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REPORT
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TO EXPRESS THE POLICY OF THE UNITED STATES REGARDING THE UNITED STATES RELATIONSHIP WITH NATIVE HAWAIIANS AND TO PROVIDE PARITY AND A PROCESS FOR THE RECOGNITION BY THE UNITED STATES OF THE NATIVE HAWAIIAN GOVERNING ENTITY

DECEMBER 17, 2012.—Ordered to be printed

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

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 675]

The Committee on Indian Affairs, to which was referred the bill (S. 675) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 675 is to ensure parity in federal treatment of Native nations with whom the United States has a trust responsibility, to establish a process for the reorganization and federal recognition of a Native Hawaiian governing entity, and to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship.

BACKGROUND

Native Hawaiians are the only federally-recognized Native people barred from self-determination and self-governance

The Native Hawaiian people are the only federally-recognized Native people without a government-to-government relationship

with the Federal Government. Native Hawaiians are indigenous to the State of Hawaii—just as American Indians are indigenous to the contiguous United States and Alaska Natives are indigenous to the State of Alaska.[1] S. 675 creates parity within federal policy so that Native Hawaiians will be treated as are all other Native Americans.[2]

> I have seen so many changes in Hawai'i and across the country, and I have been amazed at the resiliency of our Native Hawaiian people, our culture, and our language. . . . I have witnessed profound change in the status and treatment of all indigenous peoples. Gone are the days when teaching our language was banned, when our culture and traditions were deemed unimportant. We now know that our language, culture, and traditions hold incredible wisdom about how best to live in this place we call Hawaii.[3]

Having survived more than 200 years of foreign influence, the Native Hawaiian people are determined to preserve, develop, and pass on 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. Native Hawaiians preserve and perpetuate their culture, language,

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[1] In 2011, the State of Hawaii officially recognized the Native Hawaiian people as "the only indigenous, aboriginal, maoli population of Hawaii." Act 195 (26th Haw. Leg. Sess. (2011)). "The enactment of Act 195 was yet another example of Hawaii's ongoing desire to recognize the unique contributions and traditions of the Native Hawaiian people." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol). That Native Hawaiians, Alaska Native, and American Indians are not of the same racial group should not be a factor in determining who is considered "Indian." Alaska Natives and American Indians of the forty-eight contiguous states have many racial differences and yet both groups are considered Indians under federal law. Despite racial differences between Indians in the lower forty-eight states and Alaska Natives, the United States Supreme Court has included Alaska Natives, non-Indians under an anthropological meaning, within the term "Indian." Alaska Pac. Fisheries v. United States, 248 U.S. 78, 86–87 (1918) (noting that the Annette Islands were established as a reservation "for the use of the Metlakahtla Indians . . . and such other Alaskan natives as may join them"). See discussion *infra* pp. 6–9.

[2] *S. Comm. on Indian Affairs: Business Meeting to consider S. 675, S. 1345, S. 1684* (Sept. 13, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs). Native Hawaiians "have yet to be afforded the same recognition as our first Americans" and the responsibility to rectify this disparity is a moral imperative on the part of the United States Federal Government. 156 CONG. REC. H700, H712 (daily ed. Feb. 23, 2010) (statement of Rep. Faleomavaega). *See also Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law) ("Native Hawaiians . . . are . . . the only native group in the United States that has a long history of . . . federal recognition, but does not have a clearly acknowledged government-to-government relationship with the U.S. government."). The Congress has never properly addressed the status of Native Hawaiians and it is within Congress' constitutional authority to do so. U.S. CONST., art. I, § 8, cl. 3. *See also* United States v. Lara, 541 U.S. 193, 196 (2004) ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribes' inherent legal authority. We conclude that Congress does possess this power."). "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *Sandoval,* 231 U.S. at 45–46; *see* United States v. Kagama, 118 U.S. 375, 384–85 (1886) ("From [the Indians] very weakness 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. . . . 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; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

[3] Sen. Daniel K. Akaka, Final Speech to the Council for Native Hawaiian Advancement's Annual Native Hawaiian Convention (Oct. 5, 2012).

and lifeways through traditional practices like *hoʻoponopono* (peacemaking and conflict resolution), *laʻau lapaʻau* (traditional medicine), *lua* (martial arts), *oli* (chant), and *hula* (dance). These practices help Native Hawaiians address current socio-economic conditions, education, health, and resource management. By encouraging traditional practices as well as civic participation, community governance, and self-sufficiency, Native Hawaiians ensure that their culture will continue for many generations to come.

The Native Hawaiian people have become leaders in national efforts to ensure the survival and proliferation of indigenous languages, and are the first Native American peoples to develop and offer Native language education programming from preschool to Ph.D.[4] "For the past twenty years [Native Hawaiians] have been recognized as 'the go-to source of support' for Native American immersion and teaching methodology for endangered indigenous languages."[5]

Native Hawaiians suffer the same consequences of negative federal treatment as American Indians and Alaska Natives, yet Native Hawaiians do not have a means to address these issues

Native Hawaiian socio-economic and health conditions lag significantly behind other populations in Hawaii[6] and the nation, and remain comparable to other Native Americans. Native Hawaiians consistently exhibit higher rates of unemployment than the state average, and are increasingly underrepresented in white-collar jobs, while remaining overrepresented in blue-collar jobs.[7] In 1999, 14.1 percent of Native Hawaiian families living in Hawaii lived below the poverty level, nearly double the statewide rate of 7.6 percent.[8] In 2010, Native Hawaiians made up the largest percentage of people, 28.7 percent, who received homeless shelter services.[9] Native Hawaiian veterans also suffer disproportionately from the

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[4] *A Timeline of Revitalization,* E OLA KA 'OLELO HAWAII: THE HAWAIIAN LANGUAGE SHALL LIVE (Nov. 17, 2012). The two leading entities in Native American language revitalization are 'Aha Pūnana Leo, Inc. and the Liaison of Ka Haka 'Ula O Keʻelikōlani, Hawaiian language college established by the Hawaii State Legislature in 1997 at the University of Hawaii at Hilo. "These two entities lead a consortium of programs in Hawaii and also in the national Native American language immersion effort." *In Our Way: Expanding the Success of Native Language & Culture-Based Education: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 26, 2011) (statement of Nāmaka Rawlins, Liaison, Consortium 'Aha Pūnana Leo, Ka Haka 'Ula O Keʻelikōlani, Ke Kula 'o Nāwahīokalaniʻōpuʻu).

[5] *In Our Way: Expanding the Success of Native Language & Culture-Based Education: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 26, 2011) (statement of Nāmaka Rawlins, Liaison, Consortium 'Aha Pūnana Leo Ka Haka 'Ula O Keʻelik Iōlani, Ke Kula 'o Nāwahīokalaniʻōpuʻu). (noting that current federal educational legislation fails to take into account "the unique needs of Native American languages and the crisis of extinction facing Native American languages" and this legislation may actually suppress Native American languages in American education).

[6] "[T]he social statistics of Native Hawaiians, welfare rolls, incarceration rates, health issues are very, very significant and Hawaiians rank on the top of all of those social ills at this point, and have been for many, many years. And the legislation and NAHASDA and homeownership I think is an important step in providing stability." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Richard Naiwieha Wurdeman, President, Native Hawaiian Bar Ass'n).

[7] Shawn Malia Kanaʻiaupuni, Nolan J. Malone & Koren Ishibashi, *ka huakaʻi i mua: Findings from the 2005 Native Hawaiian Educational Assessment* (Mar. 2005).

[8] OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK 189, Table 2.48 (2011) [hereinafter *Data Book*].

[9] *Id*. at 251, Table 2.91.

consequences of military service, including higher rates of disorders related to combat exposure.[10]

The achievement outcomes for Native Hawaiian children are among the lowest throughout elementary and secondary school and the math achievement scores of Native Hawaiians continue to be significantly lower than those of other ethnic groups.[11] Less than half of Native Hawaiian adults hold either a bachelor's or graduate/professional degree as compared to all adults in Hawaii.[12]

Native Hawaiians have the highest incidence of lung, breast, and uterine cancer of any group in Hawaii.[13] In 2007, 11 percent of the Native Hawaiian population suffered from diabetes, compared to a rate of 6 percent for the rest of the State of Hawaii.[14] In 2009 and 2010, 69.6 percent of the Native Hawaiian population was considered overweight or obese as compared to the statewide average of 52.1 percent.[15]

Until there is a recognized government-to-government relationship between the Federal Government and the Native Hawaiian people, as there exists between the Federal Government and all other Native American peoples, Native Hawaiians will not have access to the federal policy of self-determination, nor will they be able to exercise self-governance, as do all other Native Americans. This policy was "intended to assure that all three groups of America's indigenous Native people, American Indians, Alaska Natives and Native Hawaiians have equal status under federal law."[16] Without access to this federal policy, without the opportunity to make decisions about their own affairs, resources, and futures, the disparities between Native Hawaiians and other Americans will persist and continue to worsen. Self-governance empowers Native people by recognizing, in policy and in practice, the right of all Native people to govern themselves.[17] "[S]elf-determination ensures the promise of Native self-sufficiency. It results in our continued ability to be productive and contribute to the well-being of our families, our communities, and our great nation."[18] The steady growth of sustained economic development across the nation among Native governments is evidence that the federal policy of self-determination does work.[19]

> [A] growing number of [Native] nations have broken out of the prevailing pattern of poverty. They have moved aggressively to take control of their futures and rebuild their

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[10] *Programs and Services for Native Veterans: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 24, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) (citations omitted).

[11] Shawn Malia Kana'iaupuni, Nolan J. Malone & Koren Ishibashi, *ka huaka'i i mua: Findings from the 2005 Native Hawaiian Educational Assessment* (Mar. 2005).

[12] *Id.*

[13] DATA BOOK, *supra* note 8, at 559, Figure 7.49b & 562, Figure 7.49g, Figure 7.49h (for the years 1995–2000).

[14] *Id.* at 542, Table 7.42b & 544, Figure 7.42h.

[15] *Id.* at 598–599, Table 7.64.

[16] *Native Hawaiian Government Reorganization Act: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 16 (Aug. 6, 2009) (statement of Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs).

[17] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

[18] Sen. Daniel K. Akaka, Address at the Alaska Federation of Natives Convention (Oct. 19, 2012).

[19] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

> nations, rewriting constitutions, reshaping economies, and reinvigorating Indigenous communities, cultures, and families. Today they are creating sustainable, self-determined societies that work in all dimensions—economic, social and political.[20]

Native people across the country have benefitted from the United States' policy of supporting self-determination and self-governance for its indigenous peoples. "With a similar government-to-government relationship, Native Hawaiians could access the most powerful tools in federal law to perpetuate our culture and our traditions."[21]

Committee jurisdiction over American Indians, Alaska Natives and Native Hawaiians

This Committee has jurisdiction to study the unique problems of American Indian, Native Hawaiian, and Alaska Native people, and to propose legislation to alleviate these difficulties. These issues include, but are not limited to, Indian education, economic development, land management, trust responsibilities, health care, and claims against the United States. Additionally, most legislation proposed by Members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee. This Committee has exercised jurisdiction over matters related to Native Hawaiians since it was organized in 1977. The Committee has concluded that the Native Hawaiian people are a distinctly Native community that fall within the scope of Congress's power to legislate with respect to "Indian Tribes."[22]

Congressional authority over Indian affairs

Since the founding of the United States, Congress has exercised a broad constitutional authority over Indian affairs while simultaneously recognizing the sovereignty possessed by the Native people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands which eventually became the United States.[23] "It is well-established that 'the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[24]

The Constitution vests Congress with the authority to address the conditions of the indigenous, Native people of the United States, and the Supreme Court has upheld this congressional au-

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[20] *Id.* (quoting Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations, One Works, the Other Doesn't, in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 1, 6 (Miriam Jorgensen, ed., 2007)).

[21] Sen. Daniel K. Akaka, Speech at the Annual Native Hawaiian Convention (Aug. 25, 2011).

[22] U.S. CONST. art. I, § 8, cl. 3.

[23] Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977); United States v. Sioux Nation, 448 U.S. 371 (1980); U.S. v. Lara, 541 U.S. 193, 203 (2004). Congress' plenary power over Indian affairs includes the power to recognize, terminate and restore the tribal status of Indian tribes. *Lara,* 541 U.S. at 201–2.

[24] *Lara,* 541 U.S. at 200.

thority under the Indian Commerce Clause,[25] the Treaty Clause,[26] the Supremacy Clause,[27] the Property Clause,[28] and the War Powers Clause.[29] Congress may exercise its power to rationally promote the welfare of the Native people of the United States. "These powers comprehend all that is required for the regulation of our intercourse with Indians."[30]

"Indians" and "tribes": political and legal distinctions, not cultural or racial designations

American Indians, Alaska Natives, and Native Hawaiians are often generally referred to as "Native Americans," and are cited in the Constitution as "Indians" or "Indian Tribes."[31] As indigenous, or Native, peoples, American Indians, Alaska Natives, and Native Hawaiians have collective and individual rights under international and domestic law, including rights of self-determination and self-governance.

Although the aboriginal tribes, nations, and peoples, over which Congress exercised its Indian affairs authority were defined in part by communities of common ancestry, the unique constitutional significance of such entities derives from their separate existence as independent political communities.[32] Native people and groups were nations,[33] and the relationship between the United States and its Native peoples reflected a political understanding between sovereigns. The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign

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[25] U.S. CONST. art. I, § 8, cl. 3. Congressional authority over Indian affairs does not emanate solely from the Commerce Clause's reference to "Indian Tribes." Rather, the Constitution implicitly gives Congress the power to manage Indian affairs more generally. *See, e.g.*, Board of County Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943); United States v. Sandoval, 231 U.S. 28, 45–46 (1913); United States v. Kagama, 118 U.S. 375, 383–84 (1886).

[26] U.S. CONST. art. II, § 2, cl. 2.

[27] U.S. CONST. art. IV, § 2.

[28] U.S. CONST. art. IV, § 3, cl. 2.

[29] U.S. CONST. art. I, § 8, cl. 11.

[30] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[31] Jon Van Dyke, *The Political Status of the Native Hawaiian People,* 17 YALE L. & POL'Y REV. 95, 119 (1998). Just as there is no universally agreed-upon legal defmition of "Indian," there is also no universal "definition of what constitutes a Native nation, in part because each community defines itself differently and because the U.S. government in its relations with tribes has operated from conflicting sets of cultural and political premises across time." DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 3 (3d ed. 2011) (citing the Indian Self-Determination Act of 1975, 25 U.S.C. § 450e, which defines an Indian tribe as "any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.") (citations omitted). *See also* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 n.4 (1979) ("The scope of the phrase 'Indian tribe' may vary from statute to statute.") (citing United States v. Sandoval, 231 U.S. 28, 48–49 (1913)). "Although no universal definition exists, many statutes give definitions for purposes of particular laws, federal agencies like the Bureau of Indian Affairs (BIA) generate their own definitions, numerous courts have crafted definitions, and the term tribe is found—though not defined—in the Constitution's commerce clause." WILKINS & STARK, *supra* note 31, at 3. "Federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 137 (2005 ed.).

[32] *Worcester,* 31 U.S. at 559.

