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NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

AUGUST 6, 2009

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NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT

THURSDAY, AUGUST 6, 2009

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:28 p.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. I am going to call the hearing to order.

This is a legislative hearing on the Senate Indian Affairs Committee Senate Bill 1011, the Native Hawaiian Government Reorganization Act of 2009. The bill outlines the process for the reorganization of a Native Hawaiian government for the purposes of reestablishing a government-to-government relationship with the United States. It also reaffirms that the Native Hawaiian people have the right to provide for their common welfare and to adopt an appropriate governing document or series of documents as they reorganize the government.

We as Congress have a distinct and undeniable trust responsibility toward the First Americans of the United States, and with the passage of this legislation, the Native Hawaiian people will once again have an opportunity for self-governance and self-determination. This, I think, is an important step for our Country in an attempt to redress the wrongs that our Government has committed against the Native Hawaiian people.

Congress has reaffirmed the rights of self-determination and self-government for many tribes in the lower 48 States and in Alaska. Native Hawaiians have been absent in these efforts, and the time has come for us to initiate this proposed process for their people.

While other indigenous groups can utilize the administrative process for Federal recognition, that administrative process is not available to Native Hawaiians. Moreover, that process was designed to evaluate Native American groups in the continental United States. So my colleagues and friends from Hawaii have introduced similar legislation to S. 1011 since the 106th Congress. Each of these proposals has afforded our Committee an ample record regarding this legislation. Over the past few years, a great number of compromises have been made by our colleagues and many are reflected in the legislation before the Committee today.

These changes have addressed many concerns, but maintain the ultimate goal of establishing a process to reorganize a Native Hawaiian government.

It is important to note that this will not be the first time that Congress has recognized Native Hawaiians as the indigenous people of Hawaii. Congress enacted more than 150 statutes dealing with Native Hawaiians, providing evidence of an important relationship and providing them with certain benefits and reaffirming our obligations to Native Hawaiians.

In addition, in 1993, Congress passed the Native Hawaiian Apology Resolution. I am sure that the Senators from Hawaii will better describe the history of this relationship and in much greater detail, showing that Native Hawaiians clearly had a previous political relationship with this Country. While I strongly prefer that our indigenous groups go through the Federal acknowledgement process, Native Hawaiians have a long history of a similar but distinct relationship with the United States. This bill will provide Native Hawaiians greater autonomy in determining their internal affairs and responsibility for their common welfare and their future economic and social development.

I have joined as a co-sponsor, as I have in the past, for this legislation. Our colleagues, Senator Akaka and Senator Inouye, have worked on this legislation. We will be hearing from witnesses today, but before we do, I wish to call on any other member of the Committee to make comments on the bill, particularly our two Senators from Hawaii. But first, let me call on the Vice Chairman, if you have comments.

STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you, Mr. Chairman. I do have comments. I will just insert them for the record so as not to delay the testimony of our friends.

[The prepared statement of Senator Barrasso follows:]

PREPARED STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Thank you, Mr. Chairman.

Versions of this bill have come before the Indian Affairs Committee in at least five previous Congresses, beginning in the 106th Congress.

I appreciate that it is a matter of considerable importance for Senators Akaka and Inouye, and for many Native Hawaiian people.

Based on the correspondence we have been getting, I think it's fair to say that there are strong feelings about this initiative—both for it and against it.

There are those who support or oppose it on policy grounds, and those who support or oppose it on legal or constitutional grounds.

Whether a particular group may be recognized as an Indian tribe by the Federal Government involves difficult questions—questions of ethnographic, cultural and historic facts.

Determining those facts requires a detailed scholarly inquiry. I do not believe there are many circumstances that would justify foregoing a detailed inquiry and having Congress simply deem a group to be an Indian tribe—or, in this case, the functional equivalent of an Indian tribe.

I cannot help but ask whether it would be preferable to have that decision go through a detailed inquiry in an executive agency. Nevertheless, our witnesses today seem to represent a broad spectrum of views on Senator Akaka's bill, and I look forward to hearing their remarks.

The CHAIRMAN. Senator Akaka, would you wish to make comments?

Following the comments, we will then introduce the witnesses.

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Chairman Dorgan and Vice Chairman Barrasso. Thank you for holding today's hearing.

I want to add my aloha and welcome to our witnesses and those who are present here.

As members of the Senate Committee on Indian Affairs, we have jurisdiction to examine and address the needs of our Country's indigenous people. This specifically includes Native Hawaiians, Alaska Natives, and American Indians.

The United States has not always acted honorably in its treatment of our Nation's First People. However, I am proud that as a Country we have pursued actions acknowledging past wrongs and building a mutual path forward. It has been the work of this Committee and Congress to advance policies that uphold Native rights and their ability to exercise self-governance and self-determination.

The legislation before us today provides parity. It enables Hawaii's indigenous people to establish a government-to-government relationship with the United States. This political and legal relationship is the same type of relationship natives of Alaska and tribes in the lower 48 States have with the United States.

Further, the process is consistent with the Constitution, Federal and State laws. Those that are not familiar with the history of Hawaii may wonder why such a process is needed. It is needed because in 1893, the Native Hawaiian government, led by Queen Lili'uokalani, was illegally overthrown. It was done with participation by agents of the U.S. and the U.S. military force. At the time, President Grover Cleveland characterized America's conduct as an "act of war" against the Native Hawaiian people and called for the Queen to be reinstated.

The overthrow resulted in generations of Native Hawaiians being disenfranchised from their government, culture, land and their way of life. S. 1011 provides a structured process to reorganize a Native Hawaiian governing entity to exercise self-governance and self-determination. Once federally recognized, the Native Hawaiian governing entity can enter into discussions with the State of Hawaii and the United States. Any agreements reached by the three parties will require implementing legislation at the State and Federal level.

This bill does not allow for private lands or businesses to be taken, and does not permit Hawaii to secede from the Union. Further, it does not authorize gaming in Hawaii. Rather, this bill provides the structure necessary for meaningful interaction between Native Hawaiians and non-Native Hawaiians, especially as policies are formed and implemented. Such actions enable us to honor the needs of our State, preserve its cultural heritage, and address issue that have lingered without resolution since the overthrow of the kingdom of Hawaii.

The United States recognized and maintained a trust responsibility for the welfare of Native Hawaiians. As was mentioned, to

date, Congress has enacted more than 160 statutes to address the needs of Native Hawaiians. This includes a measure I sponsored, commonly known as the Apology Resolution, that was enacted into law in 1993. In the resolution, the United States apologized for its involvement in the overthrow, as well as committed itself to acknowledge the ramifications of the overthrow and support reconciliation efforts between the United States and the Native Hawaiian people.

Reconciliation is a means for healing, enabling an ongoing dialogue that empowers us to address the political status and rights of Native Hawaiians. In order to implement the reconciliation process, in 1999, Attorney General Janet Reno and Secretary Bruce Babbitt designated officials to represent the Departments of Justice and the Interior in the reconciliation process between Native Hawaiians and the Federal Government. These officials traveled throughout the State of Hawaii, held public meetings with the Native Hawaiian community and produced a report entitled From Mauka to Makai: The River of Justice Must Flow Freely.

This comprehensive report identified crucial steps the Federal Government should take to continue the process of reconciliation, including the recommendation to extend Federal recognition. Specifically, the report stated "As a matter of justice and equity, the Departments believe the Native Hawaiian people should have self-determination over their own affairs, within the framework of Federal law, as do Native American Tribes."

The legislation we are considering today allows us to take the necessary next step in the reconciliation process. S. 1011 is constitutional and provides a framework with respect of the needs of Native Hawaiians and non-Native Hawaiians. Their combined efforts will be needed as each will play an active role in reaching agreement and enacting implementing legislation at the State and Federal levels.

Federal recognition of Native Hawaiians is supported by a majority of people in Hawaii, including the Governor, the State Attorney General, the State legislature and numerous Native and non-Native organizations. In Washington, D.C., S. 1011 is a bipartisan bill with the support of national organizations, including the American Bar Association, National Congress of American Indians and Alaska Federation of Natives.

Mr. Chairman, I look forward to building upon the established record as we proceed with the tenth hearing this Committee has held on the issue of Native Hawaiian governance.

The CHAIRMAN. Senator Akaka, I thank you very much.

Senator Inouye?

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Mr. Chairman, I thank you and Vice Chairman Barrasso for scheduling this very important hearing on the Akaka bill. We have waited many, many years for this.

Mr. Chairman, I ask unanimous consent that my full statement be made part of the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

I would like to thank Chairman Dorgan and Vice Chairman Barrasso for scheduling this important hearing today on a bill that Senator Akaka and I have worked tirelessly on for the past 10 years.

So much of what we are here to consider today arises from events that took place long ago. On January 16, 1895, the United States Minister John L. Stevens, who served as the Ambassador to the court of Queen Liliuokalani, directed a marine company on board the U.S.S. BOSTON to arrest and detain Queen Liliuokalani. She was placed under house arrest in her bedroom at Iolani Palace for nine months. This event was engineered and orchestrated by the Committee of Public Safety, which consisted of Hawaii's non-Native Hawaiian businessmen, and with the approval of Minister Stevens. President Grover Cleveland appointed James Blount to conduct a special investigation in Hawaii and write up his findings. His report was the first report that provided "evidence that officially identified the United States' complicity in the lawless overthrow of the lawful, peaceful government of Hawaii." In contrast to the Blount report a year later the Senator John T. Morgan, Chairman of the Committee on Foreign Relations also issued an investigative report that said the United States did no wrong. This was clearly written to exonerate the parties involved.

On January 17, 1895, Queen Liliuokalani temporarily yielded her authority to the United States. A new government, the Republic of Hawaii, was established and requested annexation by the United States. But after examining the circumstances and events leading to the illegal overthrow, President Cleveland refused to annex the Republic. In 1898, President McKinley, unable to obtain the necessary Senate consent to ratify a treaty of annexation, signed a Joint Resolution annexing Hawaii as a United States' territory.

As part of the annexation agreement, former crown lands were transferred to the United States. Discussions on the status of Native Hawaiians immediately began throughout Hawaii, for this was their land, their government, and their people, but they were now outcasts. In 1921, Hawaii's delegate to Congress, Prince Jonah Kuhio Kalanianaole, led Congress in enacting the Hawaiian Homes Commission Act of 1920. In adopting this Act, Congress compared its relationship with Native Hawaiians to its relationship with Indian tribes and relied on this special relationship to return certain crown lands to the Territory for the benefit of Native Hawaiians.

For those of us born and raised in Hawaii, as I was, we have always understood that the Native Hawaiian people have a status that is unique in our State. This status is enshrined in our State Constitution and is reflected in the laws of our State. It is found in well over 188 federal statutes including the Hawaii Admissions Act. This unique status reflects our deep gratitude to the native people who first welcomed is to their shores and who gave us the opportunity to live in their traditional homelands.

Mr. Chairman, in my 30 years of service on this committee, I have been fortunate to learn a bit about the history of our country and its relations with the indigenous, native people, who occupied and exercised sovereignty on this continent.

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. We have been firm in our resolve to uphold that policy.

Native Hawaiians have had a political and legal relationship with the United States for the past 183 years as shown through treaties (30) with the United States and other sovereign governments and entities, and scores of federal statutes (188). But like tribes whose federally recognized status was terminated, Hawaii's monarchy was also terminated. Even after the Native Hawaiian government was illegally overthrown, the Native Hawaiian people never gave up their expression of political status through the Royal Societies and later through the Hawaiian Civic clubs. Through these groups cultural, political, social and activities and relationships unique to the Native Hawaiian people were kept in tact.

As one who has served the citizens of Hawaii for over 50 years, as a member of the Territorial Legislature, a member of Congress, and now a member of the United States Senate, I believe that there is broad based support in our State for what the Native people are seeking, full restoration of the government to government relationship they had with the United States.

Lastly, the courts have concluded that termination can only be reversed by an act of Congress. Reconciliation is long overdue and I look forward to continuing to work with the Administration and my colleagues to ensure that the Native Hawaiian people are given their right to self-determination and self-governance back.

The CHAIRMAN. Senator Murkowski?

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. I would ask unanimous consent that my full statement be included in the record, but I also want to take just a moment and let my Hawaiian colleagues know that, for yet another round, the Alaskans will stand by you as we try to advance this important legislation for recognition of Native Hawaiians. It is something that we have been working on for many years. I think some of the questions that come up about, well, how will this work in Hawaii, can be resolved when you look to how we have handled the recognition of our Alaska Natives.

Please know that I will be working with you as we advance this legislation.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Thank you Chairman Dorgan. Senators Inouye and Akaka, I appreciate having the opportunity to support you today as the Senate Committee on Indian Affairs holds a hearing on the Native Hawaiian Government Reorganization Act. Alaska and Hawaii both joined the union in 1959. In 2009, both Alaska and Hawaii are celebrating the 50th anniversary of Statehood. This marker in history forces us to reflect on history and the history of the indigenous people of our States. They are a people that share a special relationship to the land that today we recognize as the states of Alaska and Hawaii.

As you know, Alaska Natives and Native Hawaiians share a special relationship. It was only 38 years ago that in 1971, this Congress enacted the Alaska Native Land Claims Settlement Act. While the legislation before us today is different in nature, it addresses a fundamental issue of how the United States establishes its relationship with its indigenous peoples. ANCSA settled the aboriginal land claims of the indigenous people of Alaska after some 100 years of legal uncertainty.

History has not been more kind to the indigenous people of the State of Hawaii, whose Kingdom was overthrown, and lands annexed by the United States in 1893. In 1993, at the 100 year anniversary of a devastating history for Native Hawaiians, President Clinton signed into law an Apology Resolution recognizing the historical events of the annexation of the Kingdom of Hawaii. The resolution expressed a commitment to support reconciliation efforts between the Native Hawaiian people and the United States.

This Committee has held hearings in last several Congresses and we have debated similar legislation on the Senate floor. Dissenters in this debate questioned the existence of a Native Hawaiian people. One certain truth is the existence of the Native Hawaiian people who have a rich cultural history that has continued since time immemorial.

I mentioned a special relationship between Alaska Natives and the Native Hawaiians—that relationship is built in the support the two communities have provided to each other to strengthen their communities. They have found a strength in each other to face the social challenges impressed upon Native people. I would like to elaborate on this relationship. Fundamental to every culture is language. Many of our Alaska Native communities have been vigorous in preserving their indigenous languages. In Alaska we have many dialects within the Eskimo and Indian languages. Many Alaska Native leaders and Native educators have sought to find ways to revitalize their Native languages. In doing so, they have looked to the Native Hawaiians.

Native Hawaiians have been successful in keeping alive the Native Hawaiian language, through immersion schools at the pre-school level to Masters level university programs enabling one to receive an entire formal education in Hawaiian. I reference the status of language for a very important reason—the root of every culture

is language—when a language is strong and vibrant so is a culture—within a native language, the cultural protocols and customs are preserved and appropriately expressed.

If you question the existence of Native Hawaiian people—you find a people with a strong culture, deep in tradition and custom, and a language that is alive among the Native Hawaiian community. The Constitution of the State of Hawaii has two official languages—English and Hawaiian. Such a recognition by the State of Hawaii is far beyond any other States in this union that have indigenous peoples within their borders.

This Senator believes there should be no doubt on the question of the existence of Native Hawaiians. They are the indigenous people of the State of Hawaii. Congress has recognized Native Hawaiians in legislation over 100 times, providing similar health and housing programs as those provided to American Indians and Alaska Natives.

This Nation is built on the notion of justice and equality as expressed in our founding documents. It is a notion that when the events of humanity and history recognize a grave injustice that there is hope this Congress will act to correct such injustices. The legislation before us today provides a process for Native Hawaiians to re-establish a governing body and equally recognize a government to government relationship that is shared with the other indigenous peoples in the United States—American Indians and Alaska Natives.

Our experience in Alaska with the Alaska Native Land Claims Settlement Act and the Native institutions that have been created since its passage in 1971 have empowered the Native people of Alaska—politically through the self-determination compacts and contracts entered into with the United States by our regional health and social service non-profit corporations and economically though our Native corporations. I would encourage those who have doubts in their mind regarding the legislation before us today—to look toward the history of the Alaska Native people. I look forward to hearing the testimony provided by our witnesses today.

The CHAIRMAN. Any other comments?

If not, we will call the Honorable Sam Hirsch, the Deputy Associate Attorney General of the U.S. from the Department of Justice forward.

Mr. Hirsch, we will include your formal statement as a part of the permanent record. You will summarize for the Committee, I hope, and we are very pleased you are here. I understand you have some family here, your wife and children have accompanied you to this hearing, is that correct?

Mr. Hirsch. Yes, Senator, it is.

The CHAIRMAN. You are welcome to point them out and brag about them, if you like.

[Laughter.]

Mr. Hirsch. Thank you. Yes, that's my wife, Karin, and my daughters, Julia and Charlotte.

The CHAIRMAN. We welcome you and you may proceed.

STATEMENT OF HON. SAM HIRSCH, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. HIRSCH. Thank you, Chairman Dorgan, Vice Chairman Barrasso and members of the Committee, for the opportunity to testify today regarding Senate Bill 1011, the Native Hawaiian Government Reorganization Act of 2009, as well as the companion bill, H.R. 2314, now pending in the House.

I am particularly honored to appear today before Senator Inouye and Senator Akaka. Senator Inouye gave me one of my first opportunities for public service when I had the honor of working for a select committee that he and Senator Rudman co-chaired back in 1987, and for that, Senator, I will always be very grateful.

The Department of Justice strongly supports the core policy goals of this bill. And I am very pleased to testify on this historic legislation today. It is our understanding that the bill's sponsors and cosponsors in the Senate and House are continuing to develop the legislation's precise parameters, so I will focus here on the broad principles embodied in these bills, rather than some of the details that may still be in flux.

The Supreme Court has long held that Congress has broad plenary power to recognize Indian tribes. The Court has characterized Indian tribes as "distinct political communities retaining their original natural rights in matters of local self-government." When it upheld Congress' treatment of the Pueblos of New Mexico as Indian tribes, the Court explained that "the questions whether, to what extent, and for what time distinctly Indian communities shall be recognized and dealt with as tribes are to be determined by Congress, not by the courts."

But Congress' plenary power to recognize tribes does not mean that it "may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe."

As for Native Hawaiians specifically, the Supreme Court has never decided whether Congress has the authority to treat the Native Hawaiian community in the same manner as an Indian tribe. Indeed, in its 2000 decision in *Rice v. Cayetano,* the Court expressly avoided that question, calling it "difficult terrain." And in the decade since the Supreme Court decided *Rice,* no court has squarely addressed that issue.

In recognizing a Native Hawaiian sovereign entity, then, Congress would in effect determine that Native Hawaiians constitute a distinct Native community akin to an Indian tribe. And the general history of the Native Hawaiian people bears significant similarities to the history of Indian tribes. Despite numerous obstacles, Native Hawaiians have a sustained history of acting collectively and creating institutions to preserve traditional Native Hawaiian forms of social organization, religious practice, family and cultural identity, and other distinctive cultural practices.

These institutions and organizations include, among many others, the Royal Societies, formed after the fall of the Hawaiian monarchy, the Hawaiian Civic Clubs, the Native Hawaiian Sovereignty Conference, and the Hawaiian Protective Association, a political organization established in 1914 with a constitution and bylaws that sought to unify Native Hawaiians and protect their common interests, to promote the education, health, and economic development of Native Hawaiians; and to address disputes within the Native Hawaiian community.

And the United States Congress has repeatedly given legal recognition and legal status to those distinctive Native Hawaiian institutions. In 1921, Congress enacted the Hawaiian Homes Commission Act to establish a permanent land base for the benefit and use of Native Hawaiians, thereby reversing the decline in the Native Hawaiian population and revitalizing the Native Hawaiian community.

In the legislative history of that 1921 Act, members of Congress repeatedly noted the similarities between Native Hawaiians and Indian tribes. Since that time, Congress has enacted more than 100

Federal statutes expressly recognizing Native Hawaiian tradition and culture and providing benefit programs for Native Hawaiians similar to those provided to other Native people. None of those statutes has been struck down as unconstitutional. And collectively, these Congressional enactments have provided Native Hawaiians with significant benefits in the areas of health care, education, and housing, among others.

Again, I want to express my thanks for the opportunity to appear before the Committee to discuss these important issues. As I noted at the outset, the Department of Justice strongly supports the core policy goals of the Native Hawaiian Government Reorganization Act of 2009 and looks forward to working with you as the bill's specific language further evolves.

We are very pleased to have the opportunity to work with this Committee and with the bill's sponsors and co-sponsors and their staff in developing this historic legislation.

[The prepared statement of Mr. Hirsch follows:]

PREPARED STATEMENT OF HON. SAM HIRSCH, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Thank you, Chairman Dorgan, Vice Chairman Barrasso, and Members of the Committee, for the opportunity to testify before you today regarding S. 1011, the Native Hawaiian Government Reorganization Act of 2009, as well as the companion bill, H.R. 2314, now pending in the House of Representatives. It is our understanding that the bill's sponsors and cosponsors are continuing to develop the legislation's precise parameters, so I will focus here on the broad principles embodied in these bills, rather than some of the details that may still be in flux.

The Department of Justice strongly supports the core policy goals of this bill, and I am pleased to testify on this historic legislation. My remarks highlight some background considerations relevant to Native Hawaiian recognition legislation and discuss some important provisions in the bill.

I. Authority to Recognize Indian Tribes Generally

The Supreme Court has long held that Congress has broad power to recognize Indian tribes. As the Court stated in *United States v. Lara,* 541 U.S. 193, 200 (2004), "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" In *Morton v. Mancari,* 417 U.S. 535, 551–52 (1974), the Court observed that Congress's "plenary power" to recognize and legislate on behalf of Indian tribes "is drawn both explicitly and implicitly from the Constitution itself" and is based on "a history of treaties and the assumption of a 'guardian-ward' status."

More specifically, the Federal Government derives its power to deal with the Indian tribes primarily from the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which explicitly gives Congress the power to regulate commerce not only among the States and with foreign nations but also with "the Indian Tribes," and the Treaty Clause, U.S. Const. art. II, § 2, cl. 2. The Federal Government's authority to deal separately with the Indian tribes is thus grounded in two constitutional provisions that recognize the Indian tribes as sovereign political entities.

The Supreme Court has numerous times defined tribes based on this concept of sovereignty. Most recently, in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978), the Court described Indian tribes as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."

Congress's power to recognize Indian tribes extends to tribes that have had aspects of their sovereignty diminished. For example, in *United States v. John,* 437 U.S. 634, 652–53 (1978), the Supreme Court upheld the Federal Government's ability to deal with the Mississippi Choctaws, even though federal supervision over them had not been continuous and there were times when the State's jurisdiction over them and their lands went unchallenged. Similarly, in *Lara,* 541 U.S. at 200–07, the Court upheld Congress's authority, in the wake of *Duro v. Reina,* 495 U.S. 676 (1990), to relax limitations on tribes' exercise of inherent prosecutorial power over non-member Indians.

The Indian Affairs power encompasses "distinctly Indian communities." *United States v. Sandoval,* 231 U.S. 28, 46 (1913). The Supreme Court, in upholding

Congress's treatment of the Pueblos of New Mexico as tribes, cautioned that Congress's plenary authority over tribes does not mean that it "may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *Id.* Nonetheless, within these limits, the Court has found that "the questions whether, to what extent, and for what time [distinctly Indian communities] 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." *Id.*

II. Authority to Recognize Native Hawaiians—*Rice v. Cayetano*

Any discussion of the power of the State of Hawaii and Congress regarding Native Hawaiians must begin with *Rice v. Cayetano,* 528 U.S. 495 (2000). Rice involved a challenge to a provision in the Hawaii State Constitution limiting the right to vote for the trustees of the Office of Hawaiian Affairs (OHA) to "Hawaiians." This term was defined by state statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." The Court held that the voting provision violated the Fifteenth Amendment.

Importantly, the Court did *not* reach the question whether Congress has the authority to treat Native Hawaiians in the same manner as members of an Indian tribe. Instead, the Court held that because the OHA elections were "elections of the *State,* not of a separate quasi sovereign," they were "elections to which the Fifteenth Amendment applies." *Id.* at 522 (emphasis added). The Court thus avoided what it called the "difficult terrain" of "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518–19. And since the Supreme Court decided *Rice,* nearly a decade ago, no court that we are aware of has squarely addressed that issue.

III. History of Native Hawaiian Sovereignty and Self-Government

In recognizing a Native Hawaiian sovereign entity, Congress would in effect determine that Native Hawaiians constitute a distinct community as it has done with Indian tribes. The history of Native Hawaiian sovereignty and the extent to which Native Hawaiians continue to function as an organized community—engaging in collective action and preserving traditional community and culture—are relevant to this analysis.

The general history of the Native Hawaiian people bears significant similarities to the history of Indian tribes. Prior to the arrival of western explorers, Native Hawaiians exercised self-rule. Traditionally, each island was controlled by a chief, known as an Ali'I 'ai moku, and a hierarchy of lesser chiefs (Ahupua'a konohiki) and priests (Kahuna nui). In the early nineteenth century, King Kamehameha united the separate island chiefdoms under one government, creating the Hawaiian monarchy. The United States recognized the Kingdom of Hawaii as a sovereign power and dealt with it as such through much of the nineteenth century. In fact, the two nations executed several treaties and conventions. Then, in 1893, commercial interests, with the support of the United States military, overthrew the Hawaiian monarchy. In 1993, Congress enacted a resolution formally apologizing for the role of the United States in that overthrow. *See* Pub. L. 103–150, 107 Stat. 1510 (1993).

Despite the overthrow of the monarchy, a community of Native Hawaiians continued to act collectively to preserve their culture and institutions in many ways, and the United States and the State of Hawaii gave a variety of forms of legal recognition and legal status to those distinctive institutions and culture.

A. Federal and State Protection of Native Hawaiian Autonomy and Culture

In 1921, Congress enacted the Hawaiian Homes Commission Act (HHCA), Act of July 9, 1921, ch. 42, 42 Stat. 108. The law sought to "establish a permanent land base for the benefit and use of Native Hawaiians" and to "make alienation of such land [from the Native Hawaiians] . . . impossible," 1990 Haw. Sess. Laws, Act 349, thereby stopping the decline in the Native Hawaiian population and revitalizing the Native Hawaiian community. One supporter of the legislation said, in explaining the need for the Act, that "[t]he idea in trying to get the land back to some of the Hawaiians is to rehabilitate them. . . . The only way to save them is to take them back to the lands." H. Rep. No. 66–839, at 3–4 (1920). Similarly, Hawaiian Delegate Kananianaole stated, "I am a believer in giving the small man a piece of land and assisting him to become a prosperous member of the community. There is no patriotism so great as that which is rooted in the soil. I am a believer in and have been consistent in the policy of home rule." 59 Cong. Rec. 7455 (May 21, 1920).

The HHCA set aside 1.2 million acres of land—land originally controlled by the Hawaiian monarchy—for the betterment of Native Hawaiians. These lands are inalienable and are available to certain descendants of the persons inhabiting the Ha-

waiian Islands in 1778. Significantly, the legislative history of the HHCA indicates that Congress, in establishing this program, recognized the similarity between Native Hawaiians and Indian tribes. For example, Hawaii Territorial Senator John Wise asserted that the United States had a duty to assist Native Hawaiians, and he cited land grants to Indian tribes as precedent for the HHCA. *See* H.R. Rep. 66–839, at 4–7, 11. He also considered programs that had been developed to assist other indigenous groups. *Id.* Former Interior Secretary Franklin Lane stated that the United States had a responsibility to help Native Hawaiians and compared the plight of Native Hawaiians to that of other Native Americans. *See id.* at 4–5. Similarly, Oregon Senator George Chamberlain compared Native Hawaiians to Indian tribes. *See* Hearing on H.R. 13500 Before the Committee on Territories, 66th Cong., 3d Sess. 23 (Dec. 14, 1920). Finally, like Senator Wise, the witness Rev. Akaiko Akana compared the HHCA to federal efforts to assist Native Americans. *Id.* at 53.

State and federal authorities have recognized Native Hawaiian tradition and culture through other enactments. For example, the Federal Government set aside and protected the North West Hawaiian Islands in part due to their cultural and traditional significance. Proclamation No. 8031, 50 C.F.R. § 404.1. Since the early 1970s, Congress has enacted many statutes providing benefit programs for Native Hawaiians similar to those provided to other native people, such as section 4006(a)(6) of the National Historic Preservation Act, 16 U.S.C. § 470a(d)(6), which provides particular protection to properties with religious and cultural importance to Indian tribes and Native Hawaiians; the Native Hawaiian Education Act, 20 U.S.C. § § 7901–7912, which establishes programs to facilitate the education of Native Hawaiians; and Title VIII of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § § 4221–4239. In addition, various provisions of the Hawaii State Constitution, state statutes, and State Supreme Court opinions ensure access to timber, water, and other resources with traditional significance based on ancient custom and usage. Traditional Native Hawaiian fishing and gathering rights also are protected. Moreover, in 1990, the State adopted measures to protect Native Hawaiian traditional burial sites. As stated above, such sites also are protected under the 1990 Native American Graves Protection and Repatriation Act, which protects American Indian, Alaska Native, and Native Hawaiian gravesites. Finally, the State of Hawaii created the Office of Hawaiian Affairs, whose mission is to protect Native Hawaiian interests.

B. Native Hawaiian Self-Governance

Native Hawaiians also have a sustained history of creating institutions to preserve traditional Native Hawaiian forms of social organization, religious practice, family and cultural identity, and other distinctive cultural practices. For example, the Hawaiian Protective Association was established in 1914 "for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition." Hearing on H.R. 13500 Before the Committee on Territories, 66th Cong., 3d Sess. 44 (Dec. 14, 1920) (statement of Rev. Akaiko Akana). The Association was a political organization with bylaws and a constitution that sought to maintain unity among Native Hawaiians, to protect Native Hawaiian interests, to promote the education, health, and economic development of Native Hawaiians, and to address disputes within the Native Hawaiian community. To this end, the Association established 12 standing committees and published a newspaper. The Association developed the framework that became the HHCA.

In addition, in 1918, Prince Kuhio, Hawaii's delegate to Congress, founded the Hawaiian Civic Clubs, whose goal was "to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii." McGregor, *Aina Ho'opulapula: Hawaiian Homesteading,* 24 Hawaiian J. Hist. 1, 5 (1990). These civic organizations worked to secure enactment of the HHCA, and they remain in existence today.

In addition, Royal Societies, formed after the fall of the monarchy, also remain in existence today and continue to hold political and cultural value to the Native Hawaiian community. Various trusts also have established and funded Native Hawaiian language programs and immersion schools, including the Bishop Trust, which is a trust formed from property of the last descendant of King Kamehameha for the education of Native Hawaiians. Other groups, such as the 1988 Native Hawaiian Sovereignty Conference and the Kau Inoa organization, have formed to recognize traditional Native Hawaiian sovereignty and to work towards recognition of a sovereign Native Hawaiian entity.

IV. Past Congressional Action Toward Recognizing a Native Hawaiian Sovereign

As the Committee is well aware, the current legislation does not mark the first introduction of legislation designed to provide for Native Hawaiian recognition. Congress has given extensive consideration to this question. On two recent occasions—in the 106th and 110th Congresses—the House of Representatives passed recognition bills. In both those Congresses, this Committee also approved recognition bills. This Committee also reported recognition bills to the full Senate in the 107th and 108th Congresses, although those bills ultimately did not receive a vote in either Chamber. In addition, in the 109th Congress, this Committee approved recognition legislation that was debated in the full Senate. We are heartened that the bill's sponsors and cosponsors are continuing, nearly a decade after the legislation's original introduction, to address these issues and to press ahead with this important project.

V. Current Recognition Legislation

The current legislation is the product of Congress's sustained examination of the status of Native Hawaiians and has a number of features that reflect Congress's close study of these questions. For example, the legislation contains provisions that specifically state that Congress does not intend to create any new legal claims against the United States. The Department supports these provisions and believes they should remain in the bill. In particular, the Department supports section 8(c) in S. 1011, which provides that nothing in the bill creates a cause of action against or waives the sovereign immunity of the United States.

The Department also supports the bill's civil-rights protections. Section 7(c)(2)(B)(iii) (I)(cc) and section 7(c)(4)(A)(vi) require the Native Hawaiian governing entity, in its constitution or other organic governing document, to expressly protect the civil rights of Native Hawaiians and all other persons affected by the governing entity's exercise of its governmental powers and authorities. Express civil-rights protections, as required by the Indian Civil Rights Act of 1968, have served Indian tribes, their members, and their neighbors well for many decades, while fully recognizing and respecting tribes' inherent sovereignty.

VI. Conclusion

Thank you for the opportunity to appear before the Committee to discuss this issue. As I noted at the outset, the Department of Justice strongly supports the core policy goals of the Native Hawaiian Government Reorganization Act of 2009 and looks forward to working with you as the bill's specific language further evolves. We are very pleased to have the opportunity to work with this Committee in developing this important legislation.

The CHAIRMAN. Mr. Hirsch, thank you very much for being with us.

Let me state that Senator Coburn has a statement that he wishes to submit for the record at this point, which we will then submit. *

The CHAIRMAN. And let me also say that I have a Commerce Committee hearing, and by prior arrangement, Senator Akaka will be taking the chair of this Committee in just a few moments.

Are there questions of Mr. Hirsch? Senator Akaka?

Senator AKAKA. [Presiding.] Mr. Hirsch, the United States has federally recognized more than 560 Indian tribes. To date, no States have seceded from the Union, because their indigenous people have a government-to-government relationship with the United States. This has not occurred in the lower 48 nor Alaska.

The legislation clearly spells out that agreements must be reached by the three governmental parties, and implementing legislation would need to be enacted. There are claims that Native Hawaiians would be able to secede.

As you understand the bill, Mr. Hirsch, does the legislation permit secession?

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* The prepared statement referred to is printed in the Appendix.

Mr. HIRSCH. Senator Akaka, absolutely not. There is absolutely nothing in the legislation that I see that is remotely relevant to that alleged risk.

Senator AKAKA. Thank you.

Mr. Hirsch, upon enactment of Pub. L. 103–150, commonly known as the Apology Resolution, the United States committed itself to a process of reconciliation with the Native Hawaiian people. In fact, in an effort to further the reconciliation process, Attorney General Janet Reno and the Secretary of the Interior, Bruce Babbitt, designated senior officials to travel to Hawaii and conduct a fact-finding mission.

The result of their efforts, as I mentioned in my opening statement, was a year 2000 joint DOJ and DOI report, which was called From Mauka to Makai. Can you briefly share some of the relevant facts or recommendations from the Mauka to Makai report, and what did it say about extending Federal recognition to Native Hawaiians?

Mr. HIRSCH. Senator, I would be delighted to address that. And I think you are being modest. My understanding from reading the report is that Attorney General Reno and Secretary Babbitt developed the plan for this study after hearing from you about the plight of Native Hawaiians. I believe that was in March of 1999, and it set off a 19-month period of study involving, based on the bibliography of the report, a huge amount of reading, but also field hearings where staff from Interior and Justice went to Hawaii and met with countless folks who could tell them about the actual situation on the ground there.

Since that time, I have seen the report cited by the Federal District Court in Hawaii, by the Ninth Circuit Court of Appeals, the Federal Appellate Court for Hawaii and other States, and by the Supreme Court of Hawaii. So it is an important report. One of the first things I read when I was starting to prepare for this hearing, frankly.

I can't vouch for every word in it. The Department has not taken a fresh look at that report in 2009, and it does begin with a page of legal disclaimers and other disclaimers. But that said, it basically had three sections. One was a report of history of Hawaii, similar to what was in your opening statement, but at greater length and quite nicely written, followed by a series of sub-chapters on current conditions in Hawaii.

And one sentence that summarized that really caught my eye. It said, "The Native Hawaiian people, as a Native community, continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation."

And finally, looking at the history and the current status, there were five recommendations, one of which was to continue the process of reconciliation, three of which dealt with actions to be taken by Interior or Justice, and I should say that the recommendation directed to the Department of Justice has been fully complied with.

And then one of the recommendations, the first one actually, was to begin the process towards reorganization and recognition of a single Native Hawaiian governing entity through Congressional legislation, worked out by negotiation with the Native Hawaiian

people, exactly what you and your colleagues have been working on for years.

Senator AKAKA. Thank you very much for your response.

Mr. Hirsch, some suggest that once the Native Hawaiian governing entity is recognized, it will acquire a significant amount of authority from the State and Federal governments to the detriment of non-Natives that are not under its authority. Are such claims grounded in law or reality? Has this happened in Indian Country or Alaska as their people have exercised self-governance and self-determination?

Mr. HIRSCH. Thank you for that question. My reading of the bill as it currently stands is that it has a provision expressly protecting against this potential problem. It says that jurisdiction currently exercised by the United States or by the State of Hawaii cannot be transferred to the Native Hawaiian governing entity unless all three sovereigns agree and come back for implementing legislation to this body and to the legislature of the State of Hawaii. So there is no risk of some sudden jurisdictional grab by the governing entity from the State or from the United States.

Your point also about tribes generally is well taken. Obviously, if the kind of parade of horribles that some may have dreamed up were happening elsewhere, we would see States and localities and American citizens beating your doors down for changes in our long-standing policy of Indian and Native American self-determination. I don't believe we are seeing that.

Senator AKAKA. Thank you.

Senator Inouye, your questions.

Senator INOUYE. Thank you, Mr. Chairman.

I want to thank you, Mr. Hirsch, for your clear statement, your testimony and your responses to Senator Akaka's questions. They are extremely helpful. They should clarify and clear the picture.

But as I was listening to you, I could not help but recall that at the time our Constitution was being drafted, and Indians were specifically mentioned in the provisions, that all indigenous people on the continent and elsewhere were called Indians. In fact, Native Hawaiians were referred to as Indians by Captain Cook and those who followed him. And the indigenous people in South America were all referred to as Indians, just like the ones in Canada. So one can say that we were referred to in the Constitution.

But I just wanted to thank you very much, Mr. Hirsch. You have been very helpful.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Inouye.

I want to thank Mr. Hirsch for being here and for your statements and your responses. I want you to know that there is a schedule now on the Floor where the Senators will have to report and be in their seats at 3:00 p.m. So given the 3:00 p.m. Senate vote, we will be recessing now and we will be returning after the vote is concluded.

As a result, this Committee is in recess.

[Recess.]

Senator AKAKA. Aloha. Will the second panel please come to the desk? The Senate Committee on Indian Affairs hearing on S. 1011,

the Native Hawaiian Government Reorganization Act of 2009, will come to order.

I remind our witnesses to limit their testimony to five minutes, pursuant to the rule of the Committee. And your complete written testimony will be part of the record.

Testifying before us today is the Honorable Haunani Apoliona, Chairperson of the Board of Trustees, Office of Hawaiian Affairs. Welcome.

Professor Stuart M. Benjamin, Associate Dean for Research, Duke Law School.

The Honorable Micah Kane, Chairman, Hawaiian Homes Commission.

Mr. Christopher Bartolomucci, Partner at Hogan and Hartson.

And Ms. Robin Danner, President and CEO of the Council for Native Hawaiian Advancement. And she is accompanied by Steven J. Gunn, an Adjunct Professor at Washington University in St. Louis.

Chairman Apoliona, will you please proceed with your testimony?

STATEMENT OF HON. HAUNANI APOLIONA, CHAIRPERSON, BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS

Ms. APOLIONA. Thank you, Mr. Chair and Senator Inouye. Aloha kakou.

Senator AKAKA. Aloha.

Ms. APOLIONA. As stated, I am Haunani Apoliona, and I serve as Chairperson of the Board of Trustees of the Office of Hawaiian Affairs. We are most grateful for this Committee hearing on S. 1011, the Native Hawaiian Government Reorganization Act.

The Office of Hawaiian Affairs was established in 1978 when the citizens of the State of Hawaii called for a constitutional convention and later participated in a statewide referendum to ratify amendments to the Hawaii State constitution. Among those amendments was the authorization to establish the Office of Hawaiian Affairs as the means by which Native Hawaiians could give expression to their rights under Federal law and policy to self-determination and self-governance. Since that time, the Office of Hawaiian Affairs has administered resources and provided governmental programs and services to Native Hawaiians, consistent with the provisions of the compact between the United States and the State of Hawaii that is commonly known as the Hawaii Statehood Act.

As you know, this year, the State of Hawaii, marks the 50th anniversary of its admission in to the Union of States. However, for thousands of years before western contact was first recorded in 1778, the Native people of Hawaii occupied and exercised our sovereignty in the islands that now comprises the State of Hawaii. The recognition of our sovereignty is manifested in at least 30 treaties with foreign nations, including the United Kingdom, France, Belgium, Switzerland, Russia, Japan, Germany and Italy, to name a few.

In 1826, the Hawaiian government entered into a treaty with the United States, and in 1849, our government again entered into a treaty of friendship, commerce and navigation with the United States. While our government was later removed from power by force in 1893, our relationship with the United States did not end.

In the intervening years, the Congress enacted well over 188 Federal statutes that define the contours of our political and legal relationship with the United States process which culminated 100 years after the tragic events of 1893, with the enactment by the Congress of a resolution signed into law by the President of the United States, extending an apology to Native Hawaiian people for the United States' involvement in the overthrow of our government.

Today, the indigenous Native people of Hawaii seek the full restoration of our Native government through the enactment of S. 1011. We do so in recognition of the fundamental principle that the Federal policy of self-determination and self-government is 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.

In all likelihood, just as Native governments in the Continental United States and Alaska vary widely in governmental form and structure, our government will be organized to reflect our unique history as well as our culture, traditions and our values. We do not, for instance, seek to have our lands held in trust by the United States or the State of Hawaii, nor do we seek to have our assets managed by the Federal or State governments. We do not seek the establishment of new Federal programs, for the Federal statutes that I mentioned that have been enacted over the last 30 years already provide that authority, and we have been successfully administering programs under those authorities for decades.

In enacting those statutes, the Congress chose a definition of the Native people of Hawaii that is consistent with the Interior Department's Federal acknowledgment criteria, namely, that for the purpose of our relationship with the United States, the time of first western contact with our people is the time from which our existence as a distinct Native community is recognized. That year, as you know, was 1778.

And notwithstanding the overthrow of our government in 1893, we have preserved and maintained our Native language, our traditions and our cultural practices, and we continue our social and political interactions as members of a distinct Native community within the State of Hawaii that the citizens of Hawaii not only recognize but respect. We are the host community in our islands, and despite the changing circumstances of history and the fact that we have never directly relinquished our sovereignty as a Native people, we are citizens of the United States and remain proud to be Native Hawaiian.

Because our Native home land lies more than 5,000 mile from the Nation's capital, we know that there are many who do not know our ways of life and do not know us as a Native people. Nonetheless, our people have come forward with the necessary documentation to prove that they meet the standard definition of Native Hawaiian that has been employed in all of the Federal statutes that have been enacted over the last 35 years.

Still, we know that the national government continues to seek a way to further document who we are. The Hawaiian Homes Commission Act of 1921 was the first of such Federal efforts, and pursuant to that Act and the Hawaii Admissions Act, Hawaii State

Department of Hawaiian Home Lands maintains a list of all Native Hawaiians who have been certified as meeting the eligibility criteria to receive an assignment of land under that act.

But there is also a second list of those who can document their Native Hawaiian ancestry and their direct lineal descendance from the aboriginal indigenous Native people who originally occupied our islands. And that is the Native Hawaiian registry authorized under Section 10.9 of the Hawaii Revised Statutes and maintained by the office of Hawaiian Affairs. We believe that together, these two lists can serve as a source of determination that S. 1011 authorizes the Federal Commission to make. Thus, we believe that the funds that would be necessary to establish and maintain the proposed commission can be better used to address the many challenges we as a Nation face on the economic front.

Mr. Chairman, on behalf of the Native Hawaiian people, I would be remiss if I were to fail to express our serious concerns about those sections of the bill that seek to address any claims of the Native Hawaiian people. These sections represent the outcome of negotiations that were conducted with the prior Administration in which Native Hawaiians had no direct involvement or participation. Thus, for instance, the current claims section is written so broadly as to bar any claims that might arise out of a personal injury or death of a Native Hawaiian for which the Federal or State government or their representative bear direct responsibility.

We do not believe that the Congress intended to treat Native Hawaiians differently from other American citizens or to deny Native Hawaiians the rights that are protected by the equal protection guarantees of the U.S. Constitution. Section 8 of S. 1011 provides a process for negotiations amongst the governments of the United States, the State of Hawaii and the Native Hawaiian people, and the bill makes clear that included in the matters that will be subject to these negotiations are the resolution of any claims. The bill further provides that once resolution of the various matters listed in S. 1011 have been achieved, there will be recommendations for implementing legislation submitted to the committees of the U.S. Congress, to the Governor and legislature of the State of Hawaii.

Accordingly, we firmly believe that S. 1011 already contains sufficient authorization for the three governments to address and resolve matters of sovereign immunity through the negotiations process authorized in Section 8 of the bill, and that S. 1011 is not intended to alter the status quo prior to the outcome of that negotiation process.

OHA looks forward to working with members of the Hawaii Congressional delegation, the Committee, the Obama Administration, to assure that the definition of those Native Hawaiians who wish to participate in the reorganization of the Native Hawaiian government is inclusive, to assure that there is some government certification process in determining who is eligible to participate in the reorganization of a Native Hawaiian government, and to address our concerns with the claims section of the bill. We are attaching to this testimony a list of treaties that our Hawaiian government entered into with foreign nations and a list of Federal statutes that I mentioned that have been passed to address Native Hawaiians over the last 80 years.

On behalf of the Office of Hawaiian Affairs, the agency of the State of Hawaii authorized by the constitution of the State of Hawaii to serve as the official governmental representative of the Native Hawaiian people, I thank you for the opportunity to share the views of OHA on S. 1011, for there is no Federal legislation initiative at this time more important to our people.

Mahalo.

[The prepared statement of Ms. Apoliona follows:]

PREPARED STATEMENT OF HON. HAUNANI APOLIONA, CHAIRPERSON, BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS

Nā‘Ōiwi ‘Ōlino

E ō e nā ‘Ōiwi ‘Ōlino ‘eā
Nā pulapula a Hāloa ‘eā
Mai Hawai‘i a Ni‘ihau ‘eā
A puni ke ao mālamalama ‘eā ē

Ku‘ē au i ka hewa, ku‘ē!
Kū au i ka pono, kū!
Ku‘ē au i ka hewa, ku‘ē!
Kū au i ka pono, kū!

Answer, O Natives, those who seek knowledge
The descendants of Hāloa
From Hawai‘i island in the east to Ni‘ihau in the west
And around this brilliant world

I resist injustice, resist!
I stand for righteousness, stand!
I resist injustice, resist!
I stand for righteousness, stand!

INTRODUCTION

E nāalakaʻi a me nā lālā o kēia Kōmike o nā Kuleana o ka ʻAhaʻōlelo Nui o ʻAmelika Hui Pū ia, aloha mai kākou. He loa ke ala i hele ʻia e mākou, nā ʻŌiwi ʻōlino o Hawaiʻi, a he ala i hehi mua ʻia e nā aliʻi o mākou, e laʻa, ʻo ka Mō ʻī Kalākaua, ke Kamaliʻiwahine Kaʻiulani, a me ka Mōʻīwahine hope o ke Aupuni Mōʻī Hawaiʻi, ʻo ia ko mākou aliʻi i aloha nui ʻo Liliʻuokalani. A he nui no hoʻi nā Hawaiʻi kūnou mai ai i mua o ʻoukou e nānā pono mai i ke kulana o ka ʻōiwi Hawaiʻi, kona nohona, kona olakino, ka hoʻonaauao a pēlāwale aku.

Ua pono ka helena hou a mākou nei a loaʻa ka pono o ka ʻāina, ke kulaiwi paʻa mau o ka lāhui ʻōiwi o Hawaiʻi paeʻāina, ʻo ia wale nō ka Hawaiʻi. No laila, eia hou no ka ʻōiwi Hawaiʻi, he alo a he alo, me ka ʻAhaʻōlelo Nui.

ALOHA

Chairman Dorgan, Vice Chairman Barrasso, Senator Inouye, Senator Akaka, and Members of the Committee on Indian Affairs, my name is Haunani Apoliona and I serve as the Chairperson of the Board of Trustees for the Office of Hawaiian Affairs (OHA), a body corporate established in 1978 by the Hawaiʻi State Constitution and implementing statutes.

The mission of the Office of Hawaiian Affairs is to protect and assist Native Hawaiian people and to hold title to all real and personal property in trust for the Native Hawaiian people.

OHA is working to bring meaningful self-determination and self-governance to the Native Hawaiian people, through the restoration of our government-to-government relationship with the United States.

I testify today in support of enactment of S. 1011, and its companion legislation in the U.S. House of Representatives, H.R. 2314.

Federal Policy of Self-Determination and Self-Governance

As this Committee well knows, on July 8, 1970, President Richard M. Nixon, announced that from that day forward, the policy of the United States would recognize and support the rights of America's indigenous, native people to self-determination and self-governance. In the ensuing 39 years, each succeeding U.S. President has reaffirmed this policy as the fundamental basis upon which Federal law and Federal actions affecting this nation's First Americans would be premised.

In carrying out this Federal policy, six U.S. Presidents have assured all Americans that there will be equal status and equal treatment under Federal law accorded to the three groups that make up this nation's population of indigenous, native people – American Indians, Alaska Natives and Native Hawaiians.

The Evolution of Self-Determination and Self-Governance Policy in the State of Hawai'i

1959 – Hawaii Admissions Act – Establishment of a Public Trust

In 1959, the State of Hawaii was admitted into the Union of States as the 50th State. As a condition of its admission, the United States called upon the new State to accept, in trust, the transfer of lands set aside for Native Hawaiians under Federal law – the Hawaiian Homes Commission Act of 1921 – lands which had, up until that time, been held in trust for Native Hawaiians by the United States. In addition, the United States retained the exclusive authority to initiate enforcement action should there be any breach of the homelands trust. As an additional condition of it admission into the Union, the provisions of the Hawaiian Homes Commission Act were incorporated into the State's Constitution.

The United States also ceded to the State of Hawai'i lands that had been previously transferred to the Federal government, and imposed upon the State a requirement that those lands be held in a public trust for Native Hawaiians and the general public, and further provided that the revenues derived from those lands be used for five authorized purposes, one of which was the betterment of the conditions of Native Hawaiians.

1978 – Amendment to State Constitution – Office of Hawaiian Affairs Established

Less than twenty years later, in 1978, the citizens of the State of Hawai'i participated in an historic statewide referendum in which they voted to amend the Constitution of the State of Hawai'i to provide for the establishment of the Office of Hawaiian Affairs, as a means for Native Hawaiians to give expression to their rights to self-determination and self-governance. The action taken by the citizens of Hawai'i was a natural outgrowth of the responsibilities assumed by the State of Hawai'i upon its admission into the Union of States.

The 1978 amendments to the State's Constitution establishing the Office of Hawaiian Affairs, authorized the Office of Hawaiian Affairs to hold title to all real and personal property then or thereafter set aside or conveyed to it and required that the property be held in trust for Native Hawaiians.

The Constitutional amendments further provided for a nine-member Board of Trustees that would be responsible for the management and administration of the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for the benefit of Native Hawaiians, including all income and proceeds from the pro rata portion of the public trust, as well as control over real and personal property set aside by state, federal or private sources and transferred to the Office of Hawaiian Affairs for the benefit of Native Hawaiians.

Finally, the 1978 amendments to the State Constitution charged the Board of Trustees of the Office of Hawaiian Affairs with the formulation of policy relating to the affairs of Native Hawaiians. The amendments also reaffirmed the State's commitment to protect all rights, customarily and traditionally exercised by Native Hawaiians for subsistence, cultural and religious purposes and which were possessed by those Native Hawaiians who were descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778 – which was the date of the first recorded European contact with the aboriginal, indigenous, native people of Hawai'i – subject to the right of the State to regulate those rights.

Later, statutory provisions were enacted into law to implement the State's constitutional amendments which provided that:

"**Declaration of Purpose.** (a) The people of the State of Hawai'i and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions

for native Hawaiians. The people of the State of Hawai'i reaffirmed their solemn trust obligation and responsibility to native Hawaiians and further declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawai'i."

The duties of the Board of Trustees of the Office of Hawaiian Affairs, as defined by statute are extensive, and over the past 31 years of its existence, the Office has been recognized not only within the State of Hawai'i, but nationally and internationally, as the principal governmental voice of the Native Hawaiian people.

Dismantling of the Original Native Hawaiian Government

For nearly a century before the forced annexation of the Kingdom of Hawai'i in 1898, the United States, Great Britain and France were amongst the many nations that recognized the Native Hawaiian government as sovereign, and entered into treaties and agreements with the Native Hawaiian government. Later, those who engineered the overthrow of the government of the Kingdom of Hawai'i on January 17, 1893, engaged in a systematic effort to dismantle the native government, and by their actions, severely compromised the ability of Native Hawaiians to manage their own affairs.

Notwithstanding the illegal overthrow of their government, Native Hawaiians steadfastly resisted the efforts to divest them of their rights to self-determination, and when the Provisional Government and its successor, the Republic of Hawai'i, sought the United States' annexation of Hawai'i – Native Hawaiians turned out in large numbers to register their opposition to annexation through petitions signed by tens of thousands of Native Hawaiians. (***See*** The Hui Aloha Aina Anti-Annexation Petitions, 1897 - 1898, compiled by Nalani Minton and Noenoe K. Silva (UHM Library KZ245.H3 M56 (1998)).

Within a little over 20 years of annexation, the Native Hawaiian population had been decimated. Native Hawaiians had been wrenched from their traditional lands, compelled to abandon their agrarian and subsistence ways of life, forced into rat-infested tenement dwellings, and were dying in large numbers. Those who survived disease and pestilence never gave up their quest for self-determination, and sought, through their delegate to the U.S. Congress, the enactment of a law that would enable them to be returned to their lands.

Hawaiian Homes Commission Act of 1921

That law, the Hawaiian Homes Commission Act of 1921, set aside approximately 203,500 acres of land on the five principal islands comprising the Territory of Hawai'i, for homesteading and farming and the raising of livestock by Native Hawaiians. Upon statehood, the Hawaiian homelands that were held in trust by the United States for Native Hawaiians, were transferred to the State of Hawai'i, and a provision of the compact between the United States and the State of Hawai'i required that the State assume a trust responsibility for the homelands.

Since 1921, the Hawaiian Homes Commission Act and the lands set aside under the Act have been administered by the Hawaiian Homes Commission, whose board is composed of predominantly Native Hawaiian commission members, and an agency of the State of Hawai'i, the Department of Hawaiian Homelands.

Apology Resolution – One Hundred Years After the Dismantlement of the Native Hawaiian Government

In 1993, the United States Congress adopted and the President signed a joint resolution extending an apology to the Native Hawaiian people for the United States' involvement in the overthrow of the Kingdom of Hawai'i, and acknowledging that the United States' annexation of Hawai'i in 1898 resulted in the "deprivation of the rights of Native Hawaiians to self-determination." (***See*** Apology Resolution, Public Law No. 103-150, 107 Stat. 1510 (1993), ***see also*** Robert N. Clinton, Arizona State Law Journal, "There is Not Federal Supremacy Clause for Indian Tribes," *Symposium on Cultural Sovereignty,* Spring 2002, 34 Ariz. St. L. J. 113, 165.)

Also acknowledging the impact of annexation on Native Hawaiian self-determination, the U.S. Departments of Justice and Interior called upon the Congress to "enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body." U.S. Departments of Justice and Interior, ***From Mauka to Makai: The River of Justice Must Flow Freely*** at 4 (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000).

Notwithstanding the Dismantlement of Their Government, Political Organization Amongst Native Hawaiians Continues

Since the time of the overthrow of the Kingdom of Hawai'i, Native Hawaiians have given expression to their political leadership through organizations like the Royal Societies, the Hawaiian Civic Clubs, hula halaus, and Kau Inoa.

Royal societies have continued to function from their founding to the present day and wield considerable political and cultural influence within the Native Hawaiian community. These royal societies formally link the modern day Native Hawaiian community with the Kingdom of Hawai'i. There are four societies -- the Royal Order of Kamehameha; 'Ahahui Ka'ahumanu; Hale O Nā Ali'i O Hawai'i; and Māmakakaua, Daughters and Sons of Hawaiian Warriors.

While each of the four royal societies has their own history and role, they share certain aspects. All have royal origins, which are reflected in unique insignia and regalia which remain in use today and distinguish the four societies to Native Hawaiians. Each is also led by descendants of the royalty and chiefs who served at the society's founding and each currently has members (approximately 1,155 as of 2009) and active chapters statewide. Formal leadership resides in these modern day successors to the royal families and chiefs.

Another manifestation of Native Hawaiians' desire to maintain a distinct Native Hawaiian role in the evolution of Hawai'i's society, was the establishment of a Hawaiian Civic Club in Honolulu in December of 1917, initiated by Hawai'i's delegate to the U.S. Congress and a Native Hawaiian, Prince Jonah Kūhio Kalaniana'ole. This first club was dedicated to the education of Native Hawaiians, the elevation of their social, economic and intellectual status as they promote principles of good government, outstanding citizenship and civic pride in the inherent progress of Hawai'i and all of her people.

Today, there are 52 Hawaiian Civic Clubs across the United States, with approximately 3,000 members nationwide, through which Native Hawaiians actively contribute to the civic, economic, health and social welfare of the Native Hawaiian community, by supporting programs of benefit to the people of Hawaiian ancestry, providing a forum for full discussion of all matters of public and political interest, honoring, fulfilling, protecting, preserving and cherishing all sources, customs, rights and records of the Native Hawaiian ancient traditions, cemetery areas and the historic sites of Native Hawaiians. One of the Hawaiian Civic Clubs, Ke Ali'i Maka'āinana, is named in honor of Prince Jonah Kūhio Kalaniana'ole,

and is primarily composed of members from Virginia, Maryland and the District of Columbia. There are an estimated 723 hula halaus throughout the United States that are dedicated to preserving Native Hawaiian cultural practices and dance.

Another expression of Native Hawaiian self-determination is found in the Hawaiian Homestead Associations, which were established in the 1980's to provide a means of expressing the collective voice of those Native Hawaiians residing on the homelands so that they might address issues common to all homesteaders and to make their concerns known to the Department of Hawaiian Homelands. The State Council of Hawaiian Homestead Associations is made up of 24 organizations representing over 30,000 Native Hawaiian homesteaders.

There are also a number of Native Hawaiian trusts that provide for the education of Native Hawaiian students (Kamehameha Schools – with at student population of 29,500 and an alumni population of 25,000), health care for Native Hawaiians (Queen Emma Foundation), care and housing for elderly Native Hawaiians (Lunalilo Trust), and Native Hawaiian children (Queen Liliu'okalani Children's Center through the Liliu'okalani Trust).

Native Hawaiians participate in a range of employment training programs, early childhood education, financial literacy, at-risk youth and adults programs, elderly services, and library services through a statewide Native Hawaiian service institution known as Alu Like, Inc.

Native Hawaiian health care services are provided through a system of health care programs that are administered by Native Hawaiian health care professionals on each island and coordinated through Papa Ola Lokahi, a health care board that is comprised of the State's agencies, such as the State Department of Health, community health centers, and academic institutions, such as the University of Hawaii, that have a principal role in the provision of health care services or the study of health conditions. Traditional Native Hawaiian health care practices, including the use of medicinal herbs and roots, healing practices, and the transfer of traditional knowledge are integral aspects of the health care provided through the Native Hawaiian health care systems.

Native Hawaiian educational programs are administered not only by private institutions, but are fully integrated in the University of Hawaii and public school educational system. Programs for gifted and talented Native Hawaiian students, early childhood education, private Native Hawaiian language immersion programs from pre-school through university and master's degrees levels, as well as Native Hawaiian language immersion programs in the public schools are just some of the programs that make up a statewide effort to assure that Native Hawaiian children

have the opportunity to enhance their academic performance through culturally-relevant initiatives.

Since 2003, over 105,000 Native Hawaiians have documented their Native Hawaiian ancestry and registered to participate in the reorganization of a Native Hawaiian government through the Hawai'i Maoli Kau Inoa initiative.

Native Hawaiians maintain distinct Native communities throughout the State with over 8,000 Native Hawaiians residing on Hawaiian homestead lands, and over 24,000 Native Hawaiians on a waiting list for an assignment of a residential, agricultural or pastoral lease of land.

Traditional Native Hawaiian aquaculture and fish ponds serve to maintain and preserve the subsistence lifestyle of Native Hawaiians, and Native Hawaiian hunting, fishing and gathering rights are recognized under Hawaii State law.

30,000 Native Hawaiians have documented their Native Hawaiian ancestry for purposes of eligibility for programs and services administered by the Office of Hawaiian Affairs as authorized by section 10.19 of the Hawaii Revised Statutes.

As the instrument of self-determination and self-governance that the citizens of Hawaii established it to be, the Office of Hawaiian Affairs is still the largest governmental entity representing the interests and needs of Native Hawaiians, which U.S. Census figures indicate include 401,102 Native Hawaiians residing in Hawai'i and the continental United States.

Restoration of the Native Hawaiian Government

Like our brothers and sisters in Indian country whose Federally-recognized tribal status was being terminated at the very time our State was being admitted to the Union of States, we seek Congress' action in restoring to the Native Hawaiian people that which the Congress has restored to the so-called "terminated" tribes – the Federal recognition of our governmental status, and a reaffirmation of the continuing political and legal relationship we have with the United States of America.

It is well documented that throughout the United States, Native governments are best suited to ensure the perpetuation of their people and their cultures through the development of educational and language programs, culturally-sensitive social services, and the preservation of traditional cultural practices. In Hawai'i, where

our native culture is the primary attraction in a tourist industry that fuels the State's economy, preservation of Native Hawaiian culture is an economic imperative.

We believe that the restoration of our Native government will provide the Native Hawaiian people with the tools we need to achieve self-sufficiency, economic security, and provide for the health and welfare of our people.

Political and Legal Relationship with the United States

As Native Hawaiians, we believe that our continuing legal and political relationship with the United States is not in doubt. It is manifested in treaties and given expression in well over one hundred Federal laws.

Since 1910, the United States Congress has enacted over 160 Federal statutes that are designed to address the conditions of Native Hawaiians. As we have described, the Hawaiian Homes Commission Act of 1921 set aside over 200,000 acres of land in our traditional homeland – the Islands of Hawai'i – so that we might return to the land, build homes, grow our traditional foods, raise livestock and cattle, and teach our children the values that are so closely tied to our respect for the ***'āina*** (land), and our desire to care for the land, ***mālama 'āina***.

The Act by which Hawai'i gained its admission into the Union of States is, of course, a Federal law – a compact between the United States of America and the State of Hawai'i – which explicitly recognizes the distinct status of Native Hawaiians under both Federal and State law and the State's constitution, and which expressly provides for the protection of the Native Hawaiian people and the preservation of resources to provide for the betterment of the conditions of Native Hawaiians. No other group of citizens in the State of Hawai'i has this unique status.

The Hawaiian Homes Commission Act of 1921 and the Hawai'i Admissions Act of 1959 are but two of the Federal statutes that serve to define the contours of the political and legal relationship that Native Hawaiians have with the United States.

There is the Native Hawaiian Education Act, first enacted into law by the Congress, in 1988. It authorizes funding for preschool through university

educational programs, including programs for the gifted and talented, and Native Hawaiian language immersion instruction and curricula – all of which have contributed to the improvement in educational performance and achievement of Native Hawaiian students, and the reduction of school drop-out rates.

There is the Native Hawaiian Health Care Improvement Act, also enacted by the Congress in 1988, which provides support to the Native Hawaiian health care systems that oversee the operation of clinics and outpatient facilities serving predominantly Native Hawaiian communities on the five principal islands of Hawai'i.

Title VIII of the Native American Housing Assistance and Self-Determination Act authorizes funding for the construction of housing for low-income Native Hawaiian families who are eligible to reside on the Hawaiian homelands and Federal loan guarantees for the development of housing projects on the homelands.

The Native Hawaiian Homelands Recovery Act enables the Department of Hawaiian Homelands to reclaim lands that become surplus to the needs of the United States and add them to the inventory of lands set aside for Native Hawaiians under the authority of the Hawaiian Homes Commission Act.

Nationwide, the Comprehensive Employment and Training Act has had its most successful implementation through a statewide nonprofit Native Hawaiian organization known as Alu Like, Inc., and other employment and training initiatives administered by the U.S. Department of Labor have helped to reduce the still high unemployment rates amongst Native Hawaiians.

The Native American Veterans' Housing Act provides support to Native Hawaiian veterans in enhancing homeownership opportunities.

Under the authority of the National Museum of the American Indian Act, Native Hawaiians were the first group of Native Americans to repatriate the human remains of their ancestors from the Smithsonian Institution.

The Native American Graves Protection and Repatriation Act provides Federal authorization for Native Hawaiians to repatriate human remains from military installations in Hawai'i and to reacquire precious Native Hawaiian artifacts from museums and scientific institutions across the country and in Europe.

The Native American Languages Act was one of the first sources of Federal funding for the Native Hawaiian language immersion education programs that now serve as the basis not only for language immersion programs in Hawai'i's public schools but also as a national model for Native language instruction, curriculum development, and Native language preservation across the United States.

The Native American Programs Act and the support it provides through the Administration for Native Americans for the social and economic development of Native communities has enabled Native Hawaiian farmers to recapture the large-scale practice of growing taro root – an integral staple of the traditional Native Hawaiian subsistence diet. As Native Hawaiians have been able to return to their native foods, rates of diabetes, hypertension, heart disease and cancer have plummeted. This Act has also served as a principle impetus for the start-up of small Native Hawaiian businesses, particularly in rural areas of Hawai'i, where development capital and financial institutions are scarce.

The establishment of the Office of Native Hawaiian Relations in the U.S. Department of the Interior is one of the first institutional steps the Federal government has taken in fulfilling the mission of the Apology Resolution to effect a reconciliation between the United States and the Native Hawaiian people.

And years ago, the Congress anticipated the restoration of the Native Hawaiian government when it enacted legislation to transfer an island in Hawai'i, Kaho'olawe, that had previously been used by the U.S. for military practice as a bombing range, to the State of Hawai'i. Pursuant to State statute, upon the reorganization of the Native Hawaiian governing entity, the Island of Kaho'olawe will be transferred to the Native Hawaiian government.

Conclusion

Across this great world of ours, there is a common history that the aboriginal, indigenous, native people and their descendants share. It is a history of conquest and domination over the lives of native people – it is a history of disenfranchisement and forced assimilation. It has resulted in the demoralization of native people and fostered a dependence on government that is alien to the natural ways of native people, regardless of where they reside.

What history has also shown is that given the opportunity, native people will readily and willingly cast aside the shackles of dependence and seize the initiative to take care of themselves and their families and their communities.

Some who have not experienced a similar history or the same hardships question why native people seek the right to shape their own destinies, control their own institutions, care for their children and provide for their future generations through the restoration and recognition of their governments. Perhaps they take these rights for granted and assume that all Americans enjoy the same opportunities. Sadly, they do not.

Through the enactment into law of S. 1011, the Native Hawaiian people seek the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.

The Native Hawaiian people want to assure a brighter future for their children, and the opportunity to participate in the larger society on the equal footing that better health care, access to quality education, safe communities, and preservation of their institutions and traditional cultural values affords.

Senator AKAKA. Mahalo. Thank you, Chairwoman Apoliona. Now we will receive the statement of Professor Benjamin.

STATEMENT OF STUART M. BENJAMIN, DOUGLAS B. MAGGS PROFESSOR OF LAW, ASSOCIATE DEAN FOR RESEARCH, DUKE LAW SCHOOL

Mr. BENJAMIN. Senator Akaka, Senator Inouye, thanks for having me. I am honored to be here to testify.

I am testifying only about the constitutional issues, and I want to say at the outset, I have no clients, paid or unpaid. I am speaking entirely for myself, not at anyone else's behest.

My basic bottom line, as you saw from my statement, is I think the constitutional issues are genuinely difficult ones. Why do I think they are difficult?

S. 1011 applies to a broader and more diffuse group than any other recognition of any Native American tribe. So in its breadth of coverage it is unprecedented, which is the point that Justice Breyer made in *Rice v. Cayetano*. So this really implicates what we think can be a tribe for constitutional purposes.

And the question is, what is required to be a tribe for constitutional purposes? There is no clear definition, for better or for worse, of what is a tribe. However, it seems like there is a pretty good argument that it requires some connection among the tribal members. And right now, as written in S. 1011, the only connection that is required is ancestry. It doesn't actually require any bonds among Native Hawaiians beyond that.

So it seems to me that that raises a serious question.

A second question has to do with derivation from the previously sovereign entity. As you know, the entity that was overthrown in 1893 was a multi-ethnic polity with many non-Native citizens. So if we hearken back to that and say that is what we are recreating, then the problem is, why not include all the descendants of the citizens?

If instead you want to say, no, let's have it limited to an entity that just included Native Hawaiians, well, when Kamehameha united the islands in 1810, even then there were westerners who lived there as permanent residents. If you go back to 1778, that might suggest having more than one tribe, the way that the islands were actually separately governed in 1778.

Now, having said all of this, the Supreme Court has articulated broad deference to decisions that Congress makes about recognizing tribes. But also there are limits to that deference. So the hypothetical that I put forward in my statement is, imagine that you pass legislation just like S. 1011, but instead of applying to Native Hawaiians, it applied to all Native Americans who were not currently members of tribes in the lower 48. So it applied to Native Americans who are racially Native Americans, whether they lived in Butte, or they lived in New York City, or they lived in New Orleans, or anywhere else.

My guess is the Supreme Court would strike that down, would say that's too broad, that these people don't have enough of a connection among themselves. You can't just declare all Native Americans not currently in a tribe to be in a tribe.

So the question is, are Native Hawaiians different? If they are different, I think it would be because there are some connections among them. But again, as written, the legislation doesn't highlight any connections, and, as written, it applies to, according to Census data, 140,000 people—40 percent of Native Hawaiians live outside of Hawaii in all 50 States.

But if I am wrong, and if in fact the Supreme Court would defer entirely to Congress and say it is really a decision for Congress to make, then it is all the more incumbent upon the members of Congress to reach their own determinations about the constitutional issue. I want to highlight this, because I saw in previous hearings some suggestion that said the Supreme Court would allow this, and therefore it is constitutional.

With respect, that is just not so. When I was in the Office of Legal Counsel in the Department of Justice in the early years of the Clinton Administration, we had many issues that came before us that we knew were never going to see a court, that never were going to see the light of day, that nobody was going to be able to oversee what we did. We could have said, "Great, we can do anything we want to, no legal constraints." Of course we didn't do that.

Instead, we said it's all the more important that we look carefully at these issues, because we are the only stopgap.

Or, as I pointed out in my statement, no court is going to stop you from impeaching or convicting a president or a judge for any reason you want, but you still have your own constitutional oaths, so that if you think a court isn't going to oversee it, it's all the more important for you to make your own determinations.

The final point is, for better or for worse, the constitutional ground has shifted over the last 15 years. After the *Adarand* decision, we have now got this somewhat uneasy relationship between *Adarand* and a whole bunch of other statutes that deal with Native Americans. It may be that the Supreme Court would look at S. 1011 and say, "This is constitutional, no problem." It may be they would strike it down. But it may be that they would not only strike it down but would say, "Gee, maybe we are actually going to reconsider some of these other statutes that seem similar to this." This could bring about changes in Native American law beyond S. 1011 in ways that, I suspect, members of this Committee would not be happy about.

So what do I suggest when all is said and done as ways that might put on a stronger constitutional footing? Well, the most obvious thing would be not to include within its ambit Native Hawaiians who don't live in Hawaii, so to limit it to Native Hawaiians who actually live in Hawaii.

A second thing would be to have it involve Native Hawaiians in Hawaii who have some connection among each other. In my view, that would put the legislation on stronger constitutional footing. Of course, I can't guarantee that that would either save it, or that it is necessary as a constitutional matter. All I can tell you is I think they are difficult constitutional questions. Obviously, the decision on what to do is yours. But that is my own evaluation, and again, on my own behalf, and not anyone else's.

[The prepared statement of Mr. Benjamin follows:]

PREPARED STATEMENT OF STUART M. BENJAMIN, DOUGLAS B. MAGGS PROFESSOR OF LAW, ASSOCIATE DEAN FOR RESEARCH, DUKE LAW SCHOOL

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of the Committee, thank you for the opportunity to testify before you today on S. 1011, the Native Hawaiian Government Reorganization Act of 2009. My testimony will focus on the constitutional issues raised by Congress's potential passage of this legislation. I do not presume to comment on the desirability of S. 1011 as a policy matter.

At the outset, I want to note that I am not being compensated in any way, have no clients (paid or unpaid), and indeed have no relationship with any of the entities interested in this legislation. My views reflect my own judgment about the legal issues involved – they are not at the behest of anyone else.

In 1996, I wrote a law review article titled *Equal Protection and the Special Relationship: The Case of Native Hawaiians* that appeared in the Yale Law Journal. In it, I concluded that programs for Native Hawaiians would be subject to the strict scrutiny applicable to racial classifications under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), rather than the rational basis review applicable to programs for Indian tribes under *Morton v. Mancari*, 417 U.S. 535 (1974). In the article, I suggested that Congress could try to avoid application of strict scrutiny by recognizing a Native Hawaiian tribe. I noted that such a congressional action would raise difficult questions about the outer limits of what can constitute an "Indian Tribe[]" under the Indian Commerce Clause of the Constitution, Art. I, § 8, cl. 3, and I did not provide a definitive answer to those questions. I remain in that position today. I think the constitutional question is a difficult one.

I. The Constitutionality of S. 1011 Is Uncertain

The issue is in some ways straightforward: the Supreme Court has held that legislation singling out groups defined by their race or ancestry are subject to strict scrutiny and presumptively invalid. The Supreme Court has also held that programs for Indian tribes are subject to rational basis review. Some groups clearly are "tribes" for this constitutional purpose (e.g., the Navajo Nation),

and some groups clearly would not be, even if Congress recognized them (e.g., descendants of Vikings).[1] The question is on which side of the line the contemplated Native Hawaiian government would fall. The problem is that the answer to this question is not obvious.

A. S. 1011 Stands on Weaker Constitutional Footing than Earlier Legislation and Recognitions

Recognition of a Native Hawaiian government would test the constitutional minima for an "Indian Tribe[]" under the Indian Commerce Clause. No tribe has ever had the paucity of connections that exist among Native Hawaiians. Most tribes have existed from historical times to the present as communities of members who lived together under the governance of a tribal government. Some tribes were less well organized, but all were groups of Native Americans who lived together as a meaningful community with extensive bonds among them.

S. 1011 envisions a tribe quite different from those that have preceded it.[2] Native Hawaiians as defined in S. 1011 do not appear to have anything in common beyond their ancestry.[3] There are

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[1] *See* Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks*: A Reinterpretation*, 14 St. Thomas L. Rev. 347, 367 n. 139 (2001) ("[A]lthough Congress has a lot of leeway in 'recognizing' Indian tribes, there are limits to such plenary power. For instance, Congress could not take a group of people in Minnesota claiming to be descendants of some Celtic or Viking tribe and recognize them as an 'Indian' tribe for the purposes of the Indian Commerce Clause of the Constitution.").

[2] S. 1011 provides the criteria for the group that will create a Native Hawaiian government, rather than creating the government itself. It is of course possible that the membership of the government that arises out of the S. 1011 process will be limited to "Native Hawaiians" defined more narrowly than S. 1011 defines the Native Hawaiian participants in the process. But S. 1011 leaves open the possibility that all Native Hawaiians, as defined in S. 1011, will be eligible for membership in the new Native Hawaiian government. And given the composition of the electorate (i.e., all Native Hawaiians, as defined in S. 1011) that possibility is very real.

[3] S. 1011's definition of Native Hawaiian is a bit complex. Section 3(10)(A) provides in relevant part that:

> "Native Hawaiian" means –
> (i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who –
> (I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and
> (II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or
> (ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.

Section 3(1) further provides:

> ABORIGINAL, INDIGENOUS, NATIVE PEOPLE – The term "aboriginal, indigenous,

bonds within many subgroups of Native Hawaiians. Groups of Native Hawaiians have created many organizations – Hawaiian Civic Clubs, myriad pro-sovereignty groups, etc. But none of these organizations has the allegiance of all Native Hawaiians. Even the Native Hawaiian groups with the largest memberships claim no more than a fraction of Native Hawaiians among their members. And, more to the point, S. 1011's definition of Native Hawaiians is not limited to those who have joined groups devoted to Native Hawaiians, or who otherwise have established connections with the Native Hawaiian community. So long as a person has a single ancestor who was an aboriginal inhabitant, he or she is a Native Hawaiian under S. 1011.

And Native Hawaiians are quite diverse along almost every conceivable axis. As George Kanahele noted more than two decades ago, "While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary [Native] Hawaiians are highly differentiated in religion, education, occupation, politics, and even in their claims to Hawaiian

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> native people" means people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States.

The apparent reason for this somewhat cumbersome definition is to move away from the formulation that was at issue in *Rice v. Cayetano*, 528 U.S. 495 (2000) – "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2; *see* Le'a Malia Kanehe, *The Akaka Bill: the Native Hawaiians' Race for Federal Recognition*, 23 U. Haw. L. Rev. 857, 880 (2001). In operation, however, the two definitions appear to apply to the same group of people. The "people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States" are the descendants of the aboriginal inhabitants of Hawaii as of 1778. That is how most of the federal statutes regarding Native Hawaiians are written, and thus "who[] Congress has recognized as the original inhabitants" of Hawaii. And all such descendants would further satisfy § 3(10)(A), because, by the terms of the definition of "aboriginal, indigenous, native people" in § 3(1), their ancestors "resided in the islands that now comprise the State of Hawaii" before January 1, 1893 and "occupied and exercised sovereignty in the Hawaiian archipelago." *See* Kanehe, *supra*, at 880 (stating that this definitional change "does not affect who is considered a Native Hawaiian under federal law.").

S. 1011's definition of "Native Hawaiian" would also apparently include people whose ancestors were aboriginal inhabitants of "lands that later became part of the United States" other than Hawaii and who migrated to Hawaii before 1893. If so, this would introduce a new complication to the definition: the statute would be drawing distinctions among 19th century immigrants and inhabitants to Hawaii based on their ancestry – e.g., Californian Native Americans who moved to Hawaii in 1870 would be "Native Hawaiians," and other Californians would not. But in reality this may not be an issue, because there may not be any descendants of aboriginal, but non-Hawaiian, migrants to Hawaii who are from lands that are now part of the United States. And, in any event, it would not change the constitutional status of the definition. In *Rice*, Hawaii suggested that "some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti." 528 U.S. at 514. The Court noted this possibility but concluded that it did not change the racial nature of the classification, stating flatly: "Ancestry can be a proxy for race. It is that proxy here." *Id.*

identity." George S. Kanahele, *The New Hawaiians*, 29 Soc. Process in Haw. 21, 21 (1982).[4] In addition, Native Hawaiians live in all 50 states and the District of Columbia. *See* Office of Hawaiian Affairs, *Native Hawaiian Data Book* 17 (2006). Census data indicate that more than 40% of Native Hawaiians live outside Hawaii, many of whom likely have never been to Hawaii or have any connection to it beyond one or two ancestors. The community of Native Hawaiians as defined by the Hawaiian Homes Commission Act of 1920 ("any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"), Pub. L. No. 34, § 201(a)(7), 42 Stat. 108 (1921), has a greater connection to pre-1778 Hawaiians, but S. 1011 is defined more broadly than that.

The closest historical example to S. 1011 is the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§1601-29h. Like S. 1011, ANCSA provided for the creation of entities (Alaska Native Regional Corporations and Alaska Native Village Corporations) that had not previously existed, and provided that they would receive certain property. And those new entities have been included in some of the statutory definitions of "Indian tribe." But in contrast to S. 1011's definition of Native Hawaiian as everyone with even one pre-1778 ancestor, ANCSA defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group." 43 U.S.C. § 1602(b). As this definition suggests, ANCSA built upon the existing set of traditional Alaska Native villages, which had existed as functioning governments for generations and which had been eligible for recognized status under the Indian Reorganization Act since 1936 (two years after the Act's passage). These Alaska Native Villages thus had had the legal status of tribes for decades. And the organization of the Alaska Native villages into the regions that were the basis of the new corporations reflected their connections, with the statute requiring that each region in Alaska be "composed as far as practicable of Natives having a common heritage and sharing common interests." 43 U.S.C. § 1606(a).[5]

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[4] Or, as was noted more recently, "Clearly, much of the traditional culture, particularly language, that was practiced by Native Hawaiians or brought by immigrant groups during the period of plantation labor recruitment (1852-1946) has been lost by their descendants, and assimilation into 'local' and a generalized American culture has occurred." Jonathan Y. Okamura, *Ethnicity and Inequality in Hawai'i* 6 (2008).

[5] Justice Breyer underscored the degree to which defining tribal membership based on having even one pre-1778 ancestor is unprecedented in his concurrence in *Rice v. Cayetano*, 528 U.S. 495, 516 (2000):

> Native Hawaiians [i.e., those with 50% or more native blood], considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present)....
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> I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native

S. 1011 goes beyond ANCSA because it has no blood quantum requirement and does not build upon any existing entities. The federal and state governments have created programs and entities to aid Native Hawaiians, and there are a variety of organizations devoted to the betterment of Native Hawaiians, but they are a far cry from self-governing entities. Interestingly, the furthest that Congress seemed to push the boundary of what could be characterized as an "Indian Tribe[]" is an entity that has no power and thus will not be subject to an equal protection challenge in court (unlike the envisioned Native Hawaiian government). I am referring to ANCSA's provision for an Alaska Native Corporation for Alaska Natives who did not live in Alaska. That corporation differs from the envisioned Native Hawaiian government in that, on the one hand, it was composed of people living outside Alaska, but, on the other hand, its members could be (and often were) members of existing Alaska Native Villages and it would be created only "[i]f a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect[ed] ... to be enrolled" in it. *See Alaska Native Ass'n of Oregon v. Morton*, 417 F. Supp. 459 (D. D.C. 1974). But the larger point is that this regional corporation for non-residents was provided with money but no authority over any land (whereas the regional corporations for residents were provided with both). This means that the corporation for non-residents does not have any powers that could give rise to an equal protection challenge.

Supporters of S. 1011 have pointed to the Supreme Court's approval of the restoration of the federal government's relationship with the Menominee tribe as well as *United States v. John*, 437 U.S. 634 (1978), as precedents for S. 1011, but in fact those examples demonstrate how far S. 1011 goes beyond the existing precedents. As to the former, Congress terminated its recognition of the Menominee Tribe and then later re-recognized the tribe. And in *United States v. Lara*, 541 U.S. 193, 203 (2004), the Supreme Court in dicta cited the Menominee example in saying that "Congress has restored previously extinguished tribal status – by re-recognizing a Tribe whose tribal existence it previously had terminated."[6] But less than 20 years passed between the passage of the statute terminating the government's relationship with the Menominee Tribe and the statute re-recognizing it (and due to the lengthy lead time of the termination legislation, the actual period of time in which the federal government lacked a relationship with the Menominee Tribe was only 12 years). *See* 25 U.S.C. §§ 903b-c; *Menominee Tribe of Indians v. United States*, 491 U.S. 404, 408-410 (1968). And, significantly, the Menominee Tribe retained some political organization after its relationship with the government was terminated. That is, the relationship with the federal government ended, but the tribe continued to exist.

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village or Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll – but in the far less distant past.

[6] *Lara* itself is inapposite, because in that case Congress was affirming the inherent authority of entities that were already federally recognized tribes; there was no issue of Congress conveying any authority on groups that had not been tribes.

John involved the question whether a crime occurred in "Indian country," for purposes of 18 U.S.C. § 1151, and thus whether federal jurisdiction precluded state criminal jurisdiction. The Court noted that Mississippi argued that "the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." 437 U.S. at 652. But the Court stated in response both that "Mississippi has made no effort, either in this Court or in the courts below, to support this argument with evidence of the assimilation of the Choctaw Indians in Mississippi," *id.* at 652 n.23, and, more broadly, that the history demonstrated that the Mississippi Choctaws had been functioning as a tribe for decades, and similarly had been treated as a tribe by the United States for decades. *See id.* at 645-46 (noting, *inter alia*, that "The Choctaws in Mississippi were among the many groups who, before the legislation was enacted, voted to support" the Indian Reorganization Act of 1934 ("Act"); that "[o]n March 30, 1935, the Mississippi Choctaws voted, as anticipated by § 18 of the Act, to accept the provisions of the Act"; that "[i]n December 1944, the Assistant Secretary of the Department of the Interior officially proclaimed all the lands then purchased in aid of the Choctaws in Mississippi, totaling at that time more than 15,000 acres, to be a reservation"; and that "[i]n April 1945, again as anticipated by the Indian Reorganization Act, the Mississippi Band of Choctaw Indians adopted a constitution and bylaws; these were duly approved by the appropriate federal authorities in May 1945").

B. The Constitutionality of S. 1011 Depends on the Definition of "Indian Tribe[]" for Constitutional Purposes, and There Is No Clear Definition

The fact that S. 1011 is unprecedented and attempts to expand the boundaries of what is a tribe for constitutional purposes does not mean that it is unconstitutional. It may be that the constitutional definition of "Indian Tribe[]" under the Indian Commerce Clause, properly understood, includes the envisioned Native Hawaiian government. To answer the question whether or not this is so, we need to have a definition of "Indian Tribe[]" for constitutional purposes. Unfortunately, there is no clear definition.

One possible definition is the one put forward by the Supreme Court in *Montoya v. United States*, 180 U.S. 261 (1901) – the most-cited and most-quoted definition of "tribe," and the only one the Court has put forward in the last 120 years.[7] *Montoya* stated that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266. The Court did not state that these were the constitutional minima for an Indian tribe; it has never

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[7] *See, e.g.*, *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (adopting *Montoya's* language as the definition to the term "any tribe of Indians" in the Indian Nonintercourse Act); *United States v. Chavez*, 290 U.S. 357, 364 (1933) (using *Montoya's* language in defining "Indian country"); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977) (treating *Montoya* as delineating the applicable requirements for treatment as a tribe). The main pre-*Montoya* case on the criteria for status as a tribe was *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), which adopted a similar definition – "As long as [the Red Lake and Pembina Chippewa] Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal...." *Id.* at 195.

confronted this constitutional question. In *Montoya* the Court was construing the word "tribe" from a statute, so the Court's definition may have been merely descriptive of current tribes (or current conceptions of tribes), rather than prescriptive, or the statutory definition may otherwise have differed from the constitutional one. On the other hand, there was no suggestion in *Montoya* that the Court was relying on congressional intent, or that it was limited to a narrow context.

If *Montoya* supplies the only constitutional requirements for an "Indian Tribe[]" under the Indian Commerce Clause, the envisioned Native Hawaiian government could be structured to meet these criteria. The main limit under *Montoya* would involve the notion of a community.

The problem is that, in light of the enormous diversity among Native Hawaiians and the absence of any consistent connection other than descent from one aboriginal ancestor, it is not clear that Native Hawaiians who live in Hawaii constitute the sort of community that can be validly aggregated into a tribe. And it certainly seems to strain the notion of a community to include Native Hawaiians who do not live in Hawaii. But S. 1011 is not limited to Native Hawaiians who actually live in Hawaii or have a particular connection to it beyond a single ancestor. Still, this suggests a relatively easy fix, in the form of requiring a greater connection among Native Hawaiians. An obvious possibility in this regard would be to limit the definition of "Native Hawaiians" to those who reside in Hawaii and have some connections among themselves beyond ancestry. But the larger point is that, insofar as *Montoya* delineates the criteria for a tribe, these criteria can be met.

A potentially bigger problem for S. 1011 involves the possible requirement of a connection to a pre-existing tribal entity. Some sources suggest that there may be an additional requirement for status as a tribe that does not inhere in the current structure of a tribe and thus cannot be met so easily: that the tribe have a long and continuous existence as a functioning tribal organization. The Bureau of Indian Affairs' regulations on recognizing tribes, as well as some lower court cases, indicate that this is an additional prerequisite for status as a tribe.[8] If there is a requirement of continuous tribal organization, it would seem to preclude the creation of a Native Hawaiian tribe for constitutional purposes: Native Hawaiians have not remained in a tribal entity.

There is reason to doubt that continuous functioning is required. The BIA regulations define the groups that the federal government is willing to recognize, not necessarily those that it has the authority to recognize. And nothing in the term "Indian Tribes" suggests that an unbroken history is necessary. The Indian Commerce Clause's use of the term "Indian Tribes" rather than "Indians" suggests that something more than an agglomeration of Indians is necessary, that there must be a group coherent enough to be called a "Tribe[]." But the same cannot be said of a requirement that such an Indian group have an unbroken history; the term "Indian Tribe[]" is consistent with both a formulation that would include such a requirement and one that would not.

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[8] 25 C.F.R. § 83.7(b) (requiring that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"); *id.* § 83.7(c) (requiring that "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present"); *see also, e.g., United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) ("[T]he group must have maintained an organized tribal structure.").

More important, if there is a requirement of a connection to a historical tribe, it is not clear that there is a further requirement of continuous functioning. The sources that have posited the criterion of a historical connection have differed on whether it requires merely that the current tribe be the successor to a historical tribe or that it also have an unbroken history of functioning as a tribe. In particular, the main circuit that deals with Native American law – the Ninth – has presented a shifting view on this issue. In a 1981 case, the court suggested that the tribal organization must have been maintained, though it found that such maintenance could be demonstrated "if some defining characteristic of the original tribe persists in an evolving tribal community." *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981). In 1991, the court put forward a slightly broader formulation: "[A] relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991). Finally, in a 1992 case, the Ninth Circuit stated that the members of a new tribe must meet *Montoya's* criteria and demonstrate "that they are 'the modern-day successors' to a historical sovereign entity that exercised at least the minimal functions of a governing body"; significantly, the court did not suggest any requirement of continuous functioning from historical times until the present.[9] Thus, assuming that there is a requirement of a connection to a historical sovereign entity, there is some judicial support for the suggestion that continuous functioning is not required.

A continuity requirement would be impossible for the new Native Hawaiian government to satisfy, but a connection to a previous sovereign would not. S. 1011 envisions the new Native Hawaiian government as the modern-day successors to the Hawaiian government.

But a stumbling block remains: the government that was overthrown in 1893 was a multiethnic oligarchical polity. The envisioned Native Hawaiian government, limited to descendants of pre-1778 inhabitants, would have a hard time establishing that its limitation to Native Hawaiians was consistent with the composition of the 1893 polity (or even that the 1893 government was an "Indian Tribe[]" for constitutional purposes). The obvious solution would be for the new Native Hawaiian government to assert derivation from a Native Hawaiian polity that did not include Westerners, as this would help to justify the limitation to Native Hawaiians. The difficulty with this solution is that Westerners' influence stretches far back in Hawaii. Western residents had been eligible for naturalization since 1840 and had been treated as ordinary subjects, for purposes of the application of Hawaii's laws, since 1829. *See* 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 1778-1854, at 129, 229-230 (1938); 1 Statute Laws of His Majesty Kamehameha III, ch. V, art. I, ss 3, 10-14 (1846). In fact, there were permanent Western residents dating back to the late eighteenth century, chief among whom were advisers to Kamehameha who helped him to overcome the rulers of the other islands and unite them under his rule in 1810. *See* Kuykendall at 25-51. Assuming that the goal of S. 1011 is to create a Native Hawaiian process that includes only pre-1778

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[9] *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (quoting *Native Village of Venetie,* 944 F.2d at 559); *see also Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994) (stating that "group claiming tribal status must show they are 'modern-day successors' to a historical sovereign entity that exercised political and social authority") (quoting *Native Village of Venetie*, 944 F.2d at 559).

descendants, then, the appropriate date for purposes of the derivation of the new tribe appears to be 1778 (before Westerners arrived). If so, however, then the legislation would probably need to create several tribes, corresponding to the kingdoms that existed at the time (i.e., with different rulers over different islands).[10] If, on the other hand, the goal is to create a single Native Hawaiian government, S. 1011 would probably need to define "Native Hawaiian" as of 1810 at the earliest (which might mean the inclusion of some Westerners who are not descended from pre-1778 inhabitants).

II. The Supreme Court Has Articulated Both Broad Deference to Tribal Recognition and Limits to that Deference, and S. 1011 Will Test Those Limits

The Supreme Court has stated that it grants broad deference to determinations by the political branches regarding tribes. But it also has articulated limits. The main case is *United States v. Sandoval*, 231 U.S. 28 (1913). In that case, the Court concluded Congress could regulate Pueblo Indians as an Indian tribe. In its opinion, the Court stated both the deferential principle that "in respect of distinctly Indian communities 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" and the limitation that "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *Id.* at 46.[11] And in *Delaware Tribal Business Committee v. Weeks*, the Court stated that its recognition of Congress's important role "has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. [citing *Mancari*]. 'The power of Congress over Indians may be of a plenary nature; but it is not absolute.'"[12]

Relatedly, the Supreme Court's opinion in *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), highlights both the difficulty of the constitutional questions surrounding a Native Hawaiian government and the seriousness with which the Supreme Court is likely to consider any challenge to actions by such a government. The case involved the 15th Amendment to the Constitution, and so its holding is not directly applicable here. But in the course of its opinion, the Court stated that Hawaii's ancestry-based definition of Native Hawaiian (the same one used in S. 1011) was a proxy

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[10] Kuykendall identified four kingdoms as of 1778: one over the island of Hawaii and the Hana district of east Maui; a second over Maui (except the Hana district) and its three dependent islands; a third over Oahu; and a fourth over Kauai and Nihau. *See id.* at 30.

[11] *See also Baker v. Carr*, 369 U.S. 186, 216-17 (1962) (quoting same language from *Sandoval*, then stating, "Able to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.") (citation omitted); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting same language from *Sandoval*); *United States v. Candelaria*, 271 U.S. 432, 439 (1926) (same); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 n.3 (1st Cir. 1979) ("Nor can Congress arbitrarily label a group of people a tribe.").

[12] 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (stating that deference to Congress in tribal matters embodied in political question doctrine "has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm[ittee] v. Weeks*").

for race, *id.* at 514; that the question "whether Congress may treat the native Hawaiians as it does the Indian tribes" was one "of considerable moment and difficulty," *id.* at 519; and that "To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs," *id.* at 522.[13]

As these cases suggest, the Supreme Court would likely show great deference to Congress's determination of tribal status, but it would not find that the determination alone was sufficient. Imagine, for example, legislation that mirrored S. 1011 except that it applied to all Native Americans (defined as having some Native American blood) in the continental United States who were not members of an existing tribe. So, as with S. 1011, the legislation would establish a process whereby this new, widely dispersed Native American tribe could be created. I do not believe that such a new tribe would be an "Indian Tribe[]" for constitutional purposes, and I believe that the Supreme Court would not defer to Congress's judgment. The tribe would, I believe, run afoul of the broad limits laid out in cases like *Sandoval.* It would be too inchoate, with members with too little connection to a historic tribe and to each other.

If I am right about this hypothetical bill, the question is whether the actual S. 1011 is sufficiently different that it would be constitutional. It would be distinguishable in two main respects. First, there are tribes for Native Americans in the continental United States, so this hypothetical statute would apply only to Native Americans who are not eligible for, or are not interested in, joining an existing tribe. Native Hawaiians, on the other hand, cannot join an existing tribe, no matter their interest. But this might be a distinction without a difference. At first blush, it might seem that the hypothetical continental Native American government would include a larger number of people who were not particularly interested in joining a tribe (because at least some of its members might be people who were eligible to join a recognized tribe but chose not to do so). But this overlooks the fact that both S. 1011 and the hypothetical statute membership in the new government would require an affirmative act of joining. Both governments would be composed of people who chose to join them.

Second, Native Hawaiians might be a more cohesive group, with more of a shared history and shared connections, than the hypothetical tribe in the continental United States. This is the key

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[13] It also bears noting that, as a matter of Supreme Court jurisprudence, the envisioned Native Hawaiian government will be in a different position from existing tribes, because in the 20th century the constitutional ground shifted. Most tribes were recognized decades ago, long before the Supreme Court announced that the federal government was limited by principles of equal protection (via the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497 (1954)), much less that racial classifications were subject to strict scrutiny (in *Adarand Constructors* in 1995). This means that, even if a given entity was an imperfect fit as a "tribe" at the point of recognition, that entity had been organized and recognized as a "tribe" for decades by the time any challenge would be possible. Whatever their origins, in other words, they had long since become the sort of entities that could be meaningfully called an "Indian Tribe[]" under the Indian Commerce Clause. The Native Hawaiian government, however, will not have such a long grace period before there is a tenable legal challenge to its authority. Such a challenge will be available from the outset, and it may well be brought. This may seem unfair, but that is the nature of changes in the Court's jurisprudence.

difference between S. 1011 and the hypothetical legislation. The question is whether that difference is enough to distinguish S. 1011 from my hypothetical statute. It may well be, but, again, I do not think the matter is beyond doubt. The problem, as I noted in Part I.B, is that the only thing that unites Native Hawaiians as defined by S. 1011 is having one or more ancestors who lived in Hawaii before 1778. There is enormous diversity in the Native Hawaiian community. Simply stated, it is not at all clear that there are greater connections among Native Hawaiians, as defined in S. 1011, than among Native Americans in the continental United States. S. 1011 does include findings that suggest some connections among Native Hawaiians, and these findings may be helpful. But, as the Supreme Court has made clear in a variety of contexts, congressional findings are not dispositive.[14] And, in any event, the question is the legal significance of any factual findings, whether made by Congress or the courts.

III. The Possibility that Federal Courts Will Completely Defer to Congress's Determinations Makes it All the More Important that Each Member of Congress Reach His or Her Own Judgment on the Constitutional Issues

Insofar as federal courts will defer to Congress's determinations, or no one will have standing to bring a judicial challenge to the envisioned Native Hawaiian government, it is all the more crucial that each member of Congress reach his or her own judgment about what the limits on an "Indian Tribe[]" are, and whether Native Hawaiians meet it. Saying that the courts will defer, or will never hear a case, does not mean that a given act is constitutional. I stress this point because in commentary and other testimony on this bill some have suggested that the possibility of the Supreme Court deferring to Congress means that this bill is constitutional. That is not the case.

The Constitution gives the political branches complete discretion over some decisions – impeachment, for example. So, if the House impeached a President, the Senate convicted the President, and the only reason they gave for impeachment and conviction was "we just don't like him," no court would block the impeachment and conviction. *See* Nixon v. United States, 506 U.S. 224 (1993). But those Representatives and Senators would have violated their own oaths to uphold the Constitution, because the grounds for impeachment and conviction would not be "high crimes and misdemeanors." U.S. Constitution, Art. II, § 4.

Or, to illustrate from my own experience: in 1994 and 1995, when I was in the Department of Justice's Office of Legal Counsel, we confronted a few legal questions that we knew would never

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[14] *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (refusing to defer to congressional fact-finding, explaining that "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch"); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 370-74 (refusing to give determinative weight to Congress's evidentiary findings); *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function"); *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (quoting this statement from *Crowell v. Benson* and stating: "Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

get to a court of law – no one would have standing (or even know that the relevant government action had taken place). We could have decided that there were no legal constraints, because no court would oversee us. On the contrary, we took our obligation to determine legality all the more seriously, precisely because we were the only ones who were going to make that determination.

If courts will not independently review S. 1011, the Senate and House are in that position today: each Senator and Representative would need to come to his or her own legal conclusion about what is required for an entity to be an "Indian Tribe[]" and whether Native Hawaiians met those requirements, because Congress would make the binding Constitutional determination.

As the discussion above intimates, depending on one's interpretation of "Indian Tribe[]" in the Indian Commerce Clause, a determination that a group constitutes a tribe can be a very fact-specific one, focusing on who among possible members has significant connections to the relevant community. Such factual determinations are ordinarily made by government agencies with expertise and experience in gathering these sorts of facts. There is, of course, no constitutional prohibition on Senators and Representatives undertaking such factual determinations on their own. The point is simply that some Senators and Representatives may interpret "Indian Tribe[]" to entail some factual investigation, and if so it is incumbent on them to engage in such investigation, or to authorize some other entity to do so.

IV. Conclusion: Amending S. 1011 To Put it on Stronger Constitutional Footing

S. 1011 pushes the limits of what constitutes an "Indian Tribe[]" for constitutional purposes. It may be that the Constitution is best understood as allowing for the Native Hawaiian government envisioned in S. 1011 as it is currently written, and that the courts would so conclude. If so, then there is no need to amend S. 1011. It may be that the courts (and in particular the Supreme Court) would conclude that S. 1011 goes too far and invalidates it on that basis. Most dramatically, the Supreme Court's invalidation of S. 1011 may lead it to look more critically at other programs for Native Americans that appear to be based on ancestry (and that heretofore have been thought unproblematically constitutional). If the Court concludes both that S. 1011 runs afoul of equal protection principles and that S. 1011 is similar to existing statutes, the changes to Native American law could be profound.

The discussion above suggests the amendments that would put S. 1011 on more secure constitutional footing. The most obvious change to S. 1011, in my view, would be to limit the participants in the government process to Native Hawaiians who actually live in Hawaii. This change at least eliminates the possibility of people participating in the Native Hawaiian government process who have never been to Hawaii and have no connection to it beyond one or two ancestors who long ago left Hawaii. S. 1011 would still be unprecedented in its breadth, but at least there would be *some* narrowing of its scope.

A second, related change would be to require some meaningful and significant connection among those who participate in the process of creating the new Native Hawaiian government. Blood quantum requirements have sometimes served as a proxy for such a connection, but the constitutionally safer route is to abjure the proxy and develop criteria that demonstrate the existence of real bonds among those who will be members of the new government.

A final possibility would be either to include all descendants of members of the 1893 polity, or, perhaps more palatably, to divide up tribes by islands. This amendment would reflect Native Hawaiian political organization as of 1778.

My assessment of the risks leads me to recommend the first two changes, but not the third. Determining a margin of constitutional safety is impossible, though, and the decisions are of course yours to make. But, for what it is worth, these changes would put S. 1011 on stronger constitutional footing.

Senator AKAKA. Thank you very much, Professor Benjamin, for your testimony.

Now, we will hear from the Honorable Chairman Micah Kane.

STATEMENT OF HON. MICAH A. KANE, CHAIRMAN, HAWAIIAN HOMES COMMISSION

Mr. KANE. Senator Akaka, aloha, Senator Inouye, aloha. Thank you for giving me this opportunity to testify in strong support of this measure.

For the record, my name is Micah Kane. I am the Chairman of the Hawaiian Homes Commission and also serve as the Director of the Department of Hawaiian Home Lands.

As you know, in 1921, the United States Congress set aside 200,000 acres of land for the purpose of rehabilitating Native Hawaiians. In 1959, when we became a State, the responsibility of administering this trust was passed to the State of Hawaii and hence has developed into the Department of Hawaiian Home Lands.

So today, while I chair the Hawaiian Homes Commission, advising on policy, I also serve as a member of the Governor's cabinet, as one of 17 departments in the State of Hawaii. We are managed by a nine-member commission appointed by the Governor and confirmed by the Hawaii State Senate, with membership represented throughout the State of Hawaii in staggered terms.

Today, the Department of Hawaiian Home Lands represents more than 36,000 Native Hawaiians across 29 homestead communities throughout our State. Today, the Department of Hawaiian Home Lands is the largest residential developer in the state of Hawaii, with over 1,500 units under construction throughout our State.

I think there are obvious reasons why Native Hawaiians support this measure. But what I think is most interesting and what is most compelling is the broad support that you alluded to, Senator Akaka, and Senator Inouye, about the non-Hawaiian support that is there. I think it is appropo to the comments that were made prior with regard to certain limitations that are being asked for in defining what a Native Hawaiian is. I think there is an assumption in those comments that by broadening that definition that it would limit difficulties. I think the remainder of my comments would be appropo in that we don't feel that that is the case.

I think one of the main reasons why there is such broad support is that the positive impact that the Department of Hawaiian Home Lands has had on the lives of those that are not clearly, not defined under the Hawaiian Homes Commission Act. While DHHL's mission is to serve a specific beneficiary group, we do not build segregated communities. As a result of that, many have benefited from our work. When we build a park or a community, we build it as a gathering place for all, not just for Hawaiians. When we dedicate land for a public school or a private school or a charter school, it isn't just for Native Hawaiians. Others participate in those schools.

When resources are dedicated for major infrastructure improvements, as you know, DHHL is a major builder in water, sewer and road re-improvements, we build it to county code through agreements and memoranda of agreements with the county or the State. And we take into consideration the capacity of our non-Native neighbors. So there is a collaboration that occurs. And when people enter or exit our communities, they don't recognize where it starts or ends. That is important to us.

DHHL is also a close example of what Senate Bill 1011 will result in. We already have democratically-elected communities. We operate much like a county. In fact, our CIP budget is comparable to those of the five counties in our State. And, DHHL has become a critical component of Hawaii's social fabric and a critical partner in overcoming some of Hawaii's major problems.

Today, our department is at the forefront in our State's initiative to reduce our dependency on fossil fuel. I am very proud to announce, and I really hope that our Senators can join us in December when we launch our first zero energy subdivision and sustainable community. I think we are going to be leading our Country in this area, thanks to the support that you have given us through the stimulus money, through energy money. We are very excited to share what we have learned from this process, so others throughout the Country can follow.

We are also at the forefront of our State's efforts to bring educational opportunities in rural communities, which are sometimes overlooked. We are at the forefront of helping our State overcome major infrastructure challenges throughout the state.

Contrary to what few might say, this bill does not draw a line in the sand. The irony is that it is really a bridge that we are building and that we are allowing all of us to reconnect to what we feel is important to our State. This bill is balanced. It recognizes the authority and jurisdiction that is needed by a governing entity, yet it acknowledges the role it must play within our State and within our Federal Government.

I thank you for the opportunity to testify on behalf of our beneficiaries and, as I stated earlier, we truly appreciate the genuine support you have given our people in our State as Senators representing us. Mahalo.

[The prepared statement of Mr. Kane follows:]

PREPARED STATEMENT OF HON. MICAH A. KANE, CHAIRMAN, HAWAIIAN HOMES COMMISSION

Aloha kakou, Chairman Dorgan, Vice Chairman Barrasso, Senator Inouye, Senator Akaka and members of this Committee:

I am Micah Kane, Chairman of the Hawaiian Homes Commission, and I thank you for this opportunity to express support for this bill and to address how federal recognition plays a critical role in sustaining our Hawaiian Home Lands program.

In 1921, the United States Congress adopted the Hawaiian Homes Commission Act and set aside more than 200,000 acres of land in Hawaii to rehabilitate the native Hawaiian people. with Statehood in 1959, the responsibility to administer the Hawaiian home lands program was transferred to the State of Hawaii. The United States, through its Department of the Interior, maintains an oversight responsibility and certain major amendments to the Act require Congressional consent.

For more than 80 years, the Department of Hawaiian Home Lands has worked determinedly to manage the Hawaiian Home Lands trust effectively and to develop and deliver lands to native Hawaiians. Currently, there are over 36,000 native Hawaiians living in 29 homestead communities throughout the State. Each community is an integral part of our state's economic, social, cultural, and political fabric.

Passage of S. 1011 will enable the Hawaiian Homes Commission to not only continue fulfilling the mission Congress entrusted to us, but to reach incredible successes that we are only starting to realize.

These five reasons are why we need this bill to be passed:

1. Our housing program benefits the entire state. The Department of Hawaiian Home Lands is the largest single family residential developer in the State of Hawaii and has provided nearly 3,000 families homeownership opportunities in the past five years. Each home we build represents one more affordable home

in the open market or one less overcrowded home. In a state with high living costs and an increasing homeless population, there is no question that we are doing our part in raising the standard of living for all residents of our great state.

2. We build and maintain partnerships that benefit entire communities. We think regionally in our developments and we engage the whole community in our planning processes. Our plans incorporate people, organizations (e.g. schools, civic clubs, hospitals, homeowner associations), all levels of government and communities from the entire region—not only our beneficiaries. It is a realization of an important Hawaiian concept of ahupuaa—in order for our Hawaiian communities to be healthy; the entire region must also be healthy. This approach encourages a high level of cooperation, promotes respect among the community, and ensures that everyone understands how our developments are beneficial to neighboring communities and the region.

3. We are becoming a self-sustaining economic engine. Through our general lease program, we rent non-residential parcels to generate revenue for our development projects. Since 2003, the Department has doubled its income through general lease dispositions. We have the ability to be self-sufficient. Revenue generation is the cornerstone to fulfilling our mission and ensuring the health of our trust.

4. Hawaiian communities foster Native Hawaiian leadership. Multi-generational households are very common in our Hawaiian homestead communities. This lifestyle perpetuates our culture as knowledge and values are passed through successive generations. These values build strong leaders and we are seeing more leaders rising from our homesteads and the Hawaiian community at-large. It is common to see Native Hawaiians in leadership positions in our state. Three members of Governor Lingle's cabinet are Hawaiian, as are almost one-fifth of our state legislators. Hawaiian communities grow Hawaiian leaders who make decisions for all of Hawaii.

5. Hawaiian home lands have similar legal authority as proposed under S. 1011. Because of our unique legal history, the Hawaiian Homes Commission exercises certain authority over Hawaiian home lands, subject to state and federal laws, similar to that being proposed under S. 1011.

The Commission exercises land use control over our public trust lands, but complies with State and County infrastructure and building standards. The Commission allocates land within its homestead communities for public and private schools, parks, churches, shopping centers, and industrial parks.

Amendments to the trust document, the Hawaiian Homes Commission Act, require State legislative approval and, in some instances, Congressional consent. Hawaiian home lands cannot be mortgaged, except with Commission approval, and cannot be sold, except by land exchanges upon approval of the United States Secretary of the Interior.

The State and Counties exercise criminal and civil jurisdiction on Hawaiian home lands. Gambling is not allowed and the Commission cannot levy taxes over Hawaiian home lands.

The Hawaiian Home Lands Trust and our homesteading program is part of the essence of Hawaii. On behalf of the Hawaiian Homes Commission, I ask that you approve this bill so we can work toward recognition and continue doing good work for all the people of Hawaii.

Senator AKAKA. Thank you very much for your testimony, Chairman Micah Kane.

Now we will receive the testimony of Mr. Christopher Bartolomucci.

STATEMENT OF H. CHRISTOPHER BARTOLOMUCCI, PARTNER, HOGAN & HARTSON LLP

Mr. BARTOLOMUCCI. Thank you, Mr. Chairman. It is indeed an honor to testify today on S. 1011, the Native Hawaiian Government Reorganization Act of 2009. In my testimony today, I will focus upon the legal issue of Congress' constitutional authority to enact this legislation.

The principal legal question presented by S. 1011 is whether Congress has the power to treat Native Hawaiians the same way it treats this Country's other indigenous groups; that is, American Indians and Native Alaskans. Constitutional text, Supreme Court precedent and historical events provide the answer, namely, that Congress' broad power to deal with Indian tribes allows Congress to recognize Native Hawaiians as having the same sovereign status as other Native Americans.

S. 1011 would initiate a process by which Native Hawaiians would reconstitute their governing entity. Congress has ample authority to assist Native Hawaiians in that effort. Congress' broadest power, the power to regulate commerce, specifically encompasses the power to regulate commerce "with the Indian tribes." Based upon the Indian Commerce Clause and other constitutional provisions, the Supreme Court has recognized Congress' plenary power to legislate regarding Indian affairs.

As the Supreme Court said in the 2004 case of *United States v. Lara,* "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." Congress has used that broad power in the past to restore lost tribal sovereignty. In 1954, Congress terminated the sovereignty of the Menominee Indian Tribe in Wisconsin. It ended the government-to-government relationship with the Tribe and closed its membership roll.

Nearly two decades later, in 1973, Congress reversed course and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee, reinstated the Tribe's Federal rights and Federal recognition and reopened its membership roll. Pointing to the Menominee Restoration Act, the Supreme Court in the Lara case affirmed that the Constitution authorizes Congress to enact legislation recognizing the existence of individual tribes and restoring previously extinguished tribal status.

S. 1011 is patterned after the Menominee Restoration Act and would do for Native Hawaiians what Congress did for the Menominee.

S. 1011 does not run afoul of the Supreme Court's 2000 decision in *Rice v. Cayetano.* In *Rice*, the Court ruled that the State of Hawaii could not limit the right to vote in a State election to Native Hawaiians. But Rice did not decide whether Congress may treat Native Hawaiians as it does other Native Americans. Indeed, the Rice court expressly declined to address the question whether Native Hawaiians have a status like that of Indians in organized tribes, and whether Congress may treat the Native Hawaiians as it does the Indian tribes.

Some opponents of the legislation have pointed to Rice in support of an argument that the bill violates equal protection principles. But the Supreme Court has long held that Congressional legislation dealing with sovereign indigenous groups is neither discrimination nor unconstitutional. As the Supreme Court said in the case of *United States v. Antelope,* "The decisions of this court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications." The court continued, "Federal regulation of

Indian tribes * * * is governance of once-sovereign political communities."

When Congress enacts laws regarding sovereign, indigenous peoples, it does so on a government-to-government basis. Such laws are not race-based.

Scores of Federal laws and regulations exist relating to American Indians, Native Alaskans and Native Hawaiians, and none has ever been struck down as racially discriminatory. Congress' power to enact special legislation for Native Hawaiians is also supported by Congress' unquestioned power to enact such legislation for Native Alaskans who, like Native Hawaiians, differ from American Indian tribes anthropologically, historically and culturally. Because Congress has power to enact special legislation dealing with Native Alaskans, it follows that Congress has the same authority with respect to Native Hawaiians.

Ultimately, a decision by Congress to treat Native Hawaiians like other Native groups is a political decision and one that the Federal courts are not likely to second guess. For example, in the 1913 case of *United States v. Sandoval,* which involved the New Mexican Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as Indians, even though their culture and customs differed from that of other Indian tribes.

The court decided that Congress' judgment was not arbitrary and that judicial review should end there. S. 1011 passes that legal test.

Professor Benjamin objects to the breadth of the definition of the term "Native Hawaiian" in the bill. In response, I would point out that that definition is to be used for only one narrow purpose, that is, to create the initial roll of persons eligible to elect an interim governing council. Ultimately, it will be up to the Native Hawaiian governing entity to determine the requirements of membership. That is fully in keeping with the fundamental legal principle that a tribe has the authority to determine its own membership.

In my view, a broad initial definition is preferable to one that would be unduly narrow, to allow greater participation in the initial process of reorganizing the governing entity.

That concludes my testimony. Thank you again for the invitation. I will be happy to answer the Committee's questions.

[The prepared statement of Mr. Bartolomucci follows:]

PREPARED STATEMENT OF H. CHRISTOPHER BARTOLOMUCCI, PARTNER, HOGAN & HARTSON LLP

Chairman Dorgan, Vice Chairman Barrasso, and distinguished Members of the Committee:

Thank you for the invitation to testify on S. 1011, "the Native Hawaiian Government Reorganization Act of 2009." It is indeed an honor to testify before this distinguished body. My testimony will focus upon the legal issue of Congress' constitutional authority to enact this legislation.

The principal legal question presented by S. 1011 is whether Congress has the power to treat Native Hawaiians the same way it treats this country's other indigenous groups, *i.e.,* American Indians and Native Alaskans. Constitutional text, Supreme Court precedent, and historical events provide the answer: Congress' broad power in regard to Indian tribes allows Congress to recognize Native Hawaiians as having the same sovereign status as other Native Americans.

S. 1011 would establish a process by which Native Hawaiians would reconstitute their indigenous government. Before Hawaii became a State, the Kingdom of Hawaii was a sovereign nation recognized as such by the United States. In 1893, American

officials and the U.S. military aided the overthrow of the Hawaiian monarchy. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change. *See* Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993); *see also Hawaii v. Office of Hawaiian Affairs,* 129 S. Ct. 1436, 1439 (2009) (noting that Congress "pass[ed] a joint resolution to apologize for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century").

Congress has ample authority to assist Native Hawaiians in their effort to reorganize their governing entity. Congress' broadest constitutional power—the power to regulate commerce—specifically encompasses the power to regulate commerce "with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Based upon the Indian Commerce Clause and other constitutional provisions, *see, e.g.,* Treaty Clause, art. II, § 2, cl. 2, the Supreme Court has recognized Congress' plenary power to legislate regarding Indian affairs. As the Supreme Court stated in the case of *United States v. Lara,* 541 U.S. 193 (2004), "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *Id.* at 200.

Congress has previously used that power to restore lost tribal sovereignty. In 1954, Congress terminated the sovereignty of the Menominee Indian tribe in Wisconsin, ended the government-to-government relationship with the tribe, and closed its membership roll. See Menominee Indian Termination Act, 25 U.S.C. § § 891–902. Nearly two decades later, in 1973, Congress reversed course and enacted the Menominee Restoration Act, 25 U.S.C. § § 903–903f, which restored sovereignty to the Menominee, reinstated the tribe's federal rights and federal recognition, and reopened its membership roll. Pointing to the Menominee Restoration Act, the Supreme Court in *Lara* affirmed that the Constitution authorizes Congress to enact legislation "recogniz[ing] * * * the existence of individual tribes" and "restor[ing] previously extinguished tribal status." *Lara,* 541 U.S. at 203.

S. 1011 is patterned after the Menominee Restoration Act and would do for Native Hawaiians what Congress did for the Menominee. Courts have approved of the sovereignty restoration process enacted in the Menominee Restoration Act. *See Lara,* 541 U.S. at 203 (citing the Menominee Restoration Act as an example where Congress "has restored previously extinguished tribal status–by re-recognizing a Tribe whose tribal existence it previously had terminated"); *United States v. Long,* 324 F.3d 475, 483 (7th Cir. 2003) (concluding that Congress had the power to "restor[e] to the Menominee the inherent sovereign power that it took from them in 1954") (opinion of Wood, J., joined by Posner & Easterbrook, JJ.), *cert. denied,* 540 U.S. 822 (2003).

S. 1011 does not run afoul the Supreme Court's decision in *Rice v. Cayetano,* 528 U.S. 495 (2000). In *Rice,* the Court ruled that the State of Hawaii could not limit the right to vote in a state election to Native Hawaiians. But *Rice* did not address whether Congress may treat Native Hawaiians as it does other Native Americans. Indeed, the Court in Rice expressly declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the Native Hawaiians as it does the Indian tribes." *Id.* at 518.

Some opponents of the legislation have pointed to *Rice* in support of an argument that the bill violates equal protection principles. But the Supreme Court has long held that congressional legislation dealing with sovereign indigenous groups is governmental, not racial, in character and hence is neither discrimination nor unconstitutional. As the Supreme Court explained in a 1977 case:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians. * * * Federal 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 * * *."

United States v. Antelope, 430 U.S. 641, 645–646 (1977) (quoting *Morton v. Mancari,* 417 U.S. 535, 553 n.24 (1974) (footnote omitted)).

In *Mancari,* the Supreme Court rejected the argument that an Act of Congress establishing an employment preference for qualified Indians in the Bureau of Indian Affairs violated due process and federal anti-discrimination law. The Supreme Court observed that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." 417 U.S. at 554. And the Court explained that the following rule applies with respect to Congress' special treatment of Indians: "As long as the special treatment can be tied rationally to the

fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* Here, S. 1011 is "rationally tied" to Congress' discharge of its duty with respect to the native people of Hawaii.

Accordingly, when Congress enacts laws regarding sovereign, indigenous peoples, it does so on a government-to-government basis; such laws are not race-based. Scores of federal laws and regulations exist relating to American Indians, Native Alaskans, and Native Hawaiians, and none has ever been struck down as racially discriminatory. *See, e.g.,* Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. § 7511–7517; Native Hawaiian Health Care Act, 42 U.S.C. § § 11701–11712.

Congress' power to enact special legislation for Native Hawaiians is also supported by Congress' unquestioned power to enact such legislation for Native Alaskans, who—like Native Hawaiians—differ from American Indian tribes anthropologically, historically, and culturally. *See, e.g.,* Alaska Native Claims Settlement Act, 43 U.S.C. § § 1601–1629h. Because Congress has power to enact special legislation dealing with Native Alaskans—a power that the Supreme Court has never questioned—it follows that Congress has the same authority with respect to Native Hawaiians.

Ultimately, a decision by Congress to treat Native Hawaiians like other native groups is a political decision that the federal courts are not likely to second guess. In the 1913 case of *United States v. Sandoval,* 231 U.S. 28 (1913), which involved the New Mexican Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as Indians, even though their culture and customs differed from that of other Indian tribes. The Court decided that Congress' judgment was not arbitrary and that judicial review should end there. *See Sandoval,* 231 U.S. at 45–49; *see also United States v. Holliday,* 3 Wall. 407, 419 (1886); *Long,* 324 F.3d at 482. S. 1011 passes that legal test.

For the remainder of my prepared statement, I attach a legal opinion, titled "The Authority of Congress to establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity," that I co-authored in 2007 with Professors Viet D. Dinh and Neal K. Katyal of Georgetown University. Although that opinion addressed S. 310, the version of the legislation pending in 2007, the present legislation, S. 1011, does not differ in substance from S. 310. Therefore, the opinion that offered with respect to S. 310 also holds for S. 1011.*

Senator AKAKA. Thank you very much, Mr. Bartolomucci.

Now we will receive the testimony of President Robin Danner.

STATEMENT OF ROBIN PUANANI DANNER, PRESIDENT/CEO, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT; ACCOMPANIED BY STEVEN JOSEPH GUNN, ATTORNEY AND ADJUNCT PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS

Ms. DANNER. Aloha, Senator Akaka, Senator Inouye. Thank you for this opportunity to testify on behalf of the Council for Native Hawaiian Advancement.

For the record, my name is Robin Puanani Danner. I am here today in my capacity as the President of the Council. Also with me today is Professor Steven Gunn, from the Washington University, an expert in Native American law.

CNHA was founded to unify Native Hawaiian community groups and organizations to enhance the cultural, economic and policy voice of Native Hawaiians. Similar in purpose to the Alaska Federation of Natives and the National Congress of American Indians, we work in public policy education and we connect resources to community goals on the ground.

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*The February 26, 2007 paper, entitled, The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity, by: H. Christopher Bartolomucci, Viet D. Dinh, and Neal K. Katyal has been retained in Committee files and can be found at *http://www.nativehawaiians.com/archives/pdf/NHGRA070226.pdf*

Our member organizations consist of cultural groups, charter schools, civic and homestead associations, housing and economic development type organizations, resource management practitioners, to name a few. I would like to express our strong support for Senate Bill 1011. In my written testimony, filed for the record, we make a few recommendations that we would be happy to work with our delegation and the Committee on.

As President of CNHA, I have worked for many years with extraordinary Native leaders and others to improve the opportunities and resolve challenges facing our people. This legislation, first introduced in 2000, is perhaps the single most important piece of public policy to advance solutions from within our communities and in partnership with the Federal Government, our trust agencies, and the State of Hawaii.

Senate Bill 1011 recognizes the economic, cultural and political rights and interests of Native Hawaiians. It is intended to facilitate our efforts to reorganize a Native government accountable to our community, representing the full measure of the Federal policy of self-determination and self-governance. It would particularly be appropriate if Congress would enact this legislation this year, in 2009, the 50th anniversary of Hawaii's statehood.

This Committee, the Senate Committee on Indian Affairs, perhaps more so than any other of the distinguished United States Senate Committees, is well versed in the history and public policy eras of our Country and America's native peoples. It is a worthy journey to continually seek a fair and just pathway to honor the values of our democracy while recognizing the contributions of and the impact to Native peoples in the building of a great nation.

My people are the third major category amongst the three most commonly referred to as indigenous or native to the homelands that now consist of the 50 States: American Indians, Alaska Natives and Native Hawaiians. Senators, I was born in my family's fishing village on the south shores of the island of Kauai. My upbringing was the responsibility of my parents as well as multigenerational family members.

I lived on the Navajo Indian Reservation in Arizona, I lived among the Inupiut Eskimo in the high Arctic in Alaska, and I live on my homestead in Hawaii where my four children have been raised. My parents were teachers working in the BIA and public school systems, both at home in Hawaii and among the tribes. I will say from a lifetime of witnessing first-hand the traditional and cultural practices, the communal family ties of the Navajo, the Eskimo, and yes, my own Native Hawaiian people, we are connected. We are unique, each of us, yet we share the commonality that we are each native to our respective homelands.

Just as the Great Plains are the homelands of the Lakota, so too are the Hawaiian Islands the homelands of Native Hawaiians. Our geographical locations may differ within the 50 States. But what is transpiring inside Native communities, whether an Indian reservation or our home in Hawaii, are communities engaged, connected to one another in collective action, living life ways, cultures and protocols of knowledge unique to each homeland.

As Hawaiian leaders, all of us have conducted and participated in hundreds of consultation sessions and meetings on the topic of

this legislation over the last 10 years. It has been inspiring to discuss and connect the potential of Senate Bill 1011 to the work on the ground and what it can mean to what is real in our day to day lives. There is clear consensus and support in our community for a recognition process, and to fully embrace and apply the policy of self-determination, Senate Bill 1011 is exactly the right and next step in our journey with you, the Congress, with the Administration and with our State agencies and local and State government back home.

In closing, I would like to thank you for the opportunity to be with you today. As Native Hawaiians, we want to be responsible and accountable for our resources and for our communities. We want to be a full and active partner with the State and Federal governments in growing solutions in our communities. And Senate Bill 1011 represents a pathway to once again have our own voice to govern our own affairs, and to take our rightful place in truly applying the talent and knowledge and opportunities in our homeland that will enrich the lives of all in Hawaii.

I thank you for the opportunity, and as I stated before, we remain available to work with the Committee on the recommendations in my testimony filed for the record.

[The prepared statement of Ms. Danner follows:]

PREPARED STATEMENT OF ROBIN PUANANI DANNER, PRESIDENT/CEO, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT

Aloha Chairman Dorgan, Vice Chairman Barrasso, Senator Inouye, Senator Akaka and other Members of the Committee. Thank you for your invitation to provide testimony on behalf of the Council for Native Hawaiian Advancement regarding the Native Hawaiian Government Reorganization Act of 2009, S.1011.

My name is Robin Puanani Danner. I am native Hawaiian and a resident of Hawaiian Home Lands, the trust lands created under the enactment of the Hawaiian Homes Commission Act of 1920.

I submit this testimony in my capacity as President of the Council, founded to unify Native Hawaiian groups and organizations to promote the cultural, economic and community development of Native Hawaiians. Similar in purpose to the Alaska Federation of Natives and the National Congress of American Indians, CNHA achieves its mission through a strong policy voice, capacity building and connecting resources to the challenges in our communities. Today, CNHA has a membership of 102 Native Hawaiian organizations. We are governed by a 15-member board of directors elected by our member organizations.

I would like to express CNHA's *strong support* for S. 1011 *with revisions*. As President of CNHA, I have worked for many years with extraordinary Native leaders and others to improve the opportunities and resolve challenges faced by Native Hawaiians. This legislation, first introduced in 2000 is perhaps the single most important piece of public policy to advance solutions from within our communities and in partnership with the Federal Government and State of Hawaii.

The Native Hawaiian Government Reorganization Act is important legislation that recognizes the economic, cultural, and political rights and interests of Native Hawaiians. The Act is intended to facilitate the Native Hawaiian people's efforts to reorganize our native government to promote our best interests. This legislation has been before Congress for almost 10 years, and it is particularly appropriate that Congress enact this legislation in 2009, the 50th anniversary of Hawaii's statehood.

Since Hawaii's overthrow as an independent nation and subsequent annexation to the United States, our Native Hawaiian people have sought justice. While Queen Liliuokalani, our last reigning monarch prior to the overthrow, was alive, she maintained our claims and passed the torch to Prince Jonah Kuhio Kalanianaole. One of his most significant achievements was the enactment of the Hawaiian Homes Commission Act of 1920 (HHCA). Modeled after the 1906 Native Allotment Act for Alaska Natives and American Indians enacted by Congress, the HHCA established trust lands for residential, agricultural and pastoral homesteading by Native Hawaiians.

Yet the HHCA was only a partial solution. A Native Hawaiian government, recognized by the Federal Government and accountable to Native Hawaiians, represents the full measure of the federal policy of self-determination and self-governance, which is achieved in S. 1011. The state agencies, Department of Hawaiian Home Lands and Office of Hawaiian Affairs, are vital partners yet cannot fulfill this role. As the Supreme Court pointed out in *Rice v. Cayetano,* these agencies are state government agencies founded in state law. Passage of S. 1011 authorizes a process by which the Native Hawaiian people are able to reorganize a Native Hawaiian government to speak on our behalf as native people and to work in a government-to-government relationship with the state of Hawaii and our Federal Government.

Background

I would like to include in the record, background information relevant to S. 1011 and the historical context which makes clear that passage of S. 1011 is exactly the next step in the journey of Native Hawaiians with the Federal Government.

Original People of the Hawaiian Islands

The Hawaiian Islands form the apex of the Polynesian triangle that extends from New Zealand (Aotearoa) to Easter Island (Rapa Nui) and north to Hawaii. The Polynesian triangle includes eight distinct cultures: Hawaiian, Maori, Rapa Nui, Marquesan, Samoan, Tahitian, Tongan and Tokelauan.

Our people settled the Hawaiian Islands approximately 2,000 years ago, arriving from the South Pacific through extraordinary feats of navigation. Our early Native Hawaiian ancestors established a complex society based on agriculture and aquaculture. By farming taro, breadfruit and sweet potatoes, raising animals, and using fish traps and harvesting seafood, our people had a self-sufficient, sustainable economy. As Congress recognized, the Native Hawaiian people "lived in a highly organized, self-sufficient, subsistence social system based on a communal land tenure with a sophisticated language, culture, and religion." Apology Resolution, Public Law No. 103–150, 107 Stat. 510.

We had a complex system of ali'i (chiefs), laws that governed the conduct of our people and all of us had an interest in the land. Hawaii's State Motto, Ua mau ke'ea o ka'aina i ka pono—"The life of the land is perpetuated in righteousness" reflects the respect that *all* people of the State of Hawaii have for the cultural traditions and values of Hawaii's indigenous people. In the same sense as other Native Americans are native to the other 49 states, Native Hawaiians are the "aboriginal, indigenous, native people of Hawaii."

The Kingdom of Hawaii

By 1810, King Kamehameha had consolidated the rule of the Hawaiian Islands into the Kingdom of Hawaii. Many foreign nations recognized and promulgated treaties with the Kingdom of Hawaii as an independent sovereign nation, and the United States entered into treaties with the Kingdom of Hawaii in 1826, 1849, 1875, and 1887. In the 1849 Treaty with the Kingdom of Hawaii, the United States pledged "perpetual peace and amity."

In 1840, the Kingdom of Hawaii became a constitutional monarchy, which confirmed that the lands of Hawaii belonged to the chiefs and the Native Hawaiian people subject to the management of the land by the King. From 1845 to 1848, the Hawaiian lands were divided between the ali'i (1,690,000 acres), King Kamehameha III (984,000 acres), and the Government (1,523,000 acres). It was recognized that the King held the Government lands in trust for benefit of the Native Hawaiian people.

The Overthrow of the Kingdom of Hawaii

The first foreigners to come to Hawaii beginning in 1778 came as explorers and missionaries. The next generation began sugar and pineapple plantations. In 1892, when Queen Liliuokalani sought to restore the place of the Monarchy through a constitutional revision, foreign business interests organized against her. In 1893, armed with assistance of the U.S. government minister and the support of the U.S. naval forces, the American and European plantation owners overthrew the Kingdom of Hawaii in violation of the United States' treaties of friendship and commerce.

Queen Liliuokalani sought to avoid bloodshed and rather than rally armed forces, filed diplomatic protests with the United States. Although President Cleveland agreed that the U.S. forces had acted in violation of international law and called for the restoration of the Kingdom, the Provisional Government refused to yield, declaring itself the Republic of Hawaii. In 1898, the McKinley Administration accepted the annexation of Hawaii through a joint resolution of Congress, although the Native Hawaiian people sent petitions objecting to annexation.

The Kingdom of Hawaii's Crown lands and Government lands were transferred to the United States as the "ceded lands," by the Republic of Hawaii. The Hawaii

Organic Act of 1900 formally made the Hawaiian Islands a territory of the United States and retained most of the laws created by the Kingdom of Hawaii, including ahupua'a tenant land rights, and the recognition of "Hawaiian tradition and custom". Ref: U.S. Department of the Interior and Justice Report: "From Mauka to Makai: The River of Justice Must Flow Freely," (2000), explaining Hawaii Organic Act, 31 Stat. 141, 56th Cong. 1st Sess. (April 30, 1900).

Queen Liliuokalani continued to seek justice for the Native Hawaiian people until her death in 1917. She never voluntarily relinquished her claims to sovereignty on behalf of the Native Hawaiian people. In addition, she actively continued to seek the return of the Crown lands for the Native Hawaiian people.

The Hawaiian Homes Commission Act

Prince Jonah Kuhio Kalanianaole, the Kingdom of Hawaii's heir to the throne, participated in a rebellion against the Republic of Hawaii in 1895 and was jailed for a year. After his release, he travelled widely in Europe and served in the British Army in Africa, returning to Hawaii in 1901 to take up his duties as an advocate for our Native Hawaiian people. He was elected to Congress and served from 1903 until his death in 1922. One of his most singular achievements was the enactment of the Hawaiian Homes Commission Act of 1920, which set aside approximately 200,000 acres of the ceded lands for homesteading by native Hawaiians (½ or more Hawaiian blood).

Prior to the overthrow, our people were devastated by foreign diseases and our suffering increased after the overthrow. Our difficult situation was made plain in the hearings before Congress. Before the House Committee on Territories, Territorial Senator John Wise testified:

> 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 big cities they had to live in the cheapest places, the tenements. That is one of the big reasons 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. We are not only asking for justice in the matter of division of the lands, but we are asking that the great people of the United States should pause for one moment and, instead of giving all of your help to Europe, give some help to the Hawaiians and see if you can not rehabilitate this noble people.

In the same hearings, Secretary of the Interior Lane acknowledged our Native Hawaiian people as a native people to whom the United States owed a trust responsibility:

> One thing that impressed me there 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 . . .. [T]hey are a problem now and they ought to be cared for by being provided homes out of the public lands; but homes that they could not mortgage and could not sell. H.R. Doc. No. 839, 66th Cong., 2d Sess. at 4 (1920).

In enacting the HHCA, Congress expressed its intention to, among other things, exercise its constitutional Indian affairs power to provide for Native Hawaiians by analogizing the Act to "enactments granting Indians . . . special privileges in obtaining and using the public lands."

H.R. Doc. No. 839.

As Queen Liliuokalani's heir, Prince Jonah Kuhio Kalanianaole provides a continuous link between the Kingdom of Hawaii and our native Hawaiian people in 1920. As its legislative history makes clear, the HHCA is a statutory recognition of Native Hawaiians as a native people to whom the United States owes a special trust responsibility. In other words, Native Hawaiians are a recognized native people within the area protected by Congress's constitutional authority to provide for the betterment of America's native peoples.[1] The Hawaiian Home Lands have assisted our people to maintain distinctly native communities throughout Hawaii.

For example, residents of Hawaiian Home Lands are organized through native Hawaiian homestead associations across the state, which function like city councils maintaining community cohesiveness and safety, addressing community issues and preserving community values and traditions. The membership of these associations

[1] In 1938, Congress reaffirmed these principles through the Kalapana Extension Act, which was enacted to provide access, homesteading privileges and fishing rights to native Hawaiians within the Hawaii National Park. Public Law No. 75–680, 52 Stat. 784 (1938). Between 1921 and 1959, Congress enacted 20 other statutes for the benefit of Native Hawaiians.

consists of individual members that elect leadership to implement programs and projects within the homestead community.

In addition, our Native Hawaiian people maintain distinctly native communities on the island of Niihau, where our people reside with little interference from outsiders, and on other native lands, some of which date back to the Kuleana Act of 1850, and have never been relinquished from native control and occupation.

The State Admissions Act and Other Statutes

The State Admissions Act transferred more than 1,125,000 acres of the Ceded lands (former Kingdom of Hawaii Crown and Government lands) from the United States to the new State of Hawaii. The income and proceeds from any sales of such lands are to be used for 5 purposes, including "the betterment of the conditions of native Hawaiians" as defined by the HHCA. Public Law No. 86–3, 73 Stat. 4. The State's use of the Ceded lands for any purpose other than those specified in the Act would constitute a breach of trust, which the United States retained authority to enforce in the courts.

In addition, the Admissions Act transferred the responsibility for administering the HHCA lands from the territorial government to the state government as follows: "the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States." In this way, the Admissions Act reaffirms the HHCA recognition of the Native Hawaiian people as a native people to whom the United States owes a unique trust responsibility.

Since the mid-1970s, Congress has enacted numerous statutes to provide for the betterment of Native Hawaiians as part of or analogous to congressional programs for other Native American peoples. In total, Congress has enacted more than 160 statutes that address Native Hawaiian issues.

The Clinton Administration

On November 23, 1993, President Clinton signed the Native Hawaiian Apology Resolution into law. The Apology Resolution:

- Recognizes the Native Hawaiian people as the aboriginal, indigenous, native people of Hawaii and acknowledges that our people have never ceded our claims to sovereignty or our desire for self-determination;
- Recognizes that the United States, in violation of several treaties, through its minister and naval forces, was an active participant in the overthrow of the Kingdom of Hawaii; and
- Apologizes for the United States' role in the overthrow and the deprivation of Native Hawaiian rights; and
- Pledges the Nation to a course of reconciliation with the Native Hawaiian people.

The Apology Resolution was viewed by Native Hawaiians as a great step forward towards justice and reconciliation with the United States. The leadership of our congressional delegation on this important issue was and continues to be deeply appreciated.

In February 2000 in *Rice v. Cayetano,* 528 U.S. 495 (2000), the Supreme Court reviewed the state laws restricting voting for the Board of Trustees of the State Office of Hawaiian Affairs (OHA) to Native Hawaiians to determine whether they violated the 14th and 15th Amendments to the Constitution. The Supreme Court held that the state law voting restriction based upon Native Hawaiian ancestry was unconstitutional under the 15th Amendment's prohibition against any race based limit on the right to vote. The Supreme Court rejected an analogy to Native American tribal elections, which are conducted by tribes as native sovereigns, from the state sponsored elections for a state office within a state agency.

In the *Rice* case, the Justice Department argued that state legislation on behalf of Native Hawaiians is permissible under the 14th Amendment because it is consistent with Federal laws for the betterment of Native Hawaiians, reasoning:

> Congress does not extend benefits and services to Native Hawaiians because of their race but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility.

The Justice Department explained further that so long as Congress rationally concludes that a native people remain a "distinctly" native community, Congress has authority to provide for the betterment of such community. That is true whether the native community is within the original or the subsequently acquired territory of the United States. *See United States v. Sandoval,* 231 U.S. 45–46 (1913). The

Court did not reach the 14th Amendment claim that state statutes enacted for the betterment of Native Hawaiians violates the equal protection clause as race based laws.[2]

In 1999, in furtherance of the Apology Resolution, the Clinton Administration sent a delegation from the Departments of the Interior and Justice to Hawaii on a fact finding mission to meet with Native Hawaiians on all the major islands in furtherance of reconciliation.[3] After many meetings with Native Hawaiian people, state officials and our congressional delegation, the Departments produced a report entitled: "From Mauka to Makai: The River of Justice Must Flow Freely," (2000). Issued in September 2000, after due consideration of the Supreme Court's decision in *Rice v. Cayetano,* the Mauka to Makai Report explains that:

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

The Akaka bill, S. 1011, responds and fulfills this recommendation. At the September 14, 2000 hearing on the first version of the Akaka bill, the Departments of Justice and Interior both expressed their "general support" for the bill with the exception of uncertainty concerning a definition of "Native Hawaiian" based upon a 1778 date.

The Obama Administration

In the Senate, President Obama was a co-sponsor of the Akaka bill and he voiced further support for the bill on the presidential campaign trail.

We call upon Attorney General Holder and Secretary Salazar to support the Native Hawaiian Government Reorganization Act and to help our Native Hawaiian people secure its enactment in this session of Congress.

S. 1011—The Native Hawaiian Government Reorganization Act of 2009

The Native Hawaiian Government Reorganization Act of 2009, S. 1011, does not create or newly establish federal recognition of the Native Hawaiian people—it *reaffirms* the status of Native Hawaiians as a recognized native people of the United States. Our people have been recognized as the aboriginal, indigenous, native people of Hawaii since the time of annexation:

- The Organic Act preserved the land tenure and other laws of the Kingdom of Hawaii;
- Through the HHCA, the Administration and Congress expressly recognized our Native Hawaiian people as a "native people" to whom the United States owed a trust responsibility;
- The Admissions Act reaffirmed the HHCA and its recognition of native Hawaiians and furthered that recognition through the preservation of the Ceded lands for the benefit of the native Hawaiian people, among other things; and
- Through more than 160 statutes, Congress has continued to provide for the betterment of the Native Hawaiian people.

The Akaka bill is a government reorganization bill, similar to the Indian Reorganization Act of 1934, 25 U.S.C. sec. 466–467. In summary, S. 1011 does the following:

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[2] In a concurring opinion, Justices Breyer and Souter cast doubt on the 1778-based lineal descendent rule as being too remote in time.

[3] The Island of Niihau remained closed to the U.S. officials, but Native Hawaiians from Niihau travelled to Kauai to meet with the officials and expressed their desire for more autonomy for Native Hawaiians and better education and health services.

- Defines the term "Native Hawaiian" based upon reference to the native citizens of the Kingdom of Hawaii at the time of the overthrow and their lineal descendants and also provides a definition based upon reference to the native Hawaiians eligible for HHCA lands and their descendants;
- Establishes its purpose to "provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for the purposes of a government-to-government relationship;
- Establishes the United States Office for Native Hawaiian Relations within the Department of the Interior and an Inter-agency working group to consult with the Native Hawaiian government on issues important to our people;
- Provides a process for reorganization of the Native Hawaiian Government and a process for establishing the initial roll of the Native Hawaiian community under the auspices of the Secretary of the Interior and provides for the adoption of a constitution and Native Hawaiian membership criteria by the Native Hawaiian government; and
- Has provisions concerning the federal, state and native government authority and claims against the United States and the state.

CNHA Comment on Definition

As previously stated, CNHA strongly supports S. 1011 with revisions. We comment on the definition of Native Hawaiians for the benefit of the Committee and the Obama Administration.

CNHA Supports Initial Definition of "Native Hawaiian" Because the Final Citizenship Rule Is to Be Determined by the Native Hawaiian Government

S. 1011 establishes an initial definition of "Native Hawaiian" for purposes of establishing a base roll. We believe that it is appropriate for the Department of the Interior to assist the Native Hawaiian community in this way because the United States has a direct trust responsibility to promote the welfare of the Native Hawaiian people. CNHA also believes that in the long run it is the right and duty of the Native Hawaiian people to take the next step and provide an ongoing rule for citizenship in the Native Hawaiian government.

CNHA understands that the lineal descent rule utilizing the 1778 date that Justices Breyer and Souter questioned in the *Rice* case would cause concern for the Justice Department. S. 1011 has improved on the state definition at issue in Rice by moving the timeline up by 115 years to 1893 in the first part of the definition and in the second part of the definition based upon the HHCA, the timeline is moved up by more than 140 years.

CNHA believes that the Akaka bill provisions that establish an initial definition of the term "Native Hawaiian" are constitutional and that is of the utmost importance. This definition must be based upon a solid legal foundation since it is one of the essential cornerstones of the Act. Indeed, it may be wise to bring forward the date of the HHCA definition by referring to those originally eligible, adding a reference to those now eligible, and including the lineal descendants of said individuals.

We note that Congress has used a base roll based upon lineal descent for Indian tribes. For example, The Modoc restoration act uses "lineal descendants"—25 USC 861a(3):

> The Modoc Indian Tribe of Oklahoma shall consist of those Modoc Indians who are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in November 1873, and who did not return to Klamath, Oregon pursuant to the Act of March 9, 1909, as determined by the Secretary of the Interior, and the descendants of such Indians who otherwise meet the membership requirements adopted by the tribe.

The date used for the Modocs, 1873, is more remote in time than the reference date of the overthrow of the Kingdom of Hawaii in 1893, yet Congress determined that it was appropriate because of the importance of the event in the life of the native community.

Finally, it is noteworthy that while some will point to the 14th Amendment equal protection clause to undermine the right of Native Hawaiians to self-government and self-determination within the framework of federal law, we must remember that the text of the Amendment and the history of its ratification reaffirm the political status of Native American citizens as citizens of America's original sovereigns. The 14th Amendment's Citizenship Clause, which precedes the Equal Protection Clause, makes those persons who are at birth subject to the "jurisdiction" of the United

States automatically citizens, yet the Supreme Court held that this American citizenship was not to include tribal citizens because they were first and foremost subject to the jurisdiction of their own native nations.[4] The 14th Amendment's Apportionment Clause, immediately following the Equal Protection Clause, repeats the original constitutional provision "excluding Indians not taxed" from apportionment. Since the original language of the Constitution is repeated, the framers of the 14th Amendment must have meant the original Indian affairs power—and by Indian they meant "native"—comfortably co-exists with the Equal Protection Clause.[5]

CNHA Requested Revisions

CNHA recommends revisions to Section 8 and 9 of S. 1011, to ensure that our Native Hawaiian government authority is an effective means to embrace the responsibilities and challenges we face as a people. Any government reorganized by our Native Hawaiian people should be vested with the inherent powers of native self government and positioned to negotiate as intended with the state and federal governments to ensure effective administration of government.

CNHA Requests Revisions to Sections 8(b)(3) and 9(e) Because As Written, It Undermines the Inherent Authority and Jurisdiction of the Native Hawaiian People

Sections 8(b)(3) and 9(e) of the Act may inadvertently undermine the inherent authority and jurisdiction of the Native Hawaiian people by conditioning our exercise of governmental functions upon the successful negotiation with the United States and the State of Hawaii over criminal and civil jurisdiction and all other aspects of government. Absent such agreement, the Act would prohibit the Native Hawaiian government from exercising any power that is currently exercised by the Federal or state governments. This includes every aspect of government duties and functions, so as drafted the Act might prohibit the Native Hawaiian government from acting in furtherance of traditional laws and justice systems. For example, even the most basic programming of the care and welfare of children would be prohibited until negotiated.

In contrast, the Indian Reorganization Act vested Indian tribes with existing powers of native governments while authorizing tribes to negotiate with Federal and state officials. The Supreme Court has recognized that Indian tribes maintain inherent authority over their members and their territory, and in fairness, the Native Hawaiian government should have such authority to provide for the betterment of our people. Such authority includes the power to determine the form of government, the power to determine membership, the power to operate the native government and carry out government responsibilities, including services and programs, power to approve or veto the use or disposition of native government assets, the power to determine domestic relations and to enforce native law on native lands. The House of Representatives recently affirmed the same type of authority for the Virginia tribes in H.R. 1385, 111th Cong. 1st Sess. CNHA respectfully submits that Sections 8(b)(3) and 9(e) should be deleted and replaced with the following language:

> The Native Hawaiian government shall be vested with the inherent powers and privileges of a native government under existing law, with the exceptions set forth in Section 9(a) of this Act. These powers and privileges of self-government may be modified as agreed to in negotiations with the Federal and state governments pursuant to section 8(b)(1) of this Act beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable. This includes any required modifications to the Hawaii State Constitution in accordance with Hawaii Revised Statutes. Except as provided through such agreement, nothing in this Act shall preempt Federal or state authority over Native Hawaiians under existing Federal law, provided further that nothing herein shall authorize the State to regulate or tax the Native Hawaiian government in the exercise of its powers of self-government or management of native government lands or assets.

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[4] American Indians had to be naturalized pursuant to treaty or statute. Accordingly, most American Indians were not citizens until the 1924 American Indian Citizenship Act.

[5] In fact, at the time of the 14th Amendment drafting, ratification and proclamation, the President and Congress were in the process of negotiating and ratifying numerous Indian treaties pursuant to the Indian Peace Commission, including Treaties with the Sioux, Navajo, Crow, Shoshone-Bannock, Cheyenne, Arapaho, Apache, Kiowa, and Comanche Nations.

CNHA Requests Revisions to Sections 8(c)(2) and 8(c)(3) Because As Written, It Extinguishes Claims without Compensation

Sections 8(c)(2) and 8(c)(3) seek to assert sovereign immunity for federal and state governments vis-á-vis existing Native Hawaiian land and breach of trust claims concerning the administration of HHCA and Ceded lands. 8(c)(2) would make these claims "nonjusticiable" and limits anyone other than the Federal Government from bringing such claims on behalf of the Native Hawaiian people. This raises both constitutional and policy problems.

The Fifth Amendment provides that recognized native lands may not be taken without just compensation. Claims for recognized lands are also protected property rights under the Fifth Amendment. Congress may not extinguish these claims without compensation.

Moreover, the Native Hawaiian Government Reorganization Act is intended to facilitate reconciliation between the Native Hawaiian people and the United States, and a statutory barrier to existing claims by Native Hawaiians would create further injustice. Even when Indian tribes were subject to termination, Congress preserved land claims for appropriate adjudication and resolution. *See* 25 U.S.C. sec. 750 ("Nothing in this subchapter shall deprive any Indian tribe . . . of any right, privilege, or benefit . . . including the right to pursue claims against the United States as authorized by the Act"). Fairness indicates that this Act should not determine or limit any existing claims of the Native Hawaiian people, so a savings clause would be appropriate. The Supreme Court has recently ruled that the Apology Resolution provision is neutral in meaning, so it should be employed in this Act as well. It says simply . . .

> Nothing in this Act is intended to serve as a settlement of any claims against the United States or the State of Hawaii.

This provision should replace sections 8(c)(2) and 9(e) of the current bill.

CNHA Requests Section 9(b) and 9(c) be Deleted Because As Written, It Prohibits Land Into Trust

Section 9(b) would prevent the Secretary of the Interior from taking land into trust for the Native Hawaiian government. This is contrary to the interests of the Federal, state, and Native Hawaiian governments. As was shown in the case of Kaho'olawe where the 28,000 acre Island was placed in trust for the Native Hawaiian government, it may be advantageous to the Federal, state and Native Hawaiian governments to preserve this option to address future land issues.

As to the Trade and Intercourse Act protection against the alienation of native lands, the Act either did or did not apply in the past, that cannot be changed by legislation today and there is no principled reason why this protection should not apply prospectively to Native Hawaiian lands. Accordingly, Section 9(c) should be deleted as well.

CNHA Requests Language to Define the Role of the Department of Justice Because It Provides Proper Assistance in Line with the Federal Trust Responsibility

The original versions of this bill envisioned a specific role for the Department of Justice, which we believe is important to the implementation of the bill once enacted. Language from H.R. 1711 as follows:

> The Attorney General shall designate an appropriate official within the Department of Justice to assist the United States Office for Native Hawaiian Affairs in the implementation and protection of the rights of Native Hawaiians and their political, legal, and trust relationship with the United States, and upon the recognition of the Native Hawaiian government as provided for in section 8(c)(6) of this Act, in the implementation and protection of the rights of the Native Hawaiian government and its political, legal, and trust relationship with the United States.

CNHA Requests Section 5(c) and Section 6(e) be Deleted Because It Is Unnecessary

These sections are unnecessary, as the Department of Defense is currently required to participate in consultation with the Native Hawaiian community through various federal acts, for example, the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the National Environmental Policy Act.

Conclusion—Enact S. 1011 as Revised

Thank you for the opportunity to provide testimony. As one of many Native Hawaiian community leaders that participated in the Reconciliation Hearings held by the Department of Justice and Interior in 1999, as well as a participant on Senator

Akaka's Working Group in 2000 which engaged community leaders, constitutional scholars, state officials and others that resulted in the first initial legislation to address this long standing issue, I respectfully request the Committee's support.

In this, the 50th year of statehood, 2009 is the year that Congress should enact S. 1011. As Native Hawaiians, we want to be responsible for our resources and for our communities. We want to be a full and active partner with the state and federal governments in resolving challenges and applying solutions in our communities. S. 1011 represents a pathway to once again having our own voice to govern our own affairs, and to take our rightful place in truly applying the talent, knowledge and opportunities in our homeland that will enrich the lives of all in Hawaii.

Senator AKAKA. Thank you very much, President Robin Danner, and thanks to all of you.

I would like to first call on our senior Senator for any comments.

Senator INOUYE. Mr. Chairman, I have just received notice that pending will be an amendment that will have a profound impact upon the Committee which I am honored to chair, the Appropriations Committee. Therefore I will have to leave the chamber. I want to express my regrets to all of you.

I hope I may be permitted to submit questions. I will prepare them and submit them to you. Would that be okay?

If you will excuse me, aloha to all.

Senator AKAKA. Senator Inouye, we look forward and we will certainly include your statements and questions in the record.

Chairman Apoliona, as you are aware, there were conditions by which Hawaii was admitted into the Union that related to the State adopting the Hawaiian Homes Commission Act and utilizing public lands for one of five purposes, including addressing the conditions on Native Hawaiians. My question to you is, how does enactment of S. 1011 affect the current efforts of the State of Hawaii in its treatment of Native Hawaiians?

Ms. APOLIONA. It would seem to me that enactment of Senate Bill 1011 would enhance the current and future position of Native Hawaiians as defined under the Admissions Act, and be even more inclusive of, as was stated by a couple of the testifiers, inclusive of Native Hawaiians as a people, as a unified people, moving toward the creation of this Native Hawaiian governing entity.

If I recall, back when, in some of the Congressional records and the discussion that went on when delegate to Congress, Kuhio Kalaniana'ole, fought so hard for the Hawaiian Homes Commission Act, he was really after opening the benefits of the Act that he had in mind, as Chairman Kane says, to rehabilitate the Hawaiian community. His goal was for the broadest opportunity to serve his Hawaiian people.

So I think this S. 1011 will be a return to that philosophy of engaging the most inclusive and strongest participation by Native Hawaiians for the future.

Senator AKAKA. Thank you for that response. I know you were here at the lei draping of King Kamehameha in June.

Ms. APOLIONA. Yes.

Senator AKAKA. For anyone that might question whether or not the Native Hawaiian culture exists in Hawaii, as well as throughout the Country, for this momentous occasion in June, in our Nation's capital, does the Native Hawaiian culture still exist?

Ms. APOLIONA. Absolutely, Senator Akaka. And I think Chairman Kane, in previous testimonies, has said that even those who

are not Native Hawaiian of the blood have become part and beneficiaries of Native Hawaiian culture.

Senator AKAKA. Can you share some of the events, activities that were significant, the types of activities?

Ms. APOLIONA. Absolutely. Certainly the demonstration of, at Emancipation Hall, the demonstration of oli, our mother tongue, our chants, our hula, in celebration and in honor of our historic leader, indigenous leader, Kamehameha, and celebration of those indigenous leaders that followed him.

But certainly Kamehameha the Great, whose statue is in Emancipation Hall under that skylight, sits for the next decade and beyond for Native Hawaiians a prominent place for now our Kamehameha the Great, the indigenous leader who united in one governance Native Hawaiians back in the late 1800s, now this effort to continue a united governance for Native Hawaiians in the 21st century seems to me to be a continuation of this intended leadership to support, enhance and bring, continue to being well-being to his Native people.

Senator AKAKA. Mahalo. Thank you for your responses.

Chairman Kane, the purpose of establishing the Hawaiian Homes Commission Act, as you know, was to rehabilitate Native Hawaiians by returning them to the land. Questions have been raised whether or not a distinct Native Hawaiian community exists in Hawaii. Do you have any comments for the Committee to consider on this issue?

Mr. KANE. Yes, I would. Thank you, Senator, to be able to comment on this question.

Without question, we do have distinct Hawaiian communities. My comments that I alluded to in my testimony were to express really what we believe will solidify the future prosperity of our State, which is the sharing of our culture with others.

So while we have distinct communities, we embrace others. The further our success is in that effort, the better off we will be as a State. Our prosperity as a State lies in our ability to assure our culture exists in these lands forever. Otherwise, it is just a pretty place. This bill allows us to do that.

Senator AKAKA. As you know, Mr. Kane, the cost of living in Hawaii is much higher in comparison to other States. Hawaii's housing costs are among the highest in the Country, and homelessness is at a record level. What role would you say homestead leases have on the ability of Native Hawaiians to continue to reside in Hawaii, rather than to seek employment or housing elsewhere? Also, is it uncommon for individuals who have lived outside of Hawaii for a number of years that are awarded homestead leases to return to Hawaii despite the high costs of living?

Mr. KANE. We are seeing a tremendous amount of people returning to Hawaii as a result of the acceleration that has occurred over the past few years. People coming home and being a part of the communities that they left because of the economic and housing challenges that existed in our State.

I think some of the testimony we heard from Ms. Danner is a commentary that tells you how important our homestead program is to our people and the role that it is playing. I think in Hawaii, one of the misconceptions is that when a person gets into a home,

that is the end point. For us, that is just the beginning. Home ownership is the beginning for somebody to launch their lives off to a much better place. It is not an end point.

The authority that you are giving us as an entity, the Department of Hawaiian Home Lands, to do that, is a tremendous authority, a tremendous resource that we are providing our people. We are seeing Hawaiians today serving in leadership positions that we may not see other natives serve in other States. And in our cabinet alone, we have four Native Hawaiians who serve. Our previous chief of staff was a Native Hawaiian. Our Lieutenant Governor is a Native Hawaiian. Our Senator is a Native Hawaiian.

And I think all of that is in part due to the Hawaiian Homes Commission Act.

Senator AKAKA. Can you describe, Mr. Kane, the kind of relationship Hawaiian Homestead communities have with neighboring communities and businesses, especially given the regional planning that occurs?

Mr. KANE. The Department of Hawaiian Home Lands is operating in 20 regions throughout the State of Hawaii. In each of those regions, DHHL is only a portion of the land ownership there. However, in those regions, we partner in all infrastructure improvements: roads, water, sewer and public facility needs. That allows us to do a few things. It allows us to focus our resources and have better uses of our resources.

From a cultural standpoint, it allows us to share in those things that we feel are important, to see non-Hawaiians sharing in our language and actually speaking in our language. It allows us to be much more efficient in the efforts that we are undertaking.

We utilize licenses of agreements, memoranda of agreement with our counties, land use decisions are made in coordination with both State land use policy as well as county land use policies. When we build, we designate zoning and we build to that county's zoning standards. And we create memoranda of agreements to guide the maintenance of those utilities going forward.

So a lot of the issues that people have raised over the years with regard to some of the concerns of how our entities would interface with other government agencies are already in practice today, and those things are happening within the Department of Hawaiian Home Lands today.

Senator AKAKA. Thank you.

Mr. Bartolomucci, does this bill create a race-based government? You did have a statement on that.

Mr. BARTOLOMUCCI. It creates a governing entity for Native Hawaiians. In terms of the legal issue presented by that, the Supreme Court case law is very clear that the Congress may deal with indigenous, sovereign groups and their governing structures on a government-to-government basis. That is not to be considered race-based legislation that would otherwise run afoul of constitutional restrictions on race-based action.

So the ability of the Congress to deal with Indian tribes and governing structures of other Native peoples is well established and does not run afoul of equal protection principles.

Senator AKAKA. How do you think this bill affects personal property, social services and citizens' rights?

Mr. BARTOLOMUCCI. I don't believe it would diminish anyone's rights in those regards. The bill does require the governing entity to include protections for civil rights. But of course, the members of the governing entity would always remain United States citizens and retain all of the rights of U.S. citizens.

Senator AKAKA. Upon enactment of S. 1011, would Native Hawaiians be subject to the laws of the United States? And can you explain, is the status quo maintained?

Mr. BARTOLOMUCCI. The members of the governing entity would absolutely be subject to the laws of the United States. Indian tribes and other Native governing structures are not above the law or not above Federal law and remain subject to Federal law, which remains the supreme law of the land.

Senator AKAKA. Thank you for your responses.

President Danner, there is a misconception that enacting S. 1011 will only benefit Native Hawaiians. As a grassroots member-based organization, focused on improving community development, can you explain how Federal recognition helps address community, Native and non-Native, needs?

Ms. DANNER. Thank you for the question, Senator.

I agree with Chairman Kane when he says that the advancement of Native Hawaiians in Hawaii raises the standard of living, the quality of life, of all citizens of our State. The misconception that Senate Bill 1011 would serve only Native Hawaiians is false, just as in the 35 States, 36 States where federally-recognized Native governments around the rest of the Country are impacting in a very positive way their respective States.

I will give an example, in Hawaii, it started about 10 years ago, some of our grassroots communities were very concerned about education and putting forward solutions in the arena of education and making sure that the knowledge of our ancestors was properly and also taught along with the academia of reading, writing, but also sharing the sciences of our astronomy and such. Now, 10 years later, that charter school movement, Native Hawaiian-focused charter schools, are enriching the educational system across the State for all communities, whether a Native child or a non-Native child. It is truly one of the bright spots of local education and what happens when communities are empowered to take the resources and the identities of their place on the planet into communities to advance solutions to challenges facing them.

Senator AKAKA. In your testimony you mentioned that you are presently a homesteader on Hawaiian home lands. You also lived in American Indian and also Alaska Native communities as well. What impact on these communities has the policy of Federal recognition had? How has the government-to-government relationship unified and supported working relationships between Natives and non-Natives in the States where you have resided?

Ms. DANNER. That is a great question. There are stark contrasts. Clarity, for one. In those locations where there is a government-to-government relationship, there is clarity not only for the Native community but for the community outside. There is clarity of where to go and where issues can be dealt with. There is a representative body, a clear representative body that is longstanding and can be engaged, and there is a process, a known process.

Another is that Federal recognition has brought to other indigenous peoples a focal point, really a way to have the great debate about the challenges of the day. And what cultural norms, customs, can be codified within that Native community and applied as a solution.

For example, child foster care. We have witnessed Native governments being able to support and assist State governments that have not done so well in terms of reunification with children with families. But yet when a Native government is present and able to apply solutions for that family, we have seen a rise in reunification of Native children with an extended family. That would be one example.

And finally, I would say my last example would be, you can clearly see centralized programming and dialogue and partnerships more easily integrated and executed out into the community when Federal recognition is a known quantity and the community knows what their representative body is.

Senator AKAKA. Ms. Danner, you served as an original member of the Native Hawaiian task force, one of the five task forces established to contribute to the initial drafting of this legislation. Can you share with the Committee who the other task forces were and how the bill benefited from the contributions and expertise of the other task forces?

Ms. DANNER. Yes, Senator. After the Clinton Administration Department of Justice and Department of Interior in 1999 came out for the reconciliation hearings and spent an inordinate amount of time, went all around the State speaking with our communities, in 2000 there were five working groups or task forces appointed by our Hawaii delegation and chaired by you, Senator.

Those task forces, we had a Congressional working group of Congressional representatives. We had a working group of Federal officials from across the different agencies in the Federal Government that worked with Native programs. We had a State government officials working group that we were able to integrate and discuss and look at the angle of State agencies. We had a constitutional scholars working group from all around the Country taking a look at the constitutionality and learning, frankly, from the previous eras of Federal Indian policy.

And the fifth working group was a Native Hawaiian community leaders working group with individuals with diverse backgrounds from all across the State, from various areas of expertise. It was a very intense and rewarding process to be able to be having a very in-depth dialogue, multi-faceted conversation about getting results and what would work and what would work best, not just for the Native Hawaiian community but for our State.

Senator AKAKA. Thank you. When I think back to the five task forces, it really helped us craft the bill. And as I mentioned in my testimony, all of this too began with the Mauka-Makai study that was made and the report that was written. So we have progressed from that beginning to where we are today. All these years, I think the core goals that we have set are still prominent and good for the future of Native Hawaiians. So we really appreciate the contributions that all of you and the panel have made. We certainly appreciate that.

I just wanted to ask Mr. Gunn a question. Can Native Hawaiians be treated as other Native Americans by Congress under the Indian Affairs power?

Mr. GUNN. Thank you, Senator Akaka.

I think the answer is a definitive yes. As Professor Benjamin noted, there is no definition of Indian or Indian tribe in the Constitution. The Constitution does use both of those terms. It references in the Commerce Clause Indian tribes and then in the Apportionment Clause and then again in the 14th Amendment, it speaks of Indians.

In regard to the term Indian Tribe, it has been used synonymously or interchangeably with the term Indian Nation. Hamilton in Federalist 24 talked about regulating trade with Indian tribes and spoke of them as Indian nations. And *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.

Native Hawaiians are clearly a nation, both prior to and after contact with Europeans, the United States in fact entered four treaties with the Native Hawaiian nation. So clearly, Native Hawaiians are a nation of Native people.

The term Indian has been used interchangeably with the term aboriginal. 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.

The Constitution, of course, was written, ratified, I should say, in 1789 when there were 13 colonies. But it has been applied and those terms, Indian tribes and Indians, have been applied to Native peoples beyond the original 13 colonies. And just as Natives in States and territories beyond the original 13 colonies, including Alaska Natives, have been included in the definition of Indian, so too should Native Hawaiians.

Senator AKAKA. Is it significant that the United States minister and naval forces participated in the overthrow?

Mr. GUNN. I think so, Senator, in that the United States was involved in the course of events that undermined or led to the overthrow of the Native Hawaiian kingdom. The United States has apologized for that. It has in the 100 years and even the many years between the overthrow and the Apology Resolution, and the years since the Apology Resolution, maintained a steadfast commitment to the welfare and betterment of Native Hawaiian people. It wasn't long after the overthrow that the United States passed the Hawaiian Homes Commission Act, and then reaffirmed the promise of bettering the lives of Native Hawaiians 50 years ago, in the 1959 State Admissions Act.

It is only fitting now, in the 50th anniversary of Hawaiian statehood that Congress and the United States take the next step toward bettering the lives of Native Hawaiians by reorganizing the

Native Hawaiian government that was overthrown with United States involvement.

Senator AKAKA. So just to make that point again, most scholars agree that the Hawaiian Homes Commission Act and the State Admissions Act are constitutional. Do you agree?

Mr. GUNN. I do, Senator. I absolutely agree. I would agree with the statements that have been made before me that the United States has authority to legislate in behalf of Native peoples. That derives from the Constitution.

In the written comments that I have submitted, I address the issue of whether Congress is constrained or limited by principles of equal protection when it legislates in behalf of Native people. And I would like to just address that briefly.

The equal protection principle in the U.S. Constitution finds its birthplace in the 14th Amendment, which of course was one of three amendments ending slavery and guaranteeing the right of citizenship and the vote to freed African American slaves. The 14th Amendment contains the equal protection clause, the 5th Amendment Due Process clause has what is called an equal protection component.

But the 14th Amendment spoke specifically of Native Americans. In Section 2, American Indians are excluded from apportionment of representatives in the House, and Indians not taxed are excluded. And in Section 1, it is quite clear that Indians are not included as citizens of the United States because only persons born in the United States and subject to the jurisdiction of the United States were to be included as citizens. That quite clearly at the time did not include Indians. The legislative history is clear, and the Supreme Court made that clear just a few years later in *Elk v. Wilkins.*

I mention this because the birthplace in our Constitution of the doctrine of equal protection is also, it is the 14th Amendment, and that is also an amendment that affirms that Native peoples are separate. They are separate, they were not citizens of the United States, they had their own governments, and they still do, to which they owed allegiance. And the United States had a history of enacting treaties with and legislation for Indian people. By repeating that phrase, Indians not taxed, which was used in the original Constitution, Congress and the United States ratified that policy of treating Indians as members of separate nations and considering them as distinct.

So when Congress passed the Hawaiian Homes Commission Act and the Statehood Act, it was doing what it was constitutionally permitted to do, which is, treat natives as citizens of their own distinct, separate nations.

I will note that even if one were to say that principles of equal protection were to apply, applied against the Federal Government by virtue of the 5th Amendment, I would suggest that the Hawaiian Homes Commission Act is clearly constitutional, because it fulfilled a compelling government interest, and it was narrowly tailored to achieve that purpose. The same with the Admission Act.

Senator AKAKA. Let me ask, is there a precedent for the Native Hawaiian definition using one-half Hawaiian blood in lineal descendants?

Mr. GUNN. In the Indian Reorganization Act of 1934, the definition of Indian included any member of a federally-recognized tribe or Indians of one-half blood quantum. So there is a precedent for the use of blood quantum.

I would just concur with the views of others before me that although Congress has used blood quantum in the past, and although it may use it in this piece of legislation to set the outer boundaries of tribal membership, tribes have, and ought to continue to have the ability to define their own membership further. And the Native Hawaiian governing entity created by S. 1011 should be permitted to set its own standards including any standard based on close connection to the Native Hawaiian community, as suggested by Professor Benjamin.

Senator AKAKA. Just as an interest here, how does S. 1011 compare to the Indian Reorganization Act?

Mr. GUNN. It is similar in some respects and dissimilar in others. The similarities include allowing Native nations to reorganize and to form constitutional governments with full Federal recognition. And in the case of the Indian Reorganization Act, of course, it followed a long period of allotment and assimilation of Indian lands in the continental 48. And that period of allotment and assimilation, which started in 1887, was terribly destructive to Native governments, Native political organizations and Native communities. The Reorganization Act took, damaged Indian communities and allowed them to reorganize their Native forms of government.

S. 1011 does the same thing for Native Hawaiians, Native Hawaiians who have seen their Native form of government damaged by the history of events including the Federal Government's involvement. But Native Hawaiians have not lost their distinct culture or their existence as a distinct community. And just as were tribes in the lower 48 allowed to reorganize in 1934, so too will the Native Hawaiian people.

S. 1011 is distinct from the Indian Reorganization Act in that it does allow for a continued negotiation process with the State and Federal governments to define the scope of Native powers, whereas under the IRA, Native governments were vested with all powers of Native governments under then-existing Federal law. For the Native Hawaiians, they will, as the legislation is currently drafted, they will be required to negotiate further with the Federal and State governments before they can acquire all of the inherent powers of Native governments. The CNHA has submitted comments suggesting some revisions to that provision of the legislation, and we are available to discuss those with the Senator.

Senator AKAKA. Let me ask my final question to you. Do you believe that S. 1011 is constitutional?

Mr. GUNN. Absolutely. I think for the reasons I said before, Congress has the power to treat with and enact legislation for American Indians that is not fettered by the principle of equal protection. The Constitution did not include American Indians within the American democracy. They had their own democracies. They were members of distinct nations. They were not counted for apportioning representatives.

The U.S. made treaties with them that regulated commerce with them. But they were members of their own democracies. And that

policy was continued in the 14th Amendment, the very birthplace in our constitution of the principle of equal protection. So by putting that policy of separatism in the very same amendment that finds the birthplace of equal protection, the United States was saying, we will continue to treat Indians as members of separate nations and to treat with them and to legislative for their betterment. And doing so would not violate principles of equal protection.

So yes, there is certainly no equal protection bar, in my view, to S. 1011. And in terms of whether Native Hawaiians are distinct enough an Indian group to recognize them, whether they constitute a tribe under the Constitution, I think the answer there is also clear, and that is in the affirmative.

Senator AKAKA. Thank you very much for your responses.

I would like to conclude the questions by giving each of you on the panel a chance to make any further comments about the bill or even comments referring to other parts of the testimonies that have been given here. So let me just ask each of you for any further comments. We will start in order.

Ms. APOLIONA. Well, we can go reverse order, Senator, that is fine.

[Laughter.]

Ms. APOLIONA. Because then I will end. Go ahead, Robin. Do you want to start?

Ms. DANNER. I guess my closing remark would be that it has been a 10-year journey. I would like to thank the Senate Committee on Indian Affairs for over the years continuing to move this legislation forward under its jurisdiction. I would like to thank you, Senator Akaka, for moving it. As I started my testimony in the beginning, this is likely, from a community-based organization perspective, likely the single most important public policy piece of legislation for Hawaiians today and for generations to come.

So thank you very much, and I would like to pass to Christopher.

Senator AKAKA. Mr. Bartolomucci.

Mr. BARTOLOMUCCI. Just to elaborate on something I addressed in my opening statement about the definition of the term Native Hawaiian in the bill. To be clear, this bill does not establish the definition of Native Hawaiian that will limit who may be a member of the Native Hawaiian tribe, if you will. It will be up to the Native Hawaiian people to decide what the membership criteria are and who qualifies for membership in the tribe.

This bill simply sets in process, sets in motion the process of getting to that point. So there must be an initial definition, a broad initial definition to determine who may participate in creating the criteria for the interim governing council and vote for that council, which will in turn establish organic documents and permit elections for future leadership.

So the initial definition is broad, but that is clearly by design, it is meant to be inclusive. But it doesn't dictate the criteria for membership ultimately in the tribe of Native Hawaiians. I think that is important to keep in mind in assessing a possible objection that the definition is too broad.

Thank you, Mr. Chairman.

Thank you.

Chairman Kane.

Mr. KANE. Senator Akaka, I would like to just take my time to thank you for the support you have given us to bring this issue to this Committee. I would like to also extend that gratitude to Senator Inouye as well as Senator Murkowski, who has been a longstanding supporter with us in this effort.

And also I want to thank the members of this panel, because it clarified even for myself more clearly how this is not only right, but it is righteous. And while this has been a long journey for us, I think we said close to 10 years now, I think we are at a point where it is pono, it is right. I look forward to continuing this dialogue in a very expeditious and good way.

Mahalo.

Senator AKAKA. Mahalo. Thank you.

Professor Benjamin.

Mr. BENJAMIN. Many things I could say, I would just pick up on one point about the definition. As I noted in my testimony, of course this is just the definition of who gets to decide. The question is, do you want to leave open that group of who gets to decide to the possibility that it is this very, very broad, somewhat inchoate group that would include people from all 50 States?

My suggestion would be that leaving it open to that group raises the greater possibility of a challenge that the group that has been included does not meaningfully constitute a tribe. The way to eliminate that is to have a narrower definition as to who gets to be included in the first place.

Senator AKAKA. Thank you, Professor.

Chairman Apoliona?

Ms. APOLIONA. [Phrase in native tongue.] Senator, 116 years ago, our Native Hawaiian government was ended. And I come today and have come today as one of the nine voices of the board of trustees speaking to what we believe to be our mission as the Office of Hawaiian Affairs to help to make right that past history.

I see our role as bringing some correction, bringing some restoration to the government that was overthrown illegally as our Apology Bill has stated.

As one of the nine voices of trustees of the Office of Hawaiian Affairs, we through our fiduciary and constitutional mandate firmly believe that S. 1011, H.R. 2314 must move forward. Because it provides, as I said, some opportunity to make the future better, to try to correct the past. The past is the past, much we cannot return to, but we can certainly learn from. As leaders move forward for the future, looking to unify our Hawaiian community for the greater well-being for the next generations to come, it is critical.

So we thank you, Senator Akaka, and of course, Senator Inouye, our delegation, our representatives as well from the House, and all those Congressional leaders who have, who continue and who will support the passage of our Native Hawaiian Government Reorganization Act. With that passage, tremendous work will need to begin in organizing our community of Native Hawaiians in Hawaii and away from our shores. Because we have great Hawaiian leaders, even here on the East Coast, with the Hawaiian Civic Clubs.

I thank you again for your kokua, your support, and your tenacity. Aloha.

Senator AKAKA. Aloha, and mahalo nui loa to all. Thank you very much.

I want to thank all the witnesses for your testimony, especially those who have traveled to join us here today.

In closing, the spirit of aloha and the spirit of love and compassion is the legacy of the Native Hawaiian people. It is a way of life for Native Hawaiians. Despite being marginalized and disenfranchised in their own homeland, it is a value they continue to share. Despite such challenges to their culture and cherished institutions, the Native Hawaiian people have endured.

It is time Congress and our Nation take the next step with them in honoring their resilience and bring about meaningful healing through the enactment of S. 1011.

My colleagues and I may wish to submit questions to our witnesses in response to your testimony provided today. For those not present to testify, the hearing record will be open until August 21st, 2009.

So mahalo nui loa, thank you very much. This hearing is adjourned.

[Whereupon, at 4:50 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. TOM A. COBURN, MD, U.S. SENATOR FROM OKLAHOMA

Chairman Dorgan, Dr. Barrasso, I want to thank you for this opportunity to express my opposition to S. 1011, the Native Hawaiian Reorganization Act of 2009, which was recently agreed to by the Committee.

I appreciate the Committee's support for my amendment to S. 1703. However, I regret that I was unable to stay for the remainder of the Committee Business Meeting when S. 1011 was considered due to other responsibilities. Had I been able to stay, I would have made clear my firm opposition to this bill.

Recognizing Native Hawaiians as an Indian tribe and sovereign entity without participating in the standard federal recognition process sets a dangerous precedent, threatens the framework of our nation, and, above all, is unconstitutional.

While S. 1011 was passed in my absence and was considered unanimous by some, I ask that the record clearly reflect my full and firm opposition to S. 1011.

As my colleagues on this committee know, this bill has been around for some time. While it has appeared in various forms, and been amended on several occasions, I do not believe it will ever meet the one test that matters most—Is it constitutional?

I have many concerns with this bill, and will address those concerns in documents I will officially submit for the record; however, I would like to focus my many comments today on the constitutional question that underpins this entire effort

Is the bill Constitutional?

Section 2 of this bill reads: "Congress finds that—(1) the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States;"

Section 4 reads, in part: "Congress possesses the authority under the Constitution, including but not limited to *Article I, section 8, clause 3,* to enact legislation to address the conditions of Native Hawaiians."

Since it is the only provision of our Constitution specifically mentioned in the bill, I think it is important we all read Article I, Section 8, Clause 3: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*;"

In other words, this entire bill rests upon the ability of Congress to regulate commerce with *Indian* tribes.

Supporters of this bill will argue that "Indian tribes" also refers to "indigenous peoples." I adamantly disagree with that interpretation, and while each individual member will have to decide this issue based on their reading of the Constitution and their Oath, I believe the historical record is clear.

I intend to submit for the record volumes of information I think will make this point clear. In the meantime, we should examine the words and statements of the bill's most ardent supporters on this essential question:

In 1998, the State of Hawaii (now one of the strongest supporters of the bill—expending considerable resources) had this to say in a brief before the US Supreme Court: "*the tribal concept simply has no place in the context of Hawaiian history.*" [1]

Senator Inouye—one of the most respected men to ever serve on the Indian Affairs committee—had this to say: "*Because the Native Hawaiian government is not an Indian tribe,* the body of Federal Indian law that would otherwise customarily apply when the United States extends Federal recognition to an Indian tribal group does not apply."

Senator Inouye went on to say: ". . . That is why concerns which are premised on the manner in which Federal Indian law provides for the respective govern-

[1] Brief in Opposition to Petition for Writ of Certiorari at p 18, *Rice v. Cayetano,* 528 US 495 (2000).

mental authorities of the state governments and *Indian tribal governments simply don't apply in Hawaii.*"[2]

In other words, the very foundation on which this bill is based—Congress' ability to regulate commerce among Indian tribes—is highly questionable.

On the one hand, the authors of this bill claims that Native Hawaiians are an "Indian tribe" as a basis for Constitutional authority, and on the other hand, claim it is in fact NOT an "Indian tribe" for purposes of Indian law.

If the statements of the bill's supporters are accurate, it is not even clear whether our committee has proper jurisdiction to review this bill.

There simply is no comparison to Indian tribes, or even to Alaska Native Corporations.

This bill does not restore "tribal status" where it once existed; It creates an entirely new government based solely on race. The Kingdom of Hawaii was a diverse society and government (much like the state today). The new "tribe" will not reflect that tradition and will create a government just for those deemed "indigenous."

Unlike the many Indian tribes in my state whose governments were subsequently terminated, no such history exists for a Native Hawaiian entity.

American Indians were not even formally given full citizenship until 1924.[3] In contrast, Native Hawaiians became citizens of this country in 1900, *twenty four years earlier.*[4] Native Hawaiians took part in the referendum that brought Hawaii into the Union as a state, and as one government.

In Oklahoma, and even in Alaska, there were distinct tribal populations with existing governments at the time of statehood. That was not the case in Hawaii. In Alaska, distinct tribal communities existed at the time of statehood and were addressed in that state's organic documents. Again, that is not the case in Hawaii.

What is the solution?

If the Native Hawaiians are entitled to sovereign tribal government status, as this bill presupposes, the solution is quite simple.

As my colleagues on this committee know well, the Federal Government already has in place an established and rigorous seven step process for recognition of tribal governments. This review is handled by the Office of Federal Acknowledgement (OFA).

This process is applied evenly to all who apply, and takes politics out of the equation.

This Committee should take the supporters of Native Hawaiian governmental recognition at their word. If they are indeed a tribal government with historic ties to the Federal Government, and who has continued to exercise continuous governmental authority after a any termination, a Native Hawaiian entity should submit an application to OFA.

The Legislative Process

It is my hope the Committee will hold additional hearings to hear the concerns of the bill's opponents. While I mean no disrespect to the panel before us today, it is clear that most strongly favor the creation of a separate Native Hawaiian government.

In contrast there are dozens of senators, including me, who believe this bill is a violation of our oath to the Constitution and a major affront to the Indian tribes in our states who have labored to regain their rightful recognition.

The road ahead for this bill will not be an easy one. I, along with many of our colleagues, will never give consent to moving forward on this bill.

If, as rumored, an attempt is made to attach this bill to an appropriations bill in the future, again many of us will vigorously fight to defeat it.

I look forward to our continued conversation on this bill, and thank the Chairman and Dr. Barrasso for their willingness to consider my very serious concerns.

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[2] Inouye, Senator Daniel, "Statement on Introduced Bills and Resolutions." January 25, 2005.
[3] *http://memory.loc.gov/ammem/today/jun02.html*
[4] *http://www.capitol.hawaii.gov/hrscurrent/Vol01*__Ch0001-0042F/03-ORG/ORG__0004.HTM

PREPARED STATEMENT OF STEVEN JOSEPH GUNN, ATTORNEY AND ADJUNCT PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of the Committee, thank you for the opportunity to appear before you today regarding S. 1011, the Native Hawaiian Government Reorganization Act of 2009. I represent the Council for Native Hawaiian Advancement ("CNHA"), an organization founded to unify Native Hawaiian groups and organizations to promote the cultural, economic, and community development of Native Hawaiians. I submit these comments on behalf of the CNHA and its President and Chief Executive Officer, Robin Puanani Danner.

INTRODUCTION

My comments focus on two subjects: first, the constitutional authority of the Federal government to enact legislation for the betterment of Native Americans; and second, the authority of the Federal government to enact legislation recognizing the Native Hawaiian people as a distinct, native nation.

My comments on the first subject focus on the interplay between the Indian affairs powers in the United States Constitution and the principle of equal protection, as embodied in the Equal Protection Component of the Due Process Clause of the Fifth Amendment and as articulated expressly in the Equal Protection Clause of the Fourteenth Amendment. I suggest that the Federal government's power to enact legislation directed at Native Americans, such as S. 1011, is rooted in the Constitution, as ratified in 1789, and in the Fourteenth Amendment itself, which was ratified in 1868. This power stands apart from, and does not violate, the principle of equal protection.

In respect to the second subject, I consider the question of whether the Native Hawaiian people fall within the meaning of the terms "Indians" and "Indian tribes," as used in the United States Constitution, such that S. 1011, which allows for the reorganization of the Native Hawaiians as a federally recognized Indian tribe, is a constitutional exercise of Congress' Indian affairs power. I suggest that the Native Hawaiians constitute an Indian tribe—a distinct, aboriginal polity whose national character has been recognized by the United States. I further suggest that S. 1011 is constitutional.

I. NATIVE AMERICANS AND THE UNITED STATES CONSTITUTION.

A. Federal Policy before Adoption of the Constitution.

Before the arrival of Christopher Columbus in the Americas, Indian tribes were sovereign, independent nations. From its first days, the United States recognized Indian tribes as the original American sovereigns. In 1775, the Continental Congress resolved that, "securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment" to the colonies.[1] The congress appointed various departments to "treat with the Indians ... to preserve peace and friendship."[2] Benjamin Franklin, Patrick Henry, and James Madison were elected commissioners of one such department.[3]

In the Treaty with the Delawares of 1778, the United States and Delawares agreed to maintain, pledged mutual assistance in just wars, and made arrangements for trade and the trial of criminals between the two nations.[4] The United States also agreed to "guaranty to the ... nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties."[5] The Supreme Court described this treaty as being formed, "in its language, and in its provisions ... as near as may be, on the model of treaties between the crowned heads of Europe."[6]

The United States would go on to form eight more Indian treaties under the Articles of Confederation.[7] Through these treaties, the United States recognized Indian tribes as sovereigns. Among other things, the treaties: established diplomatic, government-to-government relationships between the United States and the Indian

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[1] J. Continental Cong. 175, 183 (1775).

[2] *Id.*

[3] *Id.*

[4] Treaty with Delawares, 1778, arts. 1-5, 7 Stat. 13 (Sept. 17, 1778). *See also Worcester v. Georgia*, 31 U.S. 515, 549-550 (1832) (discussing the treaty).

[5] Treaty with Delawares, 1778, art. 6.

[6] *Worcester*, 515 U.S. at 550.

[7] *See* Treaty at Fort Stanwix with the Six Nations of the Iroquois Confederacy, 1784, 7 Stat. 15 (Oct. 22, 1784); Treaty with the Wyandot, etc., 1785, 7 Stat. 16 (Jan. 21, 1785); Treaty of Hopewell with the Cherokee, 1785, 7 Stat. 18 (Nov. 28, 1785); Treaty with the Chocktaw, 1786, 7 Stat. 21 (Jan. 3, 1786); Treaty with the Chickasaw, 1786, 7 Stat. 24 (Jan. 10, 1786); Treaty with the Shawnee, 1786, 7 Stat. 26 (Jan. 31, 1786); Treaty with the Wyandot, etc., 1789, 7 Stat. 28 (Jan. 9, 1789); Treaty with the Six Nations, 1789, 7 Stat. 33 (Jan. 9, 1789). (The United States Constitution went into effect on March 3, 1789.)

tribes; created military alliances; promised perpetual peace; created permanent homelands for Indian tribes and promised protection of Indian lands from non-Indian incursions.[8]

In the Northwest Ordinance of 1787, the United States promised perpetual peace with Indian nations and further promised to protect Indian lands from non-Indian incursions. The Ordinance provided that:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them ...[9]

The United States Congress affirmed the Northwest Ordinance on August 7, 1789, after ratification of the Constitution.[10]

Thus, as can be seen, Federal Indian policy before adoption of the Constitution was marked by nation-to-nation diplomacy. It emphasized the formation of alliances and guarantees of peace and protection. To be sure, the United States had exacted from the Indians cessions of land, but it promised in return protection of the Indians' remaining territory.[11]

B. Native Americans in the Original Constitution.

The United States Constitution, which went into effect on March 3, 1789, recognizes the government-to-government relationship between the United States and Indian tribes. It does so in several ways.

1. The Treaty Making Clause.

The Treaty Making Clause provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the

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[8] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (hereafter "COHEN'S HANDBOOK") § 1.02[3] (2005) (discussing 1784 Treaty at Fort Stanwix with the Six Nations of the Iroquois Confederacy); *Worcester*, 31 U.S. at 551-554 (discussing 1785 Treaty of Hopewell with the Cherokee Nation).

[9] Northwest Ordinance of 1787, art. III.

[10] *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The United States Constitution may be read *in pari materia* with the Northwest Ordinance. The Northwest Ordinance of 1787 "was enacted contemporaneously with the drafting of the Constitution and reenacted by the First Congress." *City of Boerne v. Flores*, 521 U.S. 507, 554 (1997) (O'Connor, J., joined by Breyer, J., dissenting). "The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights." *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

[11] *See generally* COHEN'S HANDBOOK § 1.02[3] (2005).

Senators present concur."[12] This clause affirmed the longstanding practice on the part of the Federal government of enacting treaties with Indian nations. Prior to the ratification of the Constitution, the United States had entered into (and ratified) six international treaties[13] and nine Indian treaties. Thus, the Treaty Clause was at least as much about Indian treaties as it was about international treaties. Indeed, Indian treaties later enacted under authority of the Constitution were "similar in many respects to international treaties."[14]

2. The Supremacy Clause.

The Supremacy Clause ratified the early Indian treaties. It provides that "all treaties made, and which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[15] By ratifying the "treaties made" with Indian tribes, the Constitution acknowledged Indian tribes as sovereign nations with a treaty protected right to self-government and territorial integrity.

The Constitution invests Indian treaties with equal dignity to foreign treaties. In *Worcester v. Georgia*, Chief Justice John Marshall explained:

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[16]

3. The War Powers Clause.

The War Powers Clause provides that Congress shall have the power to declare war.[17] Implicitly included within the power to declare war is the power to declare an end to warfare and to make peace.

The War Powers Clause certainly implicated Indians. The first Congress placed Indian affairs within the Department of War.[18] That would remain unchanged until 1849 when the Department of Interior was created and the Secretary of the Interior was given authority over Indian affairs.[19]

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[12] U.S. Const., art. I, § 2, cl. 2.

[13] Treaty of Amity and Commerce with France, Feb. 6, 1778; Treat of Alliance with France, Feb. 6, 1778; Act Separate and Secret with France, Feb. 6, 1778; Paris Peace Treaty, Sept. 30, 1783; Treaty of Amity and Commerce with Prussia, Sept. 10, 1785; and Treaty of Peace and Friendship with Morocco, June 28 & July 15, 1786. A seventh international treaty, the Jay-Gardoqui Treaty with Spain, was negotiated and signed under the Articles of Confederation, but it was not ratified.

[14] COHEN'S HANDBOOK § 1.03[1] (collecting examples).

[15] U.S. Const., art. VI, cl. 2.

[16] 31 U.S. at 559-560.

[17] U.S. Const., art. I, § 8, cl. 11.

[18] Act of Aug. 7, 1789, 1 Stat. 49 (1789).

[19] Act of Mar. 3, 1849, 9 Stat. 395 (1849).

4. The Commerce Clause.

In the Commerce Clause, Congress is granted authority to regulate commerce "with the foreign Nations, among the several States, and with the Indian Tribes,"[20] thereby affirming the recognition of Indian tribes as governments and granting Congress authority to legislate concerning Indian tribes.

5. The Apportionment Clause.

In the Apportionment Clause, "Indians not taxed" were not counted for purposes of apportioning Representatives in the House.[21] The Apportionment Clause confirms the status of Indians as citizens of distinct sovereigns. Indians were not citizens of the United States. They did not enjoy the same privileges and immunities as U.S. citizens. They were not counted for apportionment of Representatives in Congress. They could not vote.

6. Summary.

Under the Constitution, Indian governments were distinct sovereigns. They were not subject to the Constitution or the Bill of Rights. They enacted treaties with the United States and often accepted the protection of the United States. They were often the beneficiaries of Federal legislation aimed at improving their condition. But, they were not a part of the Federal system of government created by the Constitution.

By vesting in the national government the power to make treaties and regulate commerce with the Indian nations, the Founders affirmed the longstanding policies of the European nations, the colonies, and the United States under the Articles of Confederation. Those policies treated Indian nations as distinct sovereigns and Indian people as citizens of those distinct sovereigns. Indian people had their own ways of life and they wanted to preserve those ways of life after the arrival of Europeans on this continent. They negotiated for the right of self-government and territorial integrity. The Constitution recognized and accommodated the independence of Indian nations.

C. Federal Policy in the Nation's First 80 Years.

For the first 80 years of the nation's history, Indian nations were regarded as distinct. In *Worcester v. Georgia*, the Supreme Court described American Indians as "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[22]

The United States recognized the national character of Indian tribes, emphasizing the negotiation of treaties. In the 1795 Treaty of Friendship, Limits, and Navigation with Spain, the United States acknowledged that, "several treaties of Friendship exist"

[20] U.S. Const., art. I, § 8, cl. 3.
[21] U.S. Const., art. I, § 2.
[22] 31 U.S. a 542-543.

between the United States and the "Nations of Indians," and pledged, "by all the means" in its power, to "maintain peace and harmony among the several Indian Nations."[23]

The Federal government, not the States, exercised jurisdiction over Indian affairs. Indians were not considered citizens of the United States. For example, in the Jay Treaty of 1794, Indians were distinguished explicitly from "the Citizens of the United States."[24] But, like United States citizens, they were guaranteed the right of free passage between the United States and Canada.[25]

During this period, Congress often enacted legislation for the betterment of American Indians. Early Federal legislation protected Indian people and their lands from non-Indians. The Trade and Intercourse Act of 1790 regulated trade with the Indians.[26] The Act prohibited the purchase of Indian lands without United States approval. The Act provided for the punishment of non-Indians committing crimes against Indians. The Act was expanded in 1793 to authorize the provision of goods and services "to promote civilization" and secure the friendship of the Indians.[27]

In 1802, Congress enacted legislation authorizing expenditures for Indian civilization, providing that "in order to promote civilization among the friendly tribes, and to secure the continuance of their friendship, it shall be lawful for the President ... to cause them to be furnished with useful domestic animals, husbandry, and with goods or money ..."[28]

In 1819, Congress established a permanent "civilization fund" which authorized the President to employ persons to "instruct [the Indian tribes] in the mode of agriculture ... and to instruct the children in reading, writing, and arithmetic ..."[29] This fund was in place until its repeal in 1873.

Treaties frequently called for the United States to deliver goods, services, annuities, and other monies to Indian tribes. Provisions were often made for health and education.[30]

Many treaties also recognized the law-making authority of the United States in respect to Indian tribes. For example, treaties negotiated in 1851 contained the following provision: "Rules and regulations to protect the rights of persons and property among the Indians ... may be prescribed and enforced in such manner as the President or the Congress ... from time to time shall direct."[31]

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[23] Treaty of Friendship, 1795, art. 5, Oct. 27, 1795.
[24] Jay Treaty, art. 3, 8 Stat. 116 (Nov. 19, 1784).
[25] *Id. See also* Explanatory Article to Jay Treaty, May 4, 1796.
[26] Act of July 22, 1790, 1 Stat. 137 (1790).
[27] Act of Mar. 1, 1793, Stat. 329 (1793).
[28] Act of Mar. 30, 1802, § 13, 2 Stat. 139 (1802).
[29] Act of Mar. 3, 1819, 3 Stat. 516 (1819).
[30] *See* COHEN'S HANDBOOK § 1.03[1].
[31] *See, e.g.*, Treaty with the See-see-toan and Wah-pay-toan Bands of Dakota or Sioux, 1851, art. 6, 10 Stat. 949 (1851); Treaty with the Med-ay-wa-kan-toan and Wah-pay-koo-tay Bands of Dakota or Sioux, 1851, art. 7, 10 Stat. 954 (1851).

D. The Fourteenth Amendment.

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment is the birthplace in the United States Constitution of the principle that all persons are entitled to the equal protection of the laws.[32] This same amendment excluded Indians from citizenship in the United States and from apportionment of Representatives in Congress.

Section 1 of the Fourteenth Amendment provided that persons born in the United States. "and subject to the jurisdiction thereof" were United States citizens.[33] This did not include Indians. Senator Jacob M. Howard of Michigan explained:

> Indians born within the limits of the United States, and who maintain their tribal relations are not in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation, as being quasi foreign nations.[34]

The Supreme Court confirmed this view. In *Elk v. Wilkins*, the Court held that the children of Native Americans were not citizens, despite the fact that they were born in the United States.[35] The Court held that Indian tribes were "alien nations, distinct political communities, with whom the United States dealt with through treaties and acts of Congress."[36] Indians were not United States citizens because they were not "completely subject" to political jurisdiction of the United States.[37] They owed their "allegiance" their tribes, not to the United States.[38]

Similarly, in the Civil Rights Act of 1866,[39] Congress declared that all persons born in the United States were citizens, excluding Indians not taxed. Indians were not made citizens of the United States until the 1924 Indian Citizenship Act.[40]

Section 2 of the Fourteenth Amendment repeated the exclusion of "Indians not taxed" from the apportionment of representatives in the House of Representatives.[41] By repeating the phrase "Indians not taxed" – and by acknowledging tribal citizens as owing allegiance to an alien sovereign – the Fourteenth Amendment re-affirms the original understanding of the Constitution and the Federal policies enacted there under.

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[32] U.S. Const., amend. 14. The Fourteenth Amendment was proposed on June 13, 1866, and ratified by two-thirds of the States on July 9, 1868. Its unconditional ratification was announced on July 28, 1868.

[33] U.S. Const., amend. 14, § 1.

[34] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

[35] 112 U.S. 94 (1884).

[36] *Id.* at 99.

[37] *Id.* a 102.

[38] *Id.* at 99.

[39] Act of Apr. 9, 1866, § 1, 14 Stat. 27 (1866). The Act provided, in Section 1, that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States ..." *Id.*

[40] Act of June 2, 1924, 43 Stat. 253 (1924).

[41] U.S. Const., amend. 14, § 2.

The repetition of the phrase "Indians not taxed" indicates that Congress still considered Indians to stand outside the Federal union. By including this phrase in the Fourteenth Amendment, Congress implicitly approved and ratified the first seventy-nine years of the nation's Federal Indian policy. That was a policy in which the United States negotiated treaties and Congress enacted laws aimed specifically at Native Americans. Those treaties and laws treated Native Americans not as citizens of the United States, but as subjects of distinct nations. Federal-Indian policy was governed by principles of sovereign-to-sovereign diplomacy, not principles of equality and equal treatment of United States citizens.

The Fourteenth Amendment affirmed the sovereign-to-sovereign approach of Federal Indian law and policy. The language of the Fourteenth Amendment undermines any argument that the United States is constrained by the Constitution from legislating for the benefit of Native Americans without enacting similar legislation for the benefit of non-natives.

This view is consistent with, and confirmed by, the contemporaneous Federal policy toward Native Americans at the time the Fourteenth Amendment was drafted and ratified. Congress drafted the Fourteenth Amendment in 1866 and announced its unconditional ratification on July 28, 1868. During that same time period, the President negotiated (and the Senate approved) numerous treaties with Indian tribes in which the United States promised to provide for Indian people by: recognizing their right to self-government; establishing permanent reservation homelands; promising to prevent non-Indian incursions into Indian country; providing allocations for education and agriculture; and offering citizenship upon acceptance of allotments.[42]

In 1868, Congress authorized treaty making with the Sioux Nation by statute and the President appointed Commissioners to treat with the Sioux Nation. The Fort Laramie Treaty was negotiated in April 1868, just three months before Congress gave effect to the Fourteenth Amendment. The President sent the treaty to the Senate for ratification within six months after the Fourteenth Amendment was ratified.[43] In this way, the Fourteenth Amendment implicitly approves of the 1868 Treaty with the Sioux Nation (and other treaties that were ratified at the same time).

The Fort Laramie Treaty of 1868 provides a reasonable guide for Federal Indian policy at the time. It acknowledged Indian sovereignty and guaranteed the Great Sioux Reservation as the permanent homeland of the Sioux Nation. The United States pledged to maintain peace, to keep the military out of Sioux territory, and to punish non-Indian offenders against the Sioux. The United States offered citizenship to Sioux Indians who take allotments. The United States established an education program; pledged to provide health care; and established an agricultural program.[44]

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[42] *See, e.g.*, 1868 Treaty of Fort Laramie with the Sioux Nation, 15 Stat. 635 (Apr. 28, 1868).

[43] The 1868 Fort Laramie Treaty was ratified on February 16, 1869, and proclaimed on February 24, 1869.

[44] 1868 Treaty of Fort Laramie, *supra* note 42.

The law-making authority of Congress over Indian affairs was never in question. The Treaty of Cession with Russia in 1867 provided that Congress shall make laws for the uncivilized tribes of Alaska just as it did for the "aboriginal tribes" of the continental United States.[45] Further, President Grant was the first President after ratification of the Fourteenth Amendment. His Indian policy confirmed this understanding of the Fourteenth Amendment. He promoted peace with Indian tribes. He authorized Federal agents to work with the tribes and made allowances for Indian civilization, education, and farming.[46]

E. Summary.

The principle of equal protection of the law, as articulated in the Fourteenth Amendment, and embodied in the Due Process Clause of the Fifth Amendment, co-exists comfortably with the longstanding power of the Federal government to treat with native nations and to enact legislation singling out Native Americans.

II. APPLICATION OF THESE PRINCIPLES TO S. 1011.

The fact that S. 1011 singles out Native Hawaiians and provides for the reorganization of a Native Hawaiian government does not render the legislation unconstitutional. Congress has the power to legislate for the betterment of Native Americans without running afoul of, or offending, the Constitution or the principles of equal protection contained therein.

A. The Constitution Applies to Native Hawaiians.

The Native Hawaiian people fall within the meaning of the terms "Indians" and "Indian tribes," as used in the United States Constitution. The Constitution does not define these terms, but their use in contemporaneous papers, treaties, and laws confirms their plain meaning. The term "Indian tribes" refers to the aboriginal, indigenous polities, or organized communities, encountered by Europeans upon their arrival to the lands and territories that would later become the United States. The term "Indians" refers to members of such polities or communities.

The fact that Native Hawaiians historically have been referred to as a nation and not a "tribe" is of no import. The Framers considered the term "Indian tribe" to be synonymous with the term "Indian nation." Alexander Hamilton used the terms interchangeably in Federalist No. 24.[47] As noted above, the United States entered into nine treaties with Indian nations prior to the ratification of the Constitution. Those treaties referred to American Indians as "tribes" and "nations."[48] Through the Supremacy Clause, these treaties were made the supreme law of the land.[49] They

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[45] Treaty of Cession, 1867, art. 3, 15 Stat. 539 (June 10, 1867).

[46] *See, e.g.*, P. Rahill, THE CATHOLIC INDIAN MISSIONS AND GRANT'S PEACE POLICY, 1870-1884 (1953).

[47] *See* THE FEDERALIST PAPERS No. 24 (Hamilton discussing trade with Indian tribes and stating that military "posts will be keys to the trade with the Indian nations") (emphasis added)

[48] *See, e.g.*, Treaty with Delawares, 1778, *supra* note 4.

[49] *See* note 15, *supra*, and accompanying text.

confirm that the term "Indian tribes," as used in the Constitution, referred to the nations, or polities, of native people with whom the United States treated.[50]

The Native Hawaiians comprised such a nation. The United States entered into four treaties with the Kingdom of Hawaii between 1826 and 1887.[51] These treaties recognized the national character and nationhood of the Native Hawaiian people.

The Kingdom of Hawaii, established in 1810, was a confederacy in which all Native Hawaiians were "united as one kingdom under the leadership of ... Kamehameha I."[52] Before the formation of the Kingdom of Hawaii, the Hawaiian Islands and their people were ruled by four different kings.[53] Even still, the Supreme Court has said, "[t]he society was one, ... with its own identity, its own cohesive forces, its own history."[54]

> When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000-300,000.[55]

The Native Hawaiian governing body to be reorganized under S. 1011 is the modern day successor to the Kingdom of Hawaii. The fact that the Kingdom was a confederacy is of no consequence. Neither is the fact that the confederacy formed after the arrival of the first Europeans. Historically, it was not uncommon for native nations to unite in confederacies. Some Indian nations, like the tribes and bands of the Great Sioux Nation, formed confederacies before the arrival of Europeans on the continent. Others did so after contact, like the Cayuse, Umatilla and Walla Walla people, which make up the Confederated Tribes of the Umatilla Indian Reservation in Oregon. In any event, the United States has recognized these confederacies as "Indian tribes" within the meaning of the Constitution.[56]

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[50] Great Britain had the same understanding. In the Royal Proclamation of 1763, King George III referred to Indian tribes as "the several Nations or Tribes of Indians with whom We are connected." Royal Proclamation, Oct. 7, 1763.

[51] *See Rice v. Cayetano*, 528 U.S. 495, 504 (2000) (listing treaties between the United States and the Kingdom of Hawaii and describing them as "treaties and conventions between the two *countries*") (emphasis added).

[52] *Id.* at 501.

[53] *Id.* at 500.

[54] *Id.*

[55] *Id.*, *citing* L. Fuchs, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY 4 (1961); R. Schmitt, HISTORICAL STATISTICS OF HAWAII 7 (1977).

[56] *See* Dept. of Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 74 Fed. Reg. 40,218 (Aug. 11, 2009) (listing, among other confederated tribes: the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana; Confederated Tribes of the Chehalis Reservation, Washington; Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Goshute Reservation, Nevada and Utah; Confederated Tribes of the

It may be said that Native Hawaiians are seldom referred to as "Indians." This was not the case at the time the Europeans first encountered the Hawaiian Islands. Just as Christopher Columbus referred to the aboriginal island people of San Salvador as "Indios" or "Indians," Captain James Cook referred to the aboriginal people of Hawaii as "Indians."

Now, the term "Native Hawaiians" is used almost universally. That fact is of no significance when considering the status of Native Hawaiians as "Indians" under the Constitution. It was understood that the term "Indian" included all indigenous or aboriginal peoples. In *United States v. Rogers*, the Supreme Court described Indian tribes as "aboriginal tribes of Indians of North America."[57] Similarly, in the 1867 Treaty of Cession, the United States referred to the Indian tribes of the continental United States as "aboriginal tribes."[58] This treaty was formed at the same time the United States was considering the Fourteenth Amendment. Its use of the term "aboriginal" makes clear that the term "Indians," as used in the Fourteenth Amendment and elsewhere in the Constitution, was meant to include all aboriginal peoples of the United States.

The Native Hawaiians were, and still are, the aboriginal peoples of the Hawaiian Islands. They were, and still are, a distinct, organized polity, or nation. The United States entered treaties with the Native Hawaiian nation. When Hawaii was annexed in 1898,[59] and when it later became a Territory in 1900[60] and a State of the Union in 1959,[61] the Native Hawaiians became a Native American nation, or "Indian tribe," within the meaning of the Constitution.

The Constitution applies to Native Hawaiians, just as it does to all Indians and Indian tribes outside the original territory of the United States. In 1803, the United States purchased Louisiana Territory from France for $15 million.[62] The Louisiana Territory encompassed 600 million acres, which included all or part of Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, and South Dakota. President Jefferson acknowledged that the Treaty of Purchase actually purchased a right of pre-emption because the Indian tribes occupying the Louisiana Territory retained their natural rights to the land.

Grand Ronde Community of Oregon; Confederated Tribes of Siletz Indians of Oregon (previously listed as the Confederated Tribes of the Siletz Reservation); Confederated Tribes of the Umatilla Reservation, Oregon; Confederated Tribes of the Warm Springs Reservation of Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; and the Minnesota Chippewa Tribe, which is comprised of six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; and White Earth Band).

[57] 45 U.S. 567, 571 (1846).

[58] *See* note 45, *supra*, and accompanying text.

[59] *See* Newlands Resolution, 30 Stat. 750 (1898).

[60] *See* Hawaiian Organic Act, 31 Stat. 159 (1900).

[61] *See* Hawaiian Admission Act, Pub. L. 86-3, 73 Stat. 5 (1959).

[62] Louisiana Purchase Treaty of 1803, 8 Stat. 200 (Apr. 30, 1803).

President Jefferson made clear his understanding that the Indian affairs powers extended to the new territory. He agreed to honor the prior European treaties with Indian nations. Article VI of the Treaty of Purchase provides:

> The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other suitable articles shall have been agreed upon.[63]

Similarly, in the 1848 Treaty of Guadalupe Hildalgo, Mexico ceded nearly 1.4 million acres of land to the United States.[64] Mexico exhorted the United States not to interfere with tribal homelands because pressure on Indian lands resulted in depredations by the Indian tribes against Mexico. [65]

In the 1867 Russian Treaty of Cession of Alaska, provision was made for Alaska Natives in Article III as follows: "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[66]

Not every cession included a reference to the native peoples of the land. Yet, these treaties demonstrate that Congress understood that it had the same responsibility towards the native peoples in the newly acquired territories of the United States as it had towards the inhabitants of the original territory.

Although the Joint Resolution annexing Hawaii is silent concerning the treatment of the Native Hawaiian people, the Hawaii Organic Act expressly provided that the Constitution applies in full force to Hawaii.[67] Thus, the Constitution's Indian affairs powers apply to Hawaii and have since its territorial period.

B. <u>The Native Hawaiians Constitute an "Indian Tribe" for Which Reorganization Legislation Is Appropriate.</u>

The United States has historically recognized the national character of the Native Hawaiian people. As the Supreme Court explained in the seminal case of *Worcester v. Georgia*:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.[68]

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[63] *Id.* at art. 6.
[64] 1848 Treaty of Guadalupe Hidalgo, 9 Sat. 922 (1848).
[65] *Id.*
[66] Treaty of Cession, *supra* note 45, *supra*, at art. 3.
[67] Hawaiian Organic Act, *supra* note 60, at § 5.
[68] 31 U.S. at 543.

This aptly describes the situation of Hawaii, as well as the rest of the United States, prior to European contact.

The United States entered into treaties with the Kingdom of Hawaii in 1826, 1849, 1875, and 1887.[69] These treaties recognized the national character of the Native Hawaiian people. Upon the annexation of Hawaii as a territory of the United States, the Native Hawaiian people became a native people of the United States. As recognized in the 1803 Louisiana Treaty of Purchase, the 1848 Treaty of Guadalupe Hildalgo, and the 1867 Russian Treaty of Cession, the original peoples of the territories acquired by the United States become the native peoples of the United States upon annexation of their territory.[70]

Indeed, in her official protest of the Treaty of Annexation, Queen Liliuokalani referred to her people as native people. She stated:

> I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.[71]

The territorial courts ruled against the Queen's land claim in 1810, and shortly thereafter, the Native Hawaiian community began its quest for legislation to provide lands to the Native Hawaiian people. The Queen continued to fight for the rights of the Native Hawaiian people until her death in 1817.

Prince Kuhio was Queen Liliuokalani's heir and succeeded her in his advocacy for the Native Hawaiian people. The 1921 Hawaiian Homes Commission Act, which he championed, defines native Hawaiians as those native people of one-half or more Hawaiian blood.[72] Not surprisingly, this is the same definition that Congress established for Indian people in the Indian Reorganization Act of 1934: "Indian ... shall include all persons of Indian descent who are members of any recognized Indian tribe ... and shall further include all other persons of one-half of more Indian blood."[73] In the State Admission Act of 1959, Congress acted to further the betterment of the Native Hawaiians as a native people.[74]

The United States participated in the overthrow of the Kingdom of Hawaii, the Native Hawaiian governing body. The United States has the power to make peace with the Native Hawaiians,[75] and it can do so by enacting legislation to provide for the

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[69] *See* note 51, *supra*, and accompanying text.
[70] *See* notes 59 to 67, *supra*, and accompanying text.
[71] Queen Liliuokalani's Official Protest to the Treaty of Annexation (June 17, 1897)
[72] Act of July 9, 1921, 42 Stat. 102 (1921).
[73] 25 U.S.C. § 479.
[74] *See* note 61, *supra*.
[75] *See* note 17, *supra*, and accompanying text.

betterment of Native Hawaiians as a people and by enacting legislation allowing for the reorganization of the Native Hawaiian government. The United States took steps to provide for the betterment of Native Hawaiians through the 1921 Hawaiian Homes Commission Act and the 1959 Admission Act. Now, it is time for the United States to take the next step and allow for the reorganization of the Native Hawaiian government.

Congress has enacted legislation restoring the Federal-tribal relationship with many terminated tribes.[76]

> Congress has the authority to reestablish the tribal-federal relationship with terminated tribes. The authority of Congress extends to all Indian communities in the United States, including terminated and non-federally recognized tribes. The relationship need not be continuous. The relevant question is whether and to what extent Congress has chosen to exercise its authority with respect to a particular tribe.[77]

The case of the Menominee Indian Tribe of Wisconsin is particularly illustrative. In 1954, Congress terminated Federal recognition and supervision of the tribe.[78] In *Menominee Tribe of Indians v. United States,* the Supreme Court explained that the Termination Act caused the Federal government to cede to the State of Wisconsin "its power of supervision over the tribe and the reservation lands."[79] Yet, in 1973, Congress extended Federal recognition, as well as the benefits of the Indian Reorganization Act of 1934, to the tribe in 1973.[80] It did so notwithstanding the fact that the Federal government stopped dealing with the Menominees as a tribe for nearly twenty years.

The Supreme Court has ruled that it is the province of Congress to determine whether to exercise its authority to act for the protection of native nations or tribes, so long as the community retains its distinctly native character.[81] The Native Hawaiian people clear have done so.

The Native Hawaiian people continue to maintain their community cohesiveness as a native people, with distinctly native communities on the Hawaiian Homelands, Kuleana lands and the Island of Ni'ihau.

Accordingly, the Native Hawaiian Government Reorganization Act is constitutional. It rationally furthers Congress's legitimate purpose of providing for the betterment of the Native Hawaiian people in a manner that is similar to the Indian Reorganization Act.[82]

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[76] COHEN'S HANDBOOK § 3.02[8][c] (collecting cases).
[77] *Id.*
[78] Act of June 17, 1954, § 1, 68 Stat. 250 (1954), *codified at* 25 U.S.C. §§ 891-902.
[79] 391 U.S.404, 412 (1968).
[80] Pub. L. 93-197, § 3, 87 Stat. 770 (Dec. 22, 1973), *codified at* 25 U.S.C. § 903a.
[81] United States v. Sandoval, 231 U.S. 28, 47 (1913).
[82] The latter Act has been ruled on by the Supreme Court and amended by Congress without causing constitutional difficulties. *See Morton v. Mancari,* 417 U.S. 535 (1974).

CONCLUSION

The power of the Federal government to enact S. 1011, and other legislation for the betterment of Native Americans, is rooted in the Indian affairs powers in the original Constitution. Those powers were affirmed, not limited or circumscribed, by the Fourteenth Amendment. Thus, principles of equal protection, which find their birthplace in the Fourteenth Amendment, do not limit the ability of Congress to legislate on behalf of Native Americans.

The Native Hawaiian Government Reorganization Act of 2009 represents a constitutional exercise of the Federal government's Indian affairs powers. It is also consistent with the Federal government's longstanding recognition of the national character of the Native Hawaiian people.

PREPARED STATEMENT OF HON. MAUI LOA, CHIEF, HOU BAND OF NATIVE HAWAIIAN INDIANS OF THE BLOOD OF HAWAII

Is it known by the honorable senators sitting on this Indian Affairs committee and staff that the majority population of Hawaii at the time of statehood was Asian American? Senator Akaka and Senator Inouye are Asian Americans. They are as much natives of Hawaii as this bill is: which is to say not at all. This so called "Native" "Hawaiian" gibberish is not an Indian bill. It does not belong in this committee. It does not belong in any committee unless there is a committee wherein to codify Asian Americans continuing to loot the federal treasury by coming up with schemes to use us, the actual native recognized in our small numbers by this congress since 1921.

Another Asian American senator, Hiram Fong, inserted the very same phony alleged Asian American posing as a "Native" of the U.S. in Public Law 93–644 into Native American appropriations. That led to three U.S. Supreme Court rulings finding that the scheme being promoted today is a made up, unconstitutional scheme. Will it take three more U.S. Supreme Court rulings to finish off this fraudulent scheme for good?

Hawaii's dishonorable, lying Asian American senators are joined in this scheme in the congress by delegates from actually insular territories. Hawaii hasn't been an insular territory so has had no insular minorities since 1959. Alaska joins them as well even though Ted Stevens, Senator Inouye's partner in the Alaskan Native Corp. scheme, was driven out of the Senate involving corruption in the Alaskan Native Corporation scheme.

Hawaii's Asian American majority population at the same time as it is promoting made up gibberish like this bill continues to steal my land and my people's land. Hawaii's Asian American majority population since I first established my people as eligible for federal Native American assistance has looted around 23 billion dollars in U.S. Native American funds: they figure if the U.S. was stupid enough to let them get away with it up to now the U.S. is stupid enough to give them the legal cover of this bill to continue to get away with it. This entire matter belongs in a criminal court, not a committee in congress because this is a legal matter, not a political one: Shame on this committee. Here is the same testimony the actual native's only voice in congress from Hawaii made in the hearings of Public Law 93–644 when Senator Inouye and Senator Fong hatched the very same plot this hearing is a sorry recent chapter in:

> "Fong's catch-all definition adopted by the rules and regulations committee governing Native American programs contains no protective provisions for indigenous Hawaiians (*i.e.* the "classic") as defined in the Hawaiian Homestead Act of 1920."

Attachment

Fake Indians – Fake "Native Hawaiians"

An Indian Country Today story published 06/05/09 "Steve Russell: Fighting the fake Indians in tribal court" recommends Indian law professor Stacy Leeds' strategy: "If the faker challenges tribal jurisdiction on the grounds the faker is not part of the tribal community and not bound by tribal law, there's the self-admission of fakery". We genuine native Hawaiians Indians have a much bigger problem, not just one or two professors on a faculty teaching in ethnic studies, but a whole state full of them, they are everywhere. They are just as lost as the lost kingdom they worship.

President Obama affirms that his administration:

"...will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."

The Hou Band of native Hawaiian Indians does not have hundreds of millions of tax payer dollars to pay for lobbying and press. The state's fake Indians have shadowed the Hou Band's government to government relationship with the United States beginning when the Hou Band first succeeded in getting native Hawaiians of the Blood included in federal Native American appropriations in Public Law 93-644.

Just this past year, Senator Inouye's cronies in local government took land purchased with grants of federal assistance authorized by the *Indian Self Determination Act* where we had operated a native Hawaiian trading post for decades. The Chinese American city and county prosecutor, Mr. Duane Pang, said "your chances would have been better if the Akaka bill had passed". These crimes are the subject of FBI investigations.

Hawaii's majority Asian American population purposefully made the Hawaii they wanted for themselves. Now that what they put together is viewed outside Hawaii in the same unconstitutional, unfair way the Hou Band has always viewed it inside Hawaii, they want otherwise honorable ladies and gentlemen of this Great Nation to endorse their scheme.

It was only in the past couple of years that Asian Americans subdivided into an allegedly "indigenous" group began to promote themselves as a "tribe" eligible to be "recognized" as a "lost kingdom". This is Hogwash. Those Asian Americans who are loyal to the obsession that the U.S "overthrew" the monarchy were fond of telling the Hou Band for the prior thirty some years that we are a "cancer" that needs to be "cut out" in Hawaii for the reason, they allege, we are standing in the way of their fantastic dream to restore it so they can throw out the U.S. military and align with China.

Sea faring Chinese first came to Hawaii during the 87 year Kingdom era. Later in the Kingdom era many, many more came as indentured servants to work the plantations with the Japanese and others. Their descendants believe that they are just as qualified as actual natives because of this to be classified as "indigenous" to "royal" Hawaii even if not to tribal Hawaii. And complicating this even further, with its Indian people and Jesus theology, the Church of Jesus Christ of Latter Day Saints in Hawaii along with the Church of Christ are interwoven with these present-day allegedly indigenous "Hawaiians". An immigrant can become an American but cannot become a *Native* American.

Guided by Senator Inouye, their game today is to make sure unfair advantages connected to our land they gave themselves in statehood remain inviolate. The Interior Department and the Justice Department and the Hou Band are going to continue to make sure they do not get away with it. The U.S. Supreme Court has a record so far of supporting our position over that of these fake "Native Hawaiians".

When Asian Americans put Hawaii together they encoded preferences for their racial group into what they thought was a substitute governmental and quasi governmental network of interconnected entities working alternatively inside government and as trustees, associates or subordinates of Kamehameha Schools Bishop Estate Trust. This system has been busted now three times by the United States Supreme Court.

Hawaii's Asian American Long Con Busted by U.S. Supreme Court

This is the long con for our land and for the Big Money and, in fact, for continuing to "own" a state of the USA.

In *Rice v. Cayetano* 528 U.S. 495 (2000), the Asian Hawaiian subrogation scheme was busted when the court disabused them of the fantasy that the department of state government they set up was a "quasi-sovereign" Hawaiian government: Hogwash. The court found the same folks attempting to recover from their constitutional exposure by passing the ersatz Native Hawaiian Government Reorganization are violating the 15th Amendment. Next, my forthcoming lawsuit will find they are and have been for decades violating the 14th Amendment also.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) the High Court ruled that ownership of Indian title land by the largest missionary era royal land trust, now renamed Kamehameha Schools, did not qualify it for protection from alienation by the *Indian Non Intercourse Act.* An Indian mission school, now controlled by Asian Americans, is NOT an Indian. This gave rise to the now popular falsehood that "there are no Indians in Hawaii" and is another motivation for the current legislation.

Recently, in *Hawaii v State of Hawaii Office of Hawaiian Affairs*, the U.S. Supreme Court ruled that kingdom law or its detritus does not, as Asian American royalists think, control the fate of public lands based upon once being owned by the monarchy or a kingdom of Hawaii government. This is the same state agency currently promoting on behalf of Hawaii's dominant Asian American population continuing monopoly for the Kamehameha Schools oligarchy over everything in Hawaii via the so called Akaka bill.

In the nineteen eighties, the Hou Band's *Price v U.S. Department of Justice** won when it forced the state of Hawaii to pay compensation for violating the *Indian Non Intercourse Act* when it alienated trust corpus lands from the federal reservations established only for those with the federal blood quantum, irrespective of any royalism connection, actual or made up. Obtained for the state by the Hou Band, this is the only substantial sum of money (six hundred million dollars) with which to pay it to administer the federal native Hawaiian land trust for my people. Secretary of Interior Andrus affirmed that the Hou Band, led by the author of this letter, is a federally recognized native Hawaiian Indian band. ***(Federal Jurisdiction** over trust corpus of land set aside from available lands in 1921 affirmed – Price v. U.S. D.O.J. (C.A. No. 80-2794 (D.D.C.). U.S. retains trust responsibility indirectly through the state in relation to state homelands reserved for occupation by native Hawaiians of the Blood. Secretary of Interior states the B.I.A. is responsible for federal native Hawaiian programs).*

The Phony State Law Asian Hawaiian "Host Culture" Charade

William "C.J." Richardson was Hawaii's Lt. Governor (the first); a trustee of Kamehameha Schools Bishop Estate Trust, the royalist land trust that started out as a typical Indian mission school and Chief Justice of the Hawaii Supreme Court. In China, he would be easily *visually* recognized as Chinese. In the other states, he would be recognized as Chinese American. But in Hawaii he is recognized as a "*Native* Hawaiian" by everyone except the Hou Band.

With this bias in mind, consider what Richardson wrote (below) and one begins to have an idea of how history works against our recovery from discovery, conversion to Christianity and colonization for the reason it ignores and obstructs standard federal Indian land title law, policy and practice.

In the nineteen fifties the primary opposition to Hawaii becoming a state was coming from Southern states because of voting power in political matters based on race. Mr. Richardson and his group learned from this. This is Justice Richardson's famous dictum accepted as if Social Gospel by all of Hawaii and by Senator Inouye's protégés in Indian Country, including NARF and NCAI, among others:

"Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court, reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawaii. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases – and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned."

NCAI has it wrong: Inouye's Akaka Bill *is* Racist

A president of NCAI was in error when under pressure from Hawaii's Asian American politicians he wrote: "The Native Hawaiian Government Reorganization Act would establish a level of parity for Native Hawaiians with the other indigenous peoples of America. To invoke the equal protection of due process clauses of the Constitution in this context (to oppose it) is a distortion of what those clauses were intended to do."

The same capital "N" "Native Hawaiians", a subdivision of the Asian American majority population NCAI is referring to, are responsible for violating my people's 14th Amendment rights using official state government policy since statehood in 1959. Anyone can discern this upon critical reading in the above quoted passage of "CJ" Richardson: a guiding double-edged *racist* precept taught as if gospel by the law school named after Justice Richardson. A social and cultural "gospel" encoded into the very state laws used to take our land, mimic our culture and push us to the edge of existence: state laws now clearly and irrefutably unconstitutional.

What they learned from the dynamics of race in the Old South became an ingredient in the formulation they concocted and applied to the state's own minority population. Instead of openly mistreating Hawaii's minority population, as was done in the Old South, Mr. Richardson et al decided to "patronize" the "Host Culture" of the new state's "minority" as a pretext for passing and enforcing Hawaii's own version of Jim Crow laws. Ironically, this was identical to one of the arguments made against integration by the Old South in the Southern Manifesto that came out in 1956:

"This unwarranted exercise of power (i.e. Brown v Board of Education) by the Court, contrary to the Constitution, is creating chaos and confusion in the States, principally affected. It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding".

This condescending "friendship" and "understanding" became Hawaii's legendary "Diversity": Hawaii's hidden, disgraceful secret.

Were it actually a fact that Hawaii's majority Asian American population truly intended to "respect" the "Host Culture" they would not be diverting, obstructing or re-inventing standard U.S. Indian land title and all of U.S.C. 25. They are conveniently confusing "culture" with the actual native human.

It is reasonable to conclude from the facts that Mr. Richardson and his group of Asian Americans of the nineteen fifties saw what happened to the Old South as a result of mistreating the minority populations of those states so decided to costume their inherent biases and interests in Indian title land in a variation of the disguise of the day, adopting a pose of appearing to "owe" everything to Hawaii's natives, the 50th state's Indian *and* minority population.

Whatever language used to hide their racism and religious bigotry behind doesn't matter; any language serves the same purpose. Any person or tribe or government agency acting as shills for Hawaii's racist long con game are welcome to support it on the record except you should know that we will include you as defendants in legal proceedings and you will be just as liable for damages as they are. Manipulate congress, the President and High Court and it might come back to haunt you the next time you need them for some issue of your own?

NARF: Lies and Stroke of a Pen do not add up to Reality

Words on paper do not change reality. Lies on paper, *ex post facto* do not absolve those guilty of wrongdoing. None of this would be any of the business of tribes in other states if not for Dan Inouye. To illustrate this, why does NARF have a fake "Native Hawaiian" on its Board of Directors? A Chinese American with a Hawaiian language name does not become a native Hawaiian Indian because Dan Inouye says so.

Lies and more Lies

My Indian friends, Dan Inouye lied to you once and he will lie to you again and again and again. He will *not* protect you from the one million fake "Native Hawaiians" reducing your own slices of the federal pie. The Hou Band; Secretary

Salazar; Assistant Secretary EchoHawk; the Governor of Hawaii: we know what the actual administrative solution is and know it is the only way to ensure that your portion of the federal pie does *not* shrink.

My United States Military friends afraid of endangering your bases in Hawaii so trusting of Senator Inouye to keep a lid on things: you are being lied to as well and being manipulating into providing funding to those who are guilty of violating 14th Amendment rights of actual federal native Hawaiians. You should follow federal Indian law as encoded in USC 25 and not follow Senator Inouye's politically tainted advice. You are required to work with the Interior Department or with us directly to protect your interest in Indian title land in Hawaii. You should not go along to get along with Hawaii's Asian American royalist unconstitutional madness. Dan Inouye is a great American war hero but he is also a politician who must please his Asian American friends who elect him term after term. It would be a shame to see Senator Inouye follow in the footsteps of his best friend in the Senate, Ted Stevens.

Follow the Money: the Financial Crimes Part of Hawaii's Long Con

I know for a fact Hawaii's children and grandchildren of Asian immigrants who arrived in Hawaii as landless indentured laborers never imagined the United States would be stupid enough to permit them to obtain by a simple stroke of Dan Inouye's pen around twenty three billion dollars by posing as "Native Hawaiians" or as those "serving" this made up category. Is it any wonder they expect congress to be stupid enough to pass this bill?

Breakdown:

***23 Billion dollars* for Hawaii's Asian Americans posing as "Native Hawaiians" plus another 350 Million dollars diverted by the state to itself despite being earmarked by congress to fund only native Hawaiians moving onto federal reservations to recover from poverty and homelessness. Around 12 Billion dollars earned by Kamehameha Schools Trust using some 360,000 acres of Indian land. Around 11 Billion dollars fraudulently obtained from Native American appropriations by inflating the number of heads counted from around 3,500 to around a million.**

***600 Million dollars* for Hawaii for administering the federal land trust of actual federally recognized native Hawaiians of the Blood. (As a result of Hou Band's Price v U.S. DOJ).**

***Zero dollars* for native Hawaiians of the blood directly who are occupying on a revocable lease through a state of Hawaii license our federal reservations.**

<u>750 Thousand dollars</u> in federal assistance developed into 4 Million dollars in self determined income annually for the Hou Band of native Hawaiian Indians of the Blood. (Local government at Senator Inouye's direction recently alienated the Hou's Indian title lands as financial punishment for the Hou Band following standard federal Indian land use practices in a hostile state).

Make Room Cobell and Madoff for OHA, NARF, NCAI and Kamehameha Schools

What difference is there between the U.S. Securities and Exchange Commission Enforcement Division negligently enabling Bernard Madoff skimming 65 Billion dollars and the Department of Interior enabling fake "Native Hawaiians" skimming 23 Billion Dollars? There are federal agencies right now investigating our candidates for Madoff status therefore the House would be prudent in tabling the Akaka bill until such time as one or more of the federal investigations finish least the House find itself in a situation identical to the position the SEC put itself in through its own earlier negligence.

There should be instead of any further hearings on the Akaka bill a headline in the Washington Post reading "**Interior cracks down on Hawaii's skimming scams"**

What if Bernard Madoff Investment Securities LLC had stroke in congress equal to the power Senator Inouye and the Hawaii Congressional delegation has. Their Akaka bill asks government to save their friends and constituents not punish them:

"All right, Mr. Madoff, the SEC and other federal regulatory agencies were negligent but here's what we are going to do: we are going to pass a bill in Congress called the Bernard Madoff Financial Services Reorganization Act. It will go back and confer cover of law on all your fraudulent or indiscreet transactions while setting up a structure wherein you can move forward and eventually restructure all of Wall Street according to the way you want it to be".

Bernard Madoff was a Long Con swindler. A "long con" is a scheme whereby swindlers win the confidence of their victims then cheat them out of their money by taking advantage of the confidence reposed in the swindler (5 N.E. 2d 80, 83) The elements of the crime of the confidence game are (1) an intentional false representation to the victim as to some past or present fact . . . (2) knowing it to be false . . . (3) with the intent that the victim rely on the representation . . . (4) the representation being made to obtain the victim's confidence and thereafter his money and property (04 A. 2d 260, 275) A "long con" is criminal not civil. Criminal law is typically enforced by government.

How Hawaii's Long Con turned from stealing land to stealing federal assistance

Leadership of the Hou Band in restoring normal functioning of the trust relationship with the United States got entangled with Pinky Thompson, the patron saint of royalist social engineering in Hawaii. In the early nineteen seventies Hou Band leadership successfully lobbied Hawaii's Republican Senator Hiram Fong to include the classic native Hawaiian in Public Law 93-644.

Pinky Thompson heard about this then enticed Senator Fong to test Kamehameha School's new, unprecedented legislative strategy. The same one now found unconstitutional three times by the U.S. Supreme Court. Thompson convinced Fong to replace the classic native with Trustee Thompson's new "definition" so it would be identical to the one-drop-of-blood definition or ancestry-during-the-kingdom definition used by Kamehameha Schools in determining eligibility for consideration to attend the Bishop Trust's schools.

Thereafter, Senator Inouye, quietly and consistently abusing his seat on the Senate Indian Affairs Committee, defrauded his senate colleagues and the United States using this device to falsely claim around eleven billion dollars for state departments "serving" this vastly inflated number of members of the public who are actually a *racial* group.

Some of these funds allocated by Congress for Native Americans were directed to non profits set up by friends and associates of Senator Inouye and the Pinky Thompson group; there was hush money distributed too.

The Hou Band continued to receive direct federal assistance, much to the displeasure of Senator Inouye. He demonstrated his dislike by threatening the regional BIA officials, forcing them to terminate standard practice when they worked with the Hou Band leadership to produce a Study leading to normalization. Here is what the Hou Band leadership testified:

> ***"Fong's catch-all definition adopted by the rules and regulations committee governing Native American programs contains no protective provisions for indigenous Hawaiians (i.e. the "classic") as defined in the Hawaiian Homestead Act of 1920."***

What Happens Now: Investigations and Legal Actions

To conclude, the Hou Band leadership vigorously initiated over a dozen detailed complaints with federal investigative agencies in response to its land and Indian commerce being attacked by Hawaii's dominant power elite using cover of law. A complete file of these complaints is available upon request for members of congress and media. In anticipation of findings from multiple federal

investigations the Hou is preparing federal legal actions (state legal actions seeking justice by actual native Hawaiians are a pathetic joke).

Should federal authorities continue to permit Hawaii to abuse my people and continue to divert federal assistance for my people; the Hou Band will take legal action against federal agencies making grants of federal assistance for Indians to the Hou Band by reopening *Price v U.S. DOJ* in Washington. Such federal grants are causing local government in collusion with anti-Indian members of the public, both acting in collusion with the dominant Asian American population's majority interests in land use, to alienate the Hou's lands as a method of shutting down Indian commerce along highways serving tourists from all the states and the local public in Hawaii viewed as "illegal" competition.

The Hou vigorously will pursue legal actions against all tax exempt private foundations, like Ford foundation, for giving grants to entities violating the 14th Amendment rights of native Hawaiian Indians of the Blood who obtain fraudulently grants of assistance by misrepresenting themselves as native Hawaiian Indians. We advise such foundations to cease and desist as of today. Further, Foundations funding NARF and NARF's Cobell suit are subscribing to misrepresentations negatively affecting settlement of Cobell connected to Hawaii's fraudulent breach of trust and are at risk via NARF's connection to Hawaii's scheme.

The Hou is preparing a Complaint with the Hawaii US Civil Rights Commission alleging that the state's Richardson Law School as official policy discriminates against federal native Hawaiians of the Blood while preferring a subdivision of Hawaii's dominant Asian American population: to follow on that investigation's report with a complaint to the ABA law school rating committee. (Richardson Law School sponsors a program affording justices of the US Supreme Court take a Hawaiian holiday so they can be royally and lavishly lobbied by Richardson himself and the school's faculty and Hawaii's Richardson educated legal community, both state and federal, as to the royalist anti-trust, anti-federal native scheme).

The Hou is interviewing high value law firms to pursue a constitutional action designed to find the state liable for violating the 14th Amendment as official government policy. It is based on the strange way the state's majority population, combined with land interests of the detritus of Hawaii's brief British style monarchy, encoded their biases into state law. This results in a situation bearing an uncanny resemblance to Jim Crow with all of its ramifications.

Just as it recovered from the state of Hawaii six hundred million dollars earlier by suing the United States, the Hou Band is formulating a legal action designed to recover from the state 11 Billion dollars in federal assistance appropriated for Native Americans which the state obtained fraudulently. A sum intended by congress for the Hou Band and other eligible federally recognized

native Hawaiian Indians. The United States breached its trust to the actual native Hawaiian by doing nothing to thwart Hawaii's bizarre scheme.

In addition to violating the Fifteenth Amendment and Fourteenth Amendment, this bill violates federal Anti Trust laws. An Anti Trust action based on specific crimes with the Hou Band as victim involving land transactions wherein Kamehameha Schools and local government colluded to exclude highest bids made by the Hou Band to recover ancient lands, including ancient tribal clan burial grounds, is the subject of a complaint to the U.S. Department of Justice Anti Trust division. The Obama administration announced it intends now to begin vigorously prosecuting Anti Trust matters.

Kamehameha Schools is the state's largest land owner and has assets in the six to twelve billion dollar range. Now the Federal Trade Commission will be invited to participate in the investigation. The Federal Trade Commission deals with complaints that are filed regarding unfair business practices such as scams, deceptive advertising and monopolistic practices. It reviews these complaints to determine if businesses are in fact engaging in harmful practices. Antitrust laws guard against harmful business practices and protect the market from anti-competitive practices such as large mergers and price-fixing conspiracies.

PREPARED STATEMENT OF MARK VAN NORMAN, MEMBER, CHEYENNE RIVER SIOUX TRIBE (LAKOTA) OF SOUTH DAKOTA

My name is Mark Van Norman and I am a member of the Cheyenne River Sioux Tribe (Lakota) of South Dakota. From April 1995 through September 2000, I served as the Deputy Director and Director of the Office of Tribal Justice in the U.S. Department of Justice. I write on my own behalf in my personal capacity.

Because there is always some loss of continuity between the Administrations, I write, in part, to express some recollections of the Clinton Administration's policy towards the Native Hawaiian people, and its legislative recommendations for the Native Hawaiian Government Reorganization Act. I also write to discuss the legal relationship between the United States' and the Native American peoples, which includes Native Hawaiians.

1. Reflections from the Clinton Administration

In 1998, Senators Akaka and Inouye requested that Attorney General Reno and Secretary Babbitt send a delegation to Hawaii to meet with the Native Hawaiian people to discuss reconciliation between the United States and the native community. The starting points for these discussions were the findings of facts, declarations, and principles set forth in the Native Hawaiian Apology Resolution, Public Law No. 103-150 (1993).

In December 1999, John Berry, Assistant Secretary for Policy Management and Budget representing the Department of the Interior, and I, Director of the Office of Tribal Justice representing the Department of Justice, travelled to Hawaii, met with the Lieutenant Governor, Hawaii's Senators and Congressional Representatives, and held public meetings with Native Hawaiians on the Islands of Oahu, Kauai, Maui, Lanai, Molokai, and Hawaii. (Interior brought Karen Sprecher-Keating, Loretta Tuell and other staff. The congressional staff accompanied us and facilitated meetings with state offices and the general public.) The Interior-Justice delegation made various fact finding visits to the Department of Hawaiian Home Lands, Office of Hawaiian Affairs, Hawaiian Home Lands, Hawaiian language immersion schools, charter schools, Native Hawaiian education, health care, and self-governance organizations, and Hawaiian *Kuleana* lands.

Based upon these meetings and fact finding visits, the Departments of the Interior and Justice issued a report entitled from "Mauka to Makai: the River of Justice Must Flow Freely" (September 2000). The Report found that the Native Hawaiian people are an aboriginal, native people of the United States and that United States may act for their benefit, as a "distinctly native community," under the Indian affairs powers. The Report's primary recommendation was for Congress to enact, and the President to sign, legislation to assist the Native Hawaiian community in reorganizing its native government within the framework of Federal law, as the United States provided for Indian tribes through the Indian Reorganization Act of 1934 and for Alaska Natives through the Alaska Native Reorganization Act of 1936.

During our meetings in Hawaii, the Interior-Justice delegation concluded that the Native Hawaiian people are an aboriginal, indigenous, native people of the United States and that Native Hawaiians maintain a distinctly native political community in Hawaii. The evidence is quite clear:

- **The Native Hawaiian people have a trust land base that was established by Congress under Federal law to promote their welfare as a native people.**

In 1921, the Hawaiian Homes Commission Act set aside somewhat more than 200,000 acres of aboriginal land in trust for Native Hawaiian homesteads. Congress recognized that Native Hawaiians had suffered disease, poverty and dislocation through contact with Europeans. The Native Hawaiian population had plunged from 800,000 in 1778 to 50,000 by 1920. The purpose of the Act was to rehabilitate Native Hawaiians by returning them to their aboriginal lands and protecting those lands under a trust for the native people. For almost 40 years, HHCA lands were administered under Federal law by the Territory of Hawaii. Upon Statehood, the State Admission Act required that the State of Hawaii take on the responsibility for administration of the HHCA lands. The United States retains authority to enforce the HHCA trust against the State through the Admission Act. On the HHCA lands, the Native Hawaiian people maintain distinctly native settlements that provide a basis for retaining and promoting Hawaiian language, culture, traditions and self-government. A brief visit to the HHCA lands demonstrates that they serve and have served a parallel purpose to American Indian reservations and Alaska Native lands in the continental United States.[1]

- **The HHCA is a clear federal recognition of the Native Hawaiian people as a native people of the United States.**

In fact, Congress relied on its Indian affairs powers in enacting this legislation. The HHCA has a close parallel in the General Allotment Act for American Indians and Alaska Native allotment legislation. Under President Roosevelt's "New Deal," the 1934 Indian Reorganization Act ("IRA") was the next major policy initiative for American Indians. Perhaps because Prince Kuhio passed away in 1924, Congress did

[1] The HHCA lands are frequently rocky and substandard from the point of view of homesteading, agricultural development, and economic development – just like many Indian reservation lands. In fact, the Department of Hawaiian Home Lands has exchanged prime beach lands for lands of lesser value, just as the Bureau of Indian Affairs has done with Federal lands set aside for American Indians. Hawaiian housing is generally modest and lesser in value than surrounding communities. The parallel is clear to anyone familiar with Indian country.

not pass legislation for the Native Hawaiians similar to the 1936 Alaska Native Reorganization Act, which extended the IRA to Alaska Native governments. There is no constitutional or statutory requirement that American Indian tribes or Alaska Native villages reorganize under these Acts. *See Kerr-McGee Corporation v. Navajo Nation*, 471 U.S. 195 (1985) (Navajo Nation, not organized under the IRA, has the same government authority as Indian tribes organized under the IRA). Nor is the HHCA's Federal statutory recognition of the Native Hawaiians as a native people diminished by Congress's failure to extend the IRA to Native Hawaiian people.

- **In 1959, the State Admission Act reaffirmed the Federal statutory recognition of the Native Hawaiian people as a native people of the United States by affirming and extending the Native Hawaiian land base.**

The State Admission Act transferred the so-called Ceded Lands, which derive from the Crown and the Public Lands of the Kingdom of Hawaii, to the State of Hawaii and imposed upon Hawaii a trust duty under Federal law to administer the Ceded Lands for five purposes, including for the betterment of the native Hawaiian people. The Ceded Lands are leased and income generated thereby is used, among other things, to fund the activities of the Office of Hawaiian Affairs to promote the welfare of the Native Hawaiian people. In this manner, the United States extended the lands and natural resources of the Native Hawaiian people and provided a small measure of the justice that Queen Liliuokalani sought for her people. In the years since statehood, Congress has enacted more than 150 additional laws for the betterment of the Native Hawaiian people.

- **The Native Hawaiian people maintain distinctly native educational, health care, and self-governance institutions and traditions that originate with the Kingdom of Hawaii.**

The Kingdom of Hawaii land laws provided that the Native Hawaiian people retained the right to traditional and customary subsistence use of Kingdom Crown and Public lands and the 1900 Federal Organic Act for the Territory of Hawaii retained Kingdom laws not inconsistent with Federal and Territorial law. As a result, the State Supreme Court continues to recognize the right of Native Hawaiians to use public lands for traditional and customary subsistence uses. In the area of land use, the Great *Mahele* Law divided Kingdom lands into Crown, Public, and *Ali'i* lands. Individual Native Hawaiians were able to secure personal lands, from among the public lands which were impressed with a trust for the common people. While barriers to allocation of the *Kuleana* lands stopped many Native Hawaiians from acquiring such lands, more than a few Native Hawaiians were able to acquire the lands and then passed them down to their children, grandchildren and so on, so that some Native Hawaiian *ohana* continue to hold these aboriginal native lands today. *Ali'i* lands allocated under the Great *Mahele* also have provided continuity for Native Hawaiians. In 1884, in the area of education, Princess Bernice Pauahi Bishop used her *Ali'i* lands to establish an educational trust under Kingdom law for the educational benefit of Native Hawaiian youth, orphans and indigent youth, which is carried forward today through the Kamehameha School (that operates an elementary, middle and high school). The Kamehameha School integrates Native Hawaiian language, culture and traditions into its curriculum and

the most successful Native Hawaiian students are those who are able to successfully master the Native Hawaiian curriculum as well as the general curriculum, perhaps because they are solidly prepared to deal with the modern American culture in Hawaii while maintaining a firm footing in the distinctly native community. (Educational studies have found that Native American students who are well grounded in both native culture and western culture are most successful.) In 1859, Queen Emma, the wife of King Kamehameha IV, established Queen's Hospital under Kingdom law to provide health care for Native Hawaiians and others in need of assistance. Today, the Queen's Medical Center is celebrating its 150th Anniversary and it continues to be an important institution for Native Hawaiian health care and indigent health care.

- **As their population has been restored, the Native Hawaiian people have expanded native educational, health care, community justice, and self-governing institutions.**

Our Interior-Justice delegation visited Aha Punana Leo, the Native Hawaiian indigenous language advocacy group. Aha Punana Leo operates Native Hawaiian language immersion schools and during our visit in 1999, we were greeted by preschool Native Hawaiian students singing Native Hawaiian songs and elementary school students singing traditional Native Hawaiian chants at their schools. The success of Aha Punana Leo was clear and now they are sharing their experience and knowledge with native language immersion education with the tribes of the Sioux Nation. Na Lei Na'auao is the umbrella organization for 11 Native Hawaiian Charter Schools that operate on three of the Hawaiian Islands, using culturally based curricula. We also visited Papa Ola Lokahi, which was organized by Native Hawaiians as a health advocacy and delivery organization to promote comprehensive health strategies in keeping with Hawaiian culture and traditions. Ke Ola Mamo is one of the five Native Hawaiian health care organizations created under the Native Hawaiian Health Care Systems Act of 1988 and reauthorized under the Native Hawaiian Health Care Improvement Act of 1992. These organizations are created and run by Native Hawaiians for the Native Hawaiian people. Native Hawaiians have also taken strong steps to advance self-government through the Council for Native Hawaiian Advancement, the Sovereign Councils of Hawaiian Homelands Assembly, and the Native Hawaiian Legal Defense and Education Fund, among many others. At the same time, Native Hawaiians are revitalizing their culture and traditions through renewal of native ceremonies, song and dance, restoration of traditional Hawaiian sailing vessels and voyages, restoration of historic sites, continuity of subsistence gathering and fishing activities, among other things. Keomailani Hanapi Foundation, the Polynesian Voyaging Society, and even the native students of the Polynesian Cultural Center, among many, many others, are participating in this revitalization of native culture.

- **Native Hawaiians have always maintained their right to sovereignty, self-determination and self-government.**

The Kingdom of Hawaii was recognized by the United States as a foreign nation in treaties of 1826, 1849, 1875 and 1887. Notably, in the 1849 Treaty, the United States extended its friendship, pledged peace, and encouraged commerce with the Kingdom of Hawaii. When the Kingdom was overthrown by American and European plantation owners with the aid and assistance of the U.S.

Minister and U.S. naval forces, Queen Liliuokalani lodged diplomatic protests with President Cleveland. President Cleveland commissioned the Blount Report, which found that the overthrow violated international law and that the U.S. Minister and U.S. naval forces, without authority, had participated in the wrongful overthrow. Congress declined to actively seek restoration of the Kingdom of Hawaii and the provisional Republic of Hawaii placed Queen Liliuokalani under house arrest. Until her death in 1917, Queen Liliuokalani maintained the claims of the Native Hawaiian people to Hawaiian lands and sovereignty. Prince Kuhio, heir to the throne of the Kingdom of Hawaii, participated in an effort to restore the Crown in 1895 and was imprisoned for a year. Upon his release, his wife prevailed upon him to leave Hawaii and travel to Great Britain, where he was received as visiting royalty. Later, he joined the British Army and fought in the Boer War. The Hawaiian people protested annexation and formed Royal Societies and political advocacy organizations to promote Native Hawaiian rights. More than 25,000 Native Hawaiians signed petitions protesting annexation. Despite their protests, the United States annexed Hawaii as a territory in 1898. Prince Kuhio returned in 1901 and in 1903 was elected to Congress as a territorial representative. After Queen Liliuokalani's land claims were rejected by the territorial courts in 1910, Prince Kuhio took up the effort to provide additional lands for the Native Hawaiian people and secured passage of the Hawaiian Homes Commission Act in 1921. In essence, the HHCA extended the United States' American Indian allotment policy to the Native Hawaiian people. The Native Hawaiians who reside on the Hawaiian Home Lands organized to promote self-determination through community councils and homesteaders associations and have maintained the Home Lands as distinctly native settlements across Hawaii. The Native Hawaiian people are firm in their determination to maintain their status as a distinctly native community with a right of self-government under Federal law. While some Native Hawaiians advocated for independence (an option not now available), most Native Hawaiians that participated in our meetings pursue greater self-determination within the framework of Federal law.

In sum, the Kingdom of Hawaii was recognized by the United States as a foreign nation. When Hawaii was annexed by United States' as a territory, the Native Hawaiian people became a Native American people, and Congress recognized Native Hawaiians as one of the native people of the United States in the Hawaiian Homes Commission Act of 1921. The Native Hawaiian community has maintained clear continuity with the Kingdom of Hawaii through the maintenance of historic Native Hawaiian institutions, customs and traditions. The Queen, Prince Kuhio and the Native Hawaiian people continued to promote the rights of Native Hawaiians, and the Native Hawaiian people continue to seek self-determination and self-government within the framework of the United States. S. 1011, the Native Hawaiian Government Reorganization Act is the next logical step in the process of reconciliation between the United States and the Native Hawaiian people.

2. The United States Constitution, the Indian Affairs Power and the Native Hawaiian People

The United States dealt with American Indian nations and tribes from the first days of the American Republic. War and peace with Indian tribes were vitally important during the American Revolution. In 1776, the Declaration of Independence complained that the King of England fomented Indian wars along the American frontier, and in the winter of 1777-1778, the Oneida Nation brought

corn and supplies to General George Washington and the American troops suffering through the bitter winter at Valley Forge. In 1778, the United States entered into a military alliance with the Delaware Nation, pledging peace, respect for tribal self-government and Delaware territorial integrity. Before the Constitution was ratified, the United States entered into eight other Indian treaties.

The Constitution acknowledges Indian tribes as prior sovereigns with treaty protected rights to self-government in the Supremacy Clause, which ratifies "treaties made" under the Articles of Confederation as well as those to be made under the authority of the United States. The Commerce Clause recognizes Indian tribes as governments along with foreign nations and the several states, and its text invests Congress with authority to legislate in the field of Indian affairs. The Apportionment Clause provides that "Indians not taxed," meaning native citizens of Indian nations and tribes, were not citizens of the original American polity, but rather owed allegiance to their Indian nations and tribes.

The Constitution reflects a change in the relationship between the United States and the several states, providing stronger, clearer Federal authority in the governance areas committed to the United States than existed under the Articles of Confederation. The Constitution vests the United States with paramount power to regulate Indian affairs vis-à-vis the states, in marked contrast to the confused allocation of power under the Articles of Confederation,[2] and the Commerce, Treaty and Supremacy Clauses make clear that Federal authority pre-empts state laws in conflict with Federal laws.

While the meaning of the terms "Indian" and "tribe" are not expressly defined by the Constitution, the meaning of these terms is clear from the Declaration of Independence, the Articles of Confederation, early treaties, statutes, presidential statements, and the Federalist papers.

The starting point for a discussion of the term "Indian" is the usage of the term by Christopher Columbus. In 1492, Columbus was authorized by King Ferdinand and Queen Isabella of Spain to explore the regions of India, as his passport recites. After having landed on the Island of San Salvador and exploring other Islands in the Caribbean Sea, Columbus wrote a letter to the King and Queen of Spain in 1493 entitled, "Concerning the Islands Recently Discovered in the Indian Sea." In that letter, Columbus refers to the people of the Caribbean Islands as "Indians" based upon his mistaken assumption that he was in the "Indian Sea" of southeast Asia. In the letter, Columbus uses the term "Indian" interchangeably with the term "natives," indicating his view that the terms were synonymous. Columbus's letter was widely distributed in Europe and the term "Indians" was used by Europeans to describe the native peoples of the New World. Indeed, the Caribbean Islands are still referred to as the West Indies today.

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[2] The Articles of Confederation refer to Indian nations in Article VI: "No state shall engage in any war without the consent of the United States in Congress assembled unless such state shall actually be invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such a State, and the danger is so imminent as not to admit of a delay...." Article IX refers to the regulation of Indian affairs: "The United States in Congress shall also have the sole and exclusive right and power of ... regulating the trade and managing all affairs with Indians, not members of the States, provided the legislative right of any State within its own limits be not infringed or violated...."

In the usage of Canada and the United States, the English term "Indian" means "American Indian," which in turn means a member of one of the aboriginal people of the Western Hemisphere (dating to 1732). The term has the same meaning as the term "Native American," (dating to 1737) according to Merriam-Webster Online Dictionary. In 1778-79, Captain James Cook and his crew referred to Native Hawaiians as "Indians" or "natives," interchangeably. (The Captain Cook Society recounts this from the journals of the Captain and his men. *See* www.captaincooksociety.com.)

The Declaration of Independence of 1776 castigates King George III for bringing the "Indian savages" upon the frontier settlements and declares that the United States has the authority to contract their own "alliances," as independent states. The Articles of Confederation of 1777 refer to the "Indian nations" and authorize congressional management of "Indian affairs," without infringing the rights of individual states.

Pursuant to the Articles of Confederation, the United States entered into the 1778 Treaty with the Delaware Nation refers to the Delaware nation, Indians in general, and other tribes. Read together, the Treaty indicates that the Delaware nation is considered to be an Indian nation or tribe, the "citizens" of the Delaware nation are Indians, and with other tribes are "Indians in general." Other Indian treaties, including the 1784 Treaty with the Six Nations, the 1785 Treaty with the Wyandot, Delaware, Chippewa, and Otawa Nations, the 1785 Treaty with the Cherokee, and the 1786 Treaty with the Choctaw Nation, indicate that the United States used the native nations' indigenous, aboriginal names synonymously with the term "Indian" and use the term "tribe" synonymously with the term "nation." For example, the Treaty with the Cherokee uses "the Cherokees" at times and "the Indians" at times, and commits the Cherokee to deliver "Indian" offenders against non-Indians to the United States and places the duty to do so on "the nation, or the tribe to which such offender ... may belong." The Treaty with the Choctaw Nation refers to the "tribes and towns of the said nation." These treaties also distinguish between the native citizens, Indians, non-Indians, and citizens of the United States.

The Supremacy Clause ratifies the early Indian treaties, as "treaties made ... under the Authority of the United States," so these treaties show that the term "Indian tribe" as used in the Constitution is synonymous with indigenous or native nation or tribe. Federalist No. 24 uses the terms "Indian nations" and "tribes" synonymously, indicating that the Constitution's framers ascribed the contemporary English meaning to those terms. President George Washington, who served as the Presiding Officer of the Constitutional Convention, negotiated and ratified Indian treaties with the advice and consent of the Senate after the Constitution's ratification in 1789. Washington's Indian treaties reaffirm the original understanding of the constitutional terms, which was unchanged after its ratification. The 1790 Treaty with the Creek Nation, for example, refers to the "Creek Nation of Indians" and uses the terms "tribe" and "town" to refer to tribal subdivisions. The 1791 Treaty with the Cherokee Nation again refers to the "Cherokee Nation of Indians," uses the terms tribes and towns, and references "neighboring tribes."

Moreover, the early Supreme Court cases construing the Constitution and the early treaties explain that:

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed, and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others...." The Constitution has sanctioned the previous treaties with the Indian nations, and admits their rank among those powers capable of making treaties. The words "treaty" and "nation" are applied to Indians, as to the other nations of the earth.... [T]reaties recognize the pre-existing power of the Cherokee nation to govern itself....

Worcester v. Georgia, 31 U.S. 515, 519 (1832).

Thus, the Constitution's terms are made clear by the plain English of the time, the Declaration of Independence, the Articles of Confederation, early Indian treaties and early Supreme Court cases, which give us a clear understanding of the terms "Indian" and "tribes." Indian means aboriginal, indigenous or native and "tribe" means the same thing as nation: "a people distinct from others ..." or a "distinct political community."

After 90 years of treaty-making, Congress amended the Constitution in the wake of the Civil War. The Fourteenth Amendment was intended to cement the changes wrought by the Civil War and ensure that, as the southern states were readmitted to self-governance in the Union, the rights of freed slaves would be respected. The Civil Rights Act of 1866 had already granted U.S. citizenship to all (non-Indian) persons born in the United 5tates. But, the framers of the Fourteenth Amendment added this principle into the Constitution to ensure that the Supreme Court could not overrule the Civil Rights Act as unconstitutional for lack of congressional authority and to ensure that future Congresses would not undo the Civil War abolition of slavery and citizenship for freedmen by a bare majority vote.

The Fourteenth Amendment's Citizenship Clause provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.

The President and Congress were the framers of the Fourteenth Amendment, and the Fourteenth Amendment's framers made clear that they intended to continue the original policy of the Constitution in regard to Indian affairs. For example, when an amendment was offered to "exclude Indians not taxed" from the scope of the Citizenship Clause of the Fourteenth Amendment, several Senators explained that such an amendment was unnecessary because the phrase "subject to the jurisdiction of the United States" excluded Indians from citizenship. Senator Howard, the author of the Citizenship Clause, explained:

> Indians born within the limits of the United States, and who maintain their tribal relations are not in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation, as being *quasi* foreign nations.

Cong. Globe 39th Cong., 1st Sess. 2890 (1866). Howard was supported by Senate Judiciary Committee Chairman Lyman Trumbull and other Senators, including Edgar Cowan and Reverdy Johnson. The exclusion of Indians from citizenship and the treatment of Indian nations as distinct sovereigns were longstanding policies of the federal government. Not long after the Fourteenth Amendment was ratified, the Supreme Court confirmed the view of Senator Howard and others that Indians were not citizens because they were not "subject to the jurisdiction of the United States."[3]

The Fourteenth Amendment further affirms the United States treatment of Indian tribes as separate sovereigns in the Apportionment Clause of Section 2, which repeats the original exclusion of "Indians not taxed" from apportionment of the House of Representatives. By repeating this text in the Fourteenth Amendment, its framers expressed their intent to affirm the meaning of the Constitution's original Indian affairs provisions and the historic recognition of tribal self-government thereunder. *See Lorillord v. Pons*, 434 U.S. 575, 581 (1978). Accordingly, the Fourteenth Amendment's framers intended that the Equal Protection Clause set forth in Section 1 (and applied to the Federal Government through the 5th Amendment) would co-exist comfortably with the Indian affairs power, as it does in its text in Sections 1 and 2.

By repeating the phrase "Indians not taxed" from the original Constitution, the framers of the Fourteenth Amendment also confirmed the original meaning the terms "Indian" and "tribe." Reference to the treaties and statutes enacted by Congress at the time demonstrate that Congress continued to the original usage of these terms:

- Congress enacted the 1866 Civil Rights Act, which excluded Indians not taxed from its statutory definition of citizens, and the Fourteenth Amendment was framed against the backdrop of that statute. That Act declared that "all persons born in the United States not subject to any foreign power, excluding Indians not taxes," were citizens of the United States;
- During the term of the 39th Congress, which framed the Fourteenth Amendment and sent it to the states for ratification, the United States entered into 27 Indian treaties;
- During the term of the 40th Congress, during which the Secretary of State proclaimed the ratification of the Fourteenth Amendment on July 28, 1868, the 1867 Indian Peace Commission Act was enacted and the United States entered into 16 Indian treaties (9 of which were entered

[3] In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Citizenship Clause's meaning was tested to determine whether it meant that anyone born in the United States would be a citizen regardless of the parents' nationality. In that case, the Supreme Court held that the children of Native Americans were not citizens, despite the fact that they were born in the United States. *See also United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (children of Chinese immigrants became citizens).

into on July 25, 1868, just three days prior to the proclamation of the Fourteenth Amendment); and

- The United States ratified the 1867 Treaty of Russian Cession acquiring Alaska, pledging to enact legislation for the benefit of the "tribes of Alaska" just as it does for the "aboriginal tribes" of the United States.

The treaties and statutes contemporaneous with the Fourteenth Amendment once again affirm that "Indian" means native, indigenous, and aboriginal and that "tribe" means native "nation." *See* 1866 Treaties with the Seminole, Cherokee, Choctaw, and Chickasaw Nations and 1868 Treaties with the Sioux and Navajo Nations.

The United States' Indian affairs power is political in nature, akin to foreign relations. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Supreme Court considered whether the congressional power to legislate for Indian tribes extended to the Pueblo Indians of New Mexico and whether Pueblo Indian lands were Indian country for purposes of the U.S. criminal code. The *Sandoval* court explained:

> 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 duty of exercising ... care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.... [I]n respect of distinctly Indian communities 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....

Accordingly, so long as the native people remain a "distinctly" native community, Congress may enact legislation for their benefit, so long as it is rationally related to the Indian affairs power. The *Sandoval* Supreme Court should not be viewed as establishing a new test for congressional legislation in the field of Indian affairs. Rather, it should be viewed as carrying forward the pronouncements of the Marshall Court, which stated that an Indian nation or tribe is an aboriginal "people distinct from others" or, to state it another way, a "distinct" native political community.

Based on these principles, it is clear that congressional legislation enacted for the benefit of a native people or peoples does not rely on a "suspect" ethnic classification subject to strict scrutiny under the Equal Protection principle. Rather, such legislation is authorized by the Constitution under the Indian affairs power and subject only to a rational relation test, so long as the legislation is enacted on behalf of a distinctly native community. *Morton v. Mancari*, 417 U.S. 535 (1974) ("Indian" preference in employment at the Bureau of Indian affairs was "political" rather than "racial" in nature and was permissible because it was tied rationally to the fulfillment of the United States' unique responsibilities to Indian tribes).

There is no constitutional requirement for native communities to maintain an unbroken exercise of original sovereignty. Indeed, given the fact that the Declaration of Independence and the Articles of Confederation reference warfare between the United States and Indian tribes and that the Congress and President Washington initially placed the Bureau of Indian Affairs within the War Department, it is not surprising that native sovereigns have been disrupted by the United States military. The power to wage war includes the power to make peace, and Indian treaties expressly deal with war and peace. *See* 1868 Treaty with the Navajo Nation, Article 1 (stating: "From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is here by pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.").

Because the United States disrupted native sovereigns through war, the President and Congress can assist native peoples through peace. Native government reorganization is a political question for the political branches, not a prerequisite to reconstruction, rehabilitation, or land repatriation. After all, the United States was an active participant in the killing and elimination of American Indian leaders, including Tecumseh, Osceola, Little Crow, Crazy Horse, Sitting Bull, Captain Jack, Mangus Colorado and many other chiefs. The Seminoles, Dakota, Lakota, Nez Perce, Apache, Kiowa, Comanche and others were prisoners of war. The Cherokee, Choctaw, Chickasaw, Creeks, Seminoles, Seneca, Oneida, Miami, Kickapoo and many others were removed from original homelands. Yet, despite these disruptions of native sovereignty, the Indian Reorganization Act was extended to Indian tribes – and viewed as necessary and appropriate, in part, because of the United States' hand in undermining the original Native American governments. In earlier times, the Supreme Court acknowledged that the United States' played a large part in weakening Indian tribes, so it should act to fulfill treaty pledges to protect Indian tribes. *See, e.g., United States v. Sandoval, supra; United States v. Kagama*, 118 U.S. 375, 384 (1886) (stating that, "[f]rom their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection ... This has always been recognized by the executive, and by Congress, and by this Court ...").

Nor is there any requirement that a native community keep out non-natives. If non-natives settled upon Cherokee Nation lands, the United States recognized that the Cherokee had a right to decide whether to "punish him or not as they please." 1785 Treaty with the Cherokee Nation, Article V. Similarly, the 1865 Treaty with the Sioux—Lower Brule Band provides in Article 6:

> No white person, other than officers, agents, or employees of the United States, shall be permitted to go on or remain on the said reservation, unless previously admitted as a member of said band according to their usages.

See also 1865 Treaty with the Cheyenne and Arapaho, Article 2 (tribes may admit "other friendly tribes" but "no white person ... shall go upon or settle within the country embraced ... unless formerly admitted and incorporated into one of the tribes lawfully residing there, according to its laws and usages").

Natives were intermarried with non-natives, so Congress enacted a law regulating issuance of trust allotments to white men who married Indian women. 25 U.S.C. sec. 181 (1888). Naturally, the

United States had to determine who would be eligible as an Indian for Indian lands and services. Thus, the 1865 Treaty with the Cheyenne and Arapaho provides for "an accurate census of the Indians entitled to ... the annuity payment," provides for trust allotments to be issued to Indians and provides for fee patent lands to be issued to certain mixed-blood relatives of the Indians. Articles 5-7. So, it is not unusual for the United States to determine who the native people are who comprise an Indian tribe or native community. The United States has developed rules for Indian tribes restored to recognition. Title 25 USC 861a(3), for example, provides:

> *The Modoc Indian Tribe of Oklahoma shall consist of those Modoc Indians who are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in November 1873, and who did not return to Klamath, Oregon pursuant to the Act of March 9, 1909, as determined by the Secretary of the Interior, and the descendants of such Indians who otherwise meet the membership requirements adopted by the tribe.*

Indian recognition statues and reorganization acts generally do not impair the right of Indian tribes to seek redress for historical claims. Thus, even under the Termination Policy of the 1950s, Congress preserved native land claims for Indian tribes. 25 U.S.C. sec. 750.

The United States typically distinguished between natives and non-natives when acquiring new lands or entering treaties with, or concerning, Indian tribes. Under the 1803 Louisiana Treaty of Purchase, Thomas Jefferson entered into the treaty with France, pledging to offer U.S. citizenship to the non-native inhabitants (mainly Spanish and French) of the territory and agreeing to honor the international treaties with Indian tribes then in force until such time as the United States, by mutual consent, entered its own treaties with the Indian tribes. The 1846 Treaty of Guadulupe Hildalgo makes a similar distinction between non-native inhabitants and Indian tribes, as does the 1867 Treaty of Russian Cession for Alaska. Accordingly, Congress was acting in concert with the traditional Indian affairs policy in providing for Hawaiian Homesteading by the Native Hawaiian people, as distinct from former non-native citizens of the Kingdom of Hawaii.

Applying this analysis to the situation of the Native Hawaiian people it is clear that Native Hawaiians have maintained a "distinctly native community," with the recognition and assistance of Congress. From the time of first contact with Europeans in 1778, the Hawaiian people have been recognized by the United States and European nations as a "distinctly native people." The Native Hawaiian people are the native, indigenous and aboriginal people of Hawaii. Upon the overthrow of the Kingdom of Hawaii, Queen Liliuokalani registered diplomatic complaints on behalf of the Native Hawaiian people and upon the annexation of Hawaii as a United States Territory, the Queen lodged a further protest with the Federal Government, complaining of the injury done to the "native" and "part-native" people of Hawaii.

By establishing the Hawaiian Home Lands as distinct, native lands under Federal law trust protections, Congress has assisted the Native Hawaiian people in maintaining distinctly native housing communities throughout Hawaii. The Native Hawaiians have:

- Through Queen Liliuokalani, Prince Kuhio, and Native Hawaiian people committed to native community advocacy and activism maintained continuity with the original Kingdom of Hawaii;
- Maintained their original claims to self-determination and self-government as a native, indigenous and aboriginal people and their claims to native lands;
- Maintained their original Native Hawaiian governmental institutions that have their genesis in the Kingdom of Hawaii, including the Queens Medical Center (150 years), Kamehameha Schools (125 years), and Ali'i and Kuleana lands (160 years);
- Maintained the strength and vitality of native customary and traditional law concerning gathering rights and subsistence activities on public lands (and such traditional native usage dates back to the pre-contact history of the Kingdom of Hawaii);
- Maintained the strength and vitality of Hawaiian language, traditions, and culture; and
- Established new governmental service organizations for the Native Hawaiian people, including education, health care, public safety and community justice services.

It is simply a fact (which can has been reported by Federal government delegations to Hawaii) that the Native Hawaiian people comprise a "distinctly" native community under the Constitution.

The United States has expressly acknowledged the national character of the Native Hawaiian people through foreign treaties (notably the 1849 Treaty of Peace, Friendship, and Commerce) and when Hawaii was annexed by the United States, the Hawaiian people then became a native people of the United States. Secretary of the Interior Lane acknowledged the Native Hawaiian people as a native people to whom the United States owed a trust responsibility:

> *One thing that impressed me there 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.... [T]hey are a problem now and they ought to be cared for by being provided homes out of the public lands; but homes that they could not mortgage and could not sell.*

H.R. Doc. No. 839, 66th Cong., 2d Sess. at 4 (1920). When enacting the HHCA, Congress intended to, among other things, exercise its constitutional Indian affairs power to provide for Native Hawaiians by analogizing the Act to "enactments granting Indians ... special privileges in obtaining and using the public lands." H.R. Doc. No. 839.

Accordingly, the Native Hawaiians can be, and have been, acknowledged by Congress as a distinctly native people. S. 1011, the Native Hawaiian Government Reorganization Act of 2009, is rationally tied to the United States' efforts to provide for the betterment of Native Hawaiians, and it extends to Native Hawaiians an important measure of self-determination and self-government over their own affairs, within the framework of Federal law. The bill is similar to the provisions made for American Indians and Alaska Natives under the Indian Reorganization Act, 25 U.S.C. sec. 461, *et seq*. It is constitutional, sensible, and provides Native Hawaiians an important measure of justice.

I sincerely hope that Congress can enact this long overdue legislation this year. Thank you for the opportunity to express my views.

PREPARED STATEMENT OF STEPHEN KAAA, PRESIDENT, NATIVE HAWAIIAN CHAMBER OF COMMERCE

Aloha, Chair Dorgan, Vice Chair Barrasso and members of the United States Senate Committee on Indian Affairs, aloha kŲkou;

I am Stephen Kaaa, President of the Native Hawaiian Chamber of Commerce.

Founded in 1974, the Native Hawaiian Chamber of Commerce (NHCC) strives to encourage and promote the interests of Native Hawaiians engaged in commerce, services and the professions. NHCC members participate in a variety of economic, social and public affairs.

Mission Statement – To strengthen Native Hawaiian business and professions by building on a foundation of relationships, resources, and Hawaiian values.

In keeping with our mission, NHCC: Provides opportunities for networking among members, the people of Hawai'i and those engaged in business and industry; serves as a means to organize the Hawaiian business community into a viable economic and social voice; and provides the necessary facilities for members' educational advancement in subject areas relevant to business, industry and commerce.

The Native Hawaiian Chamber of Commerce is <u>in</u> <u>favor</u> of the passage of S.1011.

The first point that needs to be emphasized is that the Bill will not cause the restoration of the former monarchical government of Hawai'i. It will simply facilitate the recognition of a governing entity of yet another domestic Native American nation. The justification for the passage of the bill must concentrate on the fairness and justice represented in finally recognizing the native people of Hawai'i; the only state whose natives have not so far been part of that process. That issue and the fully documented, dismal plight of the Hawaiian people must be presented in a manner that clearly supports passage of the bill.

Some of the opponents of the Bill contend that Hawaiians never had a "tribal" governance in the past and that our history as a people weakens our position under U.S. Indian law. In answer to that, we state the fact that we Hawaiians continue to have our culture, our heritage, our language, our beliefs about our gods and that it is those things that continue to bind us together as a people. We know, for instance that, under the influence of the Christian convert Queen Ka'ahumanu, King Kamehameha II overthrew the old religion, drove off the priests and decreed that the people would no longer worship any of the old gods. That, and the conversion of thousands of Hawaiians to Christianity, were supposed to wipe out every shred of the old religion and banish the old gods to oblivion. Why then do our chants and hula, to this very day, continue to extol the fame and fortune of gods such as KŘ, KŲne, Kanaloa, Pete and Hi'iaka? They are still an integral part of our culture. Doubt the existence of Madame Pete, the goddess of volcanoes? We never do! Especially not when we are in her firery neighborhood.

Yes, our "tribal" governance was transformed to a Western style of monarchy, but what existed for thousands of years and lasted through the first part of the reign of Kamehameha III was a governance which was primitive, dictatorial and feudal. The kings made all the rules and the chiefs and warriors carried them out. It wasn't until the "Hawaiian Magna Carta" of 1839 and the first constitution in 1840, both decreed by Kamehameha III, that the transformation began. It was continued in 1848 to 1854 with the so-called "Great" Mahele under which, for the very first time, the king released his absolute control of all of the lands in the kingdom.

Then, in less than forty years, the kingdom was gone.

What we are saying is that the old form of governance and the living Hawaiian culture form the foundation for the Hawaiian nation which we seek to have recognized; not the later multi-racial and short-lived monarchical government. However, just as other recognized Native American nations have done, we intend to modernize our form of governance as we organize ourselves. We are sufficiently assimilated into Western thinking that we do not want to preserve the feudal system which existed before Western influence wrought its changes; but rather we wish to preserve those positive cultural aspects which still bind us together as a People while changing for the better those aspects which no longer serve us in a positive way in today's World.

However, we do intend to form a native government under the principles enunciated in the so-called "Indian Commerce Clause" of the U.S. Constitution and, before that, the Articles of Confederation of the American colonies. That's what S.1011 would enable. It will enact provisions which will allow for the process to begin and lay the framework for the eventual recognition of the Native Hawaiian nation by the federal government under United States law.

Let us go forward with the historic and legal basis for the recognition of the Native Hawaiian Nation.

"The Founding Fathers" of the United States of American had only a very shallow understanding of the natives they had found on the Eastern seaboard which they had colonized. To their credit they understood that they had established certain political relationships with those natives in the form of treaties and other pacts.

What they could hardly have envisioned was the number and variety of the natives that future generations would encounter as settlement advanced Westward. How could they have known that their descendants would come upon natives as diverse as Navaho, Chippewa, Inuit or Hawaiian? Indeed, although they have been recognized under the U.S. Constitution to be a native people of Alaska, Eskimos are no more "Indian" than Hawaiians are.

In their compact, late eighteenth century fledgling union made up of thirteen states, there were a handful of groups of natives that they called "tribes". The Founding Fathers assumed that all natives were organized in that manner. Even then, however, there were other forms of native governance . . . bands, villages, clans . . . and so forth. They lumped them all into the word "tribe". Time and time again that constitutional term "tribe" has been interpreted to include all forms of native governance.

Over the years, a procedure dubbed "federal recognition" (for lack of a better term) has been used to acknowledge the domestic sovereignty of these varied native peoples. There is only one state in the union in which its native people has not been so recognized. Its name is the State of Hawai'i.

Why has that been the case? Actually, it has been mainly due to the attitude of the Native Hawaiians themselves. We can remember when the founders and early members of what eventually became the Native Hawaiian Chamber of Commerce strongly objected to the inclusion of the word "native" in our name. Attitudes on that subject have drastically changed over the thirty-five years of our existence as a chamber of commerce.

Why do we ask you to support S.1011?

As we said, the justification for the passage of the bill must concentrate on the fairness and justice represented in finally recognizing the native people of Hawai'i; the only state whose natives have not been so recognized, thus far. That issue and the fully documented, dismal plight of the Native Hawaiian people must be presented in a manner that clearly supports passage of the bill. The federal, state and private sector social programs presently helping Native Hawaiians must be preserved.

We could easily document the social statistics concerning Native Hawaiians and the sorrowful educational, employment, economic, health and criminal problems they chronicle. These are the real reason for passage of the bill.

What's at stake? Social programs targeting these problems are in jeopardy as a result of suits pending in our federal courts which seek to dismantle them. The legal arguments made in the suits by their plaintiffs are very similar to arguments made in other states, as a national campaign to dismantle or water down affirmative action programs gains momentum. Just as we are finally gaining on solutions to these problems, the federal, state and private-sector programs addressing them are under full-on legal attack.

Please review the attached document entitled **The U.S. Constitution and Indian and Minority Law**. In short, it points out that programs benefiting the recognized native peoples of the United States are treated differently under the law than such programs aimed at benefiting racial minorities. As a native people of the United States, Native Hawaiians earnestly desire that they be recognized as well.

Thank you for this opportunity to speak to you on this critical issue. We earnestly urge your support.

Mahalo nui me ke aloha.

THE U.S. CONSTITUTION AND INDIAN AND MINORITY LAW

(Under the U.S. Constitution, federally recognized native entities have a unique status under the law and their members are not treated like members of minorities)

By H.K. Brnss Keppeler, Esq. (September, 2006)

Art. I, Sec. 8

"The Congress shall have the Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes . . . ." June 21, 1788

Morton v. Mancari (1974): An employment preference for Indians upheld under the 14th Amendment by U.S. Supreme Court which applied the "ratioual basis"[1] test and said: Indians in tribes have "[a] unique status . . . th[is] preference is **political** rather than racial in nature."

Alaska Native Claims Act: Aleuts, Inuits and Eskimos are "Indians"; their regional corporations are "tribes". H.H.C. Act of 1920, Admission Act, federal acts adding Hawaiians to native programs and "Akaka Bill": Hawaiians same as "Indians". "Akaka Bill": "governing entity" same as "tribe".

[1] Program is o.k. if it's "rationally tied" to Congress' obligation to aid natives - especially in furthering self-government.

Art. II, Sec. 2

"The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." June 21, 1788

A number of treaties were entered into between the U.S. and various Indian tribes, nations or other entities.

Note: Federal recognition[2] can also be sought from the Secretary of the Interior without specific congressional action.
Ironies: (1) The 1898 Newlands Resolution - the "treaty" of annexation of the Hawaiian islands violated the U.S. Constitution (i.e., passed by simple majority not by the required two-thirds vote of the Senate) and (2) the present legal challenges of Hawaiian programs are based on arguments used in the 1960's civil rights cases to gain equality for Blacks and other minorities.

[2] There are presently 557 federally recognized native entities in the U.S.

14th Amend.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." July 9, 1868

City of Richmond v. J.A. Crosson Co. (1989) and *Adarand Constructors, Inc., v. Pena* (1995): Race-based minority programs are subject to "strict scrutiny" test and are legal ouly if they are "narrowly tailored to further a compelling government interest". *Arakaki v. State of Hawai'i* (2000): Law saying only Hawaiians can run in OHA trustee elections struck down. *Arakaki v. Cayetano* (2002), now called *Arakaki v. Lingle*: This snit seeks to invalidate DHHL, OHA and the section 5(f) provision naming "native Hawaiians", as "race-based" and unconstitutional under the 14th Amendment.

15th Amend.

"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. 2. The Congress shall have power to enforce this article by appropriate legislation." February 3, 1870

Civil rights cases and voting rights cases (1960s).

Rice v. Cayetano (2000): U.S. Supreme Court invalidates Hawaiians-only OHA voter registration, saying:

"If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign."

and

"The OHA elections by contrast, are the affair of the State . . . and they are elections to which the Fifteenth applies."

PREPARED STATEMENT OF H. WILLIAM BURGESS, FOUNDER, ALOHA FOR ALL

Aloha Chair and members. Aloha is for everyone but the Akaka bill isn't.

This bill proposes to sponsor a separate government for one race; break up and give away much of the State of Hawaii; set a dangerous precedent for the United States and almost certainly lead to secession.

Over four years ago, Senator Dan Inouye, in his remarks on introduction of the then-version of the Akaka bill (S. 147) at 151 Congressional Record 450 (Senate, Tuesday, January 25, 2005) conceded that **federal Indian law does not provide the authority for Congress to create a Native Hawaiian governing entity.**

"Because the Native Hawaiian government is not an Indian tribe, the body of Federal Indian law that would otherwise customarily apply when the United States extends Federal recognition to an Indian tribal group does not apply."

"That is why concerns which are premised on the manner in which Federal Indian law provides for the respective governmental authorities of the state governments and Indian tribal governments simply don't apply in Hawaii."

There being no tribe, the Constitution applies. The Akaka bill stumbles over the Constitution virtually every step it takes.

- As soon as the bill is enacted, **a privileged class would be created in America**. §§2(3) & (22)(D) and §§3(1) & (8) would "find" a "special political and legal relationship" between the United States and anyone with at least one ancestor indigenous to lands now part of the U.S. that "arises out of their status as aboriginal, indigenous, native people of the United States." Creation of a hereditary aristocracy with a special legal and political relationship with the United States is forbidden by the Anti-Titles of Nobility clause of the Constitution.

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1. Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and, almost all of whom are also homeowners in Hawaii. We believe that Aloha is for everyone; every citizen is entitled to the equal protection of the laws without regard to her or his ancestry. OHA's quest in the courts and in the court of public opinion to restore equal justice under the law in the Aloha State is chronicled, in part, at: http://www.aloha4all.org .

This "sleeper" provision would also have profound **international and domestic consequences for the United States**. For over 20 years, a draft Declaration of Indigenous Rights has circulated in the United Nations. The U.S. and other major nations have opposed it because it challenges the current global system of states; is "inconsistent with international law"; ignores reality by appearing to require recognition to lands now lawfully owned by other citizens." Enactment of the Akaka bill would undo 20 years of careful diplomatic protection of property rights of American citizens abroad and at home.

- Immediately upon enactment, **superior political rights would be granted to Native Hawaiians**, defined by ancestry: §7(a) The U.S. is deemed to have recognized the right of Native Hawaiians to form their own new government and to adopt its organic governing documents. No one else in the United States has that right. This creates a hereditary aristocracy in violation of Article I, Sec. 9, U.S. Const. "No Title of Nobility shall be granted by the United States" or, under Sec 10, by the states.

- Also, under §8(a) upon enactment, the delegation by the U.S. of authority to the State of Hawaii to "address the conditions of the indigenous, native people of Hawaii" in the Admission Act is "reaffirmed." This delegation to the State of authority to **single out one ancestral group for special privilege** would also seem to violate the prohibition against hereditary aristocracy. As noted above, the Constitution forbids the United States from **granting titles of nobility** itself and also precludes the United States from authorizing states to bestow hereditary privilege.

- §7(b)(2)(A)&(B) Requires the Secretary of the DOI to appoint a commission of 9 members who "shall demonstrate ... not less than 10 years of experience in Native Hawaiian genealogy; and ...ability to read and translate English documents written in the Hawaiian language," This thinly disguised intent to restrict the commission to Native Hawaiians would likely violate the Equal Protection clause of the Fifth Amendment, among other laws, and would **require the Secretary to violate his oath to uphold the Constitution.**

- §7(c)(1)(E) & (F) require the Commission to prepare a roll of adult Native Hawaiians and the Secretary to publish the racially restricted roll in the Federal Register and thereafter update it. Since the purpose of the roll is to **deny or abridge on account of race the right of citizens of the United States to vote**, requiring the Secretary to publish it in the Federal Register would cause the Secretary to violate the Fifteenth Amendment and other laws.

- §7(c)(2) Persons on the roll may develop the criteria and structure of an Interim Governing Council and elect members from the roll to that Council. **Racial restrictions on electors and upon candidates both violate the Fifteenth Amendment and the Voting Rights Act.**

- §7(c)(2)(B)(iii)(I) The Council may conduct a referendum among those on the roll to determine the proposed elements of the organic governing documents of the Native Hawaiian governing entity. Racial restrictions on persons allowed to **vote in the referendum would violate the 15th Amendment and the Voting Rights Act.**

- §7(c)(2)(B)(iii)(IV) Based on the referendum, the Council may develop proposed organic documents and hold elections by persons on the roll to ratify them. This would be the thi**rd racially restricted election and third violation of the 15th Amendment and the Voting Rights Act**.

- §7(c)(4)(A) Requires the Secretary to certify that the organic governing documents comply with 7 listed requirements. Use of the roll to make the certification would violate the Equal Protection clause of the Fifth Amendment, among other laws, and would, again, require the Secretary to violate his oath to uphold the Constitution.

- §7(c)(5) Once the Secretary issues the certification, the Council may hold elections of the officers of the new government. (If these elections restrict the right to vote based on race, as seems very likely) they would violate the 15th Amendment and the Voting Rights Act.)

- §7(c)(6) Upon the election of the officers, the U.S., without any further action of Congress or the Executive branch, "reaffirms the political and legal relationship between the U.S. and the Native Hawaiian governing entity" and recognizes the Native Hawaiian governing body as the "representative governing body of the Native Hawaiian people." This would violate the Equal Protection clause of the 5th and 14th Amendments by giving one racial group political power and status and their own sovereign government. These special relationships with the United States are denied to any other citizens.

- §8(b) The 3 governments may then negotiate an agreement for:

  transfer of lands, natural resources & other assets; and
  delegation of governmental power & authority to the new government; and
  exercise of civil & criminal jurisdiction by the new government; and
  "residual responsibilities" of the US & State of Hawaii to the new government.

This **carte blanche grant of authority** to officials of the State and Federal governments to agree to give away public lands, natural resources and other assets to the new government, without receiving anything in return, is beyond all existing constitutional limitations on the power of the Federal and State of Hawaii executive branches. **Even more extreme is the authority to surrender the sovereignty and jurisdiction of the State of Hawaii over some or all of the lands, appurtenant reefs and surrounding waters of some or all of the islands of the State of Hawaii and**

over some or all of the people of Hawaii. Likewise, the general power to commit the Federal and State governments to "residual responsibilities" to the new Native Hawaiian government.

- §8(b)(2) The 3 governments may, but are not required to, submit to Congress and to the Hawaii State Governor and legislature, amendments to federal and state laws that will enable implementation of the agreement. Treaties with foreign governments require the approval of 2/3rd of the Senate. Constitutional amendments require the consent of the citizens. But the Akaka bill does not require the consent of the citizens of Hawaii or of Congress or of the State of Hawaii legislature to the terms of the agreement. Under the bill, the only mention is that the parties **may** recommend amendments to implement the terms they have agreed to.

Given the **dynamics at the bargaining table created by the bill**: where the State officials are driven by the same urge they now exhibit, to curry favor with what they view as the "swing" vote; and Federal officials are perhaps constrained with a similar inclination; and the new Native Hawaiian government officials have the duty to their constituents to demand the maximum; **it is not likely that the agreement reached will be moderate or that any review by Congress or the Hawaii legislature will be sought if it can be avoided.** More likely is that the State will proceed under the authority of the Akaka bill to promptly implement whatever deal has been made.

The myth of past injustices and economic deprivations. Contrary to the claims of the bill supporters, the U.S. took no lands from Hawaiians at the time of the 1893 revolution or the 1898 Annexation (or at any other time) and it did not deprive them of sovereignty. As part of the Annexation Act, the U.S. provided compensation by assuming the debts of about $4 million which had been incurred by the Kingdom. The lands ceded to the U.S. were government lands under the Kingdom held for the benefit of all citizens without regard to race. They still are. Private land titles were unaffected by the overthrow or annexation. Upon annexation, ordinary Hawaiians became full citizens of the U.S. with more freedom, security, opportunity for prosperity and sovereignty than they ever had under the Kingdom.

The political and economic power of Hawaiians increased dramatically once Hawaii became a Territory. University of Hawaii Political Science Professor Robert Stauffer wrote:

> It was a marvelous time to be Hawaiian. They flexed their muscle in the first territorial elections in 1900, electing their own third-party candidates over the *haole* Democrats and Republicans...The governor-controlled bureaucracy also opened up to Hawaiians once they began to vote Republican.
>
> By the '20s and '30s, Hawaiians had gained a position of political power, office and influence never before--nor since--held by a native people in the United States.

> Hawaiians were local judges, attorneys, board and commission members, and nearly all of the civil service. With 70 percent of the electorate--but denied the vote under federal law--the Japanese found themselves utterly shut out. Even by the late 1930s, they comprised only just over 1 percent of the civil service.
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> This was "democracy" in a classic sense: the spoils going to the electoral victors.
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> Higher-paying professions were often barred to the disenfranchised Asian Americans. *Haoles* or Hawaiians got these. The lower ethnic classes (Chinese, Japanese and later the Filipinos) dominated the lower-paying professions.
>
> But even here an ethnic-wage system prevailed. Doing the same work, a Hawaiian got paid more per hour than a Portuguese, a Chinese, a Japanese or a Filipino--and each of them, in turn, got paid more than the ethnic group below them.

Robert Stauffer, "Real Politics", Honolulu Weekly, October 19, 1994 at page 4.

The alliance between Hawaiians, with a clear majority of voters through the 1922 election, and more than any other group until 1938, and the Republican party is described in more depth in Fuchs, *Hawaii Pono: A Social History*, Harcourt, Brace & World, Inc., 1961, at 158-161.

Hawaiians prosper without "entitlements" or the Akaka bill.

The 2005 American Community Survey (ACS) for California, recently released by the U.S. Census Bureau, confirms Native Hawaiians' ability to prosper without special government programs. The estimated 65,000 Native Hawaiian residents of California, with no Office of Hawaiian Affairs or Hawaiian Homes or other such race-based entitlements, enjoyed higher median household ($55,610) and family ($62,019) incomes, relative to the total California population ($53,629 and $61,476 respectively) despite having smaller median household and family sizes. California is particularly appropriate for comparing earning power, because California has the greatest Native Hawaiian population outside of Hawaii; and it happens that the median age of Native Hawaiians residing in California (33.7 years) is almost identical to that of the general population of California (33.4 years).

The fact that Native Hawaiians are quite capable of making it on their own was suggested by Census 2000 which showed the then – 60,000 Native Hawaiian residents of California enjoyed comparable relative median household and family incomes despite their 5 year younger median age.

See Jere Krischel, *Census: Native Hawaiians Do Better When Treated Equally*, CERA Journal Special Akaka Bill Edition included in our packets for Committee members.

Hawaiians today are no different, in any constitutionally significant way, from any other ethnic group in Hawaii's multi-ethnic, intermarried, integrated society. Like all the rest of us, some do well, some don't and most are somewhere in between.

The people of Hawaii don't want the Akaka bill

Grassroot Institute of Hawaii commissioned two comprehensive automated surveys of every household in the telephone universe of the State of Hawaii, one in July 2005 and the second in May 2006. Of the 20,426 live answers to the question, two to one consistently answered "No" when asked, Do you want Congress to pass the Akaka bill?"

In1959, in the Hawaii statehood plebiscite, over 94% voted "Yes" for Statehood.

Racial Tensions are simmering in Hawaii's melting pot

So said the headline on the first page of USA Today 3/7/07 describing the attack Feb. 19th 2007 in the parking lot of the Waikele mall on Oahu, when a Hawaiian family beat a young soldier and his wife unconscious while their three year old son sat in the back seat of their car. The attack, "unusual for its brutality," sparked impassioned public debate.

Tenured University of Hawaii Professor Haunani Kay Trask's picture is displayed in the USA today article and the caption quotes her, "Secession? God I would love it. I hate the United States of America."

The USA Today article and related links may be found at http://tinyurl.com/2jle2e . See also, The Gathering Storm, Chapter 1 of *Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State* by Kenneth R. Conklin, PhD http://tinyurl.com/2f7p8b.

The brutality at Waikele mall is a flashing red light. Over 1 million American citizens in Hawaii are under siege by what can fairly be called an evil empire dedicated to Native Hawaiian Supremacy.

Red shirted protesters march often and anti-American signs are regularly posted along King Street on the Grounds of Iolani Palace. Our Governor wears the red protest shirts and tells them she supports their cause. Last August at a statehood day celebration at Iolani Palace, thugs with bull horns in the faces of the high school band members there to play patriotic music, drove them away.

Passage of the Akaka bill would encourage the Hawaiian Supremacists. Even if the bill is declared unconstitutional after a year or two or more of litigation, it may well be too late to put the Aloha State back together again.

A firm rejection of the Akaka bill by this Committee would reassure the people of Hawaii that racial supremacy and separatism are not acceptable. That, in the eyes of government, there is only one race here. It is American.

Mahalo,

PREPARED STATEMENT OF JAMES I. KUROIWA, JR.

I am James Isamu Kuroiwa, Jr., a fourth generation American of Japanese ancestry. My great grandparents arrived from Japan in 1891 to the Kingdom of Hawaii. My grand mother was born on the Island of Kauai in the year 1893, the year Queen Lilioukalani was overthrown. America is the country of my birth on July 1942 and where my family has its roots.

I am testifying in strong opposition to S. 1011, also known as the Akaka Bill. I believe that preserving Hawaii as an indivisible State of the United States of America and is a fight worth fighting for.

The common people, citizens of the Kingdom of Hawaii, revolted on January 14, 1893 by not supporting Queen Lilioukalani and on January 17, 1893 the change of government by revolution was concluded by the Committee of Safety.

The Akaka bill relies on the assumption that the 1993 Apology Resolution establishes, as a matter of federal law, that the Native Hawaiian people have un-relinquished claims against the United States for the 1.8 million acres ceded to the United States "without the consent of or compensation to the Native Hawaiian people or their sovereign government."

The Native Hawaiian Study Commission submitted their report on June 23, 1983 to Congress acknowledging the victim-hood data about low income, disease, and other problems facing the Native Hawaiians, but added that there must not be any government handouts that would be racially exclusionary solely for Native Hawaiians. The report concluded that Native Hawaiians would benefit from the same programs that benefit all races, and the responsibility of government is to inform Native Hawaiians about the benefits to which all citizens are entitled.

The 1993 Apology Resolution ignored at least three thorough investigations: The 1894 Morgan Report, the 1983 Native Hawaiian Study Commission Report and the Bellows Environmental Impact Statement. Despite those reports, proponents of the Akaka bill have repeatedly cited the tendentious whereas clauses of the Apology Resolution as legally indisputable historic fact.

The Attorney General of the State of Hawaii appealed a decision by the Hawaii State Supreme Court to the U.S. Supreme Court that ceded lands could not be sold or transferred until a resolution is completed with the native Hawaiians. On May 31, 2009, the U.S. Supreme Court held the following on page 11:

> "The Apology Resolution reveals no indication-much less a 'clear and manifest' one that Congress intended to amend or repeal the State's rights and obligations under Admission Act (or any other federal law); nor does the Apology Resolution reveal any evidence that Congress intended *sub silentio* to 'cloud' the title that the United States held in 'absolute fee' and transferred to the State in 1959. Third, the Apology Resolution would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union."

The U.S. Supreme Court was crystal clear that the 1993 Apology Resolution was purely ceremonial and did not change the Newlands Resolution of 1898, the Organic Act of 1900 and the Admissions Act of 1959. The U.S. Supreme Court also added:

> "(b) The State Supreme Court's conclusion that the 37 'whereas' clauses prefacing the Apology Resolution clearly recognize native Hawaiians' 'unrelinquished' claims over the ceded lands is wrong for at least three reasons.
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> "First, such 'whereas' clauses cannot bear the weight that the lower court placed on them. See, e.g., District of Columbia v. Heller, 554 U. S. ___, ___, n. 3.
>
> "Second, even if the clauses had some legal effect, they did not restructure Hawaii's rights and obligations, as the lower court found. '[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest.' National Assn. of Home Builders v. Defenders of Wildlife, 551 U. S. 644, ___. The Apology Resolution reveals no such intention, much less a clear and manifest one.
>
> "Third, because the resolution would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union, see, e.g., Idaho v. United States, 533 U. S. 262, 280, n. 9, the Court refuses to read the nonsubstantive 'whereas' clauses to create such a 'cloud' retroactively, see, e.g., Clark v. Martinez, 543 U. S. 371, 381 – 382. Pp. 10 – 12."

The challenge is narrow, but the ruling by the U.S. Supreme Court undermines any justification for S. 1011/HR 2314.

We in Hawaii have lived in a multi-cultural and multi-ethnic society that continued from the time King Kamehameha I united all the Islands into one nation in 1810. Since that time, the native Hawaiians have never been mistreated by Americans or the United States of America. Today, Hawaii has 55% of its total population being of multi-ethnicity. As we in Hawaii say, a majority of people in Hawaii are hapa (mixed ethnicity.)

The legislation pending before Congress, S. 1011 and HR 2314, The Native Hawaiian Government Reorganization Act of 2009 aka "The Akaka Bill" separates Hawaii by race. Hawaii is the example of how people of different ethnic groups and cultures can blend and live together as one, as American. The Akaka Bill threatens that harmony.

Mahalo and Thank you.

PREPARED STATEMENT OF HON. MARK J. BENNETT, ATTORNEY GENERAL, STATE OF HAWAII

As Hawaii's Attorney General, I respectfully submit this testimony to the Senate Committee on Indian Affairs, in support of the Native Hawaiian Government Reorganization Act of 2009. Thank you for providing me the opportunity to address this important bill.

This legislation, which I will refer to as the "Akaka Bill," in honor of its chief author and this body's only Native Hawaiian Senator, provides long overdue federal recognition to Native Hawaiians, a recognition that has been extended for decades to other Native Americans and Alaska Natives. It provides Native Hawaiians with a limited self-governing structure designed to restore a small measure of self-determination. American Indians and Alaska Natives have long maintained a significant degree of self-governing power over their affairs, and the Akaka Bill simply extends that long overdue privilege to Native Hawaiians.

The notion of some that the Akaka Bill creates a race-based government at odds with our constitutional and congressional heritage contradicts Congress's longstanding recognition of other native peoples, including American Indians, and Alaska Natives, and the Supreme Court's virtually complete deference to Congress's decisions on such matters. It is for this Congress to exercise its best judgment on matters of recognition of native peoples. Although some have expressed constitutional concerns, those concerns are, in my view, unjustified.

Native Hawaiians are not asking for privileged treatment--they are simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress has recognized the great suffering American Indians and Alaska Natives have endured upon losing control of their native lands, and has, as a consequence, provided formal recognition to those native peoples. Native Hawaiians are simply asking for similar recognition, as the native indigenous peoples of the Hawaiian Islands who have suffered comparable hardships.

The Constitution gives Congress broad latitude to recognize native groups, and the Supreme Court has declared that it is for Congress, and not the courts, to decide which native peoples will be recognized, and to what extent. The only limitation is that Congress may not act "arbitrarily" in recognizing an Indian tribe. United States v. Sandoval.[1] Because Native Hawaiians, like other Native Americans and Alaska Natives, are the indigenous aboriginal people of land ultimately subsumed within the expanding U.S. frontier, it cannot be arbitrary to provide recognition to Native Hawaiians. Indeed, because Native Hawaiians are not only indigenous, but also share with other Native Americans a similar history of dispossession, cultural disruption, and loss of full self-determination, it would be "arbitrary," in a logical sense, to not recognize Native Hawaiians.

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[1] 231 U.S. 28, 46 (1913).

The Supreme Court has never struck down a decision by the Congress to recognize a native people. And the Akaka Bill certainly gives the Court no reason to depart from that uniform jurisprudential deference to Congress's decisions over Indian affairs. The Supreme Court long ago stated that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be," United States v. McGowan,[2] "whether within its original territory or territory subsequently acquired." Sandoval, 231 U.S. at 46.

Some wrongly contend that the Akaka Bill creates a race-based government. In fact, the fundamental criterion for participation in the Native Hawaiian Governing Entity is being a descendant of the native indigenous people of the Hawaiian Islands, a status Congress has itself characterized as being non-racial. For example, Congress has expressly stated that in establishing the many existing benefit programs for Native Hawaiians it was "not extend[ing] services to Native Hawaiians because of their race, but because of their unique status as the indigenous people . . . as to whom the United States has established a trust relationship."[3] Thus, Congress does not view programs for Native Hawaiians as being "race-based."

Accordingly, a Native Hawaiian Governing Entity by and for Native Hawaiians would similarly not constitute a "race-based" government.

This is not just clever word play, but is rooted in decades of consistent United States Supreme Court precedent. The key difference between the category Native Hawaiians and other racial groups, is that Native Hawaiians, like Native Americans and Alaska Natives, are the aboriginal indigenous people of their geographic region. All other racial groups in this country are simply not native to this country. And because of their native indigenous status, and the power granted the Congress under the Indian Commerce Clause, Native Hawaiians,

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[2] 302 U.S. 535, 539 (1938).

[3] See, e.g., Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(B).

like Native Americans and Alaska Natives, have been recognized by Congress as having a special political relationship with the United States.

Those who contend that the Supreme Court in Rice v. Cayetano[4] found the category consisting of Native Hawaiians to be "race-based" under the Fourteenth Amendment and unconstitutional are simply wrong. The Supreme Court's decision was confined to the limited and special context of Fifteenth Amendment voting rights, and made no distinction whatsoever between Native Hawaiians and other Native Americans.

Furthermore, Congress has already recognized Native Hawaiians to a large degree, by not only repeatedly singling out Native Hawaiians for special treatment, either uniquely, or in concert with other Native Americans, but by acknowledging on many occasions a "special relationship" with, and trust obligation to, Native Hawaiians. In fact, Congress has already expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians."[5] The Akaka Bill simply takes this recognition one step further, by providing Native Hawaiians with the means to reorganize a formal self-governing entity, something Native Americans and Native Alaskans have had for decades.

Importantly, when Congress admitted Hawaii to the Union in 1959, it expressly imposed upon the State of Hawaii as a condition of its admission two separate obligations to native Hawaiians. First, it required that Hawaii adopt as part of its Constitution the federal Hawaiian Homes Commission Act, providing homesteads (for rent) to native Hawaiians.[6] Second,

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[4] 528 U.S. 495 (2000).

[5] See, e.g., Native Hawaiian Education Act, 20 U.S.C. § 7512(D); Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(D).

[6] The Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), Section 4.

Congress required that the public lands therein granted to the State of Hawaii be held in public trust for five purposes, including "the betterment of the conditions of native Hawaiians."[7] In admitting Hawaii on such terms, Congress obviously did not believe it was creating an improper racial state government, in violation of the Fourteenth Amendment, or any other constitutional command, and Congress would not be doing so in this bill.

Some opponents of the bill have noted that Hawaiians no longer have an existing governmental structure with which to engage in a formal government-to-government relationship with the United States. That objection is not only misguided, but is also refuted by the Supreme Court's Lara decision[8] issued just five years ago. It is misguided because Native Hawaiians do not have a self-governing structure today only because the United States participated in the elimination of that governing entity. That cannot bar the Congress from trying to restore a small measure of sovereignty to the Native Hawaiian people.

In addition, one of the very purposes and objects of the Akaka Bill is to allow Native Hawaiians to re-form the governmental structure they earlier lost. Thus, once the bill is passed, and the Native Hawaiian Governing Entity formed, the United States would be able to have a government-to-government relationship with that entity.

Finally, and perhaps most importantly, the objection is, in my view, inconsistent with the Supreme Court's Lara decision, in which the Court acknowledged Congress's ability to "restore[] previously extinguished tribal status--by re-recognizing a Tribe whose tribal existence it previously had terminated."[9] Indeed, Lara eliminates the above-described

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[7] Id., Section 5.

[8] United States v. Lara, 541 U.S. 193 (2004).

[9] 541 U.S. at 203.

objection to the Akaka Bill, by recognizing Congress's ability to restore tribal status to a people who had been stripped of their self-governing structure.

Some contend that Native Hawaiians do not fall within Congress's power to deal specially with "Indian Tribes" because Native Hawaiians are not "Indian Tribes." However, the term "Indian," at the time of the framing of the Constitution, simply referred to the aboriginal "inhabitants of our Frontiers."[10] And the term "tribe" at that time simply meant "a distinct body of people as divided by family or fortune, or any other characteristic."[11] Native Hawaiians fit within both definitions.[12]

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[10] Declaration of Independence paragraph 29 (1776); see also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955)(1789) (referring to Indians as "aboriginal inhabitants of America"). Indeed, Captain Cook and his crew called the Hawaiian Islanders who greeted their ships in 1778 "Indians." See 1 Ralph S. Kuykendall, The Hawaiian Kingdom at 14 (1968) (quoting officer journal).

[11] Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789).

[12] Some opponents of the Akaka Bill argue that including all Native Hawaiians, regardless of blood quantum, is unconstitutional, rely upon the concurring opinion of Justices Breyer and Souter in Rice v. Cayetano. 528 U.S. at 524. That argument is flawed because that concurring opinion did not find constitutional fault with including all Native Hawaiians of any blood quantum *provided* that was the choice of the tribe, and not the state. Id. at 527. The Akaka Bill gives Native Hawaiians the ability to select for themselves the membership criteria for "citizenship" within the Native Hawaiian government.

Finally, some contend that because the government of the Kingdom of Hawaii was itself not racially exclusive, it would be inappropriate to recognize a governing entity limited to Native Hawaiians. This objection should be similarly unavailing. The fact that Native Hawaiians over one hundred years ago maintained a government that was open to participation by non-Hawaiians, should not deprive Native Hawaiians today of recognition. It would be ironic if the historical inclusiveness of the Kingdom of Hawaii, allowing non-Hawaiians to participate in their government, were used as a reason to deny Native Hawaiians the recognition other native groups receive.

The Akaka Bill, under a reasonable reading of the Constitution and decisions of the Supreme Court, is constitutional, just as the Alaska Native Claims Settlement Act for Alaska Natives and the Indian Reorganization Act for American Indian tribes--both of which assured their respective native peoples some degree of self-governance--are constitutional. The Supreme Court, as noted earlier, has made clear that Congress's power to recognize native peoples is virtually unreviewable. I respectfully submit that Congress should not refrain from exercising its authority and obligation to recognize native people simply because of the possibility the judicial branch could deviate from uniform precedent.

And so I respectfully emphasize and repeat that Native Hawaiians are not asking for privileged treatment--they are simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress long ago afforded American Indians and Alaska Natives formal recognition. The Akaka Bill would simply provide Native Hawaiians comparable recognition, as the indigenous peoples of the Hawaiian Islands. Formal recognition will help preserve the language, identity, and culture of Native Hawaiians, just as it has for American Indians throughout the past century, and Alaska Natives for decades. To use the poignant words Justice Jackson employed sixty years ago: "The generations of [native people] who suffered the privations, indignities, and brutalities of the westward march . . . have gone . . ., and nothing that we can do can square the account with them. Whatever survives is a moral obligation . . . to do for the descendants of the [native

people] what in the conditions of this twentieth century is the decent thing."

I also note, however, that in important provisions, the Akaka Bill makes clear that passage of the Bill does not change the status quo in many important respects. Section 8(b)(3) states, for example:

> Any governmental authority or power to be exercised by the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall be exercised by the Native Hawaiian governing entity only as agreed to in negotiations pursuant to section 8(b)(1) of this Act and beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable.

Section 8(c)(1) states:

> Nothing in this Act—
>
> (A) creates a cause of action against the United States or any other entity or person;
> (B) alters existing law, including existing case law, regarding obligations on the part of the United States or the State of Hawaii with regard to Native Hawaiians or any Native Hawaiian entity;
> (C) creates obligations that did not exist in any source of Federal law prior to the date of enactment of this Act. . . .

And, Section 9(e) states:

> Jurisdiction-Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii. The status quo of Federal

> and State jurisdiction can change only as a result of further legislation, if any, enacted after the conclusion, in relevant part, of the negotiation process established in section 8(b).

Moreover, the Bill expressly reaffirms and retains the United States's and the State of Hawaii's sovereign immunity. For example, Section 8(c)(2) of the Bill states:

> (A) SPECIFIC PURPOSE- Nothing in this Act is intended to create or allow to be maintained in any court any potential breach-of-trust actions, land claims, resource-protection or resource-management claims, or similar types of claims brought by or on behalf of Native Hawaiians or the Native Hawaiian governing entity for equitable, monetary, or Administrative Procedure Act-based relief against the United States or the State of Hawaii, whether or not such claims specifically assert an alleged breach of trust, call for an accounting, seek declaratory relief, or seek the recovery of or compensation for lands once held by Native Hawaiians.

And, Section 8(c)(3) provides:

> (3) STATE SOVEREIGNTY IMMUNITY-
>
> (A) Notwithstanding any other provision of Federal law, the State retains its sovereign immunity, unless waived in accord with State law, to any claim, established under any source of law, regarding Native Hawaiians, that existed prior to the enactment of this Act.
>
> (B) Nothing in this Act shall be construed to constitute an override pursuant to section 5 of the Fourteenth Amendment of State sovereign immunity held under the Eleventh Amendment.

These quoted provision are crucial to our continuing support for the Akaka Bill, as creation of a Native Hawaiian governing entity should not serve as a starting point for new litigation of any kind against the State of Hawaii (or the United States), nor should passage of the Bill be taken as stripping sovereignty from the State of Hawaii or altering the State's sovereignty, which alteration can only come with the State's consent, after passage of future legislation to implement future negotiated agreements between the United States, the State of Hawaii, and the Native Hawaiian Governing Entity.[13]

To conclude, the Akaka Bill does not permit secession; it will not (as currently written) subject the United States or Hawaii to greater potential legal liability; and it does not allow gambling. Nor would passage of the bill reduce funding for other native groups, who, it should be noted, overwhelmingly support the bill. Instead, the Akaka Bill will give official recognition to Native Hawaiians' self-determination. The Akaka Bill would yield equality for all of this great country's native peoples.

As the Attorney General of Hawaii, I respectfully ask that you support this important legislation.

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[13] The State of Hawaii also opposes any effort to shift the responsibility from the Commission, see Section 7 of the bill, to the State of Hawaii, for preparing and maintaining the roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity, and of certifying that each of those members meet the definition of Native Hawaiian in the bill. The current version of the bill already authorizes the Commission to consult with relevant agencies of the State of Hawaii for their expertise. See Section 7(c)(1)(D). Shifting any such responsibility to the State would add new potential constitutional challenges to the Bill.

PREPARED STATEMENT OF MICHAEL W. GIBSON

My name is Michael Gibson. My family first arrived in Hawaii in 1842. Since then eight generations of my family have lived in Hawaii. There were not missionaries or large landowners. They have been teachers, librarians, farmers, policemen, priests, doctors, lawyers and social workers. They have always been responsible, caring and proud to be Hawaiians. Many are part-Hawaiian and some like myself are not.

My grandfather was born in 1889 in Waimea, Kauai. His mother was born in the 1850's in Honolulu. My grandfather's family had come from England and Canada. My grandmother was born in 1895 in Papaikou, on the Big Island. Her family was from Germany. My grandparents and their ancestors were citizens of the Kingdom of Hawaii and later the Republic of Hawaii. My other grandparents were from Scotland. None of my ancestors were Americans except by virtue of being born in Hawaii or having become citizens at the time of annexation.

Under the laws of the Kingdom of Hawaii, everyone born in Hawaii was a citizen of the Kingdom of Hawaii. In 1846 the laws of the Kingdom specifically stated that all persons born in Hawaii, irrespective of race or ancestry, would be considered "native subjects." The case of Naone v. Thurston, 1 Haw. 220 (1856) held that persons born in Hawaii of foreign parents were Hawaiian subjects. In 1893 when the Kingdom of Hawaii was overthrown, there were Chinese, Japanese and Caucasians in addition to native Hawaiian who were citizens of the Kingdom of Hawaii. In 1893 approximately 60% of the citizens of the Kingdom of Hawaii were not native Hawaiians.

My concern with the Akaka bill is that it is based in part upon the incorrect factual premise that only native Hawaiians were citizens of the Kingdom of Hawaii and therefore are the

only persons entitled to "reparations and restitution for acknowledged wrongs." Specifically the Akaka bill in its reference to the Apology Resolution states that the United States acknowledged the ramifications of the overthrow of the Kingdom of Hawaii and supported reconciliation efforts between the United States and native Hawaiians. The Apology Resolution and the Akaka bill neglect to mention the majority of non-native Hawaiian citizens of the Kingdom of Hawaii. In defining native Hawaiian, the Akaka bill limits native Hawaiians to those who resided in Hawaii on January 1, 1893, days before the overthrow of the Kingdom of Hawaii. Not only does the definition eliminate non-native Hawaiian citizens of the Kingdom of Hawaii, it eliminates native Hawaiians who were not living in Hawaii on January 1, 1893.

I am not opposed to federal funding of Hawaiian programs to improve the condition of needy Hawaiian or to continue the tax exempt status of alii trusts and other non-profit organizations benefiting needy Hawaiians. I am not opposed to self government for native Hawaiians if that is their choice. I am opposed to ignoring the descendents of nearly half the citizens of the Kingdom of Hawaii if any basis for a program or privilege is the overthrow of the Kingdom of Hawaii. All the descendents of citizens should be treated equally irrespective of race when it comes to reparations and restitution for the allegedly wrongful conduct by the United States. The United States should not attempt to circumscribe its legal responsibilities for restitution to only a single racial group, ignoring the majority of others identically affected by its actions.

Similarly, I do not see that the United States can "negotiate" with the State of Hawaii regarding the transfer of lands, resources, and assets to the Native Hawaiian governing body. All descendants of citizens, whether Hawaiian or non-Hawaiian, would have a similar legal right to have lands, resources, and assets restored to them. Transferring assets now held by the State of Hawaii that are held for the entire public may benefit Native Hawaiians, but it will harm the rest of the residents, including in particular descendants of non-Hawaiian citizens of the Kingdom.

PREPARED STATEMENT OF SHELBY FOSTER

Dear Senators Dorgan, Barrasso and Members of the Senate Committee on Indian Affairs,

I am submitting this testimony in opposition to S.1011.

As a non-Hawaiian living in Hawai` for the past 25 years, I am very supportive of the Hawaiian people who seek and certainly deserve redress for the overthrow of the Kingdom of Hawai`i over 100 years ago.

However, for nine years, Hawaiians have requested that island wide hearings take place so that the hundreds of Hawaiians who want to testify on the Native Hawaiian Government Reorganization Act can be included and their concerns heard. Before any further laws are passed and monies expended, it would be advantageous for your committee to first hold hearings in Hawai`i to provide the Hawaiian peoples their right to participate in the process.

As it stands, the current and past bills addressing the United States relationship with Native Hawaiians to provide a process of the recognition by the United States of the Native Hawaiian governing entity were subsequently redrafted and amendments were added with no input or testimony from the Hawaiian people.

Therefore, I strongly urge you to oppose S.1011 until Congressional hearings are scheduled and held in Hawai`i on all islands, and in all States on the US continent where a significant population of Hawaiians reside, in order to provide the Hawaiian peoples their right to a democratic fair, free, and impartial process of self-determination and to empower them with the ability to determine the culturally appropriate mechanism for their own self-governance.

PREPARED STATEMENT OF TOBY M. KRAVET

My name is Toby Kravet, I am not Native Hawaiian. I am a citizen of the United States of America since birth on April 4, 1941 and a citizen of the State of Hawaii since, approximately, July, 1970.

I am strongly opposed to the Akaka Bill for a number of reasons.

1. There is no historical basis for creation of a racially exclusive Hawaiian government. The Hawaiian Kingdom, overthrown in 1893, was multi-racial and had been so since its inception. In fact, King Kamehameha the Great, who completed his "unification" of the previously warring islands in 1810, did so with the help of Westerners, one of whom, Englishman John Young, married one of his (the King's) daughters, grand-sired a future queen, became the governor of the Island of Hawaii, and is entombed with Hawaiian royalty, at Mauna Ala, the royal mausoleum. He, however, would not qualify to become a citizen of the government resulting from this legislation.

2. All of the "Western influence" on the Hawaiian Kingdom, from it's inception in 1810 to the overthrow in 1893, was welcomed by the Kingdom government. The government freely chose to grant citizenship to non-Hawaiians, change from a feudal system of property management to one of private ownership, adopt laws and government procedures modeled after those of the United States and Europe, change from a pure monarchy to a constitutional monarchy, and model the government structure after that of England. By allowing Native Hawaiians, who can trace their lineage back to before the time of the first known Western contact when the islands were frequently at war with one another (1778), to form their own, new government, we are, in a sense, saying that all that their leaders freely accomplished between 1910 and 1983 was a mistake.

3. Native Hawaiians do not need their own government to preserve Hawaiian culture and tradition: This argument is fallacious. Hawaiian culture and tradition is very much alive and well, studied in our educational institutions, practiced by a number of privately funded organizations, and celebrated in the media and in our state holidays. There is not a resident of Hawaii, regardless of ethnicity or national origin, who is not aware of and does not appreciate and respect Hawaiian history, tradition, and culture.

4. This bill was not written to assist in righting true historical wrongs but, instead, to preserve and protect dedicated income streams which, although they had appeared proper at the time of establishment, were under increasing constitutional attack

because they were funding racially exclusive programs and entities. If the recipient of the income could become a government with the same status and protections as American Indian governments, the income streams would, thereby, be protected.

5. Carving out a single section or sections of land in the Hawaiian Islands, where realistically usable land is already in limited supply, allowing one group, identified by genealogy, to create it's own legal system, and removing both the land and the members of this group from the tax rolls, all of which could happen as the end result of this legislation, we would be creating massive future problems for Hawaii's state government and all of it's citizens, Native Hawaiians, despite the government(s) in which they claims citizenship, included.

I urge you to reject S. 1011.

PREPARED STATEMENT OF ZURI AKI

Dear Senators Dorgan, Barrasso and Members of the Senate Committee on Indian Affairs,

I thank you for allowing me to submit this testimony in OPPOSITION to S.1011, which seeks to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process of the recognition by the United States of the Native Hawaiian governing entity.

I OPPOSE S.1011: Native Hawaiian Government Reorganization Act of 2009 because -

Lack of hearings held in Hawai`i that would allow the Hawaiian people to present testimony on the Native Hawaiian Government Reorganization Act.

In 2000, only two (2) days of hearings were held on O`ahu Island. All other hearings were cancelled.

The current and past bills addressing the United States relationship with Native Hawaiians to provide a process of the recognition by the United States of the Native Hawaiian governing entity were subsequently redrafted and amendments were added with no input or testimony from the Hawaiian people.

Therefore no hearings have ever been held in Hawai`i on the current legislation before the 2009 Congress.

The Hawaiian people seek the right to a fair and democratic process that includes hearings on S.1011 throughout the islands that comprise the state of Hawai`i.

For 9 years, Hawaiians have requested that the island wide hearings be rescheduled so that the hundreds of Hawaiians who want to testify can be included and their concerns heard.

The effort being pursued in the US Congress violates the most fundamental principles of democracy and human rights.

I call for the Congressional Committee to hold hearings on the Native Hawaiian Government Reorganization Act in Hawai`i to provide the Hawaiian peoples their right to participate in the process and to seek amendments to the Native Hawaiian Government Reorganization Act.

Therefore, I strongly urge you to OPPOSE S.1011 until Congressional hearings are scheduled and held in Hawai`i on all islands, and in all States on the US continent where a significant population of Hawaiians reside, in order to provide the Hawaiian peoples their right to a democratic fair, free, and impartial process of self-determination and to empower them with the ability to determine the culturally appropriate mechanism for their own self-governance.

Mahalo nui loa,

PREPARED STATEMENT OF GARRY P. SMITH

I ask that S.1011 Akaka Bill be stopped. This bill has not received public hearings in Hawaii for almost 10 years and much has been changed in the bill since then.

This bill would divide all races in Hawaii into two. Those with the ancestry (race) to be consider Native Hawaiian and those who would be called non-Hawaiian. As an American of native American ancestry and a retired Naval Officer I find it exclusionary and un-american to divide people up by their race. I served for 21 years in the U.S. Navy working with peoples of all races, I never considered race either a barrier or a way to choose individuals for benefits. That is what S.1011 would do.

It would erase the harmony that Hawaii has tried so hard to achieve regardless of race.

In Hawaii we all live side by side, we aren't separated as a reservation would be in other states. Most of the time you can't even tell what race someone is, nor do we ask, it doesn't matter. The Akaka Bill would change that. Those who are lucky enough to have even a small amount of the blood would be entitled to participate in a new government with greater benefits. That's not only unfair it is unconstitutional.

I ask that you not divide Hawaii by race. I love it here and don't want to be forced into a race based society.

PREPARED STATEMENT OF EARL ARAKAKI

I am opposed the S1011 aka The Akaka Bill

THE AKAKA BILL A BEFITTING NAME

The Native Hawaiian Government Reorganization Act of 2009, S1011/HR2314 is known as the Akaka bill.

Akaka; a rent, split, chink, separation; to crack, split, scale.
(Hawaiian Dictionary, by Mary Kawena Pukui, and Samuel H. Ebert, c. 1971, University of Hawaii Press, page 12)

I find the title "The Akaka bill" very appropriate as the meaning of the word "akaka" literally describes what will surely happen to the people of Hawaii, and the nation if it becomes law.

If the Akaka bill becomes law and upheld by the courts it will be the akaka (chink) in the armor of citizens individual rights protected by the U.S. Constitution.

There will be akaka (separation) throughout Hawaii along racial lines. Families will akaka (split) along bloodlines and ancestry. Businesses, schools, and entire communities will akaka (rent, tear apart).

The legacy of Senator Akaka's bill will not be remembered for his name, but for the meaning of the word "akaka" and the destruction it caused.

Hawaii's Race Case

by Ilya Shapiro

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review.

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While it may be good for the country that this Supreme Court term mainly involves technical statutory issues (at least they can't do more harm to the Constitution!), it's a bit of a let down for those of us who follow the machinations of One First Street. One such obscure case, however, merits watching for its ramifications on the constitutional principle that all citizens should be treated equally under the law. The central issue in *Hawaii v. OHA* - whether Hawaii can sell certain state lands without accommodating a racialist commission called the Office of Hawaiian Affairs (OHA) - is idiosyncratic, but the case threatens to set a terrible precedent for a state that has otherwise been a model of racial harmony.

In the 2000 case of *Rice v. Cayetano*, the Supreme Court held that a race-based scheme allowing only statutorily defined "Hawaiians" to vote for OHA's trustees was unconstitutional. Despite Rice, and despite Justice John Marshall Harlan's dissenting statement in *Plessy v. Ferguson* 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates

classes among citizens," OHA continues to view Hawaiian citizens through racial lenses. This practice has spawned numerous lawsuits, including the present legal crisis in which the state's authority to manage its land for the good of all of its citizens has been replaced with a court-imposed duty to hold the land for the benefit of one racial class.

Specifically, after nearly 15 years of litigation, the Hawaii Supreme Court blocked the sale of 1.2 million acres of land (29 percent of the state's total area) based on a mistaken interpretation of a joint resolution that Congress passed in 1993 to apologize for the 1893 overthrow of the Kingdom of Hawaii. While the Apology Resolution was itself based on a slanted view of history - the propagation of which may yet lead to the creation of race-based state government (see the Akaka Bill, a subject for a different article) - the larger point is that the court rewrote the terms by which Hawaii became the 50th state.

But nothing in the Apology Resolution remotely supports the idea that somehow Congress impaired (retroactively!) the property rights in question; the Resolution does not address either Hawaii's sovereign powers or its title to state lands. Further, the Newlands Resolution of 1898 (the law annexing Hawaii to the United States), as well as the Admission Act of 1959 and subsequent federal legislation, foreclose the premise that "Native Hawaiians" may have valid claims that an injunction against land sales preserve.

That is, the United States obtained full sovereignty over the disputed lands when it annexed Hawaii, and the new state government assumed that sovereignty when Hawaii joined the Union. The Hawaii Supreme Court's decision, committed in the name of federal law, thus violates both state sovereignty and federal law! Moreover, the proposition that OHA gets a veto over the transfer of state lands merely because it purports to represent the interests of those who make race-based claims to those lands is an affront to the Equal Protection Clause of the Fourteenth Amendment.

Some argue that "Native Hawaiians" are a special class who, like Indian tribes, are allowed special treatment based on racial classification. But Hawaiians are not American Indians in the constitutional sense. The term "Indian tribes" has a fixed meaning, limited to "dependent nations" at the

time of the Founding. Such tribes must have an independent existence and "community" apart from the rest of American society, and a separate government structure for at least the past century.

Hawaii, by contrast, is the most integrated and blended society in America. Only ten percent of "Native Hawaiians" have at least fifty percent Hawaiian blood - and only two of the nine OHA trustees have Hawaiian surnames. No, Indian law is a unique compromise with pre-constitutional realities - one based on political rather than racial classifications - that is inapplicable to Hawaii.

In short, the Apology Resolution neither amended nor rescinded the federal laws that gave Hawaii full control over the disputed lands. But even if it did, race-based claims to those lands should be dismissed as unconstitutional.

The Supreme Court announced in Rice the unwavering principle that "[t]he Constitution of the United States ... has become the heritage of all the citizens of Hawaii." Let's hope that it builds on that sentiment in *Hawaii v. OHA*. Hawaii should be allowed to transfer state lands for the benefit of all its citizens - thus eroding racial divisions and treating all Hawaiians with the legal equality to which they are entitled.

By The Color of Their Skin, or The Content of Their Character?

by Ilya Shapiro

Added to *cato.org* on November 6, 2007

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http://www.cato.org/pub_display.php?pub_id=8776

The House of Representatives recently approved a bill that would establish disturbing racial classifications under American law. The Native Hawaiian Government Reorganization Act of 2007—also known as the "Akaka Bill" after its primary Senate sponsor, Daniel Akaka (D-HI)—purports to grant "native Hawaiians" federal recognition akin to that now enjoyed by Indian tribes. It uses the one-drop rule to create a race-based government that will collect political and economic preferences and exempt sufficiently ethnic Hawaiians from whatever aspects of federal and state authority it deems undesirable.

By carving out a Hawaiian exception to the Constitution's guarantees of equal protection and due process, the Akaka Bill tries to circumvent a 2000 Supreme Court decision that struck down a racial restriction on voting for trustees of Hawaii's Office of Hawaiian Affairs.

Sponsored by Neil Abercrombie (D-HI) in the House and supported by Hawaii's Republican governor, Linda Lingle, the bill is both unconstitutional and bad policy. Congress simply cannot create new sovereigns outside the constitutional framework, and analogies to American Indians misconstrue

both the history and legal status of peoples who predate the United States.

The Constitution's Indian law exception is controversial enough, but it was created by the document itself, arising as a unique historical compromise with pre-constitutional realities, and Congress still retains a great amount of oversight. Once the Constitution was ratified, no government organized under it could create another government that can exempt itself from the Bill of Rights as it sees fit.

But if the Akaka Bill is not a constitutional end-run, as its backers vehemently protest, then it is facially disallowed by the Fifth and Fourteenth Amendments' explicit proscription against any state action that treats people differently based on their race or ethnicity. The Supreme Court found Native Hawaiians to be an ethnic group, after all, so Congress cannot pass a law giving them rights denied other Americans.

Hawaiians are not American Indians in the constitutional sense. The term "Indian tribes" has a fixed meaning, limited to preexisting North American tribes that were "dependent nations" at the time of the Founding. Such tribes, to benefit from the protections of Indian law, must have an independent existence and "community" apart from the rest of American society, and their separate government structure must have a continuous history for at least the past century. By these standards, Hawaiians do not qualify.

Even if Congress could create from whole cloth the equivalent of an Indian tribe, there is no good reason to label racial or ethnic groups as distinct self-governing nations...

As one federal court recently explained, "the history of indigenous Hawaiians... is fundamentally different from that of indigenous groups and federally recognized Indian Tribes in the continental United States." The United States seized tribal lands and persecuted their inhabitants, while Hawaiians peaceably ended their monarchy and later overwhelmingly voted to become a state.

Moreover, aboriginal Hawaiians are not geographically segregated, but live together with people of all races. Hawaii is the most integrated and blended

society in America: Only 10 percent of native Hawaiians have at least 50 percent Hawaiian blood and only two of the nine trustees of the Office of Hawaiian Affairs have Hawaiian surnames. What is more, some 40 percent of those qualifying as Native Hawaiian under the Akaka Bill's one-drop "ancestry" rule don't live in Hawaii.

Even if Congress could create from whole cloth the equivalent of an Indian tribe, there is no good reason to label racial or ethnic groups as distinct self-governing nations solely because they have unique cultural traits or were once victims of oppression or discrimination. Otherwise, what is to stop African or Jewish or Catholic or Chinese Americans from demanding not only reparations for the wrongs historically committed against them but also their own separatist governments?

Not deterred by law or principle, Sen. Akaka has proposed various forms of his bill since 2000, when the House also passed it. Last year the Senate fell just four votes shy of ending a Republican filibuster, in the absence of three senators who would have voted for it. This year, with Democrats controlling Congress—and with Republican co-sponsorship from Alaska's delegation, Rep. Tom Cole (OK) and Sens. Norm Coleman (MN) and Gordon Smith (OR)—the Akaka Bill will almost certainly land on the president's desk.

The Bush administration, which in 2005 merely suggested a few amendments, has now promised a veto, citing the U.S. Civil Rights Commission's conclusion that the bill "would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege." And that is beyond the special federal recognition that Hawaiians—as well as indigenous Alaskans—already receive, not least in the form of racial check-off boxes for purposes of affirmative action.

President Bush's belated discovery of his veto pen is an encouraging sign—on this as on so many other issues—but the next occupant of the White House may not be as opposed to judging people on the basis of their skin color or national origin.

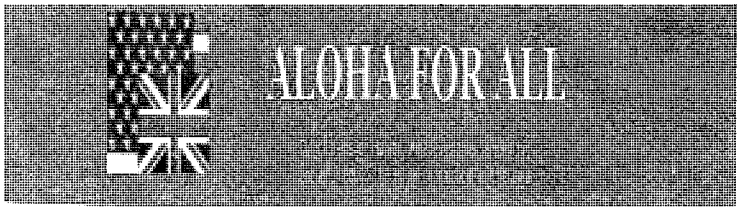
December 11, 2008
Legal Briefs

Hawaii v. Office of Hawaiian Affairs

by Ilya Shapiro

http://www.cato.org/pub_display.php?pub_id=9838

In the 2000 case of *Rice v. Cayetano*, the Supreme Court held that a race-based scheme allowing only statutorily defined "Hawaiians" to vote for the Office of Hawaiian Affairs's trustees was unconstitutional. Despite Rice, and despite Justice John Marshall Harlan's dissenting statement in *Plessy v. Ferguson* 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," the OHA continues to view Hawaiian citizens through racial lenses. This practice has spawned numerous lawsuits, including the present legal crisis in which the state's sovereign authority to manage its land for the good of all of its citizens has been replaced with a court-imposed duty to hold the land for the benefit of one racial class. Specifically, the Hawaii Supreme Court blocked the sale of certain state lands based on a mistaken (and race-based) interpretation of a joint resolution that Congress passed in 1993 to apologize to Hawaiian people for the overthrow of the Kingdom of Hawaii—which was itself based on a slanted view of history. Cato's brief, joining with the Pacific Legal Foundation and the Center for Equal Opportunity, argues that race-based government is impermissible under the Fourteenth Amendment's Equal Protection Clause, that the Constitution's Indian Commerce Clause does not provide a basis for laws that grant preferences to "Native Hawaiians," and that the Apology Resolution neither amended nor rescinded the federal laws that gave the state of Hawaii full control over the disputed land.



FURTHER TESTIMONY OPPOSING S. 1011: THE AKAKA BILL

LILKELY CONSEQUENCES OF PASSAGE OF S. 1011:

Native Hawaiian Demands for Grant of Government Powers to:

*Define who will be members (citizens) of the new native Hawaiian government.
*Regulate conduct of members through legislation.
*Adopt ordnances for health, safety and welfare.
*Regulate domestic relations and inheritance.
*Administer justice.
*Levy taxes, zone lands, produce income from, and regulate conduct on, Hawaiian lands.
*Hold and manage land or other resources and administer any trust.
*Issue allotments, assignments, leaseholds, or homesteads

Native Hawaiian Demands for Transfer of Lands & Money to New Hawaiian Government

*Payment of $10 Billion by U.S. as damages for the 1893 overthrow and 100 years of illegal land use.
*All lands taken by the U.S. government, with vital military lands leased back to the U.S. at market value.
*Joint management and leaseback to U.S. of national parks on formerly Hawaiian lands.
*All Hawaiian Home Lands and additional lands equal to 20% of 1893 Crown and Government lands.
*20% of revenues generated from the *80% of Crown and Government lands retained by the State.

.The above are the demands that were listed in a tabloid publication issued by the Office of Hawaiian Affairs on January 17, 1993, the one-hundredth anniversary of the 1893 revolution. The publication stated that OHA, in conjunction with other native Hawaiian groups and Hawaii's Congressional delegation, prepared this list of demands for inclusion in a draft Hawaiian government restoration Bill to be introduced in Congress—the original "Akaka Bill."

While the current Akaka Bill (HR 2314/S1011) does not specifically enumerate all these demands, Section 8 of the Bill does call for "negotiations" between "the U.S., the State of Hawaii, and the native Hawaiian governing entity" for an agreement on:
*the transfer of lands, natural resources, and other assets...
*the exercise of governmental authority over any transferred lands, natural resources, and other assets...
*the exercise of civil and criminal jurisdiction over the transferred lands
*the delegation of governmental powers and authorities to the native Hawaiian governing entity
*grievances regarding assertions of historical wrongs committed against native Hawaiians by the U.S. or the State

In other words, the demands in the current bill are essentially the same as in 1993, but cleverly phrased in general terms, so that the true consequences of the Akaka Bill cannot be known until AFTER the Bill becomes law.

Clearly the original intent of what eventually became the Akaka Bill was for a native Hawaiian government to have virtually all the governmental powers currently exercised by t he State of Hawaii and the City and County of Honolulu, to be exercised over any persons, Hawaiian or non-Hawaiian, who reside on or travel across lands transferred to the new Hawaiian government. This would include civil and criminal jurisdiction.

This would be a recipe for civil chaos, since Hawaiians do not live concentrated in one area, as on Indian reservations, but are scattered across all island and most neighborhoods. People who live in one area whose land is transferred to the new government would be subject to different civil and criminal laws than people who lived in a nearby area on lands that are retained by the State of Hawaii. What law would apply to a native Hawaiian who breaks a law while driving on non-Hawaiian land ? And vice-versa, what law would apply to a non-Hawaiian who commits an offense while on Hawaiian lands? And since native Hawaiians could be citizens of the new Hawaiian government regardless of where they live, what laws would apply to a native Hawaiian who lives in a non-Hawaiian neighborhood?

If anything resembling this scheme results from the negotiations called for in Section 8 of the Akaka Bill, living in Hawaii will be a chaotic experience.

We urge the Senate to kill this Bill !

Tom Macdonald

Communications Director

Aloha for All

Hawaiian Upside-Down Cake

An island far from "e pluribus unum."
By Lamar Alexander
National Review Online
May 10, 2006

This week, the U.S. Commission on Civil Rights announced its opposition to S. 147, the Native Hawaiian Government Reorganization Act of 2005, which it found to "discriminate on the basis of race."

It is possible the Senate will be asked in the next few weeks to consider this legislation, and I hope my colleagues will agree with the Civil Rights Commission and oppose this legislation.

Here is what the commission had to say:

> The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 2005, (S. 147) as reported out of committee on May 16, 2005, or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

This recommendation from the U.S. Civil Rights Commission is significant because that commission was founded specifically to protect the rights of minorities and ensure equal protection for all Americans under the law.

The bill would create a separate, independent, race-based government for Native Hawaiians. This would reverse the way we have done things from the beginning in this country. It would turn upside down the central idea of what it means to be an American.

Each day, in classrooms around America, at civic gatherings, and here in Congress, we rise and pledge allegiance to "one nation . . . indivisible"—not divisible.

Our national motto, *e pluribus unum*, is "one from many"—not many from one. Our constitution guarantees equal opportunity without regard to race—not based upon race.

Hawaiians are Americans. They became United States citizens in 1900. They have saluted the American flag, paid American taxes, fought in American wars. In 1959, 94 percent of Hawaiians reaffirmed that commitment to become Americans by voting to become a state.

Becoming an American has always meant giving up allegiance to your previous country and pledging allegiance to your new country, the United States of America.

This goes back to Valley Forge when George Washington himself signed and then administered this oath to his officers: "I . . . renounce, refuse, and abjure any allegiance or obedience to [King George III]; and I do swear that I will to the utmost of my power, support, maintain and defend the said United States. . . ."

Since those times, every new citizen of the United States has taken basically the same oath. Last year, more than 500,000 new Americans raised their right hand and said these words: ". . . I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen . . . I will support and defend the Constitution and laws of the United States . . . and bear true faith and allegiance to the same. . . ."

America is different because, under our constitution, becoming an American can have nothing to do with ancestry. That is because America is an idea, not a race. We are united by principles expressed in our founding documents, such as liberty and democracy and the rule of law, not by our multiple ancestries. An American can technically become a citizen of Japan, but would never be considered "Japanese." But if a Japanese person wants to become a citizen of the United States, he or she *must* become an American.

A few years ago I attended the Italian-American dinner here in Washington, D.C. There were cheers for Scalia, the justice. For Stallone, the actor. For Tagliabue, the commissioner. And for Pelosi, the congresswoman. They were all there.

But what struck me most about the evening was not just the pride in Italian heritage. It was the spontaneous pride in America. You felt it in the singing of our national anthem, in the recitation of the Pledge of Allegiance and in the speeches. They were proud of where their ancestors had come from. They were even prouder of having become Americans.

It is suggested that "native Hawaiians" are different because they lived on the islands of Hawaii before Asian and white settlers came there, and that their previous government was undermined by Americans who came. So, the argument goes, they should be treated as an American Indian tribe.

But U.S. law has specific requirements for recognition of an Indian tribe. A tribe must have operated as a sovereign for the last 100 years, must be a separate and distinct community, and must have had a preexisting political organization. Native Hawaiians do not meet those requirements. In 1998 the State of Hawaii acknowledged this in a Supreme Court brief in *Rice* v. *Cayetano*, saying: "The tribal concept simply has no place in the context of Hawaiian history."

If the bill establishing a "native Hawaiian" government were to pass, it would have the dubious honor of being the first to create a separate nation within the United States. While

Congress has recognized preexisting American Indian tribes before, it has never created a new one. This is a dangerous precedent. This is not much different than if American citizens who are descended from Hispanics that lived in Texas before it became a republic in 1836 created their own tribe, based on claims that these lands were improperly seized from Mexico. Or it could open the door to religious groups, such as the Amish or Hassidic Jews, who might seek tribal status to avoid the constraints of the Establishment Clause. If we start down this path, the end may be the disintegration of the United States into ethnic enclaves.

It is suggested that recognizing diversity is an American tradition. The diversity of the United States of America is a great strength, but not its greatest. Israel is diverse. Iraq is diverse. Bosnia is diverse. Great Britain has been recently been reminded that diversity by itself can create dangers as well as strengths. The unique accomplishment of the United States of America is not our diversity; it is that we have molded our multiple ancestries and magnificent diversity into a single nation based upon a set of common principles, language and traditions.

Hawaii itself is a proud example of that diversity. According to the 2000 Census, 40 percent of Hawaiians are of Asian descent. 24 percent are white. Nine percent said they were Native Hawaiian or Pacific Islanders. Seven percent claimed Hispanic ethnicity and two percent were black. 21 percent of Hawaiians reported two or more racial identities. Their two senators are of native Hawaiian and Japanese ancestry. Their governor is Jewish. But what unites Hawaii is not its diversity, but its common Hawaiian traditions and the fact that Hawaiians are all Americans.

The proposed new government for "native Hawaiians" would be based solely upon race. Surely we have by now learned our lesson about treating people differently based upon race. Our most tragic experiences have occurred when we have treated people differently based upon race, whether they were African Americans, Native American or those who lived in the Hawaiian Kingdom.

In the documents to which we have pledged allegiance, the way we have sought to right those wrongs is to guarantee respect for each American as an individual, regardless of his or her race. This legislation instead would compound those old wrongs. It would create a separate government, and separate rules—perhaps later even separate schools—based *solely* upon race.

To destroy our national unity by treating Americans differently based upon race is to destroy what is most unique about our county. It would begin to make us another United Nations instead of the United States of America

The Senate should defeat this legislation that creates a separate, race-based government for those of native Hawaiian descent. This idea is the reverse of what it means to become an American. Instead of making us one nation indivisible, it divides us. Instead of guaranteeing rights without regard to race, it makes them depend solely upon race. Instead of becoming "one from many," we would become many from one.

Senator Lamar Alexander is a Republican from Tennessee.

azcentral.com

ARIZONA REPUBLIC EDITORIAL

Aloha, equality

The 'Native Hawaiian' bill defies fundamental U.S. principles
Aug. 4, 2005 12:00 AM

As a statement flouting the fundamental premise of the 15th Amendment - that most noble item forbidding racial discrimination in voting - you could not do much worse than the "Native Hawaiian" legislation now building steam in Congress.

Sponsored by Sen. Daniel Akaka, D-Hawaii, Senate Bill 147 would create a government exclusively for "native" Hawaiians, the determination of which in this racially well-melted state to be decided later.

The essential demand of the Akaka legislation is that native Hawaiians are seeking to be treated as a Native American tribe. According to the Office of Hawaiian Affairs, qualifying natives wish to "exercise their right to self-determination" by selecting another form of government that may include "free association or total independence."

If you detect a hint of secession in that last phrase, you did not necessarily read incorrectly. The proposal does not appear to exclude the right of this new, independent government to withdraw its territory from the Union if its members, whoever they are, so choose.

Essentially alone in fighting off this terrible idea is Sen. Jon Kyl, R-Ariz. Kyl approaches his opposition from two fronts.

One is self-evident principle: Using Congress to create a "tribe" out of thin air is an affront to the very concept of equal protection before the law. Creating a native Hawaiian government, especially one lacking self-defining borders, establishes one set of laws for natives and another for "outsiders," even those who have lived for generations on the islands.

The other is practical: Native American tribes existed before the creation of the United States, and the accommodations sought for those tribes constitute an acknowledgment of realities as they existed at the time.

It shouldn't surprise anyone that it would take a lawmaker from Arizona to see through the rhetoric of this bill. At least the stunning complexity of assuring the rights of 21 existing Arizona tribes is mitigated by the fact that those tribes have borders.

There is clearly more than a sentimental support for retroactive sovereignty of a non-existent tribe driving the Akaka bill through Congress.

It enjoys some Republican support, all of it for purely political reasons. Alaska's two GOP senators back it because Hawaii's two Democratic senators supported the Alaskans' efforts to expand oil exploration.

Linda Lingle, the Republican governor of Hawaii, sees her support of the bill as an opportunity to extend her party's base in Hawaii. Not much principle at work there.

Then there is the timely question of what benefits tribal status brings these days. Gambling rights, anyone?

The "Native Hawaiian" legislation is bad because it is contrary to a founding principle of this nation: that all men and women are created equal.

It has been hard work getting to the point where that statement truly means what it says. The Akaka bill turns back the clock.

One civil war is enough

By **Boston Herald editorial staff**
Saturday, July 23, 2005

We thought the question of whether anybody could secede from the union had been settled almost a century and a half ago. We seem to have been wrong.

Sen. Daniel Akaka (D-Hawaii) is sponsoring a bill that would establish a government for ``Native Hawaiians," about a fifth of the state's population, along the lines of tribal governments of Native Americans in the other 49 states. A more divisive bad idea has rarely been seen.

Hawaii's Office of Hawaiian Affairs, along with Republican Gov. Linda Lingle, is backing the bill and argues that it would permit Native Hawaiians to ``exercise their right to self-determination by selecting another form of government including free association or total independence." There would be nothing to bar a restoration of the monarchy, except for a plausible pretender to the throne.

The bill contains no criteria for establishing who qualifies as ``native." There seems to be nothing to forbid the ``one drop of blood" criterion of the old Jim Crow laws.

It's a case of ginned-up victimology run amok. Though Sen. Jon Kyl (R-Ariz.) has made opposing the bill a personal cause, most of the Senate seems to be paying little attention and the bill could get through on a vote Kyl had to promise not to obstruct. That would leave preservation of the Union up to the House, where, we hope, somebody will remember the point of events at Appomattox Court House in 1865.

townhall.com

The worst bill you have never heard of

by Tim Chapman
June 23, 2005

Senator Daniel Akaka (D-HI) has introduced a bill called the Native Hawaiian Government Reorganization Act of 2005, S.147. Akaka wants to extend the government's policy of self-governance and self-determination to Native Hawaiians. He, and fellow Hawaiian Senator Inouye intend to do this by creating a race-based and racially separate government for Native Hawaiians. Under S. 147 Native Hawaiians would be under the federal Indian law system and would be designated as a "tribe." This new race-based government would have jurisdiction over 20 percent of Hawaii's citizens as well as 400,000 citizens nationwide.

This would be the first time in our nation's history that we have created an extra-constitutional race-based government out of a group of American citizens. Moreover, were this bill to become law, this new race-based government would be allowed to deny its constituents the protections afforded by the 1st, 5th and 14th Constitutional Amendments because they would not apply to the new "tribal government."

This bill will likely receive scheduled Senate floor time before the chamber leaves for its August recess. Proponents of the legislation have been forcefully advancing the bill for 6 years now and during the last appropriations cycle they were able to secure a deal with Senate Leadership to assure floor time before this August is over. This fight will be won or lost on the Senate floor and it is currently unclear where the votes are.

Bad Bill for Hawaii and All States

by Roger Clegg
HUMAN EVENTS
Jan 7, 2004

Pending in both houses of Congress is legislation proposed by Sen. Daniel K. Akaka (D.-Hawaii) that would recognize Native Hawaiians -- those descended from the islands' aboriginal inhabitants -- as an Indian tribe. What's behind this?

Politicians in Hawaii would like to be able to single out Native Hawaiians for special favors and programs. This appears to be true for both parties, with the Republican governor of the state, Linda Lingle, currently leading the lobbying efforts, along with some high-powered and high-priced D.C. lobbying firms.

As Ken Conklin, a Hawaiian opposing the bill, recently wrote: "Our governor, legislature and congressional delegation aggressively push the Akaka bill.... They say it's righteous; but mostly it's pork-barrel politics. More than 160 racially exclusionary programs funnel big bucks from Washington to Hawaii, giving wealth and power to 'connected' individuals and corporations. Unconstitutional? Racial balkanization? Don't worry. Our friends will be rich."

The problem confronting these politicians is that the Supreme Court made clear three years ago in *Rice v. Cayetano* that "Native Hawaiians" is an ethnic classification, and ethnic classifications are presumptively unconstitutional. If challenged, they will be struck down unless a judge finds that they pass "strict scrutiny" -- the toughest constitutional standard -- and so giveaway programs that use this classification are very vulnerable.

Preferences for Indian tribes, on the other hand, are treated more deferentially by the courts, because of another Supreme Court decision, *Morton v. Mancari*, which held in 1974 that such classifications may be viewed as not racial, but political. The way out of the box into which *Rice v. Cayetano* placed the Hawaiian politicians is, therefore, obvious: Let's just get Congress to pass a law that magically turns Native Hawaiians into an Indian tribe. If we turn them into a political entity, then when we give them preferential treatment, it will no longer trigger "strict scrutiny." And that is what the Akaka bill does.

The Akaka bill (S 344 and HR 665) asserts that the federal government "has a special political and legal responsibility to promote the welfare of Native Hawaiians" (as opposed to everyone else in Hawaii). It recognizes for Native Hawaiians alone "an inherent right to autonomy in their internal affairs," "an inherent right to self determination and self-governance," "the right to reorganize a Native Hawaiian governing entity," and "the right to become economically self-sufficient." In short, it allows them to organize themselves as and to become an Indian tribe.

There are two problems with this approach, both of them obvious and insurmountable. In the first place, Congress can't just turn a racial group into a political group by saying so. One recalls Lincoln's f amous joke, "How many legs does a dog have if you call a tail a leg? Just four -- calling a tail a leg doesn't make it one." Could Congress turn African-Americans in the District of Columbia, or the Irish in Massachusetts, or Latinos in Texas, into political rather than racial entities -- into Indian tribes -- simply by so decreeing? Of course not.

The U.S. Department of Interior has a well-developed set of regulations for determining whether an "Indian group" is an "Indian tribe." The focus of those regulations is on whether the group is already a distinct political community, not whether it might become one once recognized. Native Hawaiians -- which the Akaka bill defines as including anyone who has even one drop of "aboriginal, indigenous" blood -- do not come close to passing muster under the DOI regulations.

The second problem is: Why should Congress *want* to facilitate ethnic discrimination, which is all the Akaka bill is designed to do? Far from simply recognizing an autonomy that already exists, the Akaka bill aims to *encourage* racial separation and balkanization. It's bad enough that Hawaiian politicians should be so enthusiastic about this poisonous nonsense -- at least one in five Hawaiians would be eligible to join this "tribe" -- but they have the excuse that they are just playing politics. For the senators and representatives from the other 49 states -- and for the President -- there is no excuse.

The progress of the bill has also been checked because the Justice Department has pointed out the constitutional problems with this racialist legislation. But the Bush Administration has as an uneven record in this area, particularly when political pressure is brought to bear. It's a scary situation.

No bill is an island, and the principles at stake here are not limited to Hawaii.

Letter to the Editor
The Honolulu Advertiser
January 24, 2005

"Dividing Population Into Two Groups Isn't Justice"

It seems that each week The Advertiser carries a big article written by an attorney employed by or associated with the Hawaiian activists or by a member of the Office of Hawaiian Affairs whose salary is dependent on continuing the pursuit of the Akaka bill. The Sunday commentaries by Beadie Dawson and Bill Meheula, both attorneys dependent on the Hawaiian victims movement, are cases in point.

After rewriting Hawaiian history to their particular slant, the authors make the plea that "justice" be given to the Hawaiians for what they suffered and continue to suffer. The "justice" is always the same: Give us our ceded lands back, give us our exclusive programs, give us our own nation so we can make our own laws.

How is this justice? The ceded lands that we all enjoy today never belonged to the Native Hawaiians; they belonged to the monarchy, the government of Hawai'i, which included members of all races and ancestries who were citizens of the kingdom. When that government changed from the monarchy to a republic to a territory and eventually to a state, the lands continued to belong to all people, not just those of native blood.

The movement to receive federal recognition through the Akaka bill is simply a money grab to take back the ceded lands from all the people of the state for the exclusive benefit of those with the correct blood quantum and ancestry. Along with the ceded lands come the ceded land revenues, about $40 million per year, that would quickly rise as state buildings long ago built on ceded lands are then taxed by the new Hawaiian nation. The money would come from all other programs that help people of all races.

Over $1 billion has come out of the state treasury to pay for settlements to the Hawaiian Home Lands and OHA, not including annual appropriations for other programs serving only Hawaiians.

If it is indeed justice that is wanted and not just money, why has there never been a discrimination lawsuit filed? Dividing our great ethnic blend into two groups, those with the correct blood and those without, would not be justice for anyone.

Bud Ebel, Makaha

Letter to the Editor
The Honolulu Advertiser
February 28, 2003

"Pro-Sovereignty Stand Misleading"

James D. Kimmel (Letters, Feb. 22) misled readers about the issue of Hawaiian sovereignty. He states things as truth that are nothing more than revisionism.

U.S. Public Law 103-150 is anything but. It is a letter of apology, nothing more. It does acknowledge that American presence during the overthrow of Queen Lili'uokalani might have influenced events, but in light of the Morgan Senate report of 1894, it goes no further.

Fact: The queen was overthrown by a committee led by individuals with U.S. ties, but the majority were legal citizens of the kingdom. The queen suffered the fate of popular insurrection against her attempt to consolidate power to her court.

Fact: At the time of the overthrow, the annexation club in Honolulu had hundreds of Native Hawaiian members.

Fact: U.S. military forces played no role in the overthrow. The U.S. ambassador did not recognize the republic until all kingdom government buildings were seized. The republic was quickly recognized under international law by all major powers. The elected representatives of the republic, the majority of whom were Native Hawaiians, legally provided a mandate for the republic to seek annexation to the United States. James ignores the messy detail that all elected Hawaiians voted for annexation.

Fact: State ceded lands were defined as "crown land" by the king in 1856. Upon annexation, they were transferred intact to Washington, then returned to the state in 1959. The king's edict declared this land as a benefit for all citizens of the kingdom. The benefits flowing from ceded lands continue to serve the king's purpose to this day. It benefits all citizens of the state of Hawai'i. Individual Hawaiians never had title to this land.

The most important fact: In the annexation bill, the elected representatives unanimously voted that all Native Hawaiians become citizens of the United States. This means the Akaka bill is an offense to the U.S. Constitution. All federal and state laws that grant unique rights to Native Hawaiians are unconstitutional. To adhere to the Constitution, there cannot be a government-to-government relationship of any sort. All U.S. citizens are equal under the law.

There is a constitutionally legal method to address Native Hawaiian land grievances, which, for the large part, stem from my ancestors having little concept of fee-simple land ownership. Thousands, in ignorance, were taken undue advantage of. Ceded lands are

solely in state jurisdiction, for the benefit of my citizens, as the king put it.

I believe another Great Mahele is due. Each individual Hawaiian, of 50 percent blood quantum or greater, on Jan. 17 two years from now, to give time for the state to sort out legalities, would receives three acres fee simple. On that date, all unique state and federal programs for Native Hawaiians would cease per the Constitution.

Pat Kean, Kihei, Maui

Letter to the Editor
Honolulu Star Bulletin
March 27, 2005

"Opposition to the Akaka Bill is Overwhelming"

The Big Question" online survey in the Star-Bulletin last week asked readers the following question:

"The U.S. Senate Committee on Indian Affairs has approved the Akaka bill for a vote by the full Senate. Would you like to see the Akaka bill become law?"

The final tally was 436 "Yes" and 1,301 "No." Fourteen votes apparently were not counted. That means 25 percent of the votes cast and counted said "Yes" and 75 percent said "No," they would not like to see the Akaka bill become law.

This is opposite the figures used in a Star-Bulletin editorial a week earlier (March 11), reporting "overwhelming support," "86 percent of Hawaiians and 78 percent of non-Hawaiians favor the Akaka bill," citing a poll taken by Ward Research for the Office of Hawaiian Affairs in 2003.

OHA claimed the 2003 poll was conducted by an independent research firm. The actual report, pried out of OHA under the Hawaii's Uniform Information Practices Act, shows it was not independent at all, but "pre-campaign research" commissioned by OHA to help it "plan to launch a communications campaign in support of Hawaiian nationhood" and the Akaka bill. All questions were designed in consultation with OHA. But, even with the deceptive "explanation" of the bill, the 2003 Ward Research report concludes, "In the non-Hawaiian population, however, no consensus exists relative to Hawaiian-only programs, entitlements and a future Hawaiian government. Clearly, non-Hawaiians are not prepared to accept the creation of a Hawaiian nation in the near future."

This conclusion was never disclosed by OHA. OHA's shibai of broad public support is often cited as the prevailing "view" of the people of Hawaii. It was mentioned March 1 by Gov. Linda Lingle in her testimony before Congress and by Lt. Gov. Duke Aiona in opinion pieces. Indeed, that assumption of broad public support for the bill underlies the position of our congressional delegation, the local political establishment and seems to have been accepted by the Star-Bulletin and media generally.

Now, as indicated by the Star-Bulletin's latest poll and by the actual conclusion of the July 2003 survey, the overwhelming majority of Hawaii's citizens are clearly not prepared to accept the creation of a new Hawaiian government.

The last time citizens of Hawaii were asked what government they wanted was in the 1959 statehood plebiscite. More than 94 percent voted "Yes" for statehood. But the Akaka bill proposes sweeping changes to that government, allowing a new, separate

Hawaiian government, not subject to Hawaii's laws, to be carved out without the consent of Hawaii's citizens.

American citizenship is defined by common ideals and aspirations of equality rather than by blood or ancestry. The grandeur of the United States has been a history of escape from ugly racial, ethnic or class distinctions. The Akaka bill would turn us back to that dark side. It would divide forever not only the people of Hawaii but the people of the United States, on grounds the Supreme Court has termed odious to a free people.

Before taking such a radical step, the voice of the people of Hawaii must be heard. The Akaka bill should be amended to first require a plebiscite asking Hawaii's citizens whether they want a new, separate Hawaiian government carved out of the state of Hawaii. Unless a plebiscite is required, the bill would bypass the bedrock principle on which the United States is based: A government derives its legitimacy from the consent of the governed.

H. William Burgess and Sandra Puanani Burgess

Letter to the Editor
The Honolulu Advertiser
March 8, 2005 Tuesday

"Akaka Bill's Impact Needs Clarification"

The Associated Press reports that a U.S. Senate panel will soon vote on the Akaka bill. I am concerned that this vote may be taken without sufficient information on the justification and probable impact of the bill.

The subject bill proposes self-government for indigenous Hawaiians, similar to that of American Indians. As to justification for a separate indigenous government, American Indians had their land taken away by the U.S. government through treaty defaults. Hawai'i crown lands were transferred to the United States in connection with annexation at the request of the government of Hawai'i.

With respect to impact, American Indian self-governments generally have reservations on separate land areas. How would a native self-government function in Hawai'i without separate land reservations? In such a case, members of the native government and all other citizens of the state of Hawai'i would use the same state public services.

If the proponents of the separate indigenous government assume that the members of that government will not be obligated for state taxes to support the state infrastructure, there could be a real dilemma. Will the members of the Native Hawaiian government still receive the same federal benefits as all other citizens of the state of Hawai'i, plus the special benefits negotiated directly with the federal government?

Frank Scott, Kailua

Letter to the Editor
The Honolulu Advertiser
March 10, 2005

"Bills Would Require Special Treatment"

This year marks one of the largest government spending requests ever made by OHA for programs and a new office building to be paid for by all taxpayers, but to benefit persons of one ancestry.

Could it be that the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands are attempting to get it while they can before the federal Ninth Circuit Court of Appeals rules that their programs are racially discriminating? The following programs that would be funded by American taxpayers of every race are currently under consideration by the 2005 state Legislature to benefit Americans citizens of a chosen race:

* Senate Bill 911 would clarify lands and revenues for OHA (would triple ceded land payments to OHA).

* House Bill 1416 would require the University of Hawai'i to lower tuition for all UH students of Hawaiian descent at least 50 percent and up to 100 percent.

* Senate Bill 920 would authorize an undetermined amount of state bond funds to construct a new OHA office building and Hawaiian Community Center (to be owned by OHA, not the state).

* Senate Bill 921 SD1 would require the governor to appoint one member of the Land Use Commission from a list of three nominees from OHA.

* House Bill 444 would provide for early childhood education and care tuition subsidies only for Native Hawaiian children.

* House Bill 446 would require the governor to appoint one member to the Board of Land and Natural Resources from three nominees submitted by OHA; House Bill 453 would require the governor to appoint one member to the public advisory board for coastal zone management from a list of three submitted by OHA.

* Senate Bill 917 would authorize OHA to directly appoint one member of the Water Resource Management Commission.

* House Bill 449 would make an appropriation to provide early childhood education and play and learn centers at every Native Hawaiian homestead.

* House Bill 1415 would require all state and county signs to be in English and Hawaiian.

* Senate Bill 1287 would make a $15 million appropriation to OHA in ceded land payments.

* Senate Bill 1532 would appropriate funds to establish a preschool and junior kindergarten program in the Hawaiian language.

These are all obvious attempts by the administration and the Legislature to make all non-Hawaiians second-class citizens and provide entitlements based on race. If the Akaka bill should pass, there will be a tsunami of special entitlements and privileges extended to appease the first-class citizens of the new nation of Hawai'i.

Why have all the American citizens of the state of Hawai'i never been asked to vote whether or not they want an exclusive segregated nation in Hawai'i for one race of people? One has to ask: Can all American-Hawai'i taxpayers afford exclusive rights for American-Native-Hawaiian citizens?

Earl Arakaki, 'Ewa Beach

Letter to the Editor
The Honolulu Advertiser
May 9, 2005 Monday

"Most People Don't Understand Akaka Bill"

I think a vote taken at this time would be highly premature as most people do not understand the Akaka bill or its ramifications or its hidden agendas.

And most people do not understand the "nation within a nation" concept and all that it entails.

I feel this way because of all the people I talk to (friends, family, acquaintances), maybe 1 percent even know anything at all about the Akaka bill; yet they know it has greatly divided the Hawaiian people - even families.

Recently, a couple of friends told me that their employers tried to get the staff to support the Akaka bill as an entity; they refused, saying it is too political, too divisive and too vague - no one truly understands it or what it would truly accomplish.

Maria Orr, Mililani

Letter to the Editor
The Honolulu Advertiser
April 17, 2005 Sunday

"Akaka Bill Passage Could Boomerang"

Thanks for an interesting report on the Akaka bill last Sunday. After reading it, I had more questions than answers.

From what little information exists, if the Akaka bill passes, and isn't rejected by the Supreme Court, the likely ramifications of setting up a quasi-government here that's based on race seems more dangerous than valuable.

Why? Celebrating diversity is fine, but carving out benefits for some at the expense of others is always risky. And it's likely that it will make many in our multicultural, multiracial state less cordial, less respectful, indeed, less happy than now.

Mike Rethman, Kane'ohe

Letter to the Editor
The Honolulu Advertiser
June 11, 2004

"If Only the Senator Would Ask the People"

It was interesting to read Sen. Daniel Akaka's comments Sunday on his bill and to note that he believes the bill is "important to all of us in Hawai'i, Hawaiian and non-Hawaiian."

There has never been a hearing in all these years that would allow ordinary folks to express their opinions of the bill.

If he called a hearing and allowed anyone who wanted to to testify, he would find out why so many of us don't think the bill would be helpful. He would find many, including many Hawaiians, who think the important thing about the bill is to see that it doesn't pass.

Thurston Twigg-Smith, Diamond Head

Letter to the Editor
Honolulu Star Bulletin
June 23, 2000

"What About Non-Natives Living in Hawaii?"

WHAT about non-Hawaiians residing in Hawaii, those of us whose great-grandparents or grandparents were residents of Hawaii during the monarchy? What about those who were born on the mainland or abroad and now call Hawaii home?

I guess in the heart of Rowena Akana (View Point, June 17) and her supporters, non-Hawaiians do not exist, do not count. I believe we all, native Hawaiians and non-native Hawaiians residing in Hawaii, have a special relationship with each other.

An important part of this special relationship is the democracy, prosperity and stability we have because we are all citizens of the United States.

Akana and her friends continue to use the apology resolution of 1993 to support their demands for sovereignty -- either secession or partition of Hawaii by race -- as well as money, land and power. But the apology resolution was merely a symbolic gesture by Congress on the 100th anniversary of the overthrow recognizing its historical significance.

The resolution apologized for the part played by U.S. agents and citizens. (Four members of the Committee of Safety were Americans who resided in Hawaii, one a Scotsman, one a German and seven subjects of the kingdom.) It recited that when the new president found out what had happened, he recalled the minister, disciplined the captain of the ship and called for restoration of the monarchy.

But the resolution disavowed creation of any claims against the United States. At a brief hearing, Hawaii's senators assured their colleagues that it was not a prelude to secession and "unrelated to any kind of special treatment for native Hawaiians."

The "apology resolution" was passed by Congress with no fact-finding investigation and no hearings for evidence to be presented. The senators received assurance from Sen. Dan Inouye on the Senate floor just before the vote was taken, that the resolution was merely a harmless apology.

When Sen. Slade Gorton, R-Wash., expressed concern about the resolution and asked Inouye about its intention, Inouye said: "I once again say that the suggestion that this resolution was the first step toward declaring independence or seceding from the United States is at best a very painful distortion of our intent.

"To suggest that we are attempting to restore the kingdom, Mr. President, I find it most difficult to find words to even respond to that. No, no, this is not seceding or

independence. We fought for statehood long enough and we cherish it and we want to stay there. I can assure you. I do not wish to leave this place.

"So, Mr. President, I hope that our assurance would suffice. After all, we are the authors of this resolution, and that is not our intention. As I tried to convince my colleagues, this is a simple resolution of apology. It is a simple apology."

Gorton responded, "This senator wants to sincerely thank the senior senator from Hawaii for that answer and accepts it as such. This senator believes the senator from Hawaii has said this resolution is unrelated to any kind of special treatment for native Hawaiians."

THE resolution's final sentence (the "disclaimer") clearly states: "Nothing in this joint resolution is intended to serve as a settlement of any claims against the United States."

Akana and her friends seem to think they must test the congressional waters. The Akaka bill may not be acceptable to Congress because it splits Americans apart, the native Hawaiians and the rest of us.

Akana's dream to be appointed to an office in the U.S. Department of the Interior would become a nightmare. That is the same bureaucracy that, acting under laws passed by Congress, has mismanaged Indian affairs for more than a century.

But Akana and the congressional delegation seem to want to sentence Hawaiians to permanent status as "wards" under their supervision. I'm advising my native Hawaiian nieces and nephews to say, "No, thank you."

I was proud to be Hawaiian during basic training at Ft. Ord, Calif., in July 1964. I was riding in a cattle truck towards leadership training school, when I heard a Hawaiian chant in cadence from the "All Hawaii Company" marching to the rifle range.

Leading the All Hawaii Company were large American and Hawaiian flags. All in the truck stood up and watched the All Hawaii Company march by. I felt tremendous pride in my heart in being Hawaiian.

James L. Kuroiwa Jr

Letter to the Editor
Honolulu Star Bulletin
July 10, 2005

"Governor Should Rethink Akaka Bill"

It is one thing for Governor Lingle to personally support the Akaka bill. But to lobby Washington at our expense, for a race-based bill opposed by two-thirds of Hawaii's people, seems the height of chutzpah.

I don't know whether the bill's outcome will be as disastrous as anticipated, but when its supporters ignore us and stifle debate in Hawaii, I am suspicious.

Where is the will of the people? We need an informational program and a local plebiscite. If Hawaii's people support the bill, so be it. If not, Congress will know what we, not Lingle, want. And if Congress fails to respect our wishes, auwe!

John M. Corboy, Mililani

Letter to the Editor
The Honolulu Advertiser
Sunday, July 10, 2005

"Lingle's Support of Potential Chaos Baffling"

How can Gov. Lingle support the Akaka bill? How can giving those with any amount of Hawaiian blood a status not allowed those without Hawaiian blood benefit the state of Hawai'i? Declaring Hawaiians a separate "tribe" even though they are interspersed throughout the state creates all kinds of questions.

Neighbors using the same services, utilities and schools may have a very different status. One will pay taxes and charges, while the other, as a member of the "tribe," may be able to "negotiate" these taxes and charges. How can the governor know where these "negotiations" may lead? In the meantime, those without any Hawaiian blood would probably pick up these tabs.

Gov. Lingle's strong support of the Akaka bill absolutely baffles me. Shouldn't she represent all of us?

Bob Henninger, Honolulu

Letter to the Editor
Honolulu Star Bulletin
July 10, 2005

"Most Residents Oppose Passage of Akaka Bill"

Many of us find it quite odd that Hawaii's politicians are so devoted to the Akaka bill ("Lingle pushing Akaka bill," Star-Bulletin, July 6).

A recent online (unscientific) poll conducted by the Star- Bulletin showed that Hawaii's people are opposed to this race-based legislation.

A very fresh poll by Election Research has found that more than two-thirds of Hawaii residents opposed the bill as of last week.

Isn't there a story here that the news media won't cover? All of Hawaii's politicians are behind a bill that almost all of Hawaii's people oppose.

Can this only happen in Hawaii, or can it happen in other states where the news media refuse to serve the public interest?

Bill Jardine, Kamuela, Hawaii

Letter to the Editor
The Honolulu Advertiser
August 3, 2003

"There is No Benefit to Non-Hawaiians"

The debate over a Hawaiian nation continues to divide the many ethnic groups that call Hawai'i home.

There is no benefit to non-Hawaiians. The limited land and financial resources need to be spent for the betterment of all Hawai'i's people. The public schools, the elderly, abused women and children, the mentally ill, etc., are all underfinanced while OHA and lobbying for the Akaka bill increases via the governor and our congressional delegation.

I am half white and half Native American. I live like an Indian every day in my heart. I do not need a nation to remind me of who I am and what I believe. I am proud to be an American whose ancestors are of Indian/Caucasian descent.

Many of us hope the courts will rule quickly and decisively. The meter is running.

Jeff Thomas, Mililani

Letter to the Editor
The Honolulu Advertiser
October 17, 2004

"Questions Remain on Akaka Bill Effects"

This letter concerns the outstanding article of Oct. 10 by Bruce Fein on the Akaka Hawaiian sovereignty bill.

I have lived on O'ahu for over 26 years. I am a citizen and registered voter and participate in community affairs, including voting in all elections.

As I have a very difficult time understanding the bill, I recently wrote to Sen. Akaka and asked three basic questions:

* How would Hawaiian citizens benefit more from this bill than they now do as American citizens?

* How would the other groups of American citizens in Hawai'i (Chinese, Japanese, etc.) benefit from this bill?

* How would all the citizens of the United States and our country, as a whole, benefit from the passage of this bill?

I have a copy of the Akaka bill but can't find the answers to these questions.

Although this letter was sent over two months ago, Sen. Akaka has not yet responded to my request for information. Perhaps his answers would confirm what Mr. Fein is saying.

Rollin C. Reineck, Kailua

Letter to the Editor
The Honolulu Advertiser
December 26, 2003 Friday

"All People in Hawai'i Should Have Say in Vote"

A couple of weeks ago there was a story to the effect that Gov. Linda Lingle was very pleased she had convinced Sen. Gordon Smith of Oregon and Sen. Orrin Hatch of Utah to be counted among supporters of the Akaka bill.

The Akaka bill, as I understand it, represents the 200,000 citizens of this state who are of Hawaiian ancestry. It proposes a separate government and sovereignty for Hawaiians that would be administered by federal employees of the Department of the Interior. The bill would be passed and made into law by a simple majority vote of both houses of Congress.

There would be no vote taken by the citizens of Hawai'i on the acceptance of this bill. In fact, there has never been a vote on this bill by all of the citizens of Hawai'i.

The Akaka bill is actively supported by Hawai'i's governor and lieutenant governor. It is also actively supported by our congressmen.

My question is this: Who is representing the citizens of the state who do not claim Hawaiian ancestry? We all pay taxes, in one form or another. Our taxes, along with the taxes of the 200,000 Hawaiians, will be used to support this bill. Is this taxation without representation? Will these federal employees of the Interior Department have the power to decide how our tax dollars are spent?

Evanita Midkiff, Kahala

The Washington Times

The pineapple time bomb

By Bruce Fein
Published March 11, 2005

It is not because Native Hawaiians should be cherished less but that equality under the law should be loved more that the Akaka Bill to create a race-based government should be opposed. The Senate Committee on Indian Affairs blithely approved the legislation Wednesday without seriously examining its constitutionality. The bill previously passed the House in 2000 as a "noncontroversial," like treating South Carolina's firing on Fort Sumter as a July Fourth celebration.

The proposed legislation would ordain a Native Hawaiian Governing Entity cobbled together by Native Hawaiians meeting a threshold of Native Hawaiian blood. The Entity would negotiate with the United States and the State of Hawaii for lands, natural resources, civil and criminal jurisdiction, and other matters within the customary purview of a sovereign. It would be a race-based state within a state: a government of Native Hawaiians, by Native Hawaiians, for Native Hawaiians. It does not deserve birth.

The grandeur of the United States has been a history of escape from ugly racial, ethnic or class distinctions. The nation celebrates equality of opportunity and merit rather than birth as the touchstone of destiny. American citizenship is defined by common ideals and aspirations unstained by hierarchy; no divisions between patricians or clergy, nobles and commoners. Indeed, the Constitution forbids titles of nobility.

Accordingly, Supreme Court Justice Antonin Scalia instructed in Adarand Constructors v. Pena (1995): "To pursue the concept of racial entitlement -- even for the most admirable and benign of purposes -- is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are but one race here. It is American."

The United States has flourished by overcoming stains on its creed of equality. Black slavery was ended by the 13th Amendment, and Jim Crow died with the Civil Rights Act of 1964 and Voting Rights Act of 1965. Individual Japanese-Americans got an apology and compensation for race-based maltreatment in World War II in the Civil Liberties Act of 1988.

Racism is defeated by its renunciation, not its practice. The latter pits citizen against citizen and invites strife and jealousies that weaken rather than strengthen.

An exclusive Native Hawaiian government is no exception. Justice Anthony Kennedy persuasively discredited the argument that the Akaka Bill will bring reconciliation between Native Hawaiians and their co-citizens in Rice v. Caytano (2000). In voiding a race-based restriction on the franchise for trustees of the Office of Hawaiian Affairs, Justice Kennedy sermonized: "One of the principal reasons race is treated as a forbidden classification is that it

demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. ... [T]he use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become an instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions."

The Akaka Bill would create an unprecedented race-based government in Hawaii. Prior to the 1893 dethronement of Queen Lili'uokalani, the monarchy treated Native Hawaiians and immigrants alike. Each enjoyed equal rights under the law. Ditto under the successor government and territorial authority after Hawaii's annexation by the United States in 1898. In other words, the race-based legislation would not restore the 1893 legal landscape, but enshrine an odious political distinction amongst Hawaii's inhabitants that never before existed.

A Native Hawaiian enjoys the same freedoms as other Americans. Native Hawaiians may celebrate a distinctive culture under the protection of the Constitution, like the Amish. Racial discrimination against a Native Hawaiian is illegal. And the civil and political rights of Native Hawaiians dwarf what was indulged by the sovereign under the former monarchy.

Stripped of rhetorical adornments, the Akaka Bill is racial discrimination for the sake of racial discrimination; a dishonoring of the idea of what it means to be an American and a formula for domestic convulsions.

Bruce Fein is a constitutional lawyer and international consultant with Bruce Fein & Associates and the Lichfield Group and adviser to the Grass Roots Institute in Hawaii.

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

August 28, 2009

The Honorable Nancy Pelosi, Speaker
The Honorable John Boehner, Republican Leader
The Honorable Harry Reid, Majority Leader
The Honorable Mitch McConnell, Republican Leader
The Honorable Nick J. Rahall II, Chairman, Committee on Natural Resources
The Honorable Doc Hastings, Ranking Member, Committee on Natural Resources
The Honorable Byron Dorgan, Chairman, Committee on Indian Affairs
The Honorable John Barrasso, Vice Chairman, Committee on Indian Affairs
The Honorable John Conyers, Chairman, Committee on the Judiciary
The Honorable Lamar Smith, Ranking Member, Committee on the Judiciary
The Honorable Patrick Leahy, Chairman, Committee on the Judiciary
The Honorable Jeff Sessions, Ranking Member, Committee on the Judiciary

Re: Native Hawaiian Government Reorganization Act

Dear Distinguished Members of Congress:

Three years ago, the U.S. Commission on Civil Rights issued a report opposing the passage of the proposed Native Hawaiian Government Reorganization Act. Although that report focused on an earlier version of the proposed legislation, that earlier version was substantially similar to S. 1011. Specifically, the report stated:

> "The Commission recommends against passage of the Native Hawaiian Government Reorganization Act ... or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American People into discrete subgroups accorded varying degrees of privilege."

We write today to reiterate our opposition to the proposal.[1] We do not believe Congress has the constitutional authority to "reorganize" racial or ethnic groups into dependent sovereign nations unless those groups have a long and continuous history of separate self-governance. Moreover, quite apart from the issue of constitutional authority, creating such an entity sets a harmful precedent. Ethnic Hawaiians will surely not be the only group to demand such treatment. On what ground will Congress tell these other would-be tribes no?

[1] Commissioners voted 6-2 to develop a letter expressing our views on the legislation at an open meeting on August 7, 2009. Commissioners Melendez and Yaki voted against sending a letter from the Commission.

Some advocates of S. 1011 readily concede that the bill is an effort to preserve the State of Hawaii's current practice of conferring an array of special benefits exclusively on its ethnic Hawaiian citizens—to the detriment of it citizens of African, Asian, European or other heritage. In essence, it is an attempted end-run around the Supreme Court's decisions in *Rice v. Cayetano*[2] and *City of Richmond v. J.A. Croson Co.*[3] The Constitution, however, cannot be circumvented so easily. And even if it could be, we would oppose passing legislation with the purpose of shoring up a system of racially exclusive benefits.[4]

In closing we would like to point out that in 1840, the Kingdom of Hawaii adopted a Constitution with a bicameral, multi-racial legislature. The Constitution was signed by two hands—that of Kamehameha's son King Kamehameha III and that of the holder of the second-highest office in the nation, Keoni Ana, the son of the British-born Hawaiian Minister John Young. Its opening sentence, the substance of which was suggested by an American missionary, was based loosely on a Biblical verse: "Ua hana mai ke Akua i na lahuikanaka a pau i ke koko hookahi, e noho like lakou ma ka honua nei me ke kuikahi, a me ka pomaikai." Translated, the passage might read: "God has made of one blood all races of people to dwell upon this Earth in unity and blessedness."

It would be ironic to attempt to honor the dynamic, cosmopolitan Kingdom of Hawaii by disdaining these words.[5] We urge you to vote against the measure.

If you would like any further information or we can do anything else to assist you, please do not hesitate to ask. We can be reached through the Chairman's special assistant, Dominique Ludvigson, at (202) 376-7626 or at dludvigson@usccr.gov.

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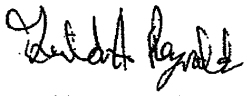
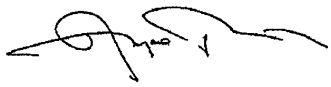
[2] 528 U.S. 495 (2000).
[3] 488 U.S. 469 (1989).
[4] For further elaboration on our reasons for opposing the bill, please see our Report, which is available on our website, www.usccr.gov.
[5] Contrary to the spirit of S. 1011, the Kingdom of Hawaii was not a kinship-based tribe that can be "restored" and "reorganized" as a membership group based on ethnic Hawaiian bloodline. It was, in fact, a multi-racial society from the first moment of the island chain's unification in 1810. In the true spirit of Aloha for which Hawaii is famous, its rulers were welcoming of immigrants, who came from all over the world, particularly from Portugal, China, Japan, the United States, Great Britain, and Germany. By 1893, when the Kingdom came to an end, ethnic Hawaiians were a minority of the population.

Thank you for your attention.

Sincerely,

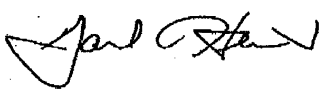


Gerald A. Reynolds
Chairman



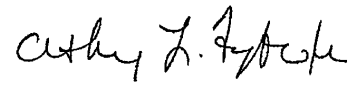
Abigail Thernstrom
Vice Chair

Todd Gaziano
Commissioner



Gail Heriot
Commissioner

Peter Kirsanow
Commissioner



Ashley Taylor, Jr.
Commissioner

cc: Commissioner Arlan Melendez
Commissioner Michael Yaki

September 1, 2005

An Open Letter to the Senate: Oppose Introduction of New and Unfair Race-Based Entitlements

Dear Senator:

On behalf of the 350,000 members of the National Taxpayers Union (NTU), I urge you to oppose and vote against S. 147, the "Native Hawaiian Government Reorganization Act of 2005." This legislation, which is expected to come to the floor of the Senate next week, would unnecessarily create a new government within the United States for the sole benefit of the linear descendants of indigenous persons who lived in Hawaii on or before January 1, 1893. The new government would be recognized by the U.S. as "the representative governing body of the Hawaiian people" and among other activities would take control of state and federal programs for social services that spend money collected from taxpayers nationwide.

Although there are minimal expenditures from the U.S. Treasury associated with this bill – nearly $1 million annually in Fiscal Years 2006-2008 and less than $500,000 in each subsequent year – both the federal government and the State of Hawaii may be expected to turn significant land holdings over to the new entity pending further negotiations. Meanwhile, Hawaiian citizens – who will have no opportunity to vote on this sweeping transformation – could face seriously higher tax bills owing to the inefficient multiplicity of local bureaucracies that will surely result from the creation of a new government structure. Hawaii's state and local tax burden already ranks among the heaviest in the nation. Both native and non-native Hawaiians would be best served by public policies that reduce rather than expand the size and number of government burdens in the Islands.

Authorizing governments to treat citizens differently based exclusively on race has proven to be bad policy in the past, and it is no coincidence that as America has moved in fits and starts toward being a more "colorblind society," economic growth and productivity have increased.

There is no reason for the federal government to engage in the process of establishing new legal classifications that only create new layers of government and new opportunities to pick Hawaiians' pockets. Taxpayers and other advocates of a more united, merit-based society whose leaders serve the fiscal interest of everyone urge you to vote against this unnecessary and ill-conceived piece of legislation.

Sincerely,

Paul Gessing

Paul J. Gessing
Director of Government Affairs

Robert K. Fukuda
Attorney
1043-C Ilima Drive • Honolulu, Hawaii 96817

August 20, 2005

Dear Senator:

I was a Deputy Attorney General of the Territory Of Hawaii from 1953 to 1959. During that time I was the attorney for the Hawaiian Homes Commission, an agency which managed and supervised the use of lands allocated to native Hawaiians for residential and agricultural uses. I was elected to the first Hawaii State legislature and served as a Representative from 1959 to 1962. I was the United States Attorney for the State of Hawaii from 1969 to 1973. I also served in the United States Army in World War II as a Japanese language interpreter and translator. I believe I have sufficient legal experience and personal understanding of the issues involved to ask you to vote down S 147, the "Akaka" Bill, which is intended to create a race-based sovereign Hawaiian nation within the State of Hawaii.

This Bill proposes to create a government whose citizens would be limited to persons whose ancestry includes any amount, however small, of blood quantum of natives who lived in the Hawaiian islands before the discovery of the islands by English explorer Captain Cook in 1778. This is without any question an attempt to create a race-based nation and government. An appropriate analogy would be the creation of a new foreign nation within the State of Texas whose citizens would be limited to descendants of persons of Hispanic blood who lived there before Texas became an independent Republic, based on an argument that the land was owned by Mexico before it was stolen by Americans. This is the same argument being used by the supporters of S 147 to create a new Hawaiian nation.

The backers of this Bill ignore the fact that the Kingdom of Hawaii allowed the free immigration of people from all parts of the world, including England, Scotland, Ireland, France, Germany, Russia, Spain, Portugal, Puerto Rico, China, Japan, the United States, and other Pacific islanders for 120 years before Hawaii became an American Territory. The backers also refuse to acknowledge that there was no restriction in the Constitutions or laws of the Hawaiian Kingdom that limited citizenship to persons of native Hawaiian blood.

I can illustrate to you how the proposed Hawaiian nation would affect my own family. We have now lived in Hawaii continuously for five generations. My grandparents came here in 1885 as contract laborers to work on the sugar plantations because there were not enough native Hawaiians who were willing or able to do the work. The immigration of Japanese to Hawaii was started by a Treaty initiated by Hawaiian King Kalakaua and agreed upon by the Japanese Emperor Meiji. In other words, the Japanese immigrants were invited to come here by the Hawaiian Kingdom. My father and his three sisters were born in Hawaii. My mother was also Japanese, so I am

pure Japanese. However, one of my aunts married a man who was one-half native Hawaiian and therefore my cousin was one-fourth native Hawaiian. If S 147 becomes law, my cousin's children and their descendants ad infinitum will be entitled to all the monetary and legal benefits that will be given to the Hawaiian nation by Congress and the State of Hawaii, while my children and their descendants will receive nothing, all on account of an accident of birth, which is precisely why the United States Constitution and laws prohibit discrimination on the basis of race or color. This same situation can be multiplied by the thousands, for all the other families of all races in Hawaii whose personal and property rights will be split apart by this Bill. This actual example of the real damage potential of a race-based nation should point out the insanity of this proposal. The racial discrimination would not be limited to persons of Japanese ancestry. It would affect the entire population of Hawaii, including Whites, Chinese, Koreans, Filipinos, Thais, Vietnamese, blacks, Hispanics and all the other racial groups who live here.

Senator Inouye does not represent all the Japanese Americans in Hawaii. Since all of our U.S. Senators and Congressmen and our Governor are committed to the passage of S 147, those who are opposed to this Bill have no recourse but to seek your assistance as well as that of other members of the Senate who can understand the disastrous results which would follow the passage of this Bill.

I have illustrated only one of the major objections to this Bill. There are many others, including the denial of the equal protection of the laws, endless disputes arising from a myriad of conflicting laws, control over the ocean and airspace, and United Nations jurisdiction over foreign relations between the United States and the Hawaiian nation.

If you would not favor the creation of a foreign nation in your own State, please vote NO on S 147 and prevent the destruction of the American Union of sovereign states.

Very Sincerely Yours,

Robert K. Tsukuda

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO H. CHRISTOPHER BARTOLOMUCCI

1. *Although, as currently formulated, the Federal recognition process within the Department of Interior for recognizing Indian tribes is not available to the Native Hawaiians, the fact is that the most conventional or common method for federal recognition of an Indian tribe is through an administrative process. Do you think an Executive body or agency would be better suited than the Congress to make the factual, historical, and/or ethnographical determinations needed in deciding whether Native Hawaiians should be treated as the equivalent of an Indian tribe? If your answer is "yes," please explain why you think so, and if "no," please explain why.*

Answer: No. Congress is best suited to decide—and indeed is granted plenary power under the Constitution to decide—whether any particular indigenous group should be recognized pursuant to Congress' Indian affairs power.

To be sure, Congress has in some cases delegated power to federal agencies, such as the Department of the Interior, to recognize tribes or decide when they should receive benefits. *See* 25 C.F.R. § 83.1 *et seq*. But that delegation, of course, does not change the fact that the Constitution grants Congress the power to decide the status of indigenous groups in the first instance. And it is a power Congress has regularly exercised without any delegation. As discussed in my testimony at pages 8-10, Congress in 1973 enacted the Menominee Restoration Act, 25 U.S.C. § 903a-b, recognizing the Menominee Indian tribe of Wisconsin. Congress has recognized many other tribes without resort to agency delegation. *See, e.g.*, 25 U.S.C. § 762 (recognizing bands of Paiute Indians in Utah). And significantly, Congress has done the same with respect to Alaska Natives; the fact that Alaska Natives differ ethnographically from continental Indian groups did not deter Congress from making factual findings, and granting Alaska Natives federal recognition, on its own. *See, e.g.*, 25 U.S.C. §§ 1212-1213 (making findings with respect to the Central Council of Tlingit and Haida Indian Tribes of Alaska and recognizing it as a tribe). Congress, in short, has long shown that it is capable of making the necessary factual determinations underlying tribal recognition. This situation is no different.

2. *If a court challenge to the bill were to reach the Supreme Court, what are some of the possible outcomes above and beyond the validity of the bill—in other words, could a Supreme Court ruling on the bill pose legal risks for Indian country in general? If your answer to the previous question is "yes," please explain what you think some of those risks are? If your answer is "no," please explain why.*

Answer: A Supreme Court ruling on the Native Hawaiian Government Reorganization Act ("NHGRA") would not pose any substantial legal risks for Indian country in general. Congress' power to legislate with respect to indigenous peoples is well-established and

extremely broad. Indeed, the Supreme Court has long described that power as "plenary," *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and has suggested that congressional decisions with respect to Indians border on an unreviewable "political question." *See Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998) ("Whether the concept of Indian country should be modified is a question *entirely* for Congress.") (emphasis added). Thus even if the Supreme Court were to disapprove of some aspect of the NHGRA—an unlikely prospect, as I discuss below—there would appear to be no realistic chance that the Court would somehow narrow Congress' Indian affairs power or otherwise call into question statutes that offer benefits to other indigenous groups.

Instead, any such Supreme Court decision most likely would turn on facts particular to the Native Hawaiians and would thus be limited to the Hawaiian situation. The best evidence of that is the fact that the primary arguments leveled against the NHGRA all focus on the notion that Native Hawaiians are somehow *different* from other indigenous groups. For example, opponents have argued that Congress cannot recognize Native Hawaiians as a sovereign people because (unlike some Indian tribes) they did not enjoy such a status before the Western takeover, or because they invited Westerners into their midst before annexation, or because their government was organized as a monarchy in the decades prior to annexation. All of these objections are mistaken, as I explained in my testimony at pages 29-33. But more importantly for present purposes, all of these objections attempt to distinguish Native Hawaiians from other American Indian groups as a means to undercut congressional authority. For this reason I do not perceive any significant risk that an adverse court decision with respect to the NHGRA would impact Indian country in general.

But it is worth emphasizing that the Supreme Court is unlikely to disapprove of the NHGRA in any event. The Court has made clear that "the questions whether, to what extent, and for what time [indigenous groups] shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the courts." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913). The Court accordingly reviews congressional decisions to employ its Indian power only for arbitrariness—a very deferential standard of review—and to my knowledge has *never* struck down a congressional decision in this area. *See Morton* v. *Mancari*, 417 U.S. 535, 552 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."); Felix Cohen, *Handbook of Federal Indian Law* 3-5 (1982) ("*Indian Law Handbook*") (stating that "no congressional or executive determination of tribal status has been overturned by the courts"). The Court likely would not start with this legislation. As discussed in my testimony, Congress has already made extensive findings recognizing Native Hawaiians as an indigenous group and "extend[ing] to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities," 20 U.S.C. § 7902(13), and it would make more such findings by virtue of the NHGRA. Those findings should easily survive deferential "arbitrariness" review. After all, the Native Hawaiians, just like Indians in the continental United States and Alaska Natives, are native indigenous people whose lands were taken "by force." *Mancari*, 417 U.S. at 552. The Supreme Court likely would defer to the congressional choice to afford them the same recognition granted to other similarly situated groups.

3. *For those that may be unfamiliar with Indian law or the federal authority and policy of self-governance and self-determination, can you explain, is the practice of federally recognizing an indigenous people and interacting with them through a government-to-government relationship a new policy? Is the authority of tribal governments well defined?*

Answer: The practice of federally recognizing an indigenous people, and interacting with them though a government-to-government relationship, is not new. On the contrary, it is nearly as old as our Nation.

Even before Congress began formally recognizing tribes, the United States treated Indians as sovereigns—and subsequently interacted with them through government-to-government relationships—by means of the treaty-making process. The United States regularly entered treaties with Indian tribes from 1789-1871. *See Indian Law Handbook* at 62. And that means by definition that the United States regarded the Indians as sovereigns; a government does not make a treaty with a non-sovereign entity. *See United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876) ("[T]he power to make treaties with the Indian tribes is . . . coextensive with that to make treaties with foreign nations."); *see also United States* v. *Wheeler*, 435 U.S. 313, 323-324 (1978) (explaining that Indians are qualified to exercise powers of self-government by virtue of their original tribal sovereignty). The Constitution itself recognizes as much, in the Indian Commerce Clause, by "categoriz[ing] tribes with other sovereigns for purposes of commerce-related functions." *Indian Law Handbook* at 232; *see* U.S. Const. art. I, § 8 (granting Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes").

Moreover, Congress has recognized Indian tribes, and the Supreme Court has approved that process, since the 19th century. *See, e.g.*, *United States* v. *Holliday*, 3 Wall. 407, 419 (1866). This process of tribal recognition necessarily creates a government-to-government relationship because formally recognized tribes are regarded as "quasi-sovereign[s]." *Mancari*, 417 U.S. at 554. Indeed, federal regulations provide that formal recognition of a tribe means "that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes *by virtue of their government-to-government relationship with the United States* as well as the responsibilities, powers, limitations and obligations of such tribes." 25 C.F.R. § 83.2 (emphasis added). As the Supreme Court has explained, Congress regularly grants indigenous groups "greater tribal autonomy within the framework of a 'government-to-government' relationship with federal agencies." *United States* v. *Lara*, 541 U.S. 193, 202 (2004). The *Lara* Court observed that the congressional power to "relax restrictions" on "tribal sovereign authority"—that is to say, to recognize tribal sovereignty and accordingly a government-to-government relationship—has been "obvious" ever since "the Nation's beginning." *Id.* In recognizing Native Hawaiians, Congress would only be doing what it has always done.

As for the second portion of question #3, tribal authority is indeed well-defined. Generally speaking, a recognized tribe retains the internal sovereign authority of any state—for example, to make laws affecting its members, to determine its form of internal governance, and to handle domestic relations issues among tribal members—but that authority can be overridden

and restricted by Congress. *See Indian Law Handbook* at 242, 246-252. Thus, for example, Congress through the Indian Civil Rights Act, 25 U.S.C. § 1302, placed "several restrictions on Indian governments" and extended to tribal members the protections of the Bill of Rights in their dealings with tribal governments, regardless of what those tribal governments may have provided through their own laws. *See id.* at 243. Congress likewise has prohibited Indian tribes from imposing severe criminal punishments, and instead has subjected tribal members to federal criminal laws, and federal criminal prosecution, for major crimes. *See* Indian Major Crimes Act, 18 U.S.C. §§ 1153, 3242. I discuss these issues further in my answer to question #9, below.

4. *Congress has acknowledged and enacted bipartisan supported legislation to address the needs of Native Americans – the indigenous people of Hawaii, Alaska, and Indian tribes in the lower 48 states. Does Congress have the power to treat Native Hawaiians just as it treats Native Americans? Has Congress through statute or policy treated Native Hawaiians as it does Native Americans?*

Answer: The answer to both questions is yes: Congress has the power to treat Native Hawaiians just as it treats Native Americans, and it has long done so. Indeed, Congress has gone further still: It does not merely treat Native Hawaiians *like* Native Americans, but instead considers them to *be* Native Americans. I address these points in turn.

a. First, Congress has very broad power to decide how to treat indigenous groups, and whether to grant them federal recognition. Its decisions in this area are subject to, at most, highly deferential "arbitrariness" review. See Answer to Question #3, above. Here, Congress has expressly found that the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives," 20 U.S.C. § 7512(12)(D), and that "[its] authority . . . under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17). Congress likewise has found that:

- Native Hawaiians "are indigenous, native people of the United States," NHGRA § 2(2);
- The United States recognized Hawaii's sovereignty prior to 1893, *id.* § 2(4);
- The United States participated in the overthrow of the Hawaiian government, *id.* § 2(13);
- "[T]he Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," *id.*;
- Native Hawaiians continue to reside on native lands set aside for them by the U.S. government, "to maintain other distinctly native areas in Hawaii," and "to maintain their separate identity as a single distinct native community through cultural, social, and political institutions," *id.* §§ 2(7), 2(11), 2(15); and
- Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past. *Id.* § 2(22)(A).

Such findings more than satisfy the deferential standard set forth in *Sandoval* because it is far from arbitrary, on these facts, for Congress to recognize Native Hawaiians pursuant to its broad Indian affairs power. This conclusion is further supported by the fact that the Supreme Court has never disapproved congressional recognition of other groups that differ from the "typical" continental American Indian tribe in the ways suggested by the NHGRA's opponents. Alaska

Natives, for example, differ from American Indian tribes anthropologically, historically, and culturally, *see Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110 n.32 (1949), but the Supreme Court has never questioned the authority of Congress to enact legislation treating Alaska Natives just as continental indigenous groups are treated. *See Native Village of Venetie*, 522 U.S. at 523-524. Likewise, the Supreme Court approved the congressional choice to treat Pueblos just like it treats other indigenous groups, even though, in the Court's view, the Pueblos differed fundamentally from the sorts of nomadic indigenous groups the Congress previously had recognized. *See Sandoval*, 213 U.S. at 39, 47.

b. As to Congress' approach to Native Hawaiians, it has for decades treated them as it treats other Native Americans. I provided a list of relevant statutes and policies at pages 17-20 of my testimony. As that list reveals, "[o]ver 160 federal statutes have enacted programs to better the conditions of Native Hawaiians in areas such as Hawaiian homelands, health, education and economic development, all exercises of Congress' plenary authority under our U.S. Constitution to address the conditions of indigenous peoples." Statement of U.S. Representative Ed Case, Hearing Before the Senate Committee on Indian Affairs on S. 147, the Native Hawaiian Government Reorganization Act, at 2-3 (March 1, 2005). Indeed, for almost 90 years now, Congress has made unmistakably clear that it is treating Native Hawaiians as subject to its Indian affairs power. *See* Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921) (placing lands under territorial jurisdiction to provide lots for Native Hawaiians); H.R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920) ("HHCA Report") (finding support for the HHCA "in previous enactments granting Indians . . . special privileges in obtaining and using the public lands"); *accord* 20 U.S.C. § 7902(13) ("extend[ing] to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities"). The NHGRA would be a continuation of consistent congressional practice.

c. Finally, it is worth emphasizing that Congress does not treat Native Hawaiians as merely some analogue to Native Americans; instead, it has concluded that they *are* Native Americans. *See, e.g.*, 20 U.S.C. § 80q-5 (finding that "Native Americans across the Nation—Indians, Native Alaskans, and Native Hawaiians—have a long, proud and distinguished tradition of service in the Armed Forces of the United States."); 20 U.S.C. § 7517 (finding that "[t]he term 'Native Hawaiian language' means the single Native American language indigenous to the original inhabitants of the State of Hawaii."); 25 U.S.C. § 2902 (defining the term "Native American," for purposes of the Native American Languages Act, to mean "an Indian, Native Hawaiian, or Native American Pacific Islander"). The Committee accordingly should reject the notion that the NHGRA would be a novel use of the Indian affairs power. On the contrary, Congress already has concluded that Native Hawaiians are an indigenous American group worthy of the same recognition as other indigenous American groups native to other parts of the country.

5. *Has Congress previously exercised Indian affairs power to address the needs of Native Hawaiians? Would enactment of the Hawaiian Homes Commission Act and the Admissions Act for the State of Hawaii be examples? Are these the only examples of Congress addressing the needs of Native Hawaiians?*

Answer: Yes, Congress has long exercised Indian affairs power to address the needs of Native Hawaiians, and the HHCA and the Admissions Act are both good examples—but there are many more. I provided a list of statutes invoking such power at pages 17-20 of my testimony before the Committee, and I have offered some examples of those enactments in the Answer to Question #4, above.

In the HHCA, as discussed above, Congress placed land that Hawaii had ceded to the United States in 1898 under the jurisdiction of the territorial government to provide property for Native Hawaiians. HHCA § 203. In so doing, Congress specifically invoked its Indian affairs power. *See* HHCA Report at 11. Likewise, in the Admissions Act, Congress conveyed to Hawaii massive additional lands to be held for the sole benefit of Native Hawaiians. *See* Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4, 5 (1959). In the decades since, Congress has even more explicitly found that Native Hawaiians fall within Congress' plenary Indian affairs power, and has repeatedly exercised that power for their benefit. *See, e.g.*, 42 U.S.C. § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."); Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000) (providing governmental loan guarantees "to Native Hawaiian families who otherwise could not acquire housing financing"); 1995 Department of Defense Appropriations Act, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) (authorizing employment preference for Native Hawaiians); Workforce Investment Act of 1998, 29 U.S.C. § 2911(a) ("The purpose of this section is to support employment and training activities for Indian, Alaska Native, and Native Hawaiian individuals"); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (making it "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians"). No court has struck down any of these legislative actions as unconstitutional.

6. *What does it mean to be an "Indian" within the meaning of the Constitution?*

Answer: The leading treatise on Indian law has defined the term "Indian" as "a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community." *Indian Law Handbook* at 20 (collecting cases). That definition is in accord with the understanding of the word "Indian" at the time the Constitution was written. During colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789). That is who Columbus thought he came upon when he discovered America. And while the Framers of course knew that Columbus had not reached India, they used "Indian" to refer to "the inhabitants of our frontiers." Declaration of Independence ¶ 29 (1776). It is not surprising, then, that Captain James Cook and his crew—the first Westerners to make contact with Native Hawaiian islanders, in 1778—called the natives who greeted their ships "Indians." 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 14 (1968).

There is no question, of course, that the ancestors of today's Native Hawaiians "lived in what is now the United States before its discovery by Europeans." *Indian Law Handbook* at 20. And the second criterion—recognition by the tribe—begs the question of what is a "tribe." On that question, Congress has sweeping interpretive power and enjoys broad deference from the courts, as I explain below in my answer to question #7.

7. *What does it mean to be an "Indian Tribe" within the meaning of the Constitution?*

Answer: At the founding of our Nation, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Sheridan, *supra*; *accord* Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). And that is precisely how Congress has described Native Hawaiians. *See* 42 U.S.C. § 11701(1) (finding that Native Hawaiians are a "distinct and unique indigenous people").

Of course, this definition of tribe has quite a bit of play in the joints—but that fact only underscores the broad deference Congress has to determine, in the exercise of its Indian affairs power, what indigenous groups count as "tribes." As the leading treatise in this area has observed: "When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination." *Indian Law Handbook* at 3. Indeed, given the deference Congress enjoys in this area, "it would appear that the only practical limitations upon congressional and executive decisions as to tribal existence are the broad requirements that (a) the group have some ancestors who lived in what is now the United States before discovery by Europeans, and (b) the group be a " 'people distinct from others.' " *Id.* at 5 (quoting *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867)).

Congress' broad power is further illuminated by history. Congress has long exercised its Indian affairs power over indigenous people not organized into the sorts of tight-knit bands that a layman might deem a "tribe." Thus, for example, "Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages." *Indian Law Handbook* at 6. Likewise, "[w]here no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties." *Id.* And Congress has recognized Alaska Natives under its Indian affairs power, even though "Indian tribes do not exist in Alaska in the same sense as in [the] continental United States." *Hynes*, 337 U.S. at 110 n.32. The Supreme Court has never questioned its authority to do so.

These considerations suggest that the word "tribe," with its broad 18th-century definition, fit the Framers' intentions perfectly. There is no reason to believe they intended to restrict Congress' authority to deal with indigenous groups of whom they may never have heard, and who may have been organized differently than the Native Americans of the East Coast, but who nevertheless would pose the same basic issues as the Indians occupying the 1789 frontier.

8. *Is it significant that the United States had treaties with the Kingdom of Hawaii prior to the overthrow? Is it significant that the United States minister and military forces participated in the overthrow?*

Answer: Yes, both of these facts are significant, and both provide additional support for the conclusion that Congress has ample power to enact the NHGRA.

As your question recognizes, the United States established a government-to-government relationship with the Kingdom of Hawaii during the 19th century and entered into various treaties and conventions with the Kingdom between 1826 and 1887. *See Rice* v. *Cayetano*, 528 U.S. 495, 504-505 (2000) (discussed at pages 15-16 of my testimony). This fact makes clear that the United States has long recognized Native Hawaiians as a sovereign people. And that in turn underscores Congress power to enact the NHGRA, because there is no doubt that Congress has the authority to restore previously extinguished sovereign relations with indigenous groups. *See Lara*, 541 U.S. at 202; *United States* v. *Johns*, 437 U.S. 634 (1978). I discuss this aspect of Congress' Indian affairs power at pages 7-8 of my written testimony.

As for the fact that the U.S. minister and U.S. military forces participated in the Kingdom's overthrow, that, too, lends additional support to Congress' already-ample power here. That is so for two related reasons. First, the fact that the Hawaiian people's lands were taken by force means they are similarly situated to other American Indian groups: They are native indigenous peoples whose lands were taken "by force, leaving them a . . . people, needing protection against the selfishness of others." *Mancari*, 417 U.S. at 552. And that in turn makes it even more difficult to deem "arbitrary" Congress' decision to treat Native Hawaiians as it treats the indigenous people of the continental United States. Second, the Supreme Court has made clear that Congress' "unique obligation toward the Indians," *Mancari*, 417 U.S. at 555, stems in part from the fact that the United States "overcame [them] and took possession of their lands, sometime by force." *Board of Cty. Commr's* v. *Seber*, 318 U.S. 705, 715 (1943). Indeed, the Court has said that "the moral obligations of the government toward the Indians . . . are for Congress alone to recognize," *Blackfeather* v. *United States*, 190 U.S. 368, 373 (1903), and that Congress may address the settlers' acquisition of what had been indigenous peoples' lands "as a matter of grace, not because of legal liability." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281-282 (1955). The American role in Hawaii thus undergirds Congress' authority to exercise its Indian affairs power here.

9. *Does this bill suggest that upon enactment, Native Hawaiians would not be subjected to the laws of the United States? Do American Indians lose their citizenship when they leave their reservation and are they subject to the laws of the United States?*

Answer: Even after enactment of the NHGRA, Native Hawaiians would still be subject to the laws of the United States, no matter where they might live.

That is true for several reasons. First, the legislation itself provides as much: It states that "[n]othing in this Act alters the civil or criminal jurisdiction of the United States or the State

of Hawaii over lands and persons within the State of Hawaii." NHGRA § 9(e). That provision appears to mean that all federal laws would continue to apply to Native Hawaiians in the state.

Second, even if the legislation were not so explicit, Native Hawaiians would continue to be subject to most federal laws, even if they were on land governed by a future Native Hawaiian governing entity. Under general Indian law principles, Indians are "normally subject to the same federal laws as other persons." *Indian Law Handbook* at 283; *see also* William C. Canby Jr., *American Indian Law in a Nutshell* 310 (5th ed. 2009) ("*Canby*") ("Federal laws of general applicability are presumed to apply to Indian tribes."). Moreover, "[t]he federal taxing power does not depend on geography, and it is fully effective in Indian country with regard to both Indians and non-Indians." *Canby* at 288. And as for criminal law, "[t]here are numerous general federal criminal statutes that are effective throughout the nation, and they apply in Indian country to all persons, whether or not Indian." *Id.* at 169. Indeed, a pair of important Indian affairs statutes—the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Indian Major Crimes Act, 18 U.S.C. § 1153—make federal criminal jurisdiction *more* extensive in Indian country, at least in some instances, than it is elsewhere. The Indian Country Crimes Act adopts state criminal law and makes it applicable in Indian country in certain circumstances, most notably when a non-Indian commits a crime with an Indian victim and vice versa. (The Act does not address minor crimes by Indians against Indians in Indian country, which often are left to tribal adjudication). *See Canby* at 172-178. And the Indian Major Crimes Act provides federal criminal jurisdiction over Indians who commit any of 15 major crimes, from murder to child abuse to burglary. *Id.* at 182. This latter statute applies to any crime committed by an Indian in Indian country, no matter who the victim, and subjects Indians to federal prosecution for a number of offenses (for example, burglary) that are normally the subject of state law.

In the civil context, there are exceptions to the general rule that federal statutes apply to Indians in Indian country. Specifically, some courts have held that a federal statute of general applicability will not apply to Indians in Indian country if: "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quotation marks omitted). These exceptions, however, are fairly narrow. Courts applying this test have held that many major federal regulatory schemes, including the National Labor Relations Act ands the Employee Retirement Income Security Act, are applicable in Indian country.

As for the status of Indians who leave their reservation, they may or may not retain tribal citizenship—some tribes adopt residency requirements for their members—but regardless, there is no question that they are subject to both federal and state law. "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 97 (2005) (quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973)) (quotation marks omitted). And the same is true for federal law: "There appears to be no serious question that federal district courts may exercise jurisdiction over cases or controversies involving tribal members and arising out of off-reservation activities, to the same extent as would be true of non-Indian litigants[.]" *Richmond* v. *Wampanoag Tribal Court Cases*, 431

F.Supp.2d 1159, 1178 (D. Utah 2006). As a result, there should be no concern that the NHGRA would "follow [a Native Hawaiian] wherever he goes, cloaking him in a mantle of civil immunity." *Id.* Native Hawaiians would be required to obey federal law, no matter where they may live.

10. *Is there any legal distinction between Native Hawaiians and American Indians or Alaska Natives that would justify denying Native Hawaiians the ability to establish a government-to-government relationship between the US? Can you explain?*

Answer: No, there is no legal distinction between Native Hawaiians and American Indians or Alaska Natives that would justify differential treatment.

In fact, the striking similarities between Native Hawaiians and those other indigenous groups demonstrate why it is anything but "arbitrary"—the deferential standard here, *see Mancari*, 417 U.S. at 555—for Congress to treat Native Hawaiians like it treats the others. The Hawaiian people, just like the Indians of the continental United States, are native indigenous people whose lands were taken by force. Indeed, they are remarkably similar, as a legal matter, to Alaska Natives. As discussed above, Alaska Natives are an indigenous people who differ anthropologically, historically, and culturally from continental Indian tribes. *See Hynes*, 337 U.S. at 110 n.32. And yet Congress views its power to deal with Alaska Natives as coterminous with its plenary authority relating to continental Indian tribes, *see* 43 U.S.C. §§ 1601-1629h, and the Supreme Court has never questioned that authority. *See Native Village of Venetie*, 522 U.S. at 523-524. Given that Congress' Indian affairs power extends to Alaska Natives—and that Congress has established government-to-government relationships with Alaska Natives—it is difficult to imagine how one can legally justify treating Native Hawaiians any differently.

Opponents of the NHGRA have identified some facts that they believe distinguish Native Hawaiians from American Indians and Alaska Natives, but for the reasons discussed in my testimony, their theories are meritless. First, the fact that the Kingdom of Hawaii was a monarchy, and that it allowed some whites to participate in government, does not distinguish Native Hawaiians as a legal matter. Congress' constitutional authority has never turned on the type of political structure an indigenous people maintained, and it would be perverse to suggest that Native Hawaiians were any less a sovereign people because their society was open enough to permit the participation of outsiders. *See* discussion at pages 29-31 of my testimony. Second, the fact that Native Hawaiians did not engage in treaty-making with the United States government hardly takes them outside the Indian affairs power, given that the era of U.S. treatymaking with Indian tribes had already ended well before 1898. *See id.* at 32. Finally, NHGRA opponents have argued that Native Hawaiians have not had a continuous tribal existence, and that this takes them outside the Indian affairs power. This too fails as a legal distinction, however, because (i) the supposed "continuity" rule does not bind Congress, and (ii) even if it did, Congress factual findings demonstrate that Native Hawaiians would meet its requirements. *See id.* at 33-37.

The short of it is, there is no reason to treat Native Hawaiians any differently than the indigenous groups native to the other 49 states, and Congress has ample power to reach just that conclusion. I appreciate the opportunity to submit testimony on this important legislation, and I would be happy to address any further questions you may have.

Response to the following written questions was not available at the time this hearing went to press.

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. SAM HIRSