did not intend to alter the nation-to-nation relationship between the United States and the Indian peoples created by the Constitution. Indeed, the Framers of the Amendment were at pains to make certain that they preserved that structure.

"Indians" are expressly singled out for special treatment by the text of the Amendment. In order to eliminate the morally repugnant language which counted slaves as three-fifths persons, the Framers of the Fourteenth Amendment redrafted the apportionment clause. The Framers deleted the "three-fifths persons," but retained the express exclusion of "Indians not subject to tax" (Amend. XIV, § 1), because, while they intended to wipe out the badges and incidents of slavery, they intended to preserve the special relationship between the United States and the Indian peoples:

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[70] Madison, Federalist 40, in Documentary History, XV: 406.

[71] George Washington, Instructions to the Commissioners for Southern Indians, August 29, 1789, in 2 First Federal Congress, at 207 (emphasis added).

[72] Thomas Jefferson, "Instructions to Captain Lewis," June 20, 1803, in Jefferson, Writings, supra, at 1126, 1128.

Before and after the Amendment, Indians were not citizens, they did not vote, they did not count for apportionment, and they were subject to special legislation in furtherance of Congress' historic trust responsibilities.

The only debate during the drafting and ratification of the Fourteenth Amendment was not about whether the special relationship with the Indian peoples should be preserved, but about how to make certain it was preserved. When one Senator suggested that specific reference be made excluding "Indians" from the citizenship clause, the Senator presenting the clause argued this was unnecessary. The Amendment provided citizenship only to persons "within the jurisdiction" of the United States,[73] and Indian nations were treated like alien peoples not fully within the jurisdiction of the government:

> in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with Indian tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes.[74]

Congress debated what language to adopt in order to make certain that the special status of the Indian tribes was preserved.[75] There was no support for, or consideration given to, eliminating the special relationship between the United States and the Indian peoples. The uniform intent was to preserve Congress' ability to decide when Indians would be granted citizenship, when Indians would be taxed, and when Indians would be subject to special legislation.[76]

For two hundred years, the Supreme Court has recognized the political distinction the Constitution draws between "Indian tribes" and all other people. The early opinions of Chief Justice John Marshall reflect the original intent of the Framers and lay the groundwork for this Court's jurisprudence. Marshall wrote that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.), 1, 16 (1831). With deliberate irony, he called the Indian tribes "domestic dependent nations." Id. At 17. The Indian peoples had surrendered "their rights to complete sovereignty," *Johnson* v. *McIntosh,* 21 U.S. (8 Wheat.) 543, 572–74 (1823), and yet they continued to be "nations" that governed themselves. See *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832).

Marshall knew that the constitutional text reflected this preexisting nation-to-nation relationship. The Indian Commerce Clause, U.S. Const. Art. I., § 3, cl. 8, and the Treaty Clause, id. Art. II, § 2, cl. 2, granted Congress broad power to regulate Indian affairs. These provisions permitted the United States to fulfill its obligations to the dependent Indian "nations" that were its "wards." Cherokee Nation, 30 U.S. (5 Pet.) at 17–18; *Worcester,* 31 U.S. (6

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[73] Similar limiting language occurs in the Equal Protection Clause.

[74] Cong. Globe, 39th Cong., 1st Sess. 2895 (1866).

[75] See, e.g., Remarks of Sen. Doolittle, Cong. Globe, 39th Cong., 1st Sess., 2895–2896 (1866) ("[Senator Howard] declares his purpose to be not to include Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them").

[76] Congress expressed the same intent in the Civil Rights Act that same year. The Act, granting citizenship to the emancipated slaves, specifically excluded "Indians not taxed." Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

Pet.) at 558–59. As "guardian," Congress had both the obligation and the power to enact legislation protecting the Indian nations. See *Worcester,* 31 U.S. (6 Pet.) at 560–61; accord Cherokee Nation, 30 U.S. (5 Pet.) at 17 ("[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants").

Marshall defined "Indians" broadly to include all of the "original inhabitants" or "natives" who occupied America when it was discovered by "the great nations of Europe." *Johnson,* 21 U.S. (8 Wheat.) at 572–74; *Worcester,* 31 U.S. (6 Pet.) at 544 (1832) (Indians are "those already in possession [of land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man").[77]

He also conceived of "tribes" in broad, inclusive terms. He used "tribe" and "nation" interchangeably: A "tribe or nation," he noted, "means a people distinct from others"—a "distinct community." *Worcester,* 31 U.S. (6 Pet.) at 599, 561.[78] Like the Founders, Marshall defined an "Indian tribe" as nothing more than a community, large or small, or descendants of the peoples who inhabited the New World before the Europeans.

Although the aboriginal "tribes" or "nations" or "peoples" were defined in part by common ancestry—or, as petitioner likes to say, by "blood"—their constitutional significance lay in their separate existence as "independent political communities." Id. At 559 (emphasis added). The "race" of Indian peoples was constitutionally irrelevant. Native peoples were "nations," id. At 559–60, and the relationship between the United States and the Natives reflected a political settlement between conquered and conquering nations.

The Supreme Court has kept faith with Marshall's conception. The Indian nations have always been defined by ancestry and political affiliation. In the Native cultures, the two are inextricably intertwined. The Court's definition is legal, and the Native American's self-definition is historic, religious or cultural; but the two reduce to the same elements: "Indians" are (i) the descendants of aboriginal peoples who (ii) belong to some Native American "people," "nation," "tribe," or "community," as the founding generation understood those terms.[79]

These interwoven qualifications reflect the Supreme Court's consistent understanding that constitutionally relevant Indian status, while based in part on ancestry, is a political classification. *United States* v. *Antelope,* 430 U.S. 641, 646–47 (1977). It is an individual's membership in a "political community" of Indians—even a community in the making—and not solely his or her racial identity, that brings him or her within Congress' broad authority to regulate Indian affairs. *Id.* At 646.

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[77] See *Johnson,* 21 U.S. (8 Wheat.) at 575 (Indians in French Canada); id. at 581 (Indians in Nova Scotia); id. at 584–87 (Indians in Virginia, Kentucky, the Louisiana Purchase, and Florida). Marshall noted the United States had dealt with variously organized "tribes" or "confederacies." See id. at 546–49.

[78] See also *Cherokee Nation,* 30 U.S. (5 Pet.,) at 20 ("an Indian tribe or nation within the United States"); *Johnson,* 21 U.S. (8 Wheat.) at 590 ("the tribes of Indians inhabiting this country").

[79] See, e.g., *Montoya* v. *United States,* 180 U.S. 261, 266 (1901) ("a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"); *United States* v. *Candelaria,* 271 U.S. 432, 442 (1926); *see Oklahoma Tax Comm'n* v. *Sac & Fox Nation,* 508 U.S. 114, 123 (1993); *United States* v. *Antelope,* 430 U.S. 641, 657 n.7 (1977) (individuals "anthropologically" classified as Indians may be outside Congress' Indian commerce power if they sever relations with tribe).

Nor does the use of blood quantum as part of the formula to determine who is and is not a Native American constitute an impermissible "racial" discrimination. The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign political communities"—not "racial groups."[80] The Court has long recognized that a tribe's "right to determine its own membership" is "central to its existence as an independent political community."[81] From time immemorial, Native American communities have defined themselves at least in part by family and ancestry.[82] Kinship and ancestry is part of what it means to be an "Indian." Indians by ancestry or blood is what the Framers meant by "Indians." It is what Chief Justice Marshall meant by "Indians." It is what the Framers of the Fourteenth Amendment meant by "Indians." This central conception of "Indian" identity is woven into the Constitution and the entire body of law that has grown up in reliance on that conception.

Congressional authority to use such traditional requirements for tribal membership or benefits has never been doubted. In *John,* the Supreme Court approved Congress' creation of an Indian reservation for the benefit of "Chocktaw Indians of one-half or more Indian blood, resident in Mississippi," 437 U.S. At 646. The Court unhesitatingly applied the definition of "Indian" that appears in the Indian Reorganization Act, which has governed Indian Tribes for most of this century: "'all other persons of one-half or more Indian blood.'" Id. At 650 (quoting 25 U.S.C. § 479). Similarly, the Alaska Native Claims Settlement Act's use of a blood quantum formula as one factor in determining "Native" status is a valid method of defining those belonging to the group eligible for statutory benefits, and the use of the blood quantum "does not detract from the political nature of the classification."[83] The use of blood ties is integral to the nature of the political deal struck between the conquering Europeans and the Native peoples, as they set out to maintain partially separate existences while inhabiting the same country.

The constitutional text and historic relationship gives Congress not just the "right" to discriminate between Native Americans and others, but the responsibility to do so. As the Supreme Court has long recognized, from the relationship between these former sovereign peoples and the "superior nation" that conquered them arises "the power and the duty" of the United States to "exercis[e] a fostering care and protection over all dependent Indian communities within its borders. * * *"[84] Recently, the Supreme Court ac-

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[80] *Antelope,* 430 U.S. At 646; see *Fisher* v. *District Court,* 424 U.S. 382, 389 (1976); *Morton* v. *Mancari,* 417 U.S. 535, 553–54 (1974); see also *Sac & Fox Nation,* 508 U.S. At 123; *United States* v. *Mazruie,* 419 U.S. 544, 557 (1975).

[81] *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 72 n.32 (1978); Cherokee Intermarriage Cases, 203 U.S. 76, 95 (1906); *Boff* v. *Burney,* 168 U.S. 218, 222–23 (1897).

[82] See Indian Policy Report at 108–09 ("the tribe, as a political institution, has primary responsibility to determine tribal membership for purposes of voting in tribal elections . . . and other rights arising from tribal membership. Many tribal provisions call for one-fourth degree of blood of the particular tribe but tribal provisions vary widely. A few tribes require as much as one-half degree of tribal blood * * *); accord Felix S. Cohen, "Handbook of Federal Indian Law" 22–23 & n. 27 (1982 ed.).

[83] *Alaska Chapter* v. *Pierce,* 694 F.2d 1162, 1168–69 n. 10 (9th Cir. 1982) (noting absence of other practicable methods, like tribal rolls or proximity to reservations).

[84] *United States* v. *Kagama,* 118 U.S. 375, 384–85 (1886) (emphasis added); see *Seminole Nation* v. *United States,* 316 U.S. 286, 296 (1942) (the government owes a "distinctive obligation of trust" to Indians).

knowledged the continued significance of this historic trust relationship.[85]

The Supreme Court has repeatedly applied the concepts of "Indian" and "Tribe" to a wide variety of Native American communities, recognizing the constant evolution of Native community life and that the questions whether and how to treat with these changing communities are assigned by the Constitution to Congress. In *The Kansas Indians,* the Court recognized that the Ohio Shawnees remained a "tribe," even though tribal property was no longer owned communally and the tribe had abandoned Indian customs "owing to the proximity of their white neighbors." 72 U.S. 737, 755–57 (1866).

Fifty year later, the Court approved similar tribal designation for the Pueblo Indians of New Mexico. After long experience under Spanish rule, the Pueblo Indians seemed little like the "savages" of James Fennimore Cooper. The Pueblo Indians lived in villages with organized municipal governments; they cultivated the soil and raised livestock; they spoke Spanish, worshiped in the Roman Catholic Church; prior to the acquisition of New Mexico by the United States, they enjoyed full Mexican citizenship. See *United States* v. *Joseph,* 94 U.S. (4 Otto.) 614, 616 (1877). Nevertheless, the Pueblo Indians lived in "distinctly Indian communities," and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes." *United States* v. *Sandoval,* 231 U.S. 28, 46–47 (1913); *United States* v. *Candelaria,* 271 U.S. 432, 439, 442–43 (1926). For Native American "communities," the Court held that "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress. * * *" *Sandoval,* 231 U.S. At 46; accord *Tiger* v. *Western Inv. Co.,* 221 U.S. 286, 315 (1911).

Sixty years later, in *United States* v. *John,* the Court recognized Congress' authority to create a reservation for the benefit of Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State. 437 U.S. At 652–53. The Mississippi Choctaw were Indians. They has recently organized into a distinctly Indian community. The Court therefore deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law." *Id.* At 650 n.20; 652–53.

Similarly, the Supreme Court has recognized Congress' broad authority to deal with individual "Indians"[86] or large organizations

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[85] See *Greater New Orleans Broadcasting Ass'n* v. *United States,* 119 S. Ct. 1923, 1934 (1999) (recognizing "special federal interest in protecting the welfare of Native Americans").

[86] *United States* v. *Holliday,* 70 U.S. (3 Wall) 407, 417, (1865) (regulation of "commerce with the Indian tribes means" regulation of "commerce with the individuals composing those tribes"); see *Morton* v. *Ruiz,* 415 U.S. 199, 230–38 (1974) (addressing the scope of federal Indian welfare benefits for individuals living in Indian communities); *Mancari,* 417 U.S. At 551–55.

comprised of numerous "Tribes."[87] Congress may create or recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress' trust obligation to the historic Indian peoples.[88] Congress' treatment of the Alaska Native peoples—including the creation of unique regional corporations whose shareholders comprise numerous Native Villages—has properly been upheld as within Congress' special power over and responsibility for the Native American peoples.[89]

DEMOGRAPPHICS OF THE NATIVE HAWAIIAN POPULATION

Housing

Within the last several years, three recent studies have documented the poor housing conditions that confront Native Hawaiians who either reside on the Hawaiian home lands or who are eligible to reside on the home lands.

In 1992, the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing issued its final report to the Congress, "Building the Future: A Blueprint for Change." The Commission's study compared housing data for Native Hawaiians with housing information for other citizens in the State of Hawaii. The commission found that native Hawaiians, like American Indians and Alaska Natives, lacked access to conventional mortgage lending and home financing because of the trust status of the Hawaiian home lands, and that Native Hawaiians had the worst housing conditions in the State of Hawaii and the highest percentage of homelessness, representing over 30 percent of the State's homeless population.

The Commission concluded that the unique circumstances of Native Hawaiians require the enactment of new legislation to alleviate and address the severe housing needs of native Hawaiians, and recommended that the Congress extend to Native Hawaiians the same federal housing assistance programs that are provided to American Indians and Alaska Natives under the Low-Income Rental, Mutual Help, Loan Guarantee Program and Community Development Block Grant programs. Subsequently, the Community Development Block Grant program authority was amended to address the housing needs of Native Hawaiians.

In 1995, the U.S. Department of Housing and Urban Development (HUD) issued a report entitled, "Housing Problems and Needs of Native Hawaiians." The HUD report was particularly helpful because it compared the data on Native Hawaiian housing conditions with housing conditions nationally and with the housing conditions of American Indians and Alaska Natives.

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[87] See *Cherokee Nation* v. *Journeycake,* 155 U.S. 196 (1894) (Delaware Indians entitled to rights of Cherokee Nation which Delawares had joined); *United States* v. *Blackfeather,* 155 U.S. 218 (1894) (same for Shawnee).

[88] See *John,* 437 U.S. At 652–53; *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 480 (1976).

[89] Although the Alaska Natives' situation is "distinctly different from that of other American Indians," Alaska Chapter, 694 F.2d at 1168–69 n. 10; see *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 50–51 (1962), it is "well established" that Althabascan Indians, Eskimos, and Aleuts are "dependent Indian people" within the meaning of the Constitution. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 87–89 (1918); see also, *Pence* v. *Kleppe,* 529 F.2d 135, 138–39 n.5 (9th Cir. 1976) ("Indian" means "the aborigines of America" and includes Eskimos and Aleuts in Alaska); *United States* v. *Native Village of Unalakleet,* 411 F.2d 1255, 1256–57 (Ct. Cl. 1969) ("Eskimos and Aleuts are Alaskan aborigines" and, therefore, "Indians").

The most alarming finding of the HUD report was that Native Hawaiians experience the highest percentage of housing problems in the nation—49 percent—higher than even that of American Indians and Alaska Natives revising on reservations (44 percent) and substantially higher than that of all U.S. households (27 percent). Additionally, the HUD study found that the percentage of overcrowding in the Native Hawaiian population is 36 percent as compared to 3 percent for all other households in the United States.

Applying the HUD guidelines, 70.8 percent of Native Hawaiians who either reside or who are eligible to reside on the Hawaiian home lands have incomes which fall below the median family income in the United States, and 50 percent of those Native Hawaiians have incomes below 30 percent of the median family income in the United States.

Also in 1995, the Hawaii State Department of Hawaiian Home Lands published a Beneficiary Needs Study as a result of research conducted by an independent research group. This study found that among the Native Hawaiian population, the needs of Native Hawaiians eligible to reside on the Hawaiian home lands are the most severe—with 95 percent of home lands applicants (16,000) in need of housing, and with one-half of those applicant households facing overcrowding and one-third paying more than 30 percent of their income for shelter.

Health status

Language contained in the 1984 Supplemental Appropriations Act, Public Law 98–396, directed the Department of Health and Human Services to conduct a comprehensive study of the health care needs of Native Hawaiians. The study was conducted under the aegis of Region IX of the Department by a consortium of health care providers and professionals from the State of Hawaii in a predominantly volunteer effort, organized by Alu Like, Inc., a Native Hawaiian organization. An island-wide conference was held in November of 1985 in Honolulu to provide an opportunity for members of the Native Hawaiian community to review the study's findings. Recommended changes were incorporated in the final report of the Native Hawaiian Health Research Consortium, and the study was formally submitted to the Department of Health and Human Services in December of 1985. The Department submitted the report to the Congress on July 21, 1986, and the report was referred to the Select Committee on Indian Affairs.

Because the Consortium report's findings as to the health status of Native Hawaiians was compared only to other populations within the State of Hawaii, the Select Committee requested that the Office of Technology Assessment (OTA), an independent agency of the Congress, undertake an analysis of Native Hawaiian health statistics as they compared to national data in other United States populations. Using the same population projection model that was employed in OTA's April 1986 report on "Indian Health Care to American Indian and Alaska Native Populations," and based on additional information provided by the Department of Health and the Office of Hawaiian Affairs of the State of Hawaii, the Office of Technology Assessment report contains the following findings:

The Native Hawaiian population living in Hawaii consists of two groups, Hawaiians and part-Hawaiians, who are distinctly different

in both age distributions and mortality rates. Hawaiians comprise less than five percent of the total Native Hawaiian population and are much older than the young and growing part-Hawaiian populations.

Overall, Native Hawaiians have a death rate that is thirty-four percent higher than the death rate for the United States. All races, but this composite masks the great differences that exist between Hawaiians and part-Hawaiians. Hawaiians have a death rate that is 146 percent higher than the U.S. All races rate. Part-Hawaiians also have a higher death rate, but only 17 percent greater. A comparison of age-adjusted death rates for Hawaiians and part-Hawaiians reveals the Hawaiians die at a rate 110 percent higher than part-Hawaiians, and this pattern persists for all except one of the 13 leading causes of death that are common to both groups.

As in the case of the U.S. All races population, Hawaiian and part-Hawaiian males have higher death rates than their female counterparts. However, when Hawaiian and part-Hawaiian males and females are compared to their U.S. All races counterparts, females are found to have more excess deaths than males. Most of these excess deaths are accounted for by diseases of the heart and cancers, with lesser contributions from cerebrovascular diseases and diabetes mellitus.

Diseases of the heart and cancers account for more than half of all deaths in the U.S. All races population, and this pattern is also found in both the Hawaiian and part-Hawaiian populations, whether grouped by both sexes or by male or female. However, Hawaiians and part-Hawaiians have significantly higher death rates than their U.S. All races counterparts, with the exception of part-Hawaiian males, for whom the death rate from all causes is approximately equal to that of U.S. All races males.

One disease that is particularly pervasive is diabetes mellitus, for which even part-Hawaiian males have a death rate 128 percent higher than the rate for U.S. All races males. Overall, Native Hawaiians die from diabetes at a rate that is 222 percent higher than for the U.S. All races. When compared to their U.S. All races counterparts, deaths from diabetes mellitus range from 630 percent higher for Hawaiian females and 538 percent higher for Hawaiian males, to 127 percent higher for part-Hawaiian females and 128 percent higher for part-Hawaiian males."

There is thus little doubt that the health status of Native Hawaiians is far below that of other U.S. population groups, and that in a number of areas, the evidence is compelling that Native Hawaiians constitute a population group for whom the mortality rate associated with certain disease exceed that for other U.S. populations in alarming proportions.

Native Hawaiians premise the high mortality rates and the incidence of disease that far exceed that of other populations in the United States upon the breakdown of the Hawaiian culture and belief systems, including traditional healing practices, that was brought about by western settlement, and the influx of western diseases to which the native people of the Hawaiian Islands lacked immune systems. Further, Native Hawaiians predicate the high incidence of mental illness and emotional disorders in the Native Hawaiian population as evidence of the cultural isolation and alienation of the native peoples, in a statewide population in which they

now constitute only 20 percent. Settlement from both the east and the west have not only brought new diseases which decimated the Native Hawaiian population, but which devalued the customs and traditions of Native Hawaiians, and which eventually resulted in Native Hawaiians being prohibited from speaking their native tongue in school, and in many instances, at all.

In 1998, Papa Ola Lokahi, the Native Hawaiian health care organization that oversees the work of the Native Hawaiian health care systems and is responsible for preparing and updating the Native Hawaiian health care master plan, updated the health care statistics from the original E Ola Mau report. In addition, on an annual basis, Papa Ola Lokahi extrapolates the data on Native Hawaiians gathered yearly by the Hawaii State Department of Health from the Department's behavioral risk assessment and health surveillance survey. The findings from those assessments revealed that—

With respect to cancer, Native Hawaiians have the highest cancer mortality rates in the State of Hawaii (231 out of every 100,000 residents), 45 percent higher than that for the total State population. Native Hawaiian males have the highest cancer mortality rates in the State of Hawaii for cancers of the lung, liver and pancreas and for all cancers combined, and the highest years of productive life lost from cancer in the State of Hawaii. Native Hawaiian females ranked highest in the State of Hawaii for cancers of the lung, liver, pancreas, breast, cervix uteri, corpus uteri, stomach, and rectum, and for all cancers combines.

With respect to breast cancer, Native Hawaiians have the highest mortality rates in the State of Hawaii, and nationally, Native Hawaiians have the third highest mortality rate due to breast cancer.

Native Hawaiians have the highest mortality rates from cancer of the cervix and lung cancer in the State of Hawaii, and Native Hawaiian males have the second highest mortality rates due to prostate cancer in the State.

For the years 1989 through 1991, Native Hawaiians had the highest mortality rate due to diabetes mellitus in the State of Hawaii, with full-blood Hawaiians having a mortality rate that is 518 percent higher than the rate for the statewide population of all other races, and Native Hawaiians who are less than full-blood having a mortality rate that is 79 percent having than the rate for the statewide population of all other races.

In 1990, Native Hawaiians represented 44 percent of all asthma cases in the State of Hawaii for those 18 years of age and younger, and 35 percent of all asthma cases reported, and in 1992, the Native Hawaiian rate for asthma was 73 percent higher than the rate for the total statewide population.

With respect to heart disease, the death rate for Native Hawaiians from heart disease is 66 percent higher than for the entire State of Hawaii, and Native Hawaiian males have the greatest years of productive life lost in the State of Hawaii. The death rate for Native Hawaiians from hypertension is 84 percent higher than that for the entire State, and the death rate from stroke for Native Hawaiians is 13 percent higher than for the entire State.

Native Hawaiians have the lowest life expectancy of all population groups in the State of Hawaii. Between 1910 and 1980, the life expectancy of Native Hawaiians from birth has ranged from 5

to 10 years less than that of the overall State population average, and the most recent data for 1990 indicates that Native Hawaiian life expectancy at birth is approximately 5 years less than that of the total State population.

With respect to prenatal care, as of 1996, Native Hawaiian women have the highest prevalence of having had no prenatal care during their first trimester of pregnancy, representing 44 percent of all such women statewide. Over 65 percent of the referrals to Healthy Start in fiscal year 1996 and 1997 were native Hawaiian newborns, and in every region of the State of Hawaii, many Native Hawaiian newborns begin life in a potentially hazardous circumstance.

In 1996, 45 percent of the live births to Native Hawaiian mothers were infants born to single mothers. Statistics indicated that infants born to single mothers have a higher risk of low birth weight and infant mortality. Of all low birth weight babies born to single mothers in the State of Hawaii, 44 percent were Native Hawaiians.

In 1996, Native Hawaiian fetal mortality rates comprised 15 percent of all fetal deaths for the State of Hawaii. Thirty-two percent of all fetal deaths occurring in mothers under the age of 18 years were Native Hawaiians, and for mothers 18 through 24 years, 28 percent were Native Hawaiians.

Education

In 1981, the Senate instructed the Office of Education to submit to Congress a comprehensive report on Native Hawaiian education. The report, entitled the "Native Hawaiian Educational Assessment Project," was released in 1983 and documented that Native Hawaiians scored below parity with regard to national norms on standardized achievement tests, were disproportionately represented in many negative social and physical statistics, indicative of special educational needs, and had educational needs that were related to their unique cultural situation, such as different learning styles and low self-image.

In recognition of the educational needs of Native Hawaiians, in 1988, Congress enacted title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (102 Stat. 130) to authorize and develop supplemental educational programs to benefit Native Hawaiians.

In 1993, the Kamehameha Schools/Bishop Estate released a 10-year update of findings of the Native Hawaiian Educational Assessment Project, which found that despite the successes of the programs established under title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, many of the same educational needs still existed for Native Hawaiians. Subsequent reports by the Kamehameha Schools Bishop Estate and other organizations have generally confirmed those findings. For example—

(A) educational risk factors begin even before birth for many Native Hawaiian children, including—

(i) late or no prenatal care:

(ii) high rates of births by native Hawaiian women who are unmarried; and

(iii) high rates of births to teenage parents;

(B) Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;

(C) Native Hawaiian students continue to score below national norms on standardized education achievement tests at all grade levels;

(D) both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs;

(E) Native Hawaiian students continue to be overrepresented among students qualifying for special education programs provided to students with learning disabilities, mild mental retardation, emotional impairment, and other such disabilities;

(F) Native Hawaiians continue to be underrepresented in institutions of higher education and among adults who have completed 4 or more years of college;

(G) Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics, indicative of special educational needs, as demonstrated by the fact that—

(i) Native Hawaiian students are more likely to be retained in grade level and to be excessively absent in secondary school;

(ii) Native Hawaiian students are the highest users of drugs and alcohol in the State of Hawaii; and

(iii) Native Hawaiian children continue to be disproportionately victimized by child abuse and neglect; and

(H) Native Hawaiians now comprise over 23 percent of the students served by the State of Hawaii Department of Education, and there are and will continue to be geographically rural, isolated areas with a high Native Hawaiian population density.

In the 1998 National Assessment of Educational Progress, Hawaiian fourth-graders ranked 39th among groups of students from 39 States and the District of Columbia in reading. Given that Hawaiian students rank among the lowest groups of students nationally in reading, and that Native Hawaiian students rank the lowest among Hawaiian students in reading, it is imperative that greater focus be placed on beginning reading and early education and literacy in Hawaii.

The findings of S. 2899 focus on the history of Native Hawaiians and United States policy as it relates to Native Hawaiians, including the enactment of over 160 public laws to address the conditions of Native Hawaiians. S. 2899 provides a process for the reorganization of a Native Hawaiian government and recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

The bill authorizes a roll to be developed of those Native Hawaiians who wish to participate in the reorganization of a Native Hawaiian government. A commission appointed by the Secretary of the Interior would certify that those on the roll meet the definition of "Native Hawaiian" that is contained in S. 2899. Upon the commission's certification, the commission submits the roll to the Interior Secretary for his certification that the roll is consistent with Federal law, and thereafter the Secretary is authorized to published the final roll. A process for appeal for anyone who believes that they have been wrongfully excluded from the roll, or to chal-

lenge the inclusion of the name of a person on the roll who does not meet the definition of Native Hawaiian is also authorized.

S. 2899 authorizes the formation of a Native Hawaiian Interim Governing Council through the election of representative by the adult members listed on the roll. The first responsibility of the Council is to conduct a referendum of all adult members listed on the roll to determine the elements of organic governing documents for the Native Hawaiian government. Thereafter, the Council is authorized to develop organic governing documents that would be subject to ratification through an election in which the adult members listed on the roll would vote. Once the organic governing documents are ratified, and election of officers to the Native Hawaiian government would be held. That election and those who would be eligible to participate in such an election are to be determined by the organic governing documents.

Upon the ratification of the organic governing documents and the election of officers to the Native Hawaiian government, the governing documents are to be submitted to the Secretary of the Interior for certification that they are consistent with Federal law and the special trust relationship between the United States and native people. The Secretary is also authorized to certify that the governing documents provide for the protection of the civil rights of the citizens of the Native Hawaiian government and any others who would come within the jurisdiction of the government. Once the Secretary has made this certification, the bill authority for the United States' recognition of the Native Hawaiian government. Upon recognition, the definition of "Native Hawaiian" for purposes of Federal law, would be as provided for in the organic governing documents of the Native Hawaiian government.

S. 2899 also provides authority for the establishment of a United States Office of Native Hawaiian Affairs within the Office of the Secretary of the U.S. Department of the Interior. The Office is to be the principal entity through which the United States will carry on relations with the Native Hawaiian people unit a Native Hawaiian government is formed. The Office is authorized to enter into contracts or make grants to facilitate the development of the roll referenced above and to assist in the elections that would be conducted by the Native Hawaiian Interim Governing Council, if the Office is called upon to provide such assistance. The Office would also serve as the primary agent of ongoing efforts to effect the reconciliation that is authorized in the Apology Resolution. Together with the Office of Tribal Justice in the U.S. Department of Justice, the two offices would serve as lead agencies for the work of a Native Hawaiian Interagency Task Force that is authorized to be established in S. 2899.

INDIAN AND NATIVE HAWAIIAN PROGRAM FUNDING

As referenced above, since 1910, the Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives. Consistent with this practice, S. 2899 provides authority for a separate and distinct appropriation that does not impact in any way on existing authorizations for American Indian and Alaska Native programs. It is also

important to note that Federal programs addressing health care, education, job training, graves protection, arts and culture, and language preservation for Native Hawaiians are already in place. Accordingly, new impacts on the Federal budget that might otherwise be anticipated with the Federal recognition of a native government will not be forthcoming as a result of the reorganization of the Native Hawaiian government. S. 2899 does authorize appropriations for the establishment of the U.S. Office of Native Hawaiian within the Department of the Interior, and for a three-year period for grants to assist Native Hawaiians in reorganizing a Native government, but the costs associated with these activities are not expected to be significant.

GAMING

Some have questioned whether the reorganization of a Native Hawaiian government might have implications for gaming that is conducted under the authority of the Indian Gaming Regulatory Act.

The Indian Gaming Regulatory Act authorizes Indian tribal governments to conduct gaming on Indian reservations and lands held in trust by the United States for Indian tribes. The scope of gaming that can be conducted under the Act is determined by the law of the state in which the Indian lands are located. The U.S. Supreme Court has held that state laws which criminally prohibit certain forms of gaming apply on Indian lands.

There are no Indian tribes in the State of Hawaii, nor are there any Indian reservations or Indian lands. Hawaii is one of only two states in the Union (the other is Utah) that criminally prohibit all forms of gaming. Accordingly, a reorganized Native Hawaiian government could not conduct any form of gaming in the State of Hawaii.

RESOLUTIONS OF SUPPORT FOR S. 2899

The resolution of the Hawaii State Legislature in the form of House Concurrent Resolution No. 41, is set forth below.

In addition, the resolution of the Board of Directors of the Alaska Federation of Natives, Inc., in the form of Board Resolution 00–05, adopted on May 8, 2000 is set forth below.

The National Congress of American Indians adopted two resolutions—Resolution JUN–00–032, adopted at the Congress' 2000 Mid-Year Session, and Resolution PSC–99–042, adopted at the Congress' 1999 Annual Session—both of which are set forth below.

The resolution of the Japanese American Citizens League, adopted at the League's 36th Biennial National Convention, is set forth below.

HOUSE OF REPRESENTATIVES
TWENTIETH LEGISLATURE, 2000
STATE OF HAWAII

H.C.R. NO. 41 S.D. 1

HOUSE CONCURRENT RESOLUTION

SUPPORTING FEDERAL RECOGNITION OF A NATIVE HAWAIIAN NATION.

WHEREAS, on the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii, Congress enacted Public Law 103-150 to acknowledge the historical significance and ramifications of the overthrow in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

WHEREAS, in Public Law 103-150, Congress acknowledged the participation of the United States in the suppression of the inherent sovereignty of the Native Hawaiian people, thereby solidifying the varied positions of previous administrations disputing responsibility; and

WHEREAS, Congress expressed its commitment and urged presidential support for reconciliation between the United States and the Native Hawaiian people; and

WHEREAS, there exists a trust relationship between the United States and Native Hawaiians, wherein many of the duties of the United States, through federal acts, including the Hawaiian Homes Commission Act of 1920, as amended, have been delegated to the State of Hawaii for administration; and

WHEREAS, current federal policies and laws allow greater autonomy and self-determination for native peoples, including direct contracting with recognized native governments to administer funds and programs designed to meet the trust obligation of the United States to those peoples; and

WHEREAS, there is a need for Congress to effect a clear statement about the political status of Native Hawaiians and to recognize a Native Hawaiian nation; and

WHEREAS, it is in the best interest of Native Hawaiians for the United States Government to recognize a Native Hawaiian nation so as to enjoy a full government-to-government relationship with the United States; and

I do hereby certify that the within document is a true and correct copy of the original on file in this office.

Clerk
House of Representatives
State of Hawaii

WHEREAS, Congress has acknowledged that the Native Hawaiian people are determined to preserve, develop, and transmit to future generations, their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twentieth Legislature of the State of Hawaii, Regular Session of 2000, the Senate concurring, that the federal government is requested to recognize an official political relationship between the United States government and the Native Hawaiian people; and

BE IT FURTHER RESOLVED that the Twentieth Legislature supports the sovereign rights of Native Hawaiians and recognizes the need to develop a government-to-government relationship between a Native Hawaiian nation and the United States; and

BE IT FURTHER RESOLVED that the Twentieth Legislature of the State of Hawaii respectfully requests that the United States Congress and President articulate and implement a federal policy of Native Hawaiian self-government with a distinct, unique, and special trust relationship and to implement reconciliation pursuant to Public Law 103-150; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the President of the United States, the Majority Leader of the United States Senate, the Speaker of the United States House of Representatives, each member of Hawaii's Congressional Delegation, the Secretaries of the United States Departments of Justice, Interior and State, the National Congress of American Indians, the Alaska Federation of Natives, the Governor of the State of Hawaii, the Trustees of the Office of Hawaiian Affairs, and the members of the Hawaiian Homes Commission.

ALASKA FEDERATION OF NATIVES, INC.
1577 C Street, Suite 300, Anchorage, Alaska 99501
907-274-3611 Fax 907-276-7989

BOARD OF DIRECTORS
Board Resolution 00-05

TITLE: IN SUPPORT OF THE HAWAIIAN PEOPLE

WHEREAS: the aboriginal people of the Hawaiian Islands, like Alaska Natives and Indians of the Lower 48 states, have long been the victims of colonial expansionism and racial discrimination; and

WHEREAS: the Office of Hawaiian Affairs, a unit of state government, has for years administered trust funds for the benefit of Native Hawaiians under the aegis of a Board of Directors elected by Native Hawaiians; and

WHEREAS: in the recent *Rice v. Cayetano* ruling, the U.S. Supreme Court held that this electoral process violates the Fifteenth Amendment to the United States Constitution, which prohibits the use of race as an eligibility factor in voting; and

WHEREAS: the *Rice* decision opens the door to additional lawsuits that would threaten the status and well-being of Hawaiians – and could create serious implications for Alaska Natives and other indigenous Americans; and

WHEREAS: the most experienced legal strategists in Hawaii, including the Governor and the Congressional Delegation, have determined that the best response to the *Rice* decision is that the United States Congress enact legislation specifically recognizing the Hawaiians as an "indigenous people" of the United States; and

WHEREAS: the State of Hawaii, particularly when compared to Alaska, has generally treated its indigenous population with respect and it is now making a unified effort to avoid the damage that *Rice* could do its own future; and

WHEREAS: there are several compelling reasons why AFN and the statewide Alaska Native community should now stand up for the Hawaiian people during the struggle for their appropriate legal status:

1) because it is the right and just thing to do;
2) because all Americans have a vested interest in healthy social relationships, racial tolerance, and political cohesion; and
3) because the Hawaiian Congressional Delegation – and above all, Senators Daniel Inouye and Daniel Akaka – have always been there for us in our long fight for Alaska Native rights, including subsistence;

NOW THEREFORE BE IT RESOLVED that the Board of Directors of the Alaska Federation of Natives declares its unqualified concern for, and support of, the Hawaiian people in their quest for federal recognition as indigenous people of the United States; and

BE IT FURTHER RESOLVED that the Alaska Federation of Natives' Board of Directors direct the President and staff to assist the State of Hawaii's political leadership in this critical effort, by all appropriate means.

Adopted this 8th day of May, 2000

Julie E. Kitka, President

Corporate Seal:

NATIONAL CONGRESS OF AMERICAN INDIANS

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION # JUN-00-032

Title: Support Federal Legislation Calling for Recognition of the Hawaiian Nation and Return of Land to the Hawaiian Nation

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and composed of representatives of and advocates for national, regional and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, the federal policy affords all Native Americans and Alaska Native the right to be self-governing within a defined land base; and

WHEREAS, there is a need for self-government; and

WHEREAS, NCAI at its 56th annual session adopted Resolution #99-042, which supports the sovereign rights of Native Hawaiians and recognizes the need to develop a true government-to-government relationship with the Hawaiian Nation; and

WHEREAS, NCAI also adopted in that same resolution that the Hawaiian Nation's goal is federal recognition as a sovereign indigenous nation with inherent rights to self-determination and self-governance.

1301 Connecticut Avenue, NW, Suite 200, Washington, DC 20036, 202.466.7767 Fax 202.466.7797

NCAI 2000 MID-YEAR SESSION **RESOLUTION # JUN-00-032**

NOW THEREFORE BE IT RESOLVED, that NCAI does hereby support federal legislation calling for recognition of the Hawaiian Nation, a self-determined entity created by and for native Hawaiians and their descendants in furtherance of a true government-to-government relationship; and

BE IT FURTHER RESOLVED, that NCAI further supports the return of land to the Hawaiian Nation.

BE IT FINALLY RESOLVED, that a copy of this resolution be transmitted to the Hawai'i state legislature, the Hawai'i congressional delegation, the 106th Congress of the United States of America, Secretary of the Department of Interior, Attorney General of the United States, Secretary of State and the President of the United States of America.

CERTIFICATION

The foregoing resolution was adopted at the 2000 Mid-Year Session of the National Congress of American Indians, held at the Centennial Hall in Juneau, Alaska on June 25-28, 2000 with a quorum present.

Susan Masten, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2000 Mid-Year Session of the National Congress of American Indians, held at the Centennial Hall in Juneau, Alaska on June 25-28, 2000.

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NATIONAL CONGRESS OF AMERICAN INDIANS

THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION # PSC-99-042

Title: **Support the Sovereign Rights of Native Hawaiians and Recognize the Need to Develop a True Government-to-Government Relationship with the Hawaiian Nation**

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, the federal policy affords all Native Americans and Alaska Natives the right to be self-governing within a defined land base; and

WHEREAS, there is a need for self-government; and

WHEREAS, there has been more than a century of injustice, including neglect and abuse of Native Hawaiian entitlements and human and civil rights, by the United States and its agent, the state of Hawai'i; and

WHEREAS, in 1993, the United States Congress passed the Apology Bill (Act of Nov. 23, 1993, Public Law 103-105, 103rd Congress, 107 STAT. 1510) acknowledging its role in the illegal overthrow of the Hawaiian Nation in 1893 and called for reconciliation; and

1301 Connecticut Avenue NW, Suite 200, Washington, DC 20036 202.466.7767 fax 202.466.7797

WHEREAS, the Apology Law further stated "...the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their monarchy or through a plebiscite or referendum; and

WHEREAS, the Hawaiian Nation's goal is federal recognition as a sovereign indigenous nation with inherent rights to self-determination and self-governance.

NOW THEREFORE BE IT RESOLVED, that NCAI does hereby support the sovereign rights of Native Hawaiians and recognizes the need to develop a true government-to-government relationship with the Hawaiian Nation; and

BE IT FURTHER RESOLVED, that NCAI does hereby request the government of the United States to articulate and implement the federal policy of Native Hawaiian self-government with a distinct, unique and special trust relationship and to implement reconciliation pursuant to Public Law 103-150; and

BE IT FINALLY RESOLVED, that a copy of this resolution be transmitted to the Hawai'i state legislature, the Hawai'i congressional delegation, the 106th Congress of the United States of America, Secretary of the Department of Justice, and the President of the United States of America.

CERTIFICATION

The foregoing resolution was adopted at the 1999 Annual Session of the National Congress of American Indians, held at the Palm Springs Convention Center, in Palm Springs, California on October 3-8, 1999 with a quorum present.

Susan Masten, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the General Assembly during the 1999 Annual Session of the National Congress of American Indians, held at the Palm Springs Convention Center, in Palm Springs, California on October 3-8, 1999.

JAPANESE AMERICAN CITIZENS LEAGUE
36th Biennial National Convention
Monterey, California

Res. 1.

Support for Federal Recognition of Native Hawaiians' Inherent Political Status and Special Relationship with the United States

WHEREAS, Native Hawaiians are the first and indigenous people of Hawai'i; and

WHEREAS, until 1893 Hawai'i was a self-governing sovereign nation recognized in the international community of nations; and

WHEREAS, in 1868 the first Japanese contract laborers, the 148 *Gannenmono* arrived in Honolulu; and

WHEREAS, beginning in 1885 the first 944 *Kanyaku Imin* arrived in Hawai'i and over the next thirty-five years 86,000 Japanese contract workers were brought to Hawai'i to work on sugar plantations, and were later joined by 132,000 Japanese immigrants between 1900 to 1924; and

WHEREAS, although Japanese workers faced harsh conditions on the plantations, they were treated with aloha by Native Hawaiians, and were allowed to become naturalized subjects of the Kingdom of Hawai'i with suffrage rights, dating back to the Hawai'i Constitution of 1852, while the privilege of United States naturalization was denied to the Japanese until after World War II; and

WHEREAS, in 1887 King Kalakaua was forced to sign the Bayonet Constitution, which denied Japanese suffrage; and

WHEREAS, in 1893 a group of American businessmen constituting the so-called Committee of Safety conspired with the United States Minister John Stevens to overthrow the Hawaiian government with the direct intervention of tile United States Marines, and Queen Lili'uokalani yielded to the superior forces of the United States Marines; and

WHEREAS, while the conspirators immediately sought annexation, Queen Lili'uokalani petitioned the United States for restoration of the Hawaiian government, and President Grover Cleveland denounced the overthrow and the role of Minister Stevens and American armed forces; and

WHEREAS, unsuccessful in their efforts for annexation, the small committee of American businessmen proclaimed a provisional government, the Republic of Hawaii; and

WHEREAS, in 1898, the United States invaded the Philippines during the Spanish-American War, and President William McKinley signed a Joint Resolution to annex the Hawaiian Islands as a territory of the United States, in an era dominated by belief in American expansionism and Manifest Destiny; and

WHEREAS, at annexation the Republic of Hawaii ceded 1.8 million acres of appropriated former crown and government lands to the United States without compensation and without the consent of the people of Hawai'i;

WHEREAS, at the end of World War II, the United Nations listed Hawai`i as one of the Non-Self Governing Territories Designated for Decolonization; and

WHEREAS, in 1959 Hawai'i was admitted to statehood, endorsed by a vote in which a return to independent nation status was not an option; and

WHEREAS, as a condition of the Admissions Act the United States conveyed 1.2 million acres of the ceded lands to the State of Hawai'i to be held in trust for the betterment of the Hawaiian people, among other express purposes, while the federal government retained the remainder of the lands ceded to it for military and other federal use; and

WHEREAS, in 1978 Hawaii Constitutional Convention approved a constitutional provision establishing the Office of Hawaiian Affairs (OHA) as the entity responsible for the administration of a portion of the ceded lands trust revenues for the benefit of Native Hawaiians, and the provision was ratified by the people of Hawai'i; and

WHEREAS, the JACL in 1984 at its National Convention adopted a resolution urging Congress to acknowledge the illegal and immoral actions of the United States and provide restitution for losses and damages suffered by Native Hawaiians as a result of these wrongful actions; and

WHEREAS, the JACL in 1986 at its National Convention reaffirmed its support for granting restitution of losses suffered by Native Hawaiians as a result of wrongful acts of the United States of America (resolution sponsored by the South Bay chapter); and

WHEREAS, the JACL in 1992 at its National Convention adopted a resolution in anticipation of the 100th anniversary of the illegal overthrow, recommitting its efforts and support of indigenous Hawaiians and calling upon the government of the United States of America to recognize the sovereign nation of Hawaii; and

WHEREAS, in 1993, the United States Congress passed, and President Clinton signed, Public Law 103-150 (the Apology Law), containing an apology to Native Hawaiians for the illegal overthrow of the Kingdom of Hawai`i, and acknowledging that the 1.8 million acres of ceded lands had been obtained without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government, ..;" and

WHEREAS, on February 23, 2000, the United States Supreme Court decided *Rice v. Cayetano*, striking down the provision of the Hawai'i State Constitution limiting those eligible to vote for OHA trustees to persons of Hawaiian ancestry as a racial classification in violation of the 15th Amendment, which provides that the right to vote may not be denied on the basis of race; and

WHEREAS, the Japanese American community is well aware that the Supreme Court does

render unjust decisions, as it did in overwhelmingly upholding the race-based curfew, exclusion, evacuation and internment of Japanese during World War, in the *Yasui, Hirabayashi* and *Korematsu* cases: and

WHEREAS, it is painfully ironic that the Supreme Court in *Rice v. Cayetano* cited *Hirabayashi* for the principle that, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"; and

WHEREAS, the Supreme Court in *Rice* refused to recognize the special political relationship that Native Hawaiians have with the United States government, and ignored legislation recognizing Native Hawaiians as a native people; and

WHEREAS, the decision of the Supreme Court in *Rice* clarifies the urgent need for Congress to clearly establish the political status of Native Hawaiians as native peoples and to recognize a Native Hawaiian entity that may then enjoy a government-to-government relationship with the United States; and

WHEREAS, the Department of Interior has initiated a reconciliation process with Hawaiians pursuant to Public Law 103-150, and Senators Daniel Inouye and Daniel Akaka of Hawaii have created a task force to address the crucial issues of federal recognition; and

WHEREAS, while Japanese Americans have received redress and reparations for the injustice of the evacuation and internment, Hawaiians have received only an apology for the denial of their sovereign rights and the deprivations they have suffered; and

WHEREAS, while discrimination and colonization are both rooted in racist attitudes, remedies for inequality of opportunity and treatment within American society will not adequately address the harms suffered by Native Hawaiians; and

WHEREAS, Asian Americans have experienced racial discrimination in the United States, both as immigrants and as citizens for generations; and

WHEREAS, Asian Americans have employed anti-discrimination laws and the United States Constitution in the fight to ensure equal opportunity and treatment, and

WHEREAS, based on their experiences as targets of discrimination and their attempts to remediate this unfortunate history, Asian Americans are well-situated to state that OHA is not a civil rights remedial program but a response to the loss or nationhood by Native Hawaiians; and

WHEREAS, the harms suffered by Native Hawaiians, while certainly as grievous if not more so than the effects of racial discrimination, require different approaches, understandings, assumptions and solutions; and

WHEREAS, the Japanese American Citizens League is an international human and civil rights organization that opposes racism and injustice; now, therefore

BE IT RESOLVED by the National Council of the Japanese American Citizens league (JACL) that we oppose the historical injustice suffered by Hawaiians, as that harm has been exacerbated by the Supreme Court in *Rice v. Cayetano*; and

BE IT FURTHER RESOLVED that the JACL reaffirms its support of Hawaiian sovereignty and self-determination; and

BE IT FURTHER RESOLVED that the JACL recognizes Native Hawaiians as an aboriginal, indigenous and native people, as opposed to an ethnic minority; and

BE IT FURTHER RESOLVED that the JACL respectfully requests that the United States Congress and President recognize the political status of Hawaiians as a native people, and provide for the implementation of steps towards reconciliation between the federal government and Native Hawaiians pursuant to Public Law 103-150; and

BE IT FURTHER RESOLVED that the JACL urges that the reconciliation process include, consistent with the desires expressed by Native Hawaiians in the exercise of their rights to self-determination, the establishment of a government-to-government relationship or other suitable structure; and

BE if FURTHER RESOLVED that each JACL chapter shall urge their respective congressional delegations to support federal recognition legislation and federal reconciliation with Native Hawaiians; and

BE IT FURTHER RESOLVED that each JACL regional office shall urge their respective congressional delegations to support federal recognition legislation and federal reconciliation with Native Hawaiians, and that this effort shall include the submission of letters in support of such legislation; and

BE IT FURTHER RESOLVED that National JACL shall urge Congressional delegations, Regional districts, Chapters, and membership to support federal recognition legislation and federal reconciliation with Native Hawaiians, and that this effort shall include the submission of letters in support of such legislation; and

BE IT FURTHER RESOLVED that copies of this Resolution be transmitted to the Hawai'i congressional delegation, the 106th Congress of the United States, the Secretaries of the Departments of Justice, Interior, and State, and the President of the United States.

Sponsored by: Honolulu Chapter
ADOPTED

SECTION-BY-SECTION ANALYSIS OF S. 2899

Section 1. Findings

This section set forth the Congress' findings. Findings (1) through 4 reflect Congress' recognition of Native Hawaiians as the native people of the United States and the State of Hawaii. Findings (5) through (7) reflect Congress's determination of the need to address conditions of Native Hawaiians through the Hawaiian Homes Commission Act of 1920. Findings (8) and (9) reflect Congress' establishment of the ceded lands trust as a condition of statehood for the State of Hawaii. Findings (9) through (11) reflect the importance of the Hawaiian Home Lands and Ceded Lands to Native Hawaiians as a foundation for the Native Hawaiian community for the survival of the Native Hawaiian people. Findings (12) through (14) reflect the effect of the Apology Resolution. Findings (15) through (19) reflect the Native Hawaiian community as a "distinctly" native community. Finding (20) reflects the legal position of the United States before the U.S. Supreme Court in the case of *Rice* v. *Cayetano.* Findings (21) and (22) reaffirm the special trust relationship between the Native Hawaiian people and the United States.

Section 2. Definitions

This section sets forth definitions of terms used in the bill. Defined terms are Aboriginal, Indigenous, Native People; Adult Members; Apology Resolution; Ceded Lands; Commission; Indigenous, Native People; Native Hawaiian; Native Hawaiian Government; Native Hawaiian Interim Governing Council; Roll; Secretary; and Task Force.

Native Hawaiian—It is the intent of the Committee that the definition of Native Hawaiian, for the purposes of membership in the government, be determined by Native Hawaiians. The Committee recognizes the longstanding issues surrounding the definition of "Native Hawaiian" and acknowledges the Native Hawaiian community's desire to address the definition of Native Hawaiian. The legislation provides for this flexibility by first identifying those Native Hawaiians eligible to participate in the reorganization of the Native Hawaiian government. The legislation further provides that once the Native Hawaiian government addresses this issue in its organic governing documents, that the definition established by the Native Hawaiian governments will serve as the definition of Native Hawaiian for purposes of this Federal law.

Roll—It is the intent of the Committee that the roll be used for the purposes of identifying those individuals who meet the definition of Native Hawaiian as defined in section 7(a)(1) to participate in the reorganization of the Native Hawaiian government. Once the roll has been established, the members on the roll have the flexibility to retain the roll should they determine it necessary for additional purpose.

Section 3. The United States policy and purpose

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a trust relationship. It also affirms that Native Hawaiians have the right to self-determination and that it is Congress' intent to provide a

process for the reorganization of a Native Hawaiian government and for Federal recognition of the Native Hawaiian government for purposes of continuing a government to government relationship.

Section 4. Establishment of the United States Office of Native Hawaiian Affairs

This provision provides authority for the establishment of the United States Office for Native Hawaiian Affairs within the Office of Secretary of the Department of Interior. This Office is charged with: (1) effectuating and coordinating the special trust relationship between the Native Hawaiian people and the United States; (2) conducting meaningful, regular, and appropriate consultation with the Native Hawaiian people regarding any action that may affect traditional or current practices and matters that significantly or uniquely impact Native Hawaiian resources, rights, or lands; (3) consulting with the Native Hawaiian Interagency Task Force, other Federal agencies, and with the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; (4) preparing and submitting to the Senate Committee on Indian Affairs, Senate Committee on Energy and Natural Resources, and House Resources Committee an annual report detailing the Interagency Task Force's activities regarding the reconciliation process, consultation with the Native Hawaiian people, and recommendations of necessary changes to existing Federal statutes; (5) continuing the process of reconciliation with the Native Hawaiian people; and (6) assisting the Native Hawaiian people in facilitating a process for self-determination, the organization of a Native Hawaiian Interim Governing Council, and recognition of the Native Hawaiian government. Once the Native Hawaiian government is formed, the Native Hawaiian government, rather than individual Native Hawaiians.

The Office is also authorized to enter into contracts and grants for the purposes of the activities authorized in section 7 for a period of 3 years.

It is the intent of the Committee that the United States Office for Native Hawaiian Affairs serve as a liaison between the Native Hawaiian people and the United States for the purposes of assisting with the reorganization of the Native Hawaiian government, continuing the reconciliation process, and ensuring proper consultation with the Native Hawaiian people for any Federal policy impacting Native Hawaiians. The Committee does not intend for the United States Office for Native Hawaiian Affairs to assume the responsibility or authority for any of the Federal programs established to address the conditions of Native Hawaiians. All Federal programs established and administered by Federal agencies will remain with those agencies.

Section 5. Designation of Department of Justice representative

This section requires the United States Attorney General to designate an appropriate official within the Department of Justice to assist the U.S. Office of Native Hawaiian Affairs in implementing and protecting the rights of Native Hawaiians and their political, legal, and trust relationship with the United States and, upon recognition of the Native Hawaiian government, the rights of the Na-

tive Hawaiian government and its political, legal, and trust relationship with the United States.

Section 6. Native Hawaiian interagency task force

This section authorizes the establishment of an Interagency Task Force composed of officials from each Federal agency, to be designated by the President, a representative from the U.S. Office of Native Hawaiian Affairs, and a representative from the Executive Office of the President. The Departments of Justice and Interior will serve as the lead agencies of the Task Force, and the Attorney General's designee and the head of the U.S. Office of Native Hawaiian Affairs will serve as co-chairs. The primary responsibility of the Task Force to coordinate Federal policies or acts that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Task Force is also charged with assuring that each Federal agency develop a Native Hawaiian consultation policy and participate in the development of the report to Congress.

Section 7. Process for the development of a roll for the organization of a Native Hawaiian interim governing council, for the organization of a Native Hawaiian interim governing council and a Native Hawaiian government, and for the Federal recognition of the Native Hawaiian government

a. Roll. This provision authorizes the U.S. Office of Native Hawaiian Affairs to assist the adult members of the Native Hawaiian community who wish to participate in the reorganization of a Native Hawaiian government in preparing a roll for the purpose of organizating a Native Hawaiian Interim Governing Council. The roll shall include the names of the adult members of the Native Hawaiian community who wish to voluntarily become citizens of a Native Hawaiian government and who are the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including all Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act and their lineal descendants. The roll may also include the names of the children of the adult members who wish to participate in the reorganization of a Native Hawaiian government. Participation in the reorganization of the government, however, is limited to the adult members listed on the roll.

A nine-member Commission is authorized to be established. The Commission is to be made up of Native Hawaiians appointed by the Secretary. In appointing members of the Commission, the Secretary may choose such members from among 5 suggested candidates submitted by the Majority and Minority Leaders of the Senate and 4 suggested candidates submitted by the Speaker of the House of Representatives and the Minority Leader of the House of Representatives. The Secretary may appoint members who are not on either list submitted by the Senate or the House of Representatives. In making appointments to the Commission, the Committee would encourage the Secretary to select Native Hawaiians who are either skilled in the translation of legal and genealogical documents that are written in the Native Hawaiian language, or who are recognized as having expertise in the research and documenta-

tion of Native Hawaiian genealogies, or who are generally recognized and accepted as genealogical experts by the Native Hawaiian community. Any vacancy on the Commission shall not affect its powers and shall be filled in the same manner as the original appointment.

The Commission is charged with certifying that the adult members of the Native Hawaiian community who wish to be listed on the roll and participate in the organization of the Native Hawaiian Interim Governing Council (Council) meet the definition of "Native Hawaiian" as established in this Act.

The Secretary shall certify that the roll is consistent with applicable federal law. If the Secretary fails to certify the roll within 90 days, the roll shall be deemed certified by the Secretary and the Commission shall publish the final roll. The Secretary is also authorized to establish an appeal mechanism to address the exclusion of the name of a person who meets the definition of Native Hawaiian or to address a challenge to the inclusion of the name of a person on the roll on the grounds that the person does not meet the definition of Native Hawaiian.

After certifying that the roll is consistent with applicable Federal law, the Secretary shall publish the final roll. The roll may be published even though appeals are pending, however, the Secretary must update the final roll upon final disposition of any appeal. The final roll shall serve as the basis for the eligibility of adult members to participate in all referenda and elections associated with the organization of the Council and the Native Hawaiian government.

b. Recognition of Rights. This provision recognizes the right of Native Hawaiians to organize for their common welfare and to adopt appropriate organic governing documents.

c. Organization of the Native Hawaiian interim Governing Council. This subsection authorizes the adult members of the roll to develop the criteria for candidates and the structure of the Council. The committee intends for the adult members of the roll to determine how the Native Hawaiian Interim Governing Council should be structured. The Committee anticipates that the adult members may consider a number of methods of representation which could include representation by island, district, ahupua'a, family, or any other form.

Upon request of the adult members listed on the roll, the U.S. Office of Native Hawaiian Affairs is authorized to provide assistance in the conduct of an election by secret ballot to elect the membership of the Council. The provision is intended to allow the adult members the flexibility to hold the election themselves or to request the assistance of the U.S. Office of Native Hawaiian Affairs.

The Council is authorized to represent those on the roll in implementing the Act and is to have no power other than those authorized by S. 2899. The Council is authorized to enter into contracts or grants to carry out is activities, to assist in the conduct of a referendum on the Native Hawaiian government's form, powers, and the proposed organic governing documents. Thereafter, the Council is authorized to conduct an election for the purpose of ratifying the organic governing documents and, upon ratification of the organic governing documents, to elect the Native Hawaiian government officers.

d. Recognition of the Native Hawaiian Government. The duly elected officers of the Native Hawaiian government shall submit the organic government documents to the Secretary for certification that the organic governing documents were adopted by a majority vote of those eligible to vote; are consistent with applicable Federal law and the special trust relationship between the United States and Native Hawaiians; provide for the exercise of those governmental authorities that are recognized by the United States as the powers and authorities that are exercised by other governments representing the inidgenous, native people of the United States; provides for the protection of the civil rights of the citizens of the Native Hawaiian government and those subject to the authority of the Native Hawaiian government; prevents the sale, disposition, lease or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian government without the consent of the Native Hawaiian government; sets forth the citizenship criteria of the Native Hawaiian government; and authorizes the Native Hawaiian government to negotiate with Federal, State, and local governments. The organic governing documents will be deemed certified if the Secretary fails to certify them within 90 days of the date the Native Hawaiian government submitted the documents.

If the Secretary determines that any provision of the organic governing documents does not comply with applicable Federal law, the Secretary shall return the organic governing documents to the Native Hawaiian government identifying each provision that is inconsistent with applicable Federal law and providing a justification for each finding that a provision is inconsistent with applicable Federal law. The Native Hawaiian government is authorized to amend the organic governing documents to assure their compliance with applicable Federal law. After the organic governing documents are amended, the Native Hawaiian government may resubmit the organic governing documents to the Secretary for certification.

e. Federal Recognition. This provision specifies that upon election of the Native Hawaiian government officers and the certifications (or deemed certifications) by the Secretary, Federal recognition is extended to the Native Hawaiian government. This provision also provides that nothing contained in the Act shall diminish, alter or amended any rights or privileges the Native Hawaiian people enjoy that are not inconsistent with the provisions of the Act.

Section 8. Authorization of appropriations

This section authorizes the appropriation of such sums as may be necessary to carry out the activities authorized.

Section 9. Reaffirmation of delegation of Federal Authority; negotiations

This section reaffirms the United States' delegation of authority to the State of Hawaii in the Admissions Act to address the conditions of Native Hawaiians. Upon Federal recognition of the Native Hawaiian government, the United States is authorized to negotiate with the State of Hawaii and the Native Hawaiian government regarding the transfer to the Native Hawaiian government of lands, resources and assets dedicated to Native Hawaiian use under existing law.

Section 10. Disclaimer

This section provides that nothing in this Act is intended to serve as a settlement of any claim against the United States, or affects the rights of the Native Hawaiian people under international law.

Section 11. Regulations

This section authorizes the Secretary to make such rules and regulations and to delegate such authority, as the Secretary deems necessary.

Section 12. Severability Clause

This section provides that should any section or provision of this Act be deemed invalid, the remaining sections, provisions, and amendments shall continue in full force and effect.

LEGISLATIVE HISTORY

S. 2899 was introduced in the Senate on July 20, 2000 by Senators Akaka and Inouye, and was referred to the Committee on Indian Affairs. A companion measure, H.R. 4904, was introduced by Congressman Abercrombie on July 20, 2000, and was referred to the Committee on Resources. Five days of hearings were held on S. 2899 and H.R. 4904 in joint hearings of the House Resources Committee and the Senate Indian Affairs Committee in Hawaii from Monday, August 28th, 2000 through Friday, September 1st, 2000. An additional hearing on S. 2899 was held in Washington, D.C. on September 13, 2000. S. 2899 was ordered favorably reported to the full Senate by the Senate Committee on Indian Affairs on September 13, 2000. H.R. 4904 was favorably reported to the House of Representatives by the House Resources Committee on September 20, 2000.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On September 13, 2000, the Committee on Indian Affairs, in an open business session, adopted an amendment in the nature of a substitute to S. 2899 by voice vote and ordered the bill, as amended, reported favorably to the Senate.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2899, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 25, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2899, a bill to express the policy of the United States regarding the United States' relationship with Native Hawaiians, to provide a process for the reorganization of a Native Hawaiian government and the recognition by the United States of the Native Hawaiian government, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2899—A bill to express the policy of the United States regarding the United States' relationship with Native Hawaiians, to provide a process for the reorganization of a Native Hawaiian government and the recognition by the United States of the Native Hawaiian government, and for other purposes

S. 2899 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing S. 2899 would cost $5 million over the 2001–2003 period, assuming the appropriation of the necessary amounts. The bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 2899 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enactment of this legislation could lead to the creation of a new government to represent native Hawaiians. The transfer of any lands or other assets to this new government, including lands now controlled by the state of Hawaii, would be the subject of future negotiations. Similarly, federal payments to native Hawaiians following recognition of a Native Hawaiian government would depend on future legislation.

The bill would establish the United States Office for Native Hawaiian Affairs within the Department of the Interior (DOI) to coordinate services to native Hawaiians, as defined in the bill. The bill would authorize the office to assist in developing a list of individuals who meet that definition. Based on information from DOI, CBO estimates that this work would cost $2 million over the 2001–2003 period. In addition, the bill would establish a commission to verify that those listed meet the bill's criteria for native Hawaiians. Based on information for DOI, we estimate that commission costs would total about $1 million each year over the three-year period.

On September 25, 2000, CBO transmitted a cost estimate for H.R. 4904, as ordered reported by the House Committee on Resources on September 20, 2000. These two bills are identical, as are our cost estimates.

The CBO staff contacts are Lanette J. Keith (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in implementing the legislation. S. 2899 authorizes the Secretary of the In-

terior to promulgate rules and regulations to carry out the provisions of the Act, thus the enactment of S. 2899 will have an impact on the Department's regulations and paperwork.

EXECUTIVE COMMUNICATIONS

The testimony of the representatives of the Departments of Justice and Interior on S. 2899 are set forth below:

STATEMENT OF ROBERT T. ANDERSON, COUNSELOR TO THE SECRETARY, DEPARTMENT OF THE INTERIOR

INTRODUCTION

Good morning, Mr. Chairman and members of both Committees. I am Robert Anderson, Counselor to the Secretary of the Department of the Interior. It is my pleasure to be here today to present the Department's views on S. 2899 and H.R. 4904.

Mr. Chairman, the Administration supports the purposes of S. 2899 and H.R. 4904 that are before both Committees. The Department believes that the Bills appropriately affirm and acknowledge the political relationship between the United States and Native Hawaiians. Our recommended change is set out below, along with our general comments.

BACKGROUND

The Native Hawaiian people are the aboriginal, indigenous, native people of Hawaii. They have lived in Hawai'i for over 1,000 years, and their culture was based on a well developed system of agriculture and acquaculture. Native Hawaiians made remarkable artistic, cultural, and scientific advances, including amazing feats of navigation, prior to the first contact with Europeans in 1778. In 1810, King Kamehameha I established the unified Kingdom of Hawai'i to govern the Native Hawaiian people. Over the next 60 years, the United States entered into several treaties of peace, friendship and commerce with the kingdom of Hawaii, recognizing its status as an independent sovereign.

During the 1880s, western influence over the Kingdom of Hawai'i increased, and in 1893, as Queen Lili'uokalani sought to restore the full authority of the Native Hawaiian monarchy, the American and European plantation owners acting in concert with the U.S. Minister and military forces overthrew the Kingdom. The Provisional Republic of Hawaii, formed by the plantation owners, then seized the Crown and public lands of the Kingdom of Hawaii, including one-third of Hawai'i that was impressed with a trust for the Native Hawaiian common people. Although President Cleveland initially opposed the overthrow, President McKinley supported the call of the Republic of Hawai'i for annexation. Congress annexed Hawai'i in 1898, without the consent of the Native Hawaiian people. As a result of the overthrow, laws suppressing Hawaiian culture and language, and displacement from the land, the Native Ha-

waiian people suffered mortality, disease, economic deprivation, social distress, and population decline.

The Territory of Hawai'i recognized that the conditions of the Native Hawaiian people continued to deteriorate, and members of the territorial legislature proposed that Congress enact a measure to rehabilitate the Native Hawaiian people by returning them to the land and promoting agriculture under Federal protections. In congressional hearings, the Secretary of the Interior acknowledged that the Native Hawaiian people were suffering a decline and that the Federal Government had a special responsibility to promote their welfare. In 1920, relying in part on the precedent of the General Allotment Act, which provided individual lands for American Indians under Federal protections, Congress enacted the Hawaiian Homes Commission Act to rehabilitate the Native Hawaiian people by setting aside for Native Hawaiian settlement and agriculture use 200,000 acres of the "ceded" lands, i.e., the former Crown and public lands of the Kingdom of Hawaii. Later, in the State Admissions Act, Congress set aside the balance of the ceded lands, not reserved for Federal purposes, in a public trust to be held and administered by the State for five purposes, including the betterment of the Native Hawaiians.

The Hawaiian Homeland settlements throughout the Hawaiian Islands assisted the Native Hawaiian people in maintaining their historic ties to the land and distinctly native settlements. In addition, through Native Hawaiian social and political institutions, such as the Native Hawaiian civil clubs, the Kamehameha schools, and the Lili'uokalani Hawaiian Children's Foundation, the Native Hawaiian community has maintained its distinct character as an aboriginal, native people. In recent years, overcoming a legacy of cultural suppression, Native Hawaiians have revitalized their language, culture, traditions, and aspiration for self-determination through Native Hawaiian language immersion programs, cultural education programs, restoration of traditional agriculture and aquaculture, creation of new social institutions and quasi-governmental service providers and the Native Hawaiian sovereignty movement, among other things. And, Native Hawaiians have made clear their desire for self-determination, i.e., increased Native Hawaiian control of Native Hawaiian affairs, resources, and lands.

Nevertheless, the Native Hawaiian people, as a native community, continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation. In response, since the early 1970s, Congress has enacted statutes that recognize these problems among Native Hawaiians and establish programs to address them. For example, the Native Hawaiian Education Act refers to studies that show that Native Hawaiian students face educational risk factors start before birth, stemming from substandard prenatal care and high rates of teen births, and continue to score

below national average at all grade levels. 20 U.S.C. sec. 7902. This Act provides funding to Native Hawaiian schools and education councils to promote special education programs for Native Hawaiian students. The Native Hawaiian Health Care Act finds that "the unmet health needs of the Native Hawaiian people are severe and the health status of Native Hawaiians continues to be far below that of the general population of the United States." 42 U.S.C. sec. 11701. This Act provides funding to Native Hawaiian health care providers to provide preventative health care to the Native Hawaiian community. The Native Hawaiian Housing Bill, S. 225, finds that Native Hawaiians face the most severe housing shortage of any group in the Nation, and if enacted, would provide low income housing to Native Hawaiians on Hawaiian Home lands.

THE RECONCILIATION PROCESS UNDER PUBLIC LAW 103–150

Against this background in 1993, Congress enacted Public Law 103–150, the Native Hawaiian Apology Resolution, which acknowledged the role of United States' officers in the overthrow of the Kingdom of Hawai'i and called on the Executive Branch to undertake special efforts to promote reconciliation between the United States and the Native Hawaiian people. The passage of the Apology Resolution was the first step in this reconciliation process.

In March of 1999, Senator Daniel K. Akaka asked Secretary of the Interior Bruce Rabbit and Attorney General Janet Reno to designate officials to represent their respective Departments in efforts of reconciliation between the Federal Government and Native Hawaiians. Secretary Babbitt designated John Berry, Assistant Secretary, Policy Management and Budget, for the Department of the Interior, and Attorney General Reno designated Mark Van Norman, Director, Office of Tribal Justice, for the Department of Justice, to take the next steps in the reconciliation process.

Informal meetings was held on O'ahu in August 1999, and public consultations with Mr. Berry and Mr. Van Norman commenced in December 1999, when meetings with the Native Hawaiian community were held on Kaua'i, Maui, Moloka'i, and Lana'i, and in Hilo, Waimea and Kona on Hawai'i. These public consultations ended in two days of formal hearings held on O'ahu. Oliver forty hours of public testimony was received. During their visit to Hawai'i, Mr. Berry and Mr. Van Norman also visited Native Hawaiian homestead communities, taro farms, Hawaiian language immersion schools, and Native Hawaiian fish ponds in the process of being restored, and observed numerous programs designed to benefit Native Hawaiians. Throughout the meetings, Native Hawaiians repeatedly expressed the desire for increased self-determination concerning Native Hawaiian affairs, resources, and lands. As a result of the process, the Departments recently issued a report outlining recommendations with respect to the con-

tinuation of the reconciliation process, including federal recognition, self-determination, and self-governance, to help the Native Hawaiians provide a better future for their members and community. The Report will be finalized after the public has had an opportunity to comment.

Native Hawaiians also have called upon the United States to assist them in improving economic opportunities educational attainment, health status, and housing. Specifically, the Native Hawaiian people requested that the Administration support and Congress enact S. 225, the Native Hawaiian Housing Act and reauthorize the Native Hawaiian Education Act and the Native Hawaiian Health Care Act.

Within the framework of Federal law, there are established precedents to accommodate the Native Hawaiian people's desire for increased self-determination. American Indian tribes and Alaska Native villages exercise self-determination over native institutions, such as schools and health care institutions; over native affairs, such as language and cultural preservation; and over native lands and resources. They do so through recognized tribal governments and federally chartered native corporations in the context of the Federal policy of recognizing the unique government-to-government and special relationships that exist between the United States and its native peoples. American Indian and Alaska Native peoples value self-determination as an avenue for addressing their communities, economic, educational, health, and social needs. Indeed, American Indian and Alaska Native peoples view the Federal Indian self-determination policy as recognizing their legitimate aspiration to transmit their distinct native values, traditions, beliefs, and aboriginal lands to their future generations.

In furtherance of reconciliation process, the Native Hawaiian people seek to re-organize a native governing body. A Native Hawaiian governing body, organized against the background of established precedent, would serve as a representative voice for the Native Hawaiian people, focus community goals, provide governmental services to improve community welfare, and recognize the legitimate aspiration of the Native Hawaiian people to transmit their values, traditions, and beliefs to their future generations.

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties and under Federal common law, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal

self-government, trust resources, and Indian tribal treaty and other rights.

Traditionally, most aspects of the trust responsibility were delegated by Congress to the Department of the Interior and the Department of Justice, the latter of which has litigated many court cases on behalf of Indian tribes and individuals. As Federal programs for Indians have proliferated in modern times, many other Federal agencies have become involved in Indian affairs and they, too, must comply with the duties imposed by the trust relationship.

In the Department of the Interior, the Bureau of Indian Affairs (BIA) is the principal bureau within the Federal Government responsible for the administration of Federal programs for Federally recognized Indian tribes, and for promoting Indian self-determination. In addition, the BIA, like all Federal agencies, has a trust responsibility emanating from treaties, statutes, judicial decisions and agreements with tribal governments. The mission of the BIA is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and properly manage the trust assets of Indian tribes and Alaska Natives. The BIA provides resources and delivers services to support tribal government operations similar to those provided by state, city, and municipal governments. These services include, but are not limited to: law enforcement, social services, education, housing improvements, loan opportunities for Indian businesses, and leasing of land.

The BIA currently provides Federal services to approximately 1.2 million American Indians and Alaska Natives who are members of more than 550 Federally recognized Indian tribes in the 48 contiguous States and in Alaska. The BIA also has a trust responsibility for more than 43 million acres of tribally-owned land and more than 10 million acres of individually-owned land. The BIA is headed by the Assistant Secretary-Indian Affairs, who is responsible for BIA policy.

TRUST RESPONSIBILITY

The courts consistently have upheld exercises of congressional power over Indian affairs, as specifically provided under the Indian Commerce Clause. U.S. Constitution, Article I, Section 8, clause 3. Pursuant to that authority, the Congress has enacted many statutes for the benefit of Native Hawaiians.

The concept of the Federal Indian trust responsibility was evident in the Trade and Intercourse Acts and other late 18th and 19th-century Federal laws protecting Indian land transactions and regulating trade with the tribes. The doctrine was first announced in Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia* (1831). The Cherokee Nation had filed suit in the United States Supreme Court to enjoin the state of Georgia from enforcing state laws on lands guaranteed to the tribe by treaties. The Court concluded that the tribe was neither a state nor a

foreign nation under the Constitution and therefore was not entitled to bring the suit initially in the Supreme Court. Chief Justice Marshall, however, concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations" and that "[t]heir relation to the United States resembles that of a ward to his guardian." The courts consistently have upheld exercises of congressional power over Indian affairs, often relying on the trust relationship.

The Supreme Court's subsequent decision in *Worcester* v. *Georgia* (1832) reaffirmed the status of Indian tribes as self-governing entities. Chief Justice Marshall construed the treaties and the Indian Trade and Intercourse Acts as protecting the tribes' status as distinct political communities possessing self-government authority within their boundaries. Thus, Georgia state law could not be applied on Cherokee lands because, as a matter of Federal law, the United States had recognized tribal self-governing powers by entering into a treaty with the Cherokees. In spite of its government status, however, the Cherokee Nation was placed expressly by the treaties "under the protection of the United States."

Under the special relationship, Indian tribes receive some benefits not available to other citizens. For example, in the 1974 *Morton* v. *Mancari* decision, the Supreme Court upheld a BIA Indian hiring preference because, like special health and education benefits flowing from the trust relationship, the preference is not based on race; rather, Federal programs dealing with Indians derive from the government-to-government relationship between the United States and Indian tribes. The same reasoning applies to off-reservation Indian hunting and fishing rights; they trace to treaties with specific tribal governments.

FEDERAL RECOGNITION

The rights, duties and obligations that make up the trust relationship as exercised through the Secretary of the Interior exist only between the United States and those Indian tribes "recognized" by the United States. Once Federal recognition is found to exist, it results in the establishment of a government-to-government relationship with the tribe.

An Indian group is a federally recognized tribe if: (1) Congress or the executive created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; and (2) the United States has some continuing political relationship with the group, such as providing services through the BIA. Accordingly, Indian groups situated on Federally maintained reservations are considered tribes under virtually every statute that refers to Indian tribes. In addition, tribes have been recognized by the United States based on the existence of treaty relations or other continuous dealings with the Federal Government, despite the lack of a reservation.

In 1978, in order to resolve doubts about the status of those tribes lacking Federal recognition, the Department of the Interior issued regulations entitled "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," now codified at 25 CFR 83. The regulations "establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist."

Such acknowledgement of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment also means that the tribe is entitled to the immunities and privileges available to other Federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes. Acknowledgment subjects the Indian tribe to the same authority of Congress and the United States to which other Federally acknowledged tribes are subjected. 25 CFR 83.2.

Under the procedures, groups not recognized as tribes by the Federal Government may apply for Federal acknowledgement. Tribes, bands, pueblos or communities already acknowledged as such and receiving services from the Bureau of Indian Affairs were not required to seek acknowledgment anew. 25 CFR 83.3 (a), (b). To assist groups in determining whether they were required to apply, the procedures provided for the publication within 90 days of a list of "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 CFR 83.6(b). This list is to be updated annually. Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

DEPARTMENT COMMENTS ON S. 2899 AND H.R. 4904

The Department has recommended a reconciliation process that would result in an official confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal Government, similar to the relationship enjoyed by other native people in the United States. The Senate and House Bills would enable the Native Hawaiians to establish a representative governing body through a process that has precedent in the federal recognition of Indian tribes.

The Department has recommend the establishment of an office under the Assistant Secretary of Indian Affairs to address Native Hawaiian issues. The Bills, however, would establish a new Interior Office of Special Trustee for Native Hawaiian Affairs.

The Department has recommended the creation of a Native Hawaiian Advisory Commission to consult with Interior bureaus that manage land in Hawaii affecting Native Hawaiians. The Bills would also establish a Native Hawaiian Interagency Task Force for the government-wide coordination of federal policies affecting Native Hawaiians, including consultations with the Native Hawaiian governing body.

We have carefully reviewed the definition of "Native Hawaiians" in the Bills and consulted with the Department of Justice. We concur in the recommendations made by the Department of Justice with respect to that definition.

CONCLUSION

The Department of the Interior generally supports the legislation and is committed to working with the Native Hawaiian people and the Congress, upon enactment of this legislation, to address successfully the steps to federal recognition, self-governance, and self-determination of the Native Hawaiian people. There are a number of prospective matters that the Federal Government may have to work out with the Native Hawaiian governing body and the State of Hawai'i, through future legislation. These challenges may include:

Potential land claims that Native Hawaiians may assert against the United States, the State of Hawai'i or private landowners;

The nature and extent of the rights, obligations and benefits in extending Federal recognition to Native Hawaiians under the Native American Indian statutes;

The Federal Government's trust and fiduciary responsibilities for any federal lands that may be transferred to the Native Hawaiian community; and

The relative responsibilities of Native Hawaiian community and the State of Hawai'i and its local governments in providing schools, law enforcement, and other public services.

With the permission of the Committees, the Department intends to supplement this testimony with additional views on S. 2899 and H.R. 4904 before the record is closed. This concludes my prepared statement. I will be happy to answer any questions the Committee members may have.

TESTIMONY OF JACQUELINE AGTUCA, ACTING DIRECTOR, OFFICE OF TRIBAL JUSTICE, U.S. DEPARTMENT OF JUSTICE

Vice Chairman Inouye, Senator Akaka, and Representatives Abercrombie and Faleomavaega, my name is Jacqueline Agtuca. I am the Acting Director of the Office of Tribal Justice in the United States Department of Justice. Thank you for the opportunity to present views on S. 2899 and H.R. 4904.

At the outset, I should explain that the Office of Tribal Justice coordinates Department policy on its dealings with American Indians, Alaska Natives, and Native Hawaiians. Department of Justice policy recognizes the principle of government-to-government relations in its work with tribal governments. See Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, at 1 (June 1, 1995); http://www.usdoj.gov/otj/sovtrb.htm. Pursuant to this policy, the Office of Tribal Justice has been integrally involved in the

Reconciliation Process between the United States and the Native Hawaiian people pursuant to Public Law 103–150 (S.J. Res. 19), 107 Stat. 1510 (1993), the Native Hawaiian Apology Resolution. S. 2899 and H.R. 4904 would provide the Native Hawaiian people with an opportunity to reorganize a representative, self-governing body to promote Native Hawaiian interests.

I will begin with a brief background of the relevant history of United States-Native Hawaiian relations and a discussion of the Reconciliation Process under Public Law 103–150 before turning to some of our specific comments on the identical Senate and House bills.

I. BACKGROUND OF NATIVE HAWAIIAN–UNITED STATES RELATIONS

The Native Hawaiian people are the indigenous people of Hawaii. Historically, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure. The Native Hawaiians have a highly developed and distinctive language, culture, and religion. The first encounter between Native Hawaiians and Europeans occurred when Captain James Cook sailed into Hawaiian waters in 1778. At that time, even though indigenous Hawaiians were all one people, the eight islands were governed by four independent Hawaiian chiefdoms.

In 1810, King Kamehameha I united the islands into the Kingdom of Hawaii. Between 1826 and 1893, the United States recognized the Kingdom as a sovereign nation and entered into several treaties with it. During that same period, Americans gained control of most of Hawaii's commerce and began to dominate the Kingdom's political affairs. Resulting social and economic changes had a "devastating" effect on the Native Hawaiian population and on their "health and well-being." Public Law 103–150, 107 Stat. 1510, 1512.

In 1893, Queen Lili'uokalani sought to re-establish Native Hawaiian control over the Kingdom's governmental affairs through constitutional reform. Fearing a loss of power, a group representing American commercial interests overthrew the Kingdom with the unauthorized aid of the United States Minister to Hawaii, who caused an armed U.S. naval force to invade Hawaii. Under this threat of military force, Queen Lili'oukalani abdicated her throne. A provisional government was established, which immediately sought Hawaii's annexation by the United States. President Cleveland refused to recognize the provisional government and called for restoration of the monarchy. However, Congress later enacted a joint resolution annexing Hawaii, which President McKinley signed into law in 1898. As part of annexation, the provisional government, without compensation to the Native Hawaiian people, ceded 1.8 million acres of the Kingdom's former crown, government, and public lands to the United States (the "ceded lands").

After annexation, the conditions of Native Hawaiians continued to deteriorate, and in 1920, territorial representatives sought assistance for the Native Hawaiian people from Congress. Explaining that the Native Hawaiian people had been "frozen out of their lands and driven into the cities," and that the "Hawaiian people are dying," the representatives recommended allotting land to the Native Hawaiians so that they could reestablish their traditional agricultural way of life. H.R. Rep. 839, 66th Cong., 2d Sess. 4 (1920). Recognizing the unique relationship between the United States and the Native Hawaiian people, the Secretary of the Interior joined in the recommendation, stating that Native Hawaiians are "our wards * * * for whom in a sense we are trustees," that they were "falling off rapidly in numbers," and that "many of them are in poverty." Id. Additionally, Congress found constitutional precedent for the HHCA in part in previous enactments that allotted individual lands to American Indians. The recommendations led to the enactment of the Hawaiian Homes Commission Act ("HHCA"), Pub. L. No. 67–34, 42 Stat. 108 (July 9, 1921), which designated 200,000 acres of lands as homelands for "Native Hawaiians" of ½ blood or more.

In 1959, Hawaii was admitted as a State. In the Hawaii Admissions Act, Pub. L. No. 86–3, 73 Stat. 4 (1959), Congress required the new State of Hawaii to adopt the HHCA as part of its constitution and transferred federal authority over administration of the HHCA lands to the State. Congress also placed an additional 1.2 million acres of the ceded lands into a trust to be managed by the State for five specified purposes, including "the betterment of the conditions of native Hawaiians." Id § 5(f), 73 Stat. at 6.

The admission of Hawaii as a State did not alter the status of Native Hawaiians as an indigenous people, and thus, did not alter the political relationship between the United States and the Native Hawaiian people. After passage of the Hawaii Admission Act, Congress continued to recognize its special responsibility for the welfare of Native Hawaiians. Congress has established programs for the benefit of Native Hawaiians in the areas of health care, education, employment, and loans. Congress has also enacted statutes to preserve Native Hawaiian culture, language, and historical sites. Native Hawaiians have been classified as Native Americans in a number of federal statutes. These laws reflect Congress's view that its "authority * * * under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. § 11701(17). This acknowledgment of a distinct political relationship between the United States and the Native Hawaiians arose out of these historical events I have just described.

In 1980, Congress authorized a Native Hawaiians Study Commission to assess the cultural needs and concerns of Native Hawaiians (Public Law 96–565, Title III). The

Commission, comprised of three Hawaiian residents, six federal officials, and support staff, conducted public meetings and other fact-finding activities throughout Hawaii during January–June 1982. The Commission's final, two-volume report was submitted to Congress on June 23, 1983. The social and economic conditions of the Native Hawaiian population has not improved significantly since this 1983 study. Their employment, income, education, and health levels have remained lower than other ethnic groups in Hawaii. The Commission recommended coordinated actions by the federal, state, and local governments and private organizations to address specific needs of Native Hawaiians.

The Senate and House bills that are being considered today would begin this process of restoring self-governance to Native Hawaiians so they may better address their social, economic and cultural needs.

II. THE RECONCILIATION PROCESS UNDER PUBLIC LAW 103–150

In 1993, Congress enacted a Joint Resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to apologize to the Native Hawaiian people for the role of the United States in that overthrow. In the Joint Resolution, Congress acknowledged that the overthrow of the Kingdom "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people," that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." Pub. 103–150 (S.J. Res. 19), 107 Stat. at 1512, 1513 (1993). The Joint Resolution calls upon the President to promote further reconciliation between the United States and the Native Hawaiian people.

In March 1999, Senator Akaka wrote to the Attorney General, requesting that an office by designated within the Department of Justice to work in cooperation with the Department of the Interior to promote reconciliation between the United States and the Native Hawaiian people. The Attorney General designated the Office of Tribal Justice to work with the Department of the Interior on the Reconciliation Process. In December 1999, the Interior Department Assistant Secretary for Policy, Management and Budget and the Director of the Office of Tribal Justice visited Native Hawaiian sites and held a series of meetings with the Native Hawaiian people to promote reconciliation.

The site visits demonstrated to the Interior-Justice delegation the continuing, distinctly native character and culture of the Native Hawaiian people. The delegation visited

Aha Punana Leo, a Native Hawaiian language immersion school on the Island of Hawaii. They were greeted by Native Hawaiian students with traditional Native Hawaiian songs, and they toured the campus grounds, which included areas planted with Taro, the traditional Native Hawaiian staple, and a fish hatchery, reflecting traditional aquaculture. Students had also planted native trees and plants on the campus to establish a conservation area. On the Island of Kauai, the delegation met with Native Hawaiian parents and students at Ni'ihau, a school run by Native Hawaiian teachers from Ni'ihau and Kauai. The Ni'ihau parents explained that their children learned Hawaiian as a first language in the home, so the focus at the school was on teaching the students to speak, read, and write English to ensure that the children are able to interact with non-Natives when they travel to neighboring islands. On the Island of Molokai, the delegation visited a Native Hawaiian group that is restoring a fish pond that is hundreds of years old for subsistence use. On Molokai, the delegation met with a Native Hawaiian kindergarden class, where all of the students are fluent in both Hawaiian and English, and visited with Native Hawaiian kupuna (elders), who explained the importance of being raised in a Hawaiian Homestead community in terms of language and cultural preservation. The delegation also met with and visited a number of Native Hawaiian organizations, including: the Alu Like, the Native Hawaiian Education advocacy organization; members of Native Hawaiian organizations advocating for self-governance; a Native Hawaiian Health Care Center; the Kamehameha schools; Hawaiian Home Land communities and land areas on Kauai, Oahu, and Maui; and several other distinctly Native Hawaiian communities. In addition, the delegation held public meetings and heard statements from several hundred Native Hawaiians.

Throughout these delegation site visits and public meetings, two things were made clear. First, the Native Hawaiians and a distinctly native community with a vibrant culture, traditions, and language and active social and political organizations. We learned from Native Hawaiians that Hawaiian Home Land settlements helped to maintain Hawaiian language and culture, which was particularly important from the 1920s through the 1960s when the use of the Native Hawaiian language and the practice of Native Hawaiian culture were often discouraged by state institutions. We also learned that since the 1960s, a number of Native Hawaiian advocacy groups have actively promoted Hawaiian language and culture and these efforts have gone hand-in-hand with efforts to enhance Native Hawaiian self-governance. To foster these efforts, the Native Hawaiian people maintain both social and quasi-governmental institutions, such as the Native Hawaiian Civic Clubs, Alu Like—the Native Hawaiian education organization, Papa Ola Lokahi—the Native Hawaiian health care

organization, Native Hawaiian schools, and Native Hawaiian traditional justice programs, among others.

Second, the delegation heard the clear call of the Native Hawaiian people for self-governance. A majority of Native Hawaiians, from whom the delegation heard, support increased self-governance over their lands, resources, and affairs.[1] Some of the critical subjects that the Native Hawaiian people identified are increased control of Native Hawaiian lands and resources, education programs, health care delivery, Native Hawaiian housing, and an increased ability to engage the Federal Government in an ongoing dialogue concerning Native Hawaiian issues.

III. COMMENTS ON S. 2899 AND H.R. 4904

The overthrow of the Kingdom of Hawaii frustrated the right of Native Hawaiians to control their own affairs. While Congress has enacted a number of measures to promote the welfare of the Native Hawaiian people, and Native Hawaiians have themselves worked to maintain their own distinct community, culture, language, and social and political institutions, they have not been afforded a clear opportunity to control their own affairs since 1893. These bills would enable the Native Hawaiians in reorganizing their own representative governing body, which will promote control over their own affairs.

A. Goals of this legislation

It is evident from the documentation, statements, and views received during the Reconciliation Process undertaken by the Interior-Justice delegation that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures, and they desire to increase their control over their own affairs. For generations, the United States has recognized the unique relationship that exists between the United States and the Native Hawaiians, and has promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action and policy statements. The proposed legislation, by clarifying the political status of Native Hawaiians, would extend to Native Hawaiians the right of self-governance over their cultural resources and internal affairs.

The proposed process of reorganizing a Native Hawaiian governing body has precedent in Federal legislation promoting self-governance for American Indian and Alaska Native peoples. The government-to-government relationship that exists between the United States and American Indian and Alaska Native communities is firmly established in federal law and policy. From its earliest days, the

[1] While most Native Hawaiians appear to support increased Native Hawaiian control over native lands, resources, and affairs within the framework of Federal law, some members of the Native Hawaiian community have called for restoration of the Kingdom of Hawaii or another form of independence from the United States. The Interior-Justice delegation explained that its mission was to promote reconciliation within the framework of Federal law, and the Reconciliation Process does not have any bearing or implication concerning international law matters.

United States recognized the sovereign status of Indian tribes. Indian tribes were independent self-governing societies long before their contact with European nations. See *National Farmers Union Ins. Co.* v. *Crow Tribe of Indians,* 471 U.S. 845, 851 (1985); F. Cohen, "Handbook of Federal Indian law," 229 (Strickland ed. 1982). The retention of inherent sovereignty forms the basis for the exercise of tribal power. Today American Indian tribes and Alaska Native villages and corporations control many programs affecting their communities, including, for example, programs affecting their lands and natural resources, schools and colleges, health, housing, water, sewer, and sanitation services, public safety, and transportation infrastructure on native lands. In addition, acknowledged governmental leaders facilitate the government-to-government relationship, which enables tribal governments to advocate effectively for their community interests.

The proposed bills respond to the call of the Native Hawaiian people for increased self-governance within the framework of domestic Federal law. It recognizes that Native Hawaiians were a elf-governing people prior to contact with the European nations, and that the clarification of their political status vis-a-vis the United States is a legitimate exercise of Congress' Indian affairs power. The reorganization of a Native Hawaiian governing body that the bill affords the Native Hawaiian people to constitute could assist the Native Hawaiians to better address their community needs and goals in the context of federal law, and could facilitate the government-to-government relationship between the Federal Government and the Native Hawaiian community. Enhancing the government-to-government relationship between the Native Hawaiians and the United States could ensure that the Native Hawaiian people have greater control over activities affecting their rights and resources. See Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994).

B. Findings

The bills' legislative findings establish Congress' intent to exercise authority pursuant to its Indian affairs power. Section 1(1) states that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native peoples of the United States." Subsections (2) and (3) find that the Native Hawaiian people are an aboriginal, indigenous, native people with a special trust relationship to the United States and that Congress has legislated on behalf of the Native Hawaiian people as such. The legislative findings concerning the Hawaiian Homes Commission Act are important because they reflect an early congressional effort to promote the welfare of the Native Hawaiian people by fostering the continuation of traditional Native Hawaiian agricultural endeavors on aboriginal lands under the protection of Federal law. The HHCA embodies a congressional determination that the

Native Hawaiians, as defined in that Act, are an indigenous, aboriginal people under the protection of the United States. The legislative findings also reflect the fact that the Native Hawaiian people today maintain a continuing, distinctly Native Hawaiian culture, language, social and political institutions, and community. These policy declaration make clear that Congress intends to reaffirm the right of Native Hawaiians to self-governance, within the framework of Federal law, and intends to continue to promote reconciliation between the United States and the Native Hawaiian people.

C. Definition of Native Hawaiian

In modern Federal legislation dealing with American Indians Alaska Natives, Congress commonly relies on a tribe's determination of its own membership. However, because the Native Hawaiian governing body has not yet been reorganized, an interim Federal law definition of "Native Hawaiian" is necessary for the operation of the legislation.

We have several comments on the definition of "Native Hawaiian" set forth in section 2(6), and section 7. First, the Department finds it important that the definition includes only those Native Hawaiians who voluntarily choose to affiliate with the Native Hawaiian governing body. Section 7(a)(1)(A) does exactly this by establishing a roll that includes the names of "the adult members of the Native Hawaiian community who wish to become members of a Native Hawaiian governing body."

Second, the interim definition of Native Hawaiian set forth in section 7(a) ties membership to "lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago."

The Supreme Court's decision in *Rice* v. *Cayetano,* 120 S. Ct. 1044 (2000) left open the question "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Rice,* 120 S. Ct. at 1057. Accordingly, in invoking its established constitutional authority with respect to Indian Tribes in the present context—namely, by providing Native Hawaiians with much the same opportunity to reorganize and establish a self-governing body that Congress has furnished to the Indian Tribes elsewhere in the United States that the Court referred to—it would make the most sense to adopt an interim definition that draws upon past practices under Congress's Indian affairs power.

Thus, we recommend an alternative interim definition that references the Hawaiian Homes Commission Act (HHCA), Pub. L. No. 67–34, 42 Stat. 108 (1921). There are several reasons for this recommendation. First, the HHCA was itself an exercise of Congress' Indian affairs power not long after annexation, and it thus represents an established Federal law process for determining who is a Native Hawaiian for federal purposes. See H.R. Rep. 839, 66th

Cong., 2d Sess. 4 (1920) (statement of Secretary Lane expressly mentioning the trust relationship that exists between the United States and Native Hawaiians). Second, the HHCA presents a definition that is tied to those Native Hawaiians who are eligible to reside on distinctly native Hawaiian lands, and which can reasonably serve as an indication of those Native Hawaiians who maintain close ties to the Native Hawaiian community. Third, insofar as lineal descendancy is concerned, this definition traces to 1778, the date of European contact, rather than 1893, after the arrival of Europeans and Americans. Finally, the Department of Hawaiian Home Lands maintains a record keeping system regarding eligibility for HHCA lands, which will make the interim reorganizational process more definitive and thus less complicated. This recommendation is intended to ensure that this legislation serves as an enduring measure to provide a strong foundation for Native Hawaiian self-governance within the framework of federal law.

Accordingly, we recommend the following interim definition of the term Native Hawaiian:

A Native Hawaiian is any person:

(a)(i) who is eligible to hold Hawaiian Home lands as a Native Hawaiian directly or by devise under the Hawaiian Homes Commission Act, Public Law 67–34, 42 Stat. 108, as amended, and (ii) who voluntarily affiliates with the Native Hawaiian people as a political community; or

(b)(i) who is a lineal descendant of a Native Hawaiian who is or was eligible to hold Hawaiian Home Lands directly or by devise under Public Law 67–34, 42 Stat. 108, as amended, (ii) who is recognized by the Native Hawaiian community as a Native Hawaiian, and (iii) who voluntarily affiliates with the Native Hawaiian people as a political community.

Finally, it is important to note that the purpose of the interim definition is to provide a means of implementing this legislation, which first seeks to establish a Native Hawaiian Interim Governing Council. Once that is accomplished, the Native Hawaiian people may then determine their own membership just as other native communities. A tribe's "right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 72 n.32 (1978). Section 7(c)(7)(D) expressly states that the organic documents of the governing body will vest it with the power to "determine the membership in the Native Hawaiian governing body."

D. Transfer of authority over HHCA and ceded lands trust to the Native Hawaiian governing body

Section 9(a) of the bills reaffirms the delegation of authority by the United States to the State of Hawaii over the HHCA in Hawaii's Admissions Act. Section 9(b) then

authorizes the United States to negotiate an agreement between the State and the Native Hawaiian governing body that would transfer authority over "lands, resources, and assets dedicated to Native Hawaiian use under existing law" to the Native Hawaiian governing body. We support the premise of providing the Native Hawaiian governing body with primary authority over these programs.

However, we recommend an alternative provision that would authorize the State and the Native Hawaiian governing body to negotiate a transfer of authority over governmental services provided by the State to the Native Hawaiian governing body, subject to the approval of the Secretary. This alternative provision would better serve the Native Hawaiian community because the State is, at present, the administrator of the HHCA and the ceded lands, trust, not the United States. Our alternative provision would also provide express protection for the justified expectations of Native Hawaiians under the HHCA.

CONCLUSION

In conclusion, the Department of Justice generally supports, S. 2899 and H.R. 4904, and is committed to working closely with the Native Hawaiian people and the Congress, upon enactment of this legislation, to address successfully the steps to Federal recognition, self-determination, and self-governance for the Native Hawaiian people. There are a number of prospective matters that the Federal Government may have to work out with the Native Hawaiian governing body and the State of Hawaii, through future legislation. These challenges may include:

Potential land claims that Native Hawaiians may assert against the United States, the State of Hawaii, or private landowners;

The nature and extent of the rights, obligations and benefits in extending Federal recognition to Native Hawaiians under the Native American Indian statues;

The Federal Government's trust and fiduciary responsibilities for any federal lands that may be transferred to the Native Hawaiian community; and

The relative responsibilities of the Native Hawaiian community and the State of Hawaii and its local governments in providing schools, law enforcement, and other public services.

The the permission of the Committees, the Department intends to supplement this testimony with additional views on S. 2899 and H.R. 4904 before the record is closed. Once again, thank you for this opportunity to present views on this important legislation.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that enactment of S. 2899 will not effect any changes in existing law.

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