[33] *See e.g.,* 42 U.S.C. § 11701(1) ("The Congress finds that: Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778."). *See also Native Hawaiian Government Reorganization Act of 2009: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 66 (Aug. 6, 2009) (statement of Steven Joseph Gunn, Attorney and Adjunct Professor of Law, Washington Univ. in St. Louis) ("In regard to the term Indian Tribe, it has been used synonymously or interchangeably with the term Indian Nation. [Alexander] Hamilton in Federalist 24 talked about regulating trade with Indian tribes and spoke of them as Indian nations. And [in] *Worcester v. Georgia,* Chief Justice Marshall talked about the words treaty and nation as being Anglo words of our choice, but clearly words that are applicable to Indian tribes.") (citations omitted).

political communities," and not "racial group[s]."[34] The Supreme Court has also repeatedly applied these concepts of "Indian" and "tribe" to a wide variety of Native American communities, recognizing both the constant evolution of Native communities and that the questions of whether and how to treat these evolving communities are ones assigned to Congress under the Constitution.[35]

To the framers of the Constitution, an "Indian tribe" simply meant a distinct group of indigenous people with their diversity of unique cultures, languages and traditions—each with their own ways of governing themselves.[36] "The consistent use of these terms

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[34] United States v. Antelope, 430 U.S. 641, 646 (1972); *see* Fisher v. District Ct. of Sixteenth Jud. District of Mont., 424 U.S. 382, 389 (1976); Morton v. Mancari, 417 U.S. 535, 553–54 (1974); Elk v. Wilkins, 112 U.S. 94, 109 (1884); *see also* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993); United States v. Mazurie, 419 U.S. 544, 557 (1975).

[35] Concerning Native American communities, the Court has 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, and not by the courts." *Sandoval,* 231 U.S. at 46 (citations omitted). For example, the Supreme Court approved Congress' tribal designation for the Pueblo Indians of New Mexico in 1913. Prior to the United States' acquisition of New Mexico, the Pueblo Indians were Mexican citizens. They became citizens of the United States through the Treaty of Guadalupe Hidalgo, U.S.-Mex., 9 Stat. 922, T.S. No. 207 (1848). "The Court determined that the Pueblos fell with the scope of Congress' Indian commerce power and could be recognized as 'Indians.'" Derek H. Kauanoe & Breann Swann Nu'uhiwa, *We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent,* 13 ASIAN-PAC. L. & POL'Y J. 117, 150 (2012) (citing *Sandoval,* 231 U.S. at 45–46). Decisions like these were noteworthy because the Pueblo Indians, once citizens of Mexico, had been already been declared "non-Indians" by the Court in 1877 because they differed in many respects from the concept of "Indian tribe" that prevailed at the time. Despite their differences, 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." *See Sandoval,* 231 U.S. at 46–47; United States v. Candelaria, 271 U.S. 432, 439, 442–43 (1926). The United States now regards Alaska Native groups as Indian tribes, despite earlier court holdings and Attorney General Opinions to the contrary. Kauanoe & Swann Nu'uhiwa, *supra* note 35, at 150 (citations omitted). In 1978, the Court again recognized Congress' authority to create a reservation for the benefit of the 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. United States v. John, 437 U.S. 634, 652–53 (1978). The Court deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law" even though the tribe had only recently organized into a distinct Indian community. *Id.* at n. 20.

[36] *See Worcester,* 31 U.S. (6 Pet.) at 519, 559, 583 (equating Indian tribe and Indian nation and defining "nation" as a "people distinct from others" and "as being vested with rights which constitute them a state, or separate community"). The term "Indian" is often used interchangeably with "aboriginal," yet "[t]here is no single definition of the term *Indian.*" STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 18 (3d ed. 2004)-(emphasis in original). "In 1846, in a case called United States v. Rogers, the Supreme Court described Indian tribes as 'aboriginal tribes of Indians.' In 1867, the United States enacted the Treaty of Cession with Russia, and it spoke of Alaska Natives and compared their treatment to that of the 'aboriginal tribes' of the United States. So we have used the word Indian and aboriginal interchangeably, and clearly, Native Hawaiians are the aboriginal and Native peoples of the Hawaiian Islands." *Native Hawaiian Government Reorganization Act of 2009: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 66 (Aug. 6, 2009) (statement of Steven Joseph Gunn, Attorney and Adjunct Professor of Law, Washington Univ. in St. Louis) (citing United States v. Rogers, 45 U.S. (1 How.) 567, 571 (1846)). *See also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 9 (5th ed. 2009) ("'Indian' is another term the meaning of which varies according to the purpose for which the definition is sought.") (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1942)). The use of the term "Indian" is credited to Christopher Columbus when he wrongly called the indigenous people of the Bahamas archipelago "Indians" because he incorrectly believed he had discovered the East Indies. "Believing he [Columbus] has discovered his conjectured shorter sea route to the Indies, he naturally calls the first people he encounters *los Indios*—Indians—and claims their island for the Spanish Crown. . . . 'Regardless of whether Columbus thought he had landed among the East Indies or among islands near Japan or even elsewhere near the Asian continent, he would probably have used the same all-encompassing term for the natives, because *India* stood as a synonym for all of Asia east of the river Indus at the time and *Indies* was the broadest designation available for all the area he claimed under royal patent." ROBERT A. WILLIAMS, JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 181 (2012) (quoting Robert Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* 5 (1979)) (emphasis in original).

'Indian' and 'tribe' results in the Federal Government treating all federally-recognized Native peoples equally, with the same tools to address the unique needs and priorities in their own communities."[37]

> The fact that they are from different regions of the United States and speak different languages does not change the fact that they are indigenous peoples with whom the United States executed treaties, took lands into trust on their behalf, and has a special responsibility to promote their welfare through the federal policy of self-governance and self-determination. The reference to native groups as "Indians" or "tribes" is a reflection of their status as indigenous peoples.[38]

Because Native Hawaiians today have a direct historic, cultural, and land-based link to the indigenous people who inhabited and exercised sovereignty over the Hawaiian Islands before the first European contact in 1778, and because they are determined to preserve and to pass on to future generations their Native lands and their distinct culture, the Native Hawaiian community falls squarely within the scope of Congress's plenary power to legislate with respect to Indian tribes.

Congressional authority to provide for the reorganization and recognition of Indian tribes

Congress has frequently enacted legislation that provides for the reorganization of Indian tribes and the recognition of Native sovereigns pursuant to its Indian affairs powers. For example, the Indian Reorganization Act of 1934 provides that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . which shall become effective when—(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary."[39]

On numerous occasions, Congress has enacted specific statutes that restore federal recognition of previously terminated tribes. There are many tribal restoration acts throughout Title 25 of the U.S. Code, involving interim council elections set up and run by the Secretary, with participation based on statutory criteria that include lineal descent or required ancestry, as well as other measures of connection to the community. Some of these statutes establish a process for nominating and electing members of an interim council or body that has responsibility for functioning as the acting tribal government and developing proposed constitutions and bylaws to be voted on by the members in an election conducted by the Secretary.[40] In addition, courts have relied on treaties or laws that

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[37] Sen. Daniel K. Akaka, Final Speech to the Native Hawaiian Convention (Oct. 5, 2012).

[38] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

[39] 25 U.S.C. § 476(a).

[40] 25 U.S.C. § 711.

promise to provide for tribal self-government,[41] as well as statutes that prescribe in detail the structure and operation of tribal governments.[42]

Each of the 566 federally recognized tribes has had its own unique political history with the United States. "While no Native political history is perfectly analogous to the political history of Native Hawaiians, it is also true that no Native political history is perfectly analogous to any other Native political history." [43] Despite their differences, each of these communities falls within the scope of Congress' authority.[44]

The federal trust responsibility to the Native Hawaiian people

The trust doctrine is one of the most important principles in Federal Indian law.[45] In treaties, Native nations relinquished certain rights in exchange for promises from the federal government. The trust responsibility is the Federal Government's obligation to honor those promises. This obligation is a legal one under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.[46] Since 1831, the United States Supreme Court has recognized the existence of a trust relationship between the United States and Indian tribes.[47] Over the past century, the Supreme Court has repeatedly reaffirmed this "distinctive obligation of trust incumbent upon the Government" in its dealings with Indians.[48]

Nearly "every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the Federal Government." [49] Within the framework of this trust relationship, Congress has enacted hundreds of statutes defining the contours of the United States' fiduciary responsibilities. Statutes, like treaties, can create a trust duty. As extensions of treaties, statutes are often the vehicles by which Congress creates the programs and services necessary to fulfill its treaty obligations.[50]

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[41] *See* Ex Parte Crow Dog, 109 U.S. 556, 568 (1883) (discussing a federal pledge in a treaty to "secure to" a tribe "an orderly government, by appropriate legislation thereafter to be framed and enacted").

[42] *See* Fletcher v. United States, 116 F.3d 1315, 1327 (10th Cir. 1997) (discussing approving and invoking an act in which "Congress . . . prescribed the form of tribal government for the Osage Tribe," including "establish[ing] the offices of a principal chief, an assistant principal chief, and an eight-member Osage tribal council, and requir[ing] that elections be held every four years to fill those offices").

[43] Kauanoe & Swann Nu'uhiwa, *supra* note 35, at 151.

[44] *See, e.g.,* United States v. Lara, 541 U.S. 193, 196 (2004) ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribes' inherent legal authority. We conclude that Congress does possess this power.").

[45] *See, e.g.,* AMERICAN INDIAN POLICY REVIEW COMMISSION, 2 FINAL REPORT, APPENDIXES, AND INDEX SUBMITTED TO CONGRESS (1977) ("The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.").

[46] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

[47] This moral obligation was first discussed by Chief Justice John Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[48] *Seminole Nation,* 316 U.S. at 296; *see* United States v. Mitchell, 463 U.S. 206, 225–26 (1983) (noting "the undisputed existence of a general trust relationship between the United States and the Indian people").

[49] COHEN, *supra* note 31, at 420–21.

[50] Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope* 2–3 (2008) ("Many [statutes] give a federal agency elaborate control over tribal property, pre-

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Native Hawaiians are the indigenous, Native people of Hawaii with whom the United States has a trust relationship. The terms "Native Hawaiian," "Hawaiian," and "native Hawaiian" are used interchangeably in numerous laws by federal, state, and local governments to refer to the indigenous people of Hawaii. Congress has consistently recognized its political, legal, and trust relationship with the Native Hawaiian people. In 1920, Congress began enacting laws to meet its trust responsibility to the Native Hawaiian people, beginning with passage of the Hawaiian Homes Commission Act (HHCA).[51] Since passage of the HHCA, Congress has repeatedly recognized the distinct status of Native Hawaiians. For over 90 years, the United States has consistently interacted with Native Hawaiians based on the same political and legal relationship it has maintained with all America's Native peoples.

The United States has acknowledged this relationship and its duty to the Native Hawaiian people, and in fact has codified its duty by enacting over 150 statutes.[52] Pursuant to its authority under the Constitution, Congress has included Native Hawaiians in numerous laws enacted to benefit other Native peoples in the United States and, in other statutes, has established separate programs specifically for Native Hawaiians, including. the Native Hawaiian Education Act and the Native Hawaiian Health Care Improvement Act.[53] The findings in both of these acts specifically refer to the existence of a trust relationship between the Native Hawaiian people and the United States. By enacting hundreds of statutes and other actions, the Federal Government has assumed the special responsibilities of a trust relationship toward Native Hawaiians—as it has for American Indians and Alaska Natives.

The struggles of Native Hawaiians to protect their rights as an indigenous people, and secure a land and natural resource base to exercise those rights, echo the historic struggle of all Native Americans. As a result, in the early 1970s, Congress began to include Native Hawaiians in statutes establishing programs designed to provide services for American Indians and Alaska Natives. Native Hawaiians are included in over 150 congressional acts providing as-

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cluding the tribe from managing these resources on their own. The Supreme Court recognized in United States v. Mitchell, 463 U.S. 206 (1983), that when this arrangement occurs, the agency then has the *fiduciary* duty to manage that property wisely and in the tribe's best interests.") (emphasis in original).

[51] 42 Stat. 108 (1921). This Act is now part of Hawaii's State Constitution. *See* Haw. Const. art. XII.

[52] Van Dyke, *supra* note 31, at 106 (noting that the following laws are among those that classify Native Hawaiians as Native Americans and include them in Native American benefit programs: the National Historic Preservation Act § 4006(a)(6), 16 U.S.C.A. § 470a(d)(6); the National Museum of the American Indian Act §§ 1–10, 13, 16, 20 U.S.C. §§ 80q–80q–12, 80q–15 (1994); the Drug Abuse Prevention, Treatment and Rehabilitation Act § 4106(d), 21 U.S.C. § 1177(d) (1994); Native American Languages Act, 25 U.S.C. §§ 2901–2912 (1994); the Workforce Investment Act of 1998 § 166, 29 U.S.C.A. § 2911 (West Supp. 1998); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994); the Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992 (1994); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act § 311(c)(4), 42 U.S.C. § 4577(c)(4) (1994). For a sampling of other recent laws aimed at benefiting Native Hawaiians economically and culturally, see, for example, 20 U.S.C.A. § 4441 (West Supp. 1998); 20 U.S.C.A. § 7118 (West Supp. 1998); the Native Hawaiian Education Act, 20 U.S.C.A. §§ 7901–7912 (West Supp. 1998); the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001–3013 (1994); 42 U.S.C. § 254s (1994); the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701–11714 (1994); the Cranston-Gonzalez National Affordable Housing Act § 958, Pub. L. No. 101–625, 104 Stat. 4079, 4422 (1990). *See also,* Native Hawaiian Education Act § 9212, 20 U.S.C.A. § 7912(1) (West Supp. 1998); National Museum of the American Indian Act § 16(11), 20 U.S.C. § 80q–14(11) (1994); Native American Graves Protection and Repatriation Act § 2(10), 25 U.S.C. § 3001(10) (1994)).

[53] Native Hawaiian Education Act, 20 U.S.C. §§ 7511–7517; Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701–11714.

sistance to Native people for health, housing, welfare, and education often on an equal basis with that provided to members of federally-recognized Indian tribes. That Congress has included Native Hawaiians in legislation promulgated primarily for the benefit of American Indians, in addition to enacting legislation solely for the benefit of Native Hawaiians is evidence of a continuing guardian-ward relationship between Native Hawaiians and the Federal Government. Congress enacted these 150 laws in order to carry out its responsibility to protect Native Hawaiian rights, address Native Hawaiian concerns, and provide resources to meet the needs of the Native Hawaiian people.[54]

Despite these explicit inclusions and congressional actions, Native Hawaiians are still not included in statutes that advance self-determination and provide a meaningful right to exercise self-governance. Although there are historical distinctions that separate Native Hawaiians from other Native Americans, none of these differences adequately explain the Federal Government's failure to assume responsibility for the protection of Native Hawaiian people, their land, and their political status. Native Hawaiians remain the only major group of Native Americans with whom the nation has not reconciled historic claims.[55]

Many programs administered by the Bureau of Indian Affairs (BIA) are premised on the existence of a tribal government that exercises powers of self-governance. Because the Native Hawaiian government was illegally overthrown with the participation of the United States, the Native Hawaiian people were divested of their ability to be self-governing. "As a result of these actions by the United States—its participation in the overthrow and its ultimate annexation of Hawaii—the United States was instrumental in depriving Native Hawaiians of their sovereignty and their national lands."[56] The Native Hawaiian people have a great need for these BIA programs, but cannot take advantage of them because the Native Hawaiian people no longer have a centralized governmental entity with which the BIA can consult.[57]

Although the United States has applied the same federal policies, and many of the same federal laws, to the Native Hawaiian people as it has applied to other Native Americans, it has not permitted

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[54] There are also 12 statutes that specifically require the Federal Government to consult with Native Hawaiian organizations in carrying out its trust responsibility. *Infra* notes 171 & 172.

[55] Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law,* 98 CAL. L. REV. 1165, 1194 (2010). "A closer examination of the historical context, however, shows that the denial of Native Hawaiian sovereignty and property followed the familiar process of treating indigenous peoples as a race in need of reformation rather than a polity with political rights. Measures that seek to restore a portion of what this racialization took away should not falter under the guise of equal protection." *Id.*

[56] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huhi Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[57] HISTORY, JURISDICTION, AND A SUMMARY OF LEGISLATIVE ACTIVITIES OF THE S. SELECT COMM. ON INDIAN AFFAIRS, 95TH CONG. 24 (1977–1978). However, just as tribes have been able to maintain a trust relationship with the Federal Government through tribal councils or similar governing bodies, Native Hawaiians have been able to maintain this relationship through their homestead associations. Homestead associations have been vital to the implementation of the HHCA as Congress intended. "[S]elf-determination and self-governance is [sic] expressed through the existence of organizations governed by beneficiaries [of the HHCA] or homesteaders themselves. These homestead associations have existed for decades, and have representative leadership through democratically elected processes for each homestead land area on different islands within the state." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Michelle Kauhane, Deputy Director, State of Hawaii, Department of Hawaiian Home Lands).

the Native Hawaiian people to become an organized, self-governing people. As a result, Native Hawaiians continue to suffer the consequences of the illegal overthrow of their indigenous government.

Self-governance: an element of the federal trust responsibility

The situation in Indian country within the United States paralleled the colonial expansion occurring abroad.[58] Initially the idea was to remove Indians to the West—outside of the settled states. As the non-Indian settlement reached the central continent and began the migration toward California and the Pacific Northwest, the logistics of relocating tribes outside of state boundaries became increasingly problematic.[59]

> As a nation we have changed course many times in the policies governing our dealings with Native people. We began with treaties with Native people, and then we turned to war. We enacted laws recognizing Native governments, and then we passed laws terminating our relationships with those governments. We repudiated our termination policy and restored our relationships with Native governments. Finally for the last 39 years we adopted a policy of recognizing and supporting the rights of this nation's First Americans to self-determination and self-governance.[60]

After more than a century of failed efforts to improve the lives of America's indigenous people, the only strategy that has worked is the federal promotion of tribal self-government, known as the policy of "self-determination."[61] Self-determination is about improving the well-being of the indigenous people in the United States, the "poorest and, arguably, historically most oppressed and disempowered people."[62]

The federal policy of self-determination recognizes the distinctive cultural, political, and economic rights of all Native nations, and encourages the political autonomy of those Native nations. Despite its blemished treaty rights record, the United States has shown an ongoing belief in the validity of treaties and agreements by maintaining federal policies that affirm nation-to-nation relationships; enacting federal laws that support tribal self-governance and tribal judicial systems; issuing judicial decisions that recognize the inherent sovereignty of all Native Americans; and by presidential ac-

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[58] Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes,* 34 ARIZ. ST. L.J. 113, 164–65 (2002). "This was the period in which the United States acquired Cuba and the Philippines through the Spanish-American War, engaged in gunboat diplomacy in the Caribbean basin and Latin America, acquired the rights to build the Panama Canal by taking Panama away from Columbia, and overthrew the internationally-recognized indigenous monarchy of the Republic of Hawaii, ultimately annexing Hawaii to the United States. In short, it was the period when the American will toward empire reached its peak. During this period, in order to justify the expanding American colonial empire, both the political branches and the federal judiciary virtually ignored the constitutional principles upon which the nation was founded. Yet, the colonial expansion of American authority continued to raise thorny constitutional problems that the Supreme Court could not easily resolve by resorting to the first principles of the United States Constitution. Ultimately, it gave up trying." *Id.* at 164 (citations omitted).

[59] *Id.* at 164–65.

[60] *Native Hawaiian Government Reorganization Act: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 5 (Aug. 6, 2009) (statement of Senator Daniel K. Inouye).

[61] Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 13 (Joint Occasional Papers on Native Affairs (JOPNA) Working Paper No. 1, 2010).

[62] *Id.* at 14.

tions that carve out a path for positive intergovernmental relations. Self-determination is more than a guiding principle; it is a full-fledged right of all peoples that can be invoked by its holders to claim their inherent sovereignty.

Since his first day in office, President Obama has worked to strengthen the government-togovernment relationship between the United States and Native governments in order to improve the quality of life for all Native Americans, including Native Hawaiians.[63] The President and his Administration have made tremendous progress addressing major concerns in Indian country.[64] In 2009, the President signed a memorandum directing federal agencies to fully implement Executive Order 13175, "Consultation and Coordination with Tribal Governments." In 2010, in response to calls from many tribal leaders, President Obama announced the United States' support of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration).[65] The Declaration was initiated in 1976, primarily by American Indian leaders who "turned to the international community principally because of the longstanding failure of the United States courts and federal law to recognize that Indian nations and other [N]ative peoples in this country are entitled to constitutional rights and to equality before the law."[66] The Declaration includes numerous references to the right of indigenous peoples to continue their languages, cultures, and traditions. Support of the Declaration by the United States goes hand-in-hand with the United States' commitment to address the consequences of the history of Native American people. As President Obama recognized, "few have been more marginalized and ignored by Washington for as long as Native Americans—our First Americans."[67]

"It is time for the United States to give [Native Hawaiians] access to its best policies on Native peoples, not just the legacies of the worst ones."[68] The federal reaffirmation of Native Hawaiian

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[63] The Obama Administration supports S. 675. *See* Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples 4 (Dec. 9, 2010). Other proponents that have expressed strong support for the Native Hawaiian Government Reorganization Act include Attorney General Eric Holder, Interior Secretary Ken Salazar, Interior Assistant Secretary Kevin Washburn, the current Governor of Hawaii, Neil Abercrombie, the entire Hawaii congressional delegation, the Hawaii State Office of Hawaiian Affairs, the American Bar Association and the National Congress of American Indians.

[64] This includes improving the quality of care offered by the Indian Health Service (IHS) by signing into law the Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010); promoting economic development in Indian country by providing more than $3 billion through the Recovery Act, Pub. L. No. 111–5, 123 Stat. 115 (2009), to help tribal communities renovate schools on reservations, spur job creation in tribal economies, improve housing and energy efficiency, and support health facilities and policing services; and making tribal communities safer through the Tribal Law and Order Act (TLOA), Pub. L. No. 111–211, 124 Stat. 2258 (2010).

[65] G.A. Res. 61/295, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. 07–58681 (Oct. 2, 2007).

[66] *Setting the Standard: Domestic Policy Implications of the U.N. Declaration on the Rights of Indigenous Peoples: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 13–14 (June 9, 2011) (statement of Robert T. Coulter, Executive Director, Indian Law Resource Center) (noting that the conditions that gave rise to the Declaration have not improved and Native nations in this country continue to live with a system of Federal law that is unconstitutional, discriminatory, and unworkable, analogous to the "separate but equal" legal doctrine). "Congress should embrace the Declaration, because it is American. It is based on American values. It is American in its origin." *Id.* at 14.

[67] Remarks by President Obama during the Opening of the Tribal Nations Conference & Interactive Discussion with Tribal Leaders (Nov. 5, 2009).

[68] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs) (noting how "self-deter-

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sovereignty, acknowledged through the same self-governance programs that have enabled other tribes to generate revenues through their own business enterprises, operate court and effective law enforcement systems, and design school curricula to better meet the needs of Native students, would do the same for the Native Hawaiian people. The federal policy of self-determination has enabled Native nations to build strong economies, reverse decades of culture and language loss, and to tailor programs and services to better meet the needs of their people.[69]

Congress' commitment to parity among all Native Americans

Congress enunciated its policy of parity in the federal treatment of Native nations when it amended the IRA in 1994 in order to prohibit the Federal Government and its agencies from taking any action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."[70] Signed into law by President Clinton on May 31, 1994, the amendments overruled prior practices of classifying tribes based on date of their date of recognition or manner of recognition.[71] Congress made it clear that "if a tribe is federally recognized, they possess the full panoply of powers of sovereign Indian tribes unless specifically divested by treaty or Congressional action."[72] "Tribe" was thus defined to include all federally recognized tribes in all federal statutes affecting Indian tribal governments.[73]

The 1994 amendments to the IRA put an end to the discriminatory practices that had been developing within the Department of the Interior (DOI).[74] DOI began to classify tribes as either "his-

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mination and self-governance has proven to be the only federal policy that has worked for Native communities").

[69] *Id.*

[70] Pub. L. No. 103–263, 108 Stat. 707 (codified at 25 U.S.C. § 476(f)–(g)).

[71] Memorandum from John D. Leshy, Solicitor, Office of the Solicitor, U.S. Dep't of the Interior, to Ada E. Deer, Assistant Secretary, Office of Indian Affairs, U.S. Dep't of the Interior 3 (July 13, 1994).

[72] *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 45 (statement of Steven J.W. Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (noting also that this "artificial distinction represents a significant departure from the Congressional intent and purpose of the IRA and is reminiscent of the very policies of assimilation that the IRA was intended to address")). "Subsequent amendments to the IRA also addressed the category of tribes that chose not to . . . organize under IRA constitutions, and to make clear that federally recognized Indian tribes had the right to not adopt an IRA constitution if they so chose." *Id.* at 46. *See also* H.R. Rep. No. 103–781 at 3 (1994) as reprinted in 1994 USCCAN 3768.

[73] Leshy, *supra* note 71, at 3–7 (citing the broad defmition of "tribe" in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(1): "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government"). In his memorandum, Leshy also notes the broad defmition of "tribe" in many other federal statutes, including, Indian Land Consolidation Act, 25 U.S.C. § 2201(1); the Indian Child Welfare Act, 25 U.S.C. § 1903(8); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e); and the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10).

[74] *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 35–41 (June 23, 2011) (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(f) and noting that DOI's practice came to light when the Pascua Yaqui Nation of Arizona made efforts to amend their tribal constitution)). "Strangely, although the Department was apparently making this distinction amongst tribes, it appears that the Department never notified the affected tribes or the Congress of their new status. Had they done so, we would have acted to correct this unauthorized arbitrary and unreasonable differentiation of tribal status long ago. . . . [O]ur amendment would void any past determination by the Department that an Indian tribe is created and would prohibit any such determinations in the future. . . . [O]ur amendment will correct any instance where any federally recognized Indian tribe has been classified as 'created' and that it will prohibit such classifica-

toric," and entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action, or "created," and therefore possessing limited sovereign powers.[75] By enacting the 1994 amendments and broadening the definition of "tribe" in federal statutes, Congress explicitly rejected DOI's classifications.[76] The amendments ensured that DOI, as well as all other federal agencies, upheld the original intent of the IRA to promote tribal sovereignty by allowing all federally recognized tribes to organize and self-govern.[77]

Native Hawaiian self-governance: a brief history

The Hawaiian Islands were isolated from outside contact for centuries before 1778, when the British explorer Captain James Cook arrived. The Native Hawaiian people were an independent, self-governing society long before contact with Europeans and Americans.[78] The Native Hawaiian people thrived in a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."[79]

High chiefs (*ali'nui*) controlled a district of an island or an entire island. Local chiefs (*ali'i*) controlled specific lands or resources (*konohiki*), and commoners (*maka'ainana*) worked the land for the benefit of all. Lands were divided into parcels enclosed by boundaries that radiated from a point on a mountain top to the sea. The parcel was known as an *ahupua 'a,* an economically self-sufficient

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tions from being imposed or used in the future. Our amendment makes it clear that *it is and has always been* Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government." 140 CONG. REC. S6147 (daily ed. May 19, 1994) (statement of Sen. Daniel K. Inouye (D-Hawaii) (emphasis added).

[75] "Such an artificial distinction represent[ed] a significant departure from the Congressional intent and purpose of the IRA and [was] reminiscent of the very policies of assimilation that the IRA was intended to address. . . . In enacting Public Law 103–263 [the 1994 IRA amendments], Congress rejected the artificial distinction of historic and created tribes and made clear that any regulation, rule or administrative decision that classifies, enhances or diminishes the privileges and immunities available to a federally recognized tribe relative to other tribes shall have no force and effect." *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 36 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(0)).

[76] Leshy, *supra* note 71, at 7. Leshy also noted that the 1994 amendments to the IRA were not "confined to the IRA," but were "intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify, or implement the categories or classifications." *Id.* at 3, n.3 (quoting 140 CONG. REC. S6147 (daily ed. May 19, 1994) (statement of Sen. John McCain)).

[77] Sen. Daniel K. Inouye (D–Hawaii), who co-sponsored the legislation, told Congress that "The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes. . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . ., we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted." 140 CONG. REC. S6147 (daily ed. May 19, 1994).

[78] The history of Native Hawaiian self-governance forms the foundation for the exercise of self-governing authority by Native Hawaiians today, originating from the sovereignty exercised by Native Hawaiians prior to European and American suppression of that authority. In federal law, this is known as "inherent sovereignty." *See* United States v. Wheeler, 435 U.S. 313, 320, 322–23 (1978).

[79] Jon M. Van Dyke, *supra* note 31, at 95 (quoting Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103–150, 107 Stat. 1510, 1510 (1993) [hereinafter *Apology Resolution*]). The Senate passed the Apology Resolution on Oct. 27, 1993, the House passed it on Nov. 15, 1993, and President Clinton signed it on Nov. 23, 1993. A joint resolution is passed by a simple majority in both houses of Congress and is signed by the President.

tract of land, which included farmland, forest resources, fresh water, and access to the sea. The lands were held in common for the benefit of all. By 1810, not long after the first European contact, King Kamehameha I unified the Hawaiian Islands. The unified Hawaiian Kingdom preserved the communal land tenure system and created a centralized governmental with which foreign governments could interact.

In 1840, acting on the advice of westerners, King Kamehameha III promulgated the first written constitution of the Hawaiian Kingdom. The constitution established the Hawaiian monarchy and declared that the monarchy controlled the land for the benefit of the chiefs and the commoners, who owned the land collectively.[80] Following this formal declaration clarifying land ownership in the kingdom was the "Great Mahele" of 1848, authorizing the monarchy to divide lands between the king, the government, the ali'i (chiefs), and the common people, in order to determine, and ultimately transfer, clear title. Although the Great Mahele created, for the first time in Hawaii's history, an opportunity for private ownership of land, ownership was subject to the right of Native tenancy by those who had customarily used and occupied the lands.

Of the approximate 4 million acres in the islands of Hawaii, the King, through the Great Mahele, reserved 1 million acres for himself and his royal successors, known as "crown lands"; 1.5 million acres were designated as "government lands";[81] and the other 1.5 million acres were given to the King's chiefs, for use by the common people, and became known as "konohiki lands."

The political relationship between the Kingdom of Hawaii and the United States

The United States ratified more than 365 Indian treaties from 1777 until 1871. These treaties evidence the government-to-government relationships between the tribes and the United States.[82] Under the Constitution of the United States, United States courts are bound by treaties made under the authority of the United States and by customary international law.[83] Although the United States has never treated the governments of its indigenous peoples as *equal* governments, it has treated them as governments.

As the United States expanded westward, treaties became the primary vehicle for acquiring Indian lands. For the United States, treaties with America's indigenous peoples were tools for diplomacy

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[80] "The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom." *The First Constitution of Hawaii* in THE FUNDAMENTAL LAW OF HAWAII 10, 12 (Lorrin A. Thurston ed., 1904).

[81] *In re* Estate of Kamehameha, 2 Haw. 715, 725–6 (1864). The land considered government and crown lands eventually became the basis for a land trust for Native Hawaiians. *See* Newlands Resolution, J. Res. 55, July 7, 1898, § 1, 30 Stat. 750 and the Admissions Act of 1959, Pub. L. No. 86–3, 73 Stat. 4 (1959).

[82] DOCUMENTS OF UNITED STATES INDIAN POLICY 84 (Francis Prucha, ed. 2000) (noting that the Fort Laramie Treaty of September 17, 1851 refers to the United States and the Sioux [signatories of the treaty] as "the aforesaid nations").

[83] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

and acquiring land. For the American Indians, Alaska Natives, and Native Hawaiians, treaties were about establishing peace and friendship and preserving their tribal sovereignty over their homelands.[84] The United States considered the Hawaiian Islands vital to the protection of its interests and power in the Pacific. Treaty relations increasingly focused on assuring commercial and military access. "Throughout the nineteenth century, the United States recognized the independence of the Kingdom of Hawaii; extended full and complete diplomatic recognition to the Hawaiian government; and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887." [85] These five treaties represented official recognition of sovereign status; the relationship between the Hawaiian Government and the Federal Government was considered to be one between sovereigns. On December 30, 1842, President Tyler officially recognized Hawaii as an independent nation and declared a policy of maintaining Hawaiian independence. In recognition of its independence, Congress provided an appropriation for the appointment of a United States minister to Hawaii, and in 1848, President Tyler assigned a minister to Hawaii.[86]

From the beginning of its relations with Hawaii, the United States sought to "prevent the absorption of Hawaii or the political control of that country by any foreign power." [87] While the treaties did offer Hawaii advantageous trade relations with the United States, "the United States has so far interfered with the internal policy of Hawaii as to secure an agreement from that Government restricting the disposal of bays and harbors and the crown lands to other countries, and has secured exclusive privileges in Pearl Harbor of great importance to this Government." [88] By the late-1800s, the United States had come to view Hawaii as part of the American system and efforts by another foreign power to colonize the islands would have been regarded as acts of war against the United States.[89]

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[84] *Compare, e.g.,* U.S. Treaty with the Hawaiian Islands in 1849 with the United States' Treaty with the Wyandot, 7 Stat. 49 (Aug. 3, 1795). The early treaties with the Native Hawaiians, like the treaties the United States entered into with the mainland Indian tribes during the same period, included a provision that declared perpetual peace and friendship. These treaties, in actuality, often provided the United States commercial gain while offering no real benefits to the native people. 3 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 269–272 (Hunter Miller ed. 1933).

[85] Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People,* 10–JUL. HAW. B. J. 63, 63 (July 2006) (citing Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993)). Between 1839 and 1852 Hawaii received formal recognition as a sovereign, independent national from the United States and nearly every major European nation. *See* Ralph S. Kuykendall, I THE HAWAIIAN KINGDOM 1–11 (1967) (citations omitted).

[86] 5 Stat. 643 (1843).

[87] S. REP. NO. 227, at 20 (1894). "Without stating the reasons for this policy, which included very important commercial and military considerations, the attitude of the United States toward Hawaii was in moral effect that of a friendly protectorate. It has been a settled policy of the United States that if it should turn out that Hawaii, for any cause, should not be able to maintain an independent government, that country would be encouraged in its tendency to gravitate toward political union with this country." *Id.*

[88] S. REP. NO. 227, at 21–22 (1894).

[89] "It is known and felt by the Hawaiian Government and people that their Government and institutions are feeble and precarious; that the United States, being so near a neighbor, would be unwilling to see the islands pass under foreign control. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers. A reciprocity treaty, while it could not materially diminish the revenues of the United States, would be a guaranty of the good will and forbearance of all nations until the people of the islands shall of themselves, at no distant day, voluntarily apply for admission into

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The United States' illegal overthrow of the Kingdom of Hawaii allowed for Hawaii's annexation

In 1887, an opposition group of mostly Americans pressed for the adoption of a constitution that would reduce the king to a ceremonial figurehead.[90] King Kalakaua, in power at the time, unsuccessfully sought the protection of the United States from this powerful group. The opposition used the threat of violence to force King Kalakaua to accept a new constitution that stripped the monarchy of executive powers and replaced his cabinet with members of the opposition group. The new constitution, signed by King Kalakaua under duress, became known as the Bayonet Constitution, and it effectively disenfranchised most Native Hawaiian voters.[91]

Under the 1887 Constitution, the King was deprived of his power and the United States-dominated cabinet and legislature became increasingly more influential. King Kalakaua moved to restore his power, but all attempts were unsuccessful. The constant presence of American military forces in Hawaii helped to discourage his efforts. When King Kalakaua died in 1891, his sister Lili'uokalani succeeded him, and members of the Native population persuaded the new queen to draft a new constitution in an attempt to restore Native rights and powers.[92] Queen Lili'uokalani's proposed constitution was opposed by a group calling themselves the Committee of Safety, a small group of mostly American businessmen and politicians who felt that annexation by the United States, the major importer of Hawaiian agricultural products, would be beneficial for the economy of Hawaii.[93] With strong encouragement from Washington, D.C., and the assurances of support from the United States minister, John L. Stevens, the Committee of Safety conspired to

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the Union." President Andrew Johnson, Fourth Annual Message to the Congress (Dec. 9, 1868). *See also* Letter from John L. Stevens, United States Minister to Hawaii, to John W. Foster, Secretary of State (Nov. 20, 1892) (*in* PAPERS RELATING TO THE ANNEXATION OF THE HAWAIIAN ISLANDS TO THE UNITED STATES 184, 189 (1893) ("To postpone American action many years is only to add to present unfavorable tendencies and to make future possession [of Hawaii] more difficult.")); Henry Cabot Lodge, Republican Senator from Massachusetts, *Our Blundering Foreign Policy,* in 19 THE FORUM 8, 16 (Mar.–Aug. 1895) (Mr. Lodge later became Chairman of the Senate Foreign Relations Committee (1919–1924)) ("[F]or the sake of our commercial supremacy in the Pacific we should control the Hawaiian Islands . . . .").

[90] This group was a party of *haole* ("white") businessmen that was distrustful of King Kalakaua, even though he signed a reciprocity treaty with the United States making it possible for sugar to be sold to the U.S. tax-free, in large part because of his revival of Hawaiian traditions such as the historic Hula, and construction of the royal Iolani Palace. *See* DOCUMENTS OF AMERICAN DEMOCRACY: A COLLECTION OF ESSENTIAL WORKS 205 (Roger L. Kemp ed. 2010) [hereinafter *DOCUMENTS OF AMERICAN DEMOCRACY*].

[91] By forcing the adoption of the Bayonet Constitution, foreigners, primarily Americans, greatly increased their political role in Hawaii. *See* REMAKING QUEEN VICTORIA 142 (Margaret Homans & Adrienne Munich, eds., 1997) ("In 1887, while Liliuokalani was attending Queen Victoria's jubilee celebrations, the American business community revolted and her brother Kalakaua, then king, was forced at bayonet-point to sign a new constitution, known historically as the 'Bayonet Constitution.' This illegal document, never ratified by the people of Hawaii, 'deprived the sovereign of all power,' and 'from that day the missionary party took the law into its own hands.'") (quoting LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 181 (1898)). The new constitution extended the right to vote to wealthy non-citizens (foreign resident aliens) for the first time, excluded Asians, and restricted access for Native Hawaiians through land-ownership and English literacy provisions. In this manner, many Americans and Europeans acquired full voting rights without the need for Hawaiian citizenship. *Compare* Hawaiian Kingdom Const. art. 62 (1887) (allowing for "male *resident[s]* of the Kingdom" of "American or European birth or descent" who can "read and write the Hawaiian, English or some European language" the right to vote for their district Representative), *with* Hawaiian Kingdom Const. art. 62 (1864) (allowing "male *subject[s]* of the Kingdom, who . . . know how to read and write" the right to vote for their district Representative) (emphasis added).

[92] DOCUMENTS OF AMERICAN DEMOCRACY, *supra* note 90, at 205.

[93] *Id.* The Committee of Safety, under the leadership of Sanford B. Dole, was also known as the "Committee of Public Safety," the "Committee on Annexation," or the "Annexation Club." The Committee of Safety consisted of thirteen men, "*all foreigners* and some of *brief residence* in the country." H.R. Exec. Doc. No. 47, 53d Cong., 3d Sess. 353 (1893) (emphasis in original).

overthrow the monarchy.[94] Following Stevens' orders, American troops landed in Honolulu on January 16, 1893.[95]

Within twenty-four hours of the American troops landing, and before the takeover of the Hawaiian government was complete, Stevens, without permission from the U.S. State Department,[96] recognized the Committee of Safety as the new "Provisional Government," "the de facto government of the Hawaiian Islands."[97] On January 17, 1893, Queen Lili'uokalani abdicated her authority, but did so only under protest[98] and subject to a later review of the situation by the American government. The United States military then took custody of the government building.

A presidential investigation of the overthrow revealed facts that led President Grover Cleveland to call for restoration of the monarchy.[99] In a message to Congress, the President observed that the overthrow was not "by the people of the islands," but rather that "the Provisional Government owes its existence to an armed invasion by the United States."[100] He concluded that the United States' role was in opposition to established American foreign policy, to morality, and to principles of international law.[101] Consequently, he stated that the United States "cannot allow itself to refuse to

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[94] Stevens, an avowed annexationist, was the United States Department of State Minister to the Kingdom of Hawaii in 1893. *See* Pub. L. No. 103–150, 107 Stat. 1510 (1993) (acknowledging the illegal actions of Minister Stevens and the United States).

[95] Although the stated reason for the military invasion was to protect the U.S. consulate and the lives and property of American citizens, the troops took up a position between the queen's palace and the government building, allowing the insurrectionists to take over occupation of the buildings. "[W]hen Hawaiian leaders stopped accommodating [Anglo-American interests], they met with American force." Berger, *supra* note 55, at 1195.

[96] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 311 (1893) ("Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister.").

[97] WASHINGTON GOVERNMENT PRINTING OFFICE, PAPERS RELATING TO THE ANNEXATION OF THE HAWAIIAN ISLANDS TO THE UNITED STATES 22 (1893).

[98] Queen Lili'uokalani had not yet surrendered when Minister Stevens recognized the Provisional Government on behalf of the United States. The United States' recognition of the Provisional Government may have influenced Lili'uokalani's decision to surrender in 1893: "Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands." Letter from Queen Lili'uokalani to Sanford B. Dole, Esq., (Jan. 17, 1893). Protesting the annexation of Hawaii, the Queen later wrote, "I yielded my authority to the forces of the United States in order to avoid bloodshed, and because I recognized the futility of a conflict with so formidable a power." Letter from Queen Lili'uokalani to William McKinley, President of the United States (June 17, 1897).

[99] *President's Message Relating to the Hawaiian Islands,* H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess., at XVI (1893) (commonly referred to as the *Report of the Commissioner to the Hawaiian Islands* or the *Blount Report*). The Blount Report was conducted by Commissioner James H. Blount, who was appointed by President Cleveland to impartially investigate the events surrounding the January 1893 overthrow of the Kingdom of Hawaii. Blount concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government—all in violation of international law. International law deems acts of state officials and representatives as acts of the state for purposes of determining international responsibility. Thus, Minister Stevens' actions, although not directed by the Department of the State or the President, would be the responsibility of the United States. Blount also discovered that many Native Hawaiians were forced to sign the petition for annexation by storekeepers and others in exchange for food and other necessities. *Id.* at 354. As a result of this investigation, Stevens was recalled from his diplomatic post.

[100] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 311 (1893). President Cleveland called the United States' role in the overthrow of Hawaii "an act of war." *Id* ("[B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens' recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.").

[101] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 312 (1893).

redress an injury inflicted through an abuse of power by an officer clothed with its authority and wearing its uniform; the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation."[102] President Cleveland refused to annex Hawaii to the United States, and in 1894, "[m]embers of the provisional government declare[d] themselves the 'Republic of Hawaii' and wait[ed] for a better opportunity to seek annexation."[103]

The overthrow of Queen Lili'uokalani and imposition of the Republic of Hawaii was contrary to the will of the Native Hawaiians. Native Hawaiians staged mass protest rallies and formed two groups to protest the overthrow and prevent annexation. One was the *Hui Hawaii Aloha Aina,* loosely translated as the Hawaiian Patriotic League, and the other was its female counterpart, the *Hui Hawaii Aloha Aina o Na Wahine.* On January 5, 1895, the protests took the form of an armed attempt to derail annexation but the armed revolt was suppressed by forces of the Republic. The leaders of the revolt were imprisoned along with Queen Lili'uokalani who had been jailed for failing to put down the revolt.

Cleveland's successor, President McKinley, ran for office in 1896 on a pro-annexation platform, arguing that even though most residents of the islands were either Native Hawaiian or Asian, they were under the control of the superior American minority, and annexation was necessary to prevent a Japanese takeover.[104] In March of 1897, William McKinley was inaugurated as President of the United States. McKinley was in favor of annexation, and the change in leadership was soon felt. On June 16, 1897, McKinley and three representatives of the government of the Republic of Hawaii signed a treaty of annexation. President McKinley then submitted the treaty to the United States Senate for ratification.

The *Hui Hawaii Aloha Aina* protest groups organized a mass petition drive. They hoped that if the United States government realized that the majority of Native Hawaiian citizens opposed annexation, the move to annex Hawaii would be stopped. Between September 11 and October 2, 1897, the two groups collected petition signatures on each of the five principal islands of Hawaii. The petition, clearly marked "Petition Against Annexation" and written in both the Hawaiian and English languages, was signed by 21,269 Native Hawaiian people—nearly every adult and *more than half* of the 39,504 Native Hawaiians reported by the census for the same year.[105]

The petition helped to defeat the proposed annexation treaty in 1898.[106] However, other events immediately brought the subject of annexation up again.[107] With the ensuing Spanish-American War, part of which was fought in the Philippine Islands, proponents of annexation argued that Hawaii was needed to support military ac-

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[102] *Id.*

[103] DATA BOOK, *supra* note 8, at 412.

[104] Berger, *supra* note 55, at 1195 (citations omitted).

[105] Presumably, Native Hawaiian children would not have signed the petition. In the 1896 Census, there were 15,018 Native Hawaiian children (ages 0–15). This means that there were only 3,217 eligible Native Hawaiians who did not sign the anti-annexation petition. Department of Public Instruction, Report of the General Superintendent of the Census, 1896, at 54, table VIII (1897).

[106] On February 27, 1898, after the Hawaiian delegation, which included Lili'oukalani, presented the petition against annexation to the Senate, there were only 46 senators willing to vote for annexation. The treaty was thus defeated in the Senate.

[107] On February 15, 1898, the U.S. Battleship *Maine* was blown up in Havana harbor in Cuba.

tion as a mid-Pacific fueling station and naval installation. The pro-annexation forces in Congress submitted a proposal to annex the Hawaiian Islands by joint resolution, which required only a simple majority vote in both chambers. This eliminated the two-thirds majority needed, and, as a result, the necessary support was in place. In July 1898, a joint resolution passed control of Hawaii to the United States. House Joint Resolution 259, 55th Congress, 2nd session, known as the "Newlands Resolution," passed Congress, and was signed into law by President McKinley on July 7, 1898. Amidst the fervor surrounding the Spanish American War, President McKinley thus secured the political domination of the territory of Hawaii and the appropriation of its lands." [108]

Upon annexation, control of the crown and government lands passed from the Republic of Hawaii to the United States.

> Through the 1898 Joint Resolution and the 1900 Organic Act,[109] the United States received 1.8 million acres of lands, formerly Crown and Government Lands under the Hawaiian Kingdom, and exempted these lands from the existing public laws of the United States by mandating that the revenue and proceeds from these lands be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes." [110]

This public trust established a special trust relationship between the United States and the inhabitants of Hawaii, similar to the trust relationship between the Federal Government and Indian Tribes, by imposing fiduciary responsibilities on the United States and constraining the use, management, and proceeds generated from the trust to public purposes.[111] This meant that 1.8 million acres in which the Native Hawaiian people were to have interest following the Great Mahele [112] became United States property.

Hawaii's transition from a foreign nation to domestic dependent Native nation

At the time of annexation, the political and legal relationship between the Native Hawaiian people and the United States changed from interacting as two independent nations through treaties to one of relating to the Native Hawaiian people as a domestic dependent Native nation. As is noted in Public Law 103–150, the Apology Resolution, "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, either through their monarchy or through a plebiscite or referendum." [113]

Hawaii was designated as a non-self-governing territory of the United States from 1898 to 1959. During that time, the United States allowed citizenship for all persons living in the Hawaiian Islands, greatly expanding the number of non-Native Hawaiian citizens beyond what had been allowed by the Kingdom of Hawaii. Al-

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[108] Berger, *supra* note 55, at 1195. The annexation of Hawaii reveals the same denigration of indigenous interests found throughout American Indian history. *Id.*

[109] *See* An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900).

[110] Van Dyke & MacKenzie, *supra* note 85, at 63 (citing the Newlands Resolution and Organic Act).

[111] *Id.* at 63–64 (citations omitted).

[112] *See* discussion *supra* p. 17.

[113] Pub. L. No. 103–150, 107 Stat. 1510 (1993).

though Native Hawaiians made up less than half the resident population in Hawaii at the time of the overthrow, they were more than 80 percent of the Kingdom's citizenry.[114] After Annexation, the Native Hawaiian percentage of the citizenry of the territory was less than 25 percent.[115] "[T]he residents of the Hawaiian Islands exercised their right to self-determination in 1959 when they voted to become a state,[116] and they are now a self-governing political community. But the Native Hawaiian population has never had an opportunity to exercise its separate right to self-determination and to reestablish itself as self-governing autonomous [N]ative nation."[117]

The fact that the indigenous Native Hawaiian community does not presently have an operating tribal government recognized by the Department of the Interior (DOI) does not remove that community from the scope of Congress's Indian affairs power. The Constitution does not limit Congress' Indian affairs power to indigenous groups with a particular government structure. "[S]ome bands of Indians, for example, had little or no tribal organization while others . . . were highly organized."[118] Nor does the Constitution limit Congress's power to groups that continue to exercise all aspects of sovereignty. European "discovery" and the establishment of the United States necessarily diminished certain aspects of Indian sovereignty.[119] Thus, under the Constitution, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"[120]

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[114] At the time of the overthrow, only those born in Hawaii were considered citizens. *See, e.g.,* I Statute Laws of Kamehameha III, p. 76, § III (1846); Letter from Ferdinand Hutchison, Minister of the Interior for the Hawaiian Kingdom, to H.H. Parker, regarding the determination of his citizenship status, published in the HAWAIIAN GAZETTE (official publication of the Government of the Kingdom), at 2 (Jan. 21, 1868). At the time of the overthrow of the Kingdom of Hawaii, less than 10 percent of foreigners were actually born in Hawaii. 1 NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUBLIC LAW 96–565, TITLE III, at 68, table 3 (Jun. 23, 1983).

[115] 1 NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUBLIC LAW 96–565, TITLE III, at 69, table 4 (Jun. 23, 1983). The Organic Act extended citizenship to all residents of Hawaii, even those who were born elsewhere. An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900).

[116] "Even this statement has been challenged, because the only options offered to the people of Hawaii were (1) to become a state or (2) to remain a territory. Some have argued that the resolutions of the United Nations General Assembly . . . require that nonself-governing peoples be given the additional options of complete independence and free associated state status." Jon M. Van Dyke, Carmen Di Amore-Siah, & Gerald W. Berkely-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii,* 18 U. HAW. L. REV. 623, 624 n. 3 (1996) (referring to Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960)).

[117] Van Dyke, Di Amore-Siah, & Berkely-Coats, *supra* note 116, at 624–25.

[118] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) (citations omitted). *See also,* United States v. John, 437 U.S. 634 (1978), where the Court upheld Congress's power to provide for a group of Indians that did not have a federally-recognized tribal government, because federal supervision had lapsed.

[119] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 45 (1831).

[120] United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974)).

The Hawaiian Homes Commission Act of 1921

By the time Hawaii was annexed as a territory to the United States in 1898, the Native Hawaiian population had plummeted,[121] its traditional practices[122] and the communal land tenure system had been forcibly replaced by European and American models of ownership, the Kingdom of Hawaii had been illegally overthrown, and Hawaiian lands had been taken without the consent of the Native Hawaiian people. Two years later, Congress entrusted management of the lands to a territorial legislature established by the Organic Act of 1900.[123] These lands are referred to as the "Ceded Lands" or the "Public Lands Trust." As a result of losing their homelands, the Native Hawaiian people found themselves at the bottom of the socio-economic scale in their own land.[124]

During this time, federal Indian policies were focused primarily on the allotment and assimilation of the Native people.[125] The two prevailing laws of this era were the Dawes Act[126] and Burke Act.[127] These two acts sought to provide eligible Indians with allotments of lands for residential, ranching, and agricultural purposes, with the hope of hastening the assimilation process. Through these federal allotment and assimilation practices, Congress attempted to address the deteriorating social and economic conditions among the Native people by returning them to their land.

Passed in 1921, the Hawaiian Homes Commission Act (HHCA)[128] was modeled after these Acts, as it too recognized the

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[121] Estimates of the Native Hawaiian population prior to the arrival of Captain James Cook in 1778 range from 300,000 to 800,000. By 1850, the population dropped to 84,165, and by 1872, it dropped even further to 56, 897. Van Dyke, supra note 31, at 95.

[122] When Hawaii became an American territory in 1900, the Native Hawaiian language and cultural practices were discouraged. *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AL 316 (1992); Van Dyke, *supra* note 31, at 103 n.50.

[123] An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900). The Organic Act established the government for the Territory of Hawaii. Prior to Hawaii's statehood, the Territorial Government was responsible for implementing the HHCA. The Territorial Government often provided leases to sugar planters on the 203,500 acres while failing to provide the land for Native Hawaiian homesteads. After Hawaii became a state, the Department of Hawaiian Home Lands (DHHL) took over that responsibility. DHHL has also not administered the Act well, and this has sparked intense criticism.

[124] DATA BOOK, *supra* note 8, at 189, Table 2.48. *See* discussion *supra,* pp. 3–5.

[125] The Kingdom of Hawaii was overthrown and annexed during the Allotment & Assimilation Era of Federal Indian Law (1871–1928). The United States did not identify Native Hawaiians as a separate political entity because it would have been inconsistent with federal Indian policy. During this period, the United States attempted to rid American Indians and Alaska Natives of their native languages and culture. The HHCA was an allotment-era policy and was enacted when Congress still thought that "civilizing" the indigenous peoples required destruction of their autonomy and their identification as a separate political identity. In 1928, the Merriam Report revealed the devastating effects of the Indian General Allotment Act (GAA) (25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (1887) (§§ 331 to 333 repealed)) and it became clear that the United States needed to change its policies towards tribal governments. In response to the Merriam Report, Congress passed the Indian Reorganization Act in 1934 (IRA) (25 U.S.C. §§ 461–479 (1934)) as a remedy for its prior allotment practices. The IRA repudiated the policy of allotment and allowed tribes to adopt constitutions and to reestablish structures for tribal governance. Tribal sovereignty was now to be encouraged rather than destroyed.

[126] Popularly known as the "Indian" General Allotment Act (GAA) (25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (§§ 331 to 333 repealed)). This Act stated that Indians who received land allotments or voluntarily took up residence away from their tribes were to be given United States citizenship.

[127] 34 Stat. 182 (1906). The Burke Act amended section 6 of the GAA, by postponing the acquisition of citizenship until the end of the trust period, typically twenty-five years, or until the allottee received a patent in fee from the Secretary of the Interior.

[128] 42 Stat. 108 (1921). This Act is now part of Hawaii's State Constitution. *See* Haw. Const. art. XII. The HHCA was remarkably similar in purpose and effect to the General Allotment Act (GAA), 25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (1887) (§§ 331–333 repealed), which destroyed tribalism and assimilated Indians as individuals into the dominant society. The GAA took collectively owned tribal lands and allotted parcels to individual tribal members. The surplus lands, lands not allotted to individual tribal members, was then sold to

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deteriorating conditions of the Native Hawaiian people [129] and sought to rehabilitate Hawaii's indigenous peoples by setting aside 203,500 acres of ceded lands for a homesteading program to provide residences, farms, and pastoral lots for native Hawaiians,[130] and returning Native Hawaiians to their ancestral lands, allowing them to take up homesteading on specified lands and reestablish a traditional Hawaiian way of life.[131] "The Hawaiian Homes Commission Act is a clear example of federal policies towards Native peoples that have consistently been applied to Native Hawaiians, not always at exactly the same time, but often closely afterwards." [132]

Having learned from the devastating consequences that resulted from American Indians losing most of their lands as a result of the Dawes Act, Congress, through enactment of the HHCA, created a federal land trust that provided for 99-year leases to qualified Native Hawaiians. These long-term leases ensured that the trust lands would benefit the Native Hawaiian people for generations. With passage of the HHCA, Congress began to enact measures to remedy the Native Hawaiian people's plight resulting from the loss of their home lands and culture.[133]

By developing the HHCA, executive branch and congressional leaders were under the impression that the Federal Government was assuming trust responsibilities similar to those it had historically exercised in managing Indian affairs. In hearings on the legislation, the Secretary of the Interior, Franklin K. Lane, testified, "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." [134]

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non-Indians. Both the HHCA and the GAA were poorly carried out, often giving their beneficiaries parcels of useless, inarable land.

[129] Van Dyke & MacKenzie, *supra* note 85, at 64 (citing Act of July 9, 1921, ch. 42, 42 Stat. 108).

[130] *Id.* (citing Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161, 1162 (1982), "in which the Hawaii Supreme Court found that the purpose of the HHCA was to rehabilitate Native Hawaiians. The court drew on language in the legislative history of the HHCA to conclude that there was 'an intent to establish a trust relationship between the government and Hawaiian persons.'").

[131] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huhi Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[132] *Id* (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[133] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 2012) (statement of Colleen Hanabusa, Rep., U.S. House of Representatives) (noting that the HHCA was critical to preserve the Native Hawaiian people and culture).

[134] H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). The House Committee Report on the HHCA defended the bill against the charge that it was "unconstitutional class legislation" by noting that Congress had the authority to provide special benefits for unique groups such as "Indians, soldiers and sailors." Half a century later, the United States Supreme Court would address constitutional arguments to uphold legislation benefitting Indians as a group in Morton v. Mancari, 417 U.S. 535, 553 n.24, 554 (1974) (holding that Indian status was "political rather than racial in nature" because tribal Indians were "members of quasi-sovereign tribal entities"). The Court determined that the employment preference for Indians in the Bureau of Indian Affairs was not impliedly repealed by the Equal Employment Opportunities Act of 1972, and that the preference did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government. *Id.* The Supreme Court was careful to note, however, that [*Mancari*] was confined to the authority of the BIA, an agency described as "*sui generis.*" Rice v. Cayetano, 528 U.S. 495, 520 (2000) (quoting *Mancari*, 417 U.S. at 554) (emphasis in original). "Thus while Native Hawaiian classifications do not automatically come within the safe harbor *Mancari* provides for American Indian classifications, equal protection challenges regarding Native Hawaiians implicate similar questions and should be analyzed under similar principles." Berger, *supra* note 55, at 1193.

Secretary Lane explained 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.[135]

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

> 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 big 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.[136]

In 1920, Prince Kuhio, the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "[I]f conditions continue to exist as they do today . . . my people . . . will pass from the face of the earth."[137] Secretary Lane attributed the declining population to health problems similar to those faced by the "Indian in the United States" and concluded that the Nation must provide similar remedies.[138]

Congress compared the HHCA to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands."[139] In support of the Act, the House Committee on the Territories recognized that, prior to the Great Mahele, Native Hawaiians had a one-third interest in the lands of the Kingdom. The Committee reported that the HHCA was necessary to address the way Native Hawaiians had been short-changed in prior land-distribution schemes.[140]

The history of federal Indian policy establishing reservations was also in the minds of the Congressmen who voted for the HHCA. Recognizing that the Native Hawaiian people were deprived of their lands without their consent,[141] the Chairman of the House

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[135] *Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the H. Comm. on the Territories*, 66th Cong. 129–31 (statement of Secretary Lane that "[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," rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians, and citing a Department of the Interior Solicitor's opinion stating that setting aside public lands within the Territory of Hawaii would not be unconstitutional, relying in part on the Congressionally authorized allotment to Indians as precedent for such an action); *see also id.* at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians); T3id. at 167–170 (colloquy between Rep. Curry, Chair of the Committee, and Reps. Dowell and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

[136] *Id.* at 129–31.

[137] 59 CONG. REC. 7453 (1920).

[138] H.R. Rep. No. 66–839. at 5 (1920).

[139] H.R. Rep. No. 66–839, at 11 (1920); *see also id.* at 4 (suggesting that the HHCA was enacted in part because, after the arrival and settlement of foreigners in Hawaii, the Native Hawaiians had been "frozen out of their lands and driven into the cities," where they were "dying" as a people).

[140] H.R. Rep. No. 66–839, at 6–7 (1920).

[141] Although Hawaii became a state, the Native Hawaiian people never surrendered their right to self-governance. "Native Hawaiians were never consulted or given an opportunity to

Continued

Committee on Territories noted that the motivations behind the legislation were the same as those supporting similar land trust legislation relating to Indian tribes:

> The United States Government has supported [the Indians] and helped them along; now they are in such a position that they can take care of themselves. And we can do that for the Indians. Why? Because we came to this country and took their land away from them, and treaty after treaty has been violated. And if we can afford to do that for the Indians—and we have done it and it is constitutional—why can we not do the same for the Hawaiians whose land has been taken away from them? [142]

Under the HHCA, Congress designated a trust of 203,500 acres of public lands to be available for Native Hawaiian homesteads (Hawaiian Home Lands Trust or HHL Trust).[143] However, similar to other federal policies enacted to remedy the effects of the loss of land on American Indians and Alaska Natives of this era, the HHCA has generally failed to provide agricultural or residential lands or to achieve its lofty goal of rehabilitating the Native Hawaiian people." [144] The lands set aside as part of the HHL Trust were some of the poorest, largely unsuitable for farming, and lacking in necessary irrigation water.

It has been over 90 years since the enactment of the HHCA and only approximately 10,000 land leases have been issued to Native Hawaiian beneficiaries for homesteading purposes.[145] "[T]he waitlist of individual applicants to receive a land award under the [HHCA] exceeds 26,000 individuals, with waiting times ranging from five years to 50 years." [146]

Statehood and the delegation offederal trust responsibilities to the State of Hawaii

When the State of Hawaii was admitted into the Union in 1959, the federal policy toward the Native people of America was designed to divest the Federal Government of its responsibilities for

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vote on whether incorporation into the United States was desirable." Native Hawaiian Rights Handbook 97 (Melody Kapilialoha MacKenzie, ed., 1991). *See* Worcester v. Georgia, 31 U.S. 515,520 (1832) ("[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.").

[142] *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings on HR. 7257 Before the H. Comm. on the Territories,* 67th Cong. 1st Sess. 141 (June 9 & 10, 1921) (statement of Charles F. Curry, Chairman, H. Comm. on the Territories).

[143] The HHL Trust was designated from the 1.8 million acres of land that became United States property upon the annexation of Hawaii. *See supra* p. 25. From the 1.8 million acres, the United States reserved 400,000 acres for its use. The 1.2 million acres remaining became the public land trust. The public land trust was ceded to the State of Hawaii for five specified purposes, including "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act." *See infra* note 151. In doing so, Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians.

[144] "[I]n many ways we're back in the same situation we were in 1920 with people coming to Congress basically saying our people are dispossessed from their lands. They're dying. They don't have a place to live. And we're in that same situation. So I see this S. 65 as an opportunity to really fulfill the promise of the Hawaiian Homes Commission Act." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law & Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, University of Hawaii Richardson School of Law, University of Hawaii at Manoa).

[145] *Id.* (statement of Michelle Kauhane, Deputy Director, State of Hawaii, Department of Hawaiian Home Lands).

[146] *Id.*

the Indian tribes and their members and to transfer many of those responsibilities to the several states.[147] A prime example of this federal policy was the enactment of Public Law No. 83–280, an Act which vested criminal jurisdiction and certain aspects of civil jurisdiction over Indian lands in certain states.[148] Similarly, in 1959 and as a condition of statehood, the United States transferred responsibilities related to administering the HHCA to the new State of Hawaii, while explicitly retaining the authority to alter, amend or repeal the HHCA.[149] In the Hawaii Admission Act, the United States delegated its principal responsibilities under the HHCA to the new state.[150] As a further condition of statehood, the United States imposed a public trust on lands ceded to the State of Hawaii for five purposes, one of which was the "betterment of the conditions of native Hawaiians."[151] The Act says that departure from the prescribed purposes is a breach of trust.[152] The Admission Act makes clear that the United States anticipated that the State of Hawaii's constitution and laws would provide for the manner in which the HHCA and the public trust would be administered.

"While the State of Hawaii has administrative and rulemaking authority, the Federal Government retains oversight to ensure that the original intent of the Act is maintained."[153] This supervisory role of the United States demonstrates the existence of a trust relationship between the United States and the Native Hawaiian community. "[T]he State of Hawaii has embraced its role in managing the Hawaiian Home Lands trust, and continues to support efforts to enhance [the] self-determination and self-governance [of the Native Hawaiian people]."[154]

That the special requirements of the Admissions Act have not been fully observed by the state is well established. "[D]espite the legal obligations and responsibilities, [Native Hawaiians] have always . . . been in the lessor priority when there have been other needs for the community."[155] At Hawaii's 1978 constitutional convention, this led to proposals for three constitutional amendments that were accepted and adopted by voters. The result was the establishment of the State of Hawaii Office of Hawaiian Affairs

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[147] This was during the era known as Termination in Federal Indian Policy (1945–1961). During Termination, federal policies attempted to end the Indians' status as wards of the United States by forcing the assimilation of all America's indigenous peoples. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). By the 1970s, Congress once again changed its course, rejecting such policies of assimilation and termination and promoting tribal self-determination. *See, e.g.,* Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, 88 Stat. 2214 (codified at 25 U.S.C. 458–458(e)).

[148] 67 Stat. 5884 (1953).

[149] Section 223 of the HHCA, Act of July 9, 1921, 42 Stat. 108 (1920), codified in Haw. Const., Art. XII § 1.

[150] Hawaii Admission Act, 5(f), Pub. L. No. 86–3, 73 Stat. 4 (1959).

[151] *Id.* (declaring the purposes of the public trust to be: (1) for the support of the public schools; (2) for the betterment of the conditions of native Hawaiians, as defined by the Hawaiian Homes Commission Act, as amended; (3) for the development of farm and home ownership on as widespread basis as possible; (4) for the making of public improvements; (5) and for the provision of lands for public use). The language of trust in the Act arguably reflects a continuing interest of Hawaiian people in the 5(f) lands transferred to the state by the United States. This would give rise to a claim for income from the lands or for the value of lands the state has appropriated to its own uses.

[152] Hawaiian Admission Act, sec. 5(f), Pub. L. No. 86–3, 73 Stat. 4 (1959).

[153] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[154] *Id.* (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[155] *Id.* (statement of Richard Naiwieha Wurdeman, President, Native Hawaiian Bar Association).

(OHA)[156] managed by a board of trustees that receives and expends the portion of income from the public trust lands that is allocable to Native Hawaiians. OHA was created by the State of Hawaii in order to administer the trust created by the congressional legislation authorizing its annexation as the fiftieth state of the United States. Pursuant to its authorizing legislation, OHA was "intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival [in 1778]."[157]

Apology & Reconciliation: a mandate for the United States to address Native Hawaiian self-governance

Acknowledging the 100th anniversary of the 1893 overthrow of the Kingdom of Hawaii, Congress passed an Apology Resolution[158] in 1993 in which it apologized on behalf of the United States to Native Hawaiians for the United States' role in the illegal overthrow of the Kingdom of Hawaii, the subsequent suppression of the inherent right of the Native Hawaiian people to self-determination and self-governance, and committed the United States to a process of reconciliation with Native Hawaiians.

The Apology Resolution acknowledges the direct participation of United States agents and citizens in the overthrow, and recognizes that the 1.8 million acres of lands acquired by the United States were done so without the consent of or compensation paid to the Native Hawaiian people. The apology also acknowledges that Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, urges the President to seek reconciliation with the Hawaiian people, and provides a foundation for reconciliation between the United States and the Native Hawaiian people.[159]

> When I proposed the Apology Resolution a few years ago, I had three goals. They were to (1) educate the Congress and the American public on the overthrow of the Kingdom of Hawaii, (2) to provide a continuing forum for discussion and (3) to lay the foundation for reconciliation efforts between Native Hawaiians and the Federal Government. The Apology Resolution is the first step towards reconciliation, the first step towards healing.[160]

In response to the Apology Resolution, the Departments of the Interior and Justice conducted a series of consultations and hearings in Native Hawaiian communities in 1999. These hearings determined that because the United States aided in the destruction of the Native Hawaiian government, effectively suppressing the Native Hawaiian people's right to self-determination, federal recognition of a Native Hawaiian government is the proper path to

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[156] Haw. Const., art. XII, §§§ 4–6 (1978).
[157] Rice v. Cayetano, 528 U.S. 495, 528 (2000) (Stevens, J., dissenting).
[158] Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993).
[159] *Id.*
[160] Daniel Akaka, United States Senator for Hawaii, Newsroom, Statements and Speeches, *Remarks of U.S. Senator Daniel K. Akaka for Reconciliation Process Public Dialogue* (Dec. 10, 1999).

reconciliation. The result of the Departments' reconciliation efforts was a joint report, From Mauka to Makai: The River of Justice Must Flow Freely, published in 2000. The report concluded:

> [T]hat 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.[161]

This report recommends that the reconciliation process between the Federal Government and the Native Hawaiian people should "result in congressional confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal Government pursuant to Congress' plenary authority over Indian Affairs." [162]

Since the issuance of the report, the Senators from Hawaii have introduced legislation to implement the findings of the reconciliation report. This Committee held several hearings on the matter. While Congress has consistently recognized Native Hawaiians as among the indigenous peoples of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause, it has not as yet acted to provide a process for the reorganization and subsequent recognition of a sovereign Native Hawaiian governing entity as a necessary first step to promote reconciliation, as called for by the Apology Resolution.

While its potential remains unfulfilled, the Apology Resolution has increased Native Hawaiians' initiatives for self-determination.[163] It is within Congress' plenary power to enact 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.[164]

Nineteen years after the Apology, the federal trust responsibility to Native Hawaiians remains intact but unfulfilled

In 2011, the Hawaii state legislature introduced and enacted Act 195.[165] Act 195 established a Native Hawaiian Roll Commission which officially acknowledges Native Hawaiians as the only indigenous people of the Islands. It also establishes a governor-appointed commission charged with enrolling qualified Native Hawaiians to participate in the reorganization of a self-governing entity.

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[161] THE DEPARTMENT OF THE INTERIOR & THE DEPARTMENT OF JUSTICE, FROM MAUKA TO MAICAI: THE RIVER OF JUSTICE MUST FLOW FREELY, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 17 (Oct. 23, 2000) [hereinafter *Mauka to Makai*].

[162] *Id.* at ii.

[163] *Legislative Hearing on H.R. 443, 444, 1461, 1556, 2444 Before the H. Subcomm. on Indian and Alaska Native Affairs,* 112th Cong. (Sep. 22, 2011) (statement of Representative Boren (D–OK), Member, H. Subcomm. on Indian and Alaska Native Affairs) ("Self-governance is arguably the most successful Indian policy in the history of our country.").

[164] MAUKA TO MAKAI, *supra* note 161, at 17.

[165] The Hawaii State Legislature passed SB1520 and it was signed into law as Act 195 by Governor Abercrombie. Act 195 recognizes Native Hawaiians as the indigenous population of the Hawaiian Islands. The law establishes the Native Hawaiian Roll Commission, with unpaid commissioners appointed by the Governor, to certify and publish a roll of Qualified Native Hawaiians. Act 195 calls for the roll to be used to organize a Native Hawaiian governing entity that is recognized by the State of Hawaii, and can be recognized by the United States.

Through Act 195, the State of Hawaii expressly supports the continuing development of the reorganization of the Native Hawaiian governing entity and its subsequent recognition by the Federal Government. "The enactment of Act 195 was yet another example of Hawaii's ongoing desire to recognize the unique contributions and traditions of the Native Hawaiian people." [166]

The State of Hawaii has also worked to embrace, protect and advance the Native Hawaiian people and their culture in other ways, including but not limited to: designating the Native Hawaiian language as one of the two official languages of the state; [167] recognizing the legitimacy of the traditional Native Hawaiian child-rearing practice of hanai (fostering/adoption) in state functions such as the provision of human services and education; [168] and implementing a system of protecting Native Hawaiian graves and sacred sites through State burial councils comprised of Native Hawaiian representatives with expertise in Native Hawaiian culture and burial practices appointed by the Governor and confirmed by the State Senate.[169]

Further, the Administration has implemented programming in a number of departments to address many Native Hawaiian concerns, concerns shared by other Native Americans, in the Departments of Defense, Health and Human Services, Housing and Urban Development, the Interior Agriculture, Treasury, Veterans Affairs, Commerce and Education, as well as the Small Business Administration and other federal agencies.

In addition to retaining oversight and policy responsibilities over the HHCA, Congress has enacted over 150 laws addressing the conditions of Native Hawaiians, protecting their rights, and strengthening their ability to perpetuate their language and culture.[170] In many of these statutes, Congress specifically requires federal agencies to engage in meaningful consultation with the Native Hawaiian people for issues related to national parks, national historic preservation programs, the national trails system, the Native American Graves Protection and Repatriation Act (NAGPRA), vocational rehabilitation services, and public health and welfare economic opportunity programs.[171] There are additional federal statutes that direct the employment of at least one Native Hawaiian representative to applicable boards, councils, or advisory commissions to represent the interests of Native Hawaiians and to en-

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[166] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[167] Haw. Const. art. XV, § 4.

[168] Hawaii Administrative Rules, Title 17, Subtitle 6, Chapter 656.1 (1998).

[169] Hawaii Administrative Rules, Title 13, Chapter 300 (1996).

[170] These acts are codified in 14 titles of the United States Code. *See* discussion *supra* pp. 10–12.

[171] 16 U.S.C. § 396d; 16 U.S.C. §§ 470a, h–2, h–4; 16 U.S.C. § 1244; 25 U.S.C. § 3002; 25 U.S.C. § 3003; 25 U.S.C. § 3004; 25 U.S.C. § 3005; 25 U.S.C. § 3006; 29 U.S.C. § 721; 42 U.S.C. § 2991B–1; 42 U.S.C. § 3032G; 42 U.S.C. § 11705. In response to President Obama's 2009 Memorandum on Tribal Consultation requiring regular and meaningful consultation and collaboration with tribal officials, the Department of Defense published its policy and procedures to identify and ensure compliance "with the requirements of Presidential Memorandums, Executive orders, statutes, and regulations." U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 4710.03: CONSULTATION POLICY WITH NATIVE HAWAIIAN ORGANIZATIONS (Oct. 25, 2011). *See* Memorandum on Tribal Consultation (Nov. 5, 2009) (referring to Exec. Order No. 13175 (Nov. 6, 2000)); DEPARTMENT OF DEFENSE PLAN OF ACTION TO IMPLEMENT THE POLICIES AND DIRECTIVES OF EXECUTIVE ORDER 13175, CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS, PROGRESS REPORT (2011).

sure the survival of traditional Native Hawaiian subsistence, culture, and religion.[172]

Separate is not equal: the Secretary of the Interior has failed to act to uphold the federal trust responsibility

The Committee has compiled an extensive oversight record in the 112th Congress, conducting 32 oversight hearings, 5 field hearings, and 12 roundtables to study the unique problems of Native Americans, which includes the American Indian, Native Hawaiian, and Alaska Native people. The Committee reviewed, monitored, and studied federal agency programs, activities, and policy implementation related to Native Americans and the trust responsibility of the United States. While most of these oversight activities produced information related to Native Hawaiians, approximately ten specifically focused in part, and another three focused exclusively on Native Hawaiians or programs for their benefit.

Over the last 21 months, as part of its oversight duties, the Committee conducted seventeen site visits to Native Hawaiian homelands, historical and sacred sites, natural and cultural resources project sites, agricultural sites, public charter schools, Native language immersion programs, housing, health care, social services, senior and childcare programs and facilities; and, economic development activities and projects in Hawaii. The Committee has also received and reviewed oral and written testimony from federal, state, and tribal officials, dozens of Native Hawaiian educators, housing officials, community representatives and leaders, business leaders, professors of Federal Indian Law, experts in Native Hawaiian history, law and legal precedents, and many other Native Hawaiian and Native American organizations.

Witnesses testified before the Committee explaining the numerous obstacles Native Hawaiians face because the Federal Government continues to retain oversight over Native Hawaiian affairs, yet allows for the implementation of federal law by state offices. This delegation of authority disregards federal mandates and ignores the Federal Government's trust responsibility to Native Hawaiians. "The enactment of S. 675 . . . would address this inequity and provide for Native Hawaiian control, management and accountability of native lands and resources, thereby providing parity in federal policies towards American Indians, Alaska Natives and Native Hawaiians."[173]

The broad scope of the Committee's oversight has established a notable failure of the United States to afford the Native Hawaiian people the same rights, the same privileges, and the same opportunities as every other federally-recognized Native people. This fail-

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[172] 16 U.S.C. § 396d; 16 U.S.C. § 410jj–7; 16 U.S.C. § 470i; 16 U.S.C. § 6401; 20 U.S.C. § 4441; 20 U.S.C. § 7514; and 25 U.S.C. § 4221.

[173] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) ("These situations best illustrate the challenges faced by Native Hawaiians and the consequences of not being afforded the opportunity to federal policies that encourage and empower native peoples to manage their lands and resources within the federal framework of self-determination,"). Ms. Kalipi specifically mentioned the HHCA (a Federal statute adopted into the State of Hawaii's Constitiutuion as a condition of statehood "subject to amendment or repeal only with the consent of the United States") and its implementation by DHHL (a state agency) and the complications that can arise when state officials are faced with having to choose between what is in the best interest of the State versus what it is the best interest of the Native Hawaiians). *See, e.g.,* Hawaii Admissions Act, Pub. L. 86–3, 73 Stat. 4.

ure is particularly egregious with respect to DOI and the Office of Native Hawaiian Relations.

In 2004, Congress created the Office of Native Hawaiian Relations within the Office of the Secretary of the Interior with the following duties: (1) effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; (2) continue the process of reconciliation with the Native Hawaiian people; and (3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.[174]

Congress delegated authority for the federal recognition of tribes to the executive branch. This authority flows from the President to the Secretary of the Interior to the Bureau of Indian Affairs. Yet, regarding Native Hawaiians, the Secretary of the Interior did not delegate this authority to the Bureau of Indian Affairs. The Office of Native Hawaiian Relations has been designated by the Secretary of the Interior to administer the responsibilities of the United States under the Hawaiian Home Lands Recovery Act[175] and the HHCA, which include advancing the interests of the beneficiaries, and assisting the beneficiaries and the State of Hawaii Department of Hawaiian Home Lands (DHHL) in obtaining assistance from programs of the Department of the Interior and other federal agencies that will promote homesteading opportunities, economic self-sufficiency, and social well-being of the beneficiaries. When these responsibilities are ignored, or transferred to the State of Hawaii, as witnesses have noted often occurs, the Federal Government fails to uphold its trust responsibility to the Native Hawaiian people.

The Department of the Interior (DOI) has a trust responsibility to all Native Americans: American Indians, Native Hawaiians, and Alaska Natives. Yet, the Office of Native Hawaiian Relations is not located within the framework of the Assistant Secretary of Indian Affairs within DOI. The Assistant Secretary of Indian Affairs has the responsibility to fulfill DOI's trust responsibilities to all Native American tribes and individuals, as well as promoting the self-determination and economic well-being of the tribes and their members. As it is currently structured, the Office of Native Hawaiian Relations does not engage on behalf of the United States, despite the mandate to "effectuate and implement the special relationship between the Native Hawaiian people and the United States" and to "fully integrate the principle and practice of meaningful . . . consultation with the Native Hawaiian people . . . before any Federal agency takes actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands."[176]

The Committee notes the support of the current Assistant Secretary of Indian Affairs, and urges the Secretary of the Interior to take affirmative steps to carry out the federal trust responsibility.

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[174] On January 22, 2004, the U.S. Senate approved funding for an Office of Native Hawaiian Relations based in Washington, D.C., thereby highlighting the special relationship between the U.S. government and Native Hawaiians. President Bush signed the bill into law as part of the Omnibus Appropriations Act for fiscal year 2004. Pub. L. No. 108–199, 118 Stat. 445 (2004) (referring specifically to section 148).

[175] Pub. L. No. 104–42, 109 Stat. 353 (1995).

[176] Pub. L. No. 108–199, 118 Stat. 445 (2004).

"The Native Hawaiians are in a very similar situation to the Native Alaskans and American Indians on the mainland. There is every reason to believe that they should also have a government-to-government relationship with the United States. I personally fully support that . . . [The Native Hawaiians] deserve to have a similar treatment as similar entities . . . and I hope [S. 675] passes as it is because I would look forward to implementing such a bill, if I were confirmed." [177] In order to fulfill its federal trust responsibility, American Indians, Native Hawaiians, and Alaska Natives must all be organized under Indian Affairs at DOI.

The Committee has concluded that the conditions and challenges facing Native Hawaiians mirror those found in American Indian and Alaska Native communities across the nation. These challenges are daunting, the problems seemingly intractable, the health disparities and other statistical inequities deeply troubling. Without full and equal access to the prevailing federal policy on self-determination, and the ability to once again exercise their right to be self-governing, Native Hawaiians will continue to lack parity under federal law, and the purpose of the more than 150 federal statutes enacted over the past 90 years will be frustrated, and the intent and authority of the Congress undermined.

Congress has consistently fulfilled its trust responsibilities to Native Hawaiians and must act to correct the failure of the Secretary of the Interior

"Congress has created and continues to fund programs to address the Native Hawaiian needs in the areas of health, education, welfare and housing, but has failed to uphold the final and most important piece of the trust relationship with Native Hawaiians, a guaranteed right to self-governance." [178] However well-intentioned, without a government-to-government relationship between the United States and Native Hawaiians, the programs and mechanisms created to help manage Native Hawaiian land trusts and resources, including the Office of Native Hawaiian Relations, will continue to prevent self-governance and self-determination by Native Hawaiians.[179] "[T]he management of Native Hawaiian resources within the state framework does not result in self-governance and self-determination by Native Hawaiians, nor does it result in Native Hawaiian control and management of resources—a fundamental element of self-rule under the federal framework." [180]

While the history of the United States is replete with examples of unequal treatment of certain groups of people, one of the things that make our nation so great is that our system of laws allows us to change, correct mistakes, and right past wrongs. "It is our responsibility as a nation to do right by America's Native people, those who exercised sovereignty on lands that later became part of

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[177] *The President's Nomination of Kevin K. Washburn to be Assistant Secretary—Indian Affairs, Department of the Interior: Nomination Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 14, 2012) (statement of Kevin K. Washburn).

[178] *S Comm. on Indian Affairs: Business Meeting to consider S. 675, S. 1345, S. 1684* (Sept. 13, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs).

[179] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) (noting that "without access to the federal framework of self-governance and self-determination . . . Native Hawaiians don't have the same tools available to manage and control their resources").

[180] *Id.*

the United States. While we can never change the past, we have the power to change the future."[181] The United States has recognized hundreds of Alaska Native and American Indian communities. The Committee has concluded that it is long past time for the Native Hawaiian people to have the same rights, the same privileges, and the same opportunities as every other federally-recognized Native people.

NEED FOR LEGISLATION

The Native Hawaiian Government Reorganization Act of 2012 is necessary legislation for a number of compelling reasons.

The primary goal of S. 675 is to establish a process for the reorganization and federal recognition of a Native Hawaiian government and to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship. Congress has consistently recognized Native Hawaiians as among the Native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause and other relevant provisions of the Constitution. Congress has not yet acted to provide a process for reorganizing a Native Hawaiian governing entity.

That inaction has placed Native Hawaiians at a unique disadvantage. Of the three major groups of Native Americans in the United States—American Indians, Alaska Natives, and Native Hawaiians—only Native Hawaiians currently lack the benefits of democratic self-government. In earlier eras, similar deprivations wreaked havoc on countless American Indians and Alaska Natives. To avoid this, consultation with Native Hawaiians must be emphasized.[182] As President Obama recently stated, "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results."[183]

For nearly a half century, Congress has pursued a strong policy of tribal self-determination and self-government, with the "overriding goal of encouraging tribal self-sufficiency and economic development."[184] The results of this policy have been striking. As the co-director of the Harvard Project on American Indian Economic Development, Joseph P. Kalt, recently wrote, "the evidence is overwhelming that political self-rule is the only policy" that has succeeded in overcoming Native Americans' "social, cultural, and economic destruction."[185] For Native Americans, economic develop-

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[181] 158 CONG. REC. S7765–66 (daily ed. Dec. 12, 2012) (statement of Sen. Daniel K. Akaka).

[182] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Robin Danner, President/CEO, Council for Native Hawaiian Advancement (CNHA)).

[183] Memorandum of November 5, 2009—Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 9, 2009).

[184] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (citations omitted).

[185] Joseph P. Kalt, *Constitutional Rule and the Effective Governance of Native Nations, in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184 (Eric D. Lemont ed., 2006). "[F]ederal promotion of tribal self-government under formal policies known as 'self-determination' is turning out to be, after a century or more of failed efforts to improve the lives of the U.S. indigenous people, the only strategy that has worked. In so doing, the strategy is improving the well-being of its poorest and, arguably, historically most oppressed and disempowered people." Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 15 (Harvard Kennedy School Faculty Research Working Paper Series, Paper No. RWP10–043, 2010) (quoting Richard M. Nixon, Special

ment "is first and foremost a political problem. At the heart of it lie sovereignty and the governing institutions through which sovereignty can be effectively exercised." [186] By establishing a process that would lead to the reorganization of a sovereign Native Hawaiian government, S. 675 will finally put Native Hawaiians on a par with other Native Americans, giving them equal access to the benefits of accountable, local, democratic self-rule.

Reconciliation and remedy to a historical wrong

Much of the evolving federal policy and history with the Indian Tribes was the result of balancing the nation's founding ideals against its need for civil order. The federal policy of recognizing the sovereignty of tribes, and promoting the self-determination and self-governance of Native nations through their tribal governments is in part, a testament to the American understanding that (1) tribal peoples never consented to be governed by the United States, and (2) that the power of tribal governments emanates from the consent of their membership. Over time, the United States came to view its relationship with the Indian tribes as one of a trustee to a ward, and of a greater nation to a dependent nation.

The last recognized government of the Native Hawaiian people was the Kingdom of Hawaii, built on the foundation of Native Hawaiian culture and sovereignty in the Hawaiian archipelago from time immemorial. Prior to the illegal overthrow in 1893, the United States recognized the Kingdom of Hawaii as foreign nation, but it is clear that the United States' attitude and policies towards the Kingdom of Hawaii evolved in a manner consistent with its attitude, policies and treatment of Indian Tribes as dependent nations in need of protection. This is evidenced by President Johnson's message to Congress on December 9, 1868 wherein he states, "It is known and felt by the Hawaiian Government and people that their Government and institutions are feeble and precarious; that the United States, being so near a neighbor, would be unwilling to see the islands pass under foreign control. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers."

In enacting the Apology Resolution, the United States acknowledged that, in contravention of existing treaties of friendship and peace, the United States Minister John L. Stevens "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous

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Message on Indian Affairs (July 8, 1970). In July 2009, then-Assistant Secretary of the Interior for Indian Affairs, Larry Echo Hawk signed a Memorandum of Understanding (MOU) with Harvard University's Project on American Indian Economic Development "whereby the Department and Harvard will collaborate on promoting Tribal economic development through research, outreach and leadership education." *Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities Oversight Field Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 8, 16 (Aug. 17, 2011) (statement of Michael R. Smith, Deputy Bureau Director, Field Operations, Bureau of Indian Affairs, U.S. Department of the Interior) (citations omitted). *See also Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities Oversight Field Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 32 (Aug. 17, 2011) (statement of Robin Puanani Danner, President & CEO, Council for Native Hawaiian Advancement).

[186] Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation Building: The Development Challenge in Indian Country Today,* 22 Amer. Indian Culture & Res. J. 187, 212 (1998); Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 271 (2005) ("Experience in Indian economic development . . . has shown that strong and effective tribal governments, anchored in tribal culture, are critical for economic progress.").

and lawful government of Hawaii," by landing armed naval forces of the United States to support the illegal overthrow of the Kingdom of Hawaii and extending "diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii."

The Apology Resolution recognizes that actions by the United States resulted in the suppression of the "inherent sovereignty of the Native Hawaiian people" and the "deprivation of the rights of Native Hawaiians to self-determination." Further, the Apology Resolution finds 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." The United States committed itself to a process of reconciliation, urging the President to "support reconciliation efforts between the United States and the Native Hawaiian people."

As a result of the Apology Resolution, the U.S. Departments of Justice and the Interior conducted a series of reconciliation hearings in Hawaii in December 1999, resulting in the issuance of the a report on the reconciliation process between the Federal Government and Native Hawaiians on October 23, 2000, entitled *From Mauka to Makai: The River of Justice Must Flow Freely*. The report notes that reconciliation requires "actions to rectify the injustices and compensation for the harm."

The Native Hawaiian Government Reorganization Act of 2012 provides a remedy for the unjust suppression of the Native Hawaiian right to self-determination and self-governance within the framework of existing federal law. Because the bill simply empowers the Secretary of the Interior to recognize a Native Hawaiian government once reorganized by the Native Hawaiian people, it serves as the first necessary step towards reconciliation. As is the case with other federally-recognized tribes, the contours of the federal relationship with the Native Hawaiian people can be further defined by future Congresses with appropriate and representative consultation with the Native Hawaiian government.

The Native Hawaiian Government Reorganization Act implements the key recommendation called for in the 2000 report issued by the Departments of Justice and the Interior, advancing the reconciliation process Congress called for in the Apology Resolution nearly 20 years ago.

Necessary tool for the preservation and perpetuation of an indigenous people and culture

"Native self-governance leads to Native self-sufficiency, resulting in our continued ability to be productive and contribute to the well-being of our families, our communities, and our great nation."[187] Self-governance would allow Native Hawaiian people to exert control over their people and communities—as they had done for thousands of years before the overthrow of the Kingdom of Hawaii. Self-governance is vital to the survival of the Native Hawaiian people and their culture. As explained in the Apology Resolution, self-gov-

[187] Sen. Daniel K. Akaka, Final Speech to the Native Hawaiian Convention (Oct. 5, 2012).

ernance is a fundamental right that Native Hawaiians, like all other Native Americans, should be allowed to practice. Establishing an avenue for Native Hawaiians to reorganize and receive federal recognition will provide opportunities for Native Hawaiians to preserve their cultural resources, exercise self-governance and self-determination, and develop their own solutions to the problems faced by their community.

With the ability to control the decision-making process, Native Hawaiians could expand the level of services that it provides and has brought economic benefits to all Native Hawaiians: provide more housing, medical facilities, develop its economic base, and the course of the protection of natural resources. One of the great advantages of the federal policy of advancing Native self-determination through self-governance has been the wide range of tools afforded to Native people in their ability to perpetuate their traditional knowledge, perspectives, values and cultures for generations to come. Self-determination is the only federal policy to help Native people address health concerns and the socio-economic conditions of their communities in a manner that leads to greater self-sufficiency.[188]

Self-governance ensures that, within the framework of federal law, Native people can exercise their legislative, judicial and executive authorities consistent with their cultural values and community norms. By doing so, tribes are able to develop their economies and address the health, safety and welfare concerns of their communities in a manner that ensures their indigenous cultures are perpetuated and their traditional lifeways continue to be relevant to future generations. Tribes have also used their sovereign authority to develop programs and services to retain and recover aspects of tribal life, such as the Native language and ceremonies, which may otherwise be lost.

While the United States has clearly legislated to provide resources to assist the Native Hawaiian people in perpetuating their culture and language, and to improve the health and socio-economic conditions of their communities, a failure to recognize the self-governing authority of the Native Hawaiian people will always hamper the efficacy of these resources and deny Native Hawaiians some of the greatest tools available under existing federal law to perpetuating their culture and ensuring a healthy population.

The Native Hawaiian Government Reorganization Act of 2012 provides a process for the Native Hawaiian people to reorganize their representative government and petition to have that government recognized by the United States, providing an effective mechanism for the Native Hawaiian people to be self-governing and to exercise legislative, judicial and executive authorities in a manner that is consistent with Native Hawaiian culture, lifeways and values.

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[188] "[T]he question was not whether the federal government had an interest in the affairs of the American Indian tribes, but rather 'how that responsibility can be best fulfilled.' The answer adopted by the federal government was and remains self-determination through self-governance and economic self-sufficiency." Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 19 (Harvard Kennedy School Faculty Research Working Paper Series, Paper No. RWP10–043, 2010) (quoting Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

Clarity and parity in federal policy

The United States has long recognized the Native Hawaiian people as an indigenous people to whom it has a trust responsibility. Beginning in 1921, the Congress began enacting legislation to address the socio-economic conditions of Native Hawaiians and the protection of their collective rights and culture, sometimes in the same legislation it advanced for other Native American groups, and in other instances, as separate but parallel legislation.

The rationale for separate legislation for Native Hawaiians was enunciated in the History, Jurisdiction, and a Summary of Legislative Activities of the United States Senate Select Committee on Indian Affairs during the Ninety-Fifth Congress, as it contemplated legislation to include the Native Hawaiian people in the Indian Education Act. The report states:

> [T]he committee concluded that simply expanding the definition of "Indian" under present Federal laws to include Native Hawaiians ignored the uniqueness of a number of programs administered by the Bureau of Indian Affairs which are premised on the existence of a tribal government exercising powers of self-government. Native Hawaiian organizations do not exercise comparable self-governing authority. However, the committee received testimony which documented the Native Hawaiian's need for supplemental educational services. The committee amendment to S. 857, the Native Hawaiian Education Act, was in the nature of a substitute, and established separate educational programs for Native Hawaiians identical to those provided by the Indian Education Act.[189]

This approach to meeting the federal trust responsibility to the Native Hawaiian people is common when the primary legislation relies on tribal government institutions in implementing key provisions, but when the legislation can be implemented without heavy reliance on the self-governing authority of tribes, Congress has generally elected to legislate on behalf of Native Hawaiians in the same legislation as American Indians and Alaska Natives.

This disparate treatment is a direct result of U.S. action aiding in the illegal overthrow of the Kingdom of Hawaii, effectively depriving Native Hawaiians of their traditional government. "[T]his bill does not propose anything new nor does it afford special treatment to Native Hawaiians. Rather, this bill acknowledges our special relationship with Native Hawaiians and places them on equal footing with the other aboriginal, indigenous people of the United States. It merely extends the Federal policy of self-governance and self-determination to Native Hawaiians." [190]

The federal policy towards its Native nations is to uphold the trust responsibility in three primary ways: (1) the provision of programs and services to address socio-economic needs; (2) the protection of the collective rights of the Native people; and (3) assuring the right to self-governance within the framework of federal law.

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[189] HISTORY, JURISDICTION, AND A SUMMARY OF LEGISLATIVE ACTIVITIES OF THE S. SELECT COMM. ON INDIAN AFFAIRS, 95TH CONG. 24 (1977–1978).

[190] Joint Statement of Senators Daniel K. Akaka and Daniel K. Inouye Before the House Judiciary Subcommittee on the Constitution regarding H.R. 309/S. 147, the Native Hawaiian Reorganization Act 3 (July 19, 2005).

For more than 90 years, Congress has acted to address the socio-economic needs and protect the collective rights of the Native Hawaiian people, enacting over 150 statutes. S. 675 fulfills the third and final area of the trust responsibility by ensuring that the Native Hawaiian people have a mechanism to reorganize their representative Native government and seek its recognition by the United States.

"[S. 675] is nothing more than another manifestation of the bedrock of our federal policy toward indigenous people."[191] With its passage, the Congress ensures parity in federal policy for all recognized Native people and clarifies the federal relationship with the Native Hawaiian people, allowing them full access to the prevailing federal policy on self-determination and the ability to exercise their right to self-governance.[192]

Administrative efficiency and best use of federal and Native Hawaiian resources

As was noted earlier, existing federal law requires the provision of services to and consultation with the Native Hawaiian people by a variety of federal departments and agencies. Effective and efficient administration of programs designed to provide services and meet consultation requirements are hampered by the lack of a formal government-to-government relationship through which federal agencies can work. As a result, federal agencies must develop separate programs, regulations, and processes for meeting responsibilities to Native Hawaiians than are developed for meeting the same responsibilities to other Native people that have a government-to-government relationship with the United States. This results in duplicative efforts and an inefficient use of resources that could otherwise be dedicated to programmatic solutions rather than administrative costs.

The disparate treatment of Native Hawaiians and a lack of centralized services also results in a duplication of efforts by Native Hawaiian organizations seeking to serve the same populations, particularly in the areas of outreach and program administration. One of the core efficiencies that tribal governments represent for their members is a centralized place for accessing a variety of programs, services, and solutions. Without a recognized representative government, Native Hawaiians must learn about and access a multiplicity of organizations providing services, often focused around an area of concern, a locality, or both.

Finally, the absence of a recognized government representing the Native Hawaiian people results in undue burdens and inefficiencies for organizations and agencies seeking to work or consult with the Native Hawaiian community. For example, both the State of Hawaii and the United States have laws governing the treatment of Native graves and funerary objects, particularly when found in the course of development.

The State of Hawaii burial protection laws require developers to consult with the lineal and cultural descendants of burials that

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[191] Joint Statement of Congressmen Neil Abercrombie and Ed Case Before the House Judiciary Subcommittee on the Constitution on H.R. 309/S. 147, the Native Hawaiian Government Reorganization Act of 2005, 2–3 (July 19, 2005).

[192] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm on Indian Affairs).

may be found on a development site in advance of development. The absence of a recognized Native government requires developers to have a deeper understanding of the history and family composition of an area where they are proposing development in order to effectively meet the state law requirements. They must conduct outreach and provide public opportunities for input into communities they may not know how best to reach. A recognized Native Hawaiian government could decrease the level of effort required by developers to comply with the applicable laws and increase the rates of success in effectively engaging the lineal and cultural descendants in a coordinated and timely fashion.

By reorganizing a central and recognized representative government for the Native Hawaiian people, passage of S. 675, the Native Hawaiian Government Reorganization Act, will enhance efficiencies for: federal, state and local governments working with the Native Hawaiian community; the Native Hawaiian community members finding and successfully accessing appropriate and available programs and services; as well as other organizations and efforts seeking to work or consult with the Native Hawaiian people.

LEGISLATIVE HISTORY

S. 675 was introduced on March 30, 2011, by Senator Akaka for himself and Senators Inouye, Begich and Murkowski, and referred to the Committee on Indian Affairs. S. 675 was identical to the version of the legislation marked up by the Committee in the 111th Congress, except for technical and conforming changes. On April 7, 2011, the bill was ordered by the Committee to be favorably reported without amendment. On September 13, 2012, the bill was ordered by the Committee to be reported favorably with an amendment in the nature of a substitute.

A House companion measure to S. 675, H.R. 1250, was introduced on March 30, 2011, by Representative Hirono for herself and Representatives Bordallo, Boswell, Carnahan, Cole, Courtney, DeGette, Faleomavaega, Farr, Hanabusa, Hinchey, Honda, Kildee, Kucinich, Maloney, Matsui, McDermott, McIntyre, Napolitano, Payne, Roybal-Allard, Sablan, Stark, Walz, Woolsey, and Young, and referred to the Committee on Natural Resources. Representatives Andrews, Brady, Cohen, Jones, McCollum, Miller, and Rahall joined as co-sponsors on March 31, 2011. Representatives Boren, DeLauro, Grijalva, Lewis, Moore, Moran, Olver, Pastor, and Reyes joined as co-sponsors on April 1, 2011. Representatives Frank, Garamendi, Lofgren, Zoe and Sarbanes joined as co-sponsors on April 6, 2011. Representatives Brown, Christensen, Chu, Conyers, Markey, and Rangel joined on April 12, 2011. The Natural Resources Committee has not met to consider the bill as of this report.

In the 111th Congress, S. 1011 was introduced on May 7, 2009, by Senator Akaka for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senators Dorgan, Begich, and Murkowski became cosponsors on August 5, 2009. A hearing was held before the Committee on Indian Affairs on August 6, 2009. On December 17, 2009, the bill was ordered by the Committee to be favorably reported with an amendment in the nature of a substitute. Other versions of the bill, S. 381 and S. 708, were introduced but not considered by the Committee.

A House companion measure to S. 1011, H.R. 2314, was introduced on May 7, 2009, by Representative Abercrombie for himself and Representative Hirono, and referred to the Committee on Natural Resources. The Natural Resources Committee met to consider the bill on June 11, 2009. On December 16, 2009, the bill was favorably reported without amendment to the House of Representatives by the Yeas and Nays 26–13. On February 23, 2010, the House of Representatives considered H.R. 2314 and passed by the Yeas and Nays 245–164 with an amendment in the nature of a substitute offered by Representative Abercrombie. Other versions of the bill, H.R. 862 and H.R. 1711, were introduced but not considered by the Natural Resources Committee.

In the 110th Congress, S. 310 was introduced on January 17, 2007, by Senator Akaka for himself and Senators Inouye, Cantwell, Dodd, Murkowski, Stevens, Coleman, Dorgan, and Smith, and referred to the Committee on Indian Affairs. Senator Klobuchar became a cosponsor on December 3, 2007. A hearing was held before the Committee on Indian Affairs on May 3, 2007. On May 10, 2007, the bill was ordered by the Committee to be favorably reported without amendment to the full Senate.

A House companion measure to S. 310, H.R. 505, was introduced on January 17, 2007, by Representative Abercrombie, and referred to the Committee on Natural Resources. On May 2, 2007, the Natural Resources Committee met to consider the bill. The bill was ordered favorably reported to the House of Representatives by voice vote. The bill passed the House on October 24, 2007.

In the 109th Congress, S. 147 was introduced on January 25, 2005, by Senator Akaka for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Smith of Oregon became a cosponsor on February 16, 2005, Senator Cantwell of Washington on February 18, 2005, and Senator Murkowski of Alaska on March 8, 2005. A hearing on S. 147 was held before the Committee on March 1, 2005, and on March 9, 2005, the bill, with an amendment in the nature of a substitute, was ordered by the Committee to be favorably reported to the full Senate. After the business meeting on March 9, 2005, when the bill was ordered reported with the substitute amendment, the following additional Senators joined as cosponsors: Senator Coleman of Minnesota on March 10, 2005, Senator Dorgan of North Dakota on April 4, 2005, Senator Stevens of Alaska on April 5, 2005, and Senator Graham of South Carolina on May 11, 2005.

A House companion measure to S. 147, H.R. 309, was introduced on January 25, 2005, by Representative Abercrombie, for himself and Representatives Case, Grijalva, Young, Moran, Bordallo and Faleomavaega, and referred to the Committee on Resources. On February 1, 2005, Representative Rahall joined as a cosponsor.

In the 108th Congress, S. 344 was introduced on February 11, 2003, by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Reid of Nevada became a cosponsor on February 27, 2003, Senator Stevens of Alaska on March 17, 2003, Senator Hatch of Utah on November 12, 2003, Senator Smith of Oregon on December 9, 2003, Senator Campbell of Colorado on April 21, 2004, and Senator Carper of Delaware on June 24, 2004. A hearing on S. 344 was held before the Committee on Indian Affairs on February 25, 2003. S. 344 was

ordered favorably reported to the full Senate by the Committee on Indian Affairs on May 14, 2003.

A House companion measure to S. 344, H.R. 665, was introduced on February 11, 2003, by Representative Abercrombie, for himself and Representative Case, and thereafter referred to the Committee on Resources.

In the 107th Congress, S. 746 was introduced on April 6, 2001, by Senator Akaka, for himself and Senator Inouye, and thereafter referred to the Committee on Indian Affairs. On July 24, 2001, S. 746 was ordered favorably reported to the full Senate. The Committee report accompanying the bill was S. Rep. No. 107–66.

A House companion measure to S. 746, H.R. 617, was introduced in the House of Representatives by Representative Neil Abercrombie, for himself and Representatives Patsy Mink, Eni Faleomavaega, James Hansen, Dale Kildee, Nick Rahall, and Don Young, and thereafter referred to the Committee on Resources. H.R. 617 was ordered favorably reported to the full House of Representatives on May 16, 2001. S. 746 and H.R. 617 were not acted upon prior to the sine die adjournment of the 107th session of Congress.

In the 106th Congress, S. 2899 was introduced by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives and thereafter referred to the Committee on Resources. The Committee and the Committee on Resources held five consecutive days of joint hearings on S. 2899 and H.R. 4904 in Hawai'i from Monday, August 28, through Friday, September 1, 2000. The Committee held an additional hearing on S. 2899 in Washington D.C. on September 13, 2000. S. 2899 was ordered favorably reported to the full Senate by the Committee on September 13, 2000. The Committee report accompanying the bill was Senate Report 106–424. H.R. 4904 was ordered favorably reported by the House Resources Committee and passed the House on September 26, 2000. H.R. 4904 failed to pass the Senate before the sine die adjournment of the 106th session of the Congress.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

A number of amendments were made to S. 675, all of which were included in a substitute amendment accepted by the Committee on September 13, 2012. These changes were made to streamline the legislation and recognize the work of the State of Hawaii's Native Hawaiian Roll Commission, tasked with establishing a base roll of Native Hawaiians interested in reorganizing a Native Hawaiian government.

SECTION-BY-SECTION ANALYSIS OF S. 675, AS AMENDED

Section 1. Short title

Section 1 states that this Act may be cited as the "Native Hawaiian Government Reorganization Act of 2012".

Section 2. Findings

Section 2 establishes that Congress finds that, like American Indians and Alaska Natives, the Native Hawaiian people, having

never relinquished claims to inherent sovereignty, have a special political and legal relationship to the United States, arising out of their status as indigenous, Native people. Section 2 also establishes that Congress possesses and has exercised its constitutional authority to address the conditions of the Native Hawaiian people in more than 150 federal laws, including adopting the Hawaiian Homes Commission Act of 1920 and the Hawaii Admissions Act in 1959. This section also identifies other state, federal and international support for the purpose of this legislation.

Section 3. Definitions

Defines various terms used in the Act.

Section 4. United States policy and purpose

Section 4 provides the following: Congress possesses and exercises the constitutional authority to address Native Hawaiian conditions; the Native Hawaiian people have the right to autonomy in internal affairs, an inherent right of self-determination and self-governance; the Native Hawaiian people have the right to reorganize and the right to become economically self-sufficient; the United States reaffirms the special political and legal relationship between the United States and the Native Hawaiian people, and the authority delegated to the State of Hawaii in the Admissions Act; the United States ensures parity in policy and treatment among all federally-recognized indigenous groups; the U.S. will continue to engage in reconciliation process and political relations with the Native Hawaiian people; and the purpose of the bill is to provide a process for the reorganization and federal recognition of a single Native Hawaiian government that exercises the inherent powers of native self-government under existing federal law, with the same privileges and immunities as other federally-recognized Indian tribes.

Section 5. Reorganization of the Native Hawaiian governing entity

Section 5 recognizes the Native Hawaiian right to reorganize under Section 16 of the Indian Reorganization Act; defines the membership of the Native Hawaiian people for the purposes of reorganization as those people appearing on the roll certified by the State of Hawaii Native Hawaiian Roll Commission authorized under Act 195; provides for the establishment of an Interim Governing Council, tasked with preparing the Constitution and By-Laws and submitting them for Secretarial approval; and requires the Interim Governing Council, with assistance from the Secretary, to conduct the election of officers of the Native Hawaiian governing entity, then terminates the Council.

Section 6. Applicability of other Federal laws

Section 6 provides the following: the Native Hawaiian Governing Entity has the inherent powers and privileges of self-government of an Indian Tribe, including the power to define its own membership, and will be listed as an Indian Tribe on the Federally Recognized Indian Tribe List; the Native Hawaiian Governing Entity is subject to the Indian Gaming Regulatory Act (IGRA) and its gaming prohibitions. Effectively, the Native Hawaiian Governing Entity will be barred from gaming, as all gaming in the State of Hawaii

is prohibited under state law; and the Secretary may treat the Native Hawaiian governing entity as an Indian Tribe for the purpose of carrying out any activity authorized under the Indian Reorganization Act.

Section 7. Severability

Section 7 provides that if any provision of the Act is held invalid, it is the intent of Congress that the remaining provisions remain in effect.

Section 8. Authorization of appropriations

Section 8 authorizes the appropriation of such sums as are necessary to carry out the Act.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 13, 2012, the Committee on Indian Affairs, by voice vote, adopted S. 675 with an amendment in the nature of a substitute and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 675 as reported.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory impact of S. 675 will be minimal.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 675.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 675 will not affect any changes in existing law.

ADDITIONAL VIEWS OF VICE CHAIRMAN BARRASSO

Federal recognition of a Native group is of profound importance to many stakeholders—the Native group itself and its members, the United States and its citizens, local communities and the people who live in them. I understand how challenging, complex, and time-consuming the administrative recognition process is—the Committee has heard a great deal about those problems—and sympathize with groups that have gone through it or attempted to go through it.

Nevertheless, it is my view that legislative recognition—legislation that deems a group or tribe to be federally recognized—is not the right way to decide which groups should be recognized and which groups should not be recognized.

That is a determination that can be best made by the Executive Branch of the Government following the regulations that have been adopted for that purpose, to analyze and evaluate of the historic, cultural, political, and other key factors that should go into the decision of whether a Native group should be formally recognized by the United States.

Testifying about several recognition bills at a hearing before this Committee during the 110th Congress, the Director of the Office of Federal Acknowledgement at the Department of the Interior stated—

> Legislation such as S. 514, S. 724, S. 1058, and H.R. 1294 [recognition bills introduced in the 110th Congress] would allow these groups to bypass this [the Federal acknowledgement] process—allowing them to avoid the scrutiny to which other groups have been subjected. The Administration supports all groups going through the Federal acknowledgment process under 25 CFR Part 83.1.

The Department's witness went on to point out that, in light of the importance and implications of recognition decisions, the Department adopted its Federal acknowledgment regulations at 25 CFR Part 83 in 1978 in recognition of "the need to end ad hoc decision making and adopt uniform regulations for Federal acknowledgment."

I do know and appreciate how important this bill is to the Chairman and to many Native Hawaiian people in his home state. However, I feel that the policy should be the same for all Native groups—they should go through the administrative acknowledgement process to be federally recognized. Although there is a reorganization process contemplated by the bill as amended in the business meeting on September 13, 2012, it is, in effect, a legislative recognition of the Native Hawaiian entity. For that reason I cannot support the bill.

JOHN BARRASSO.

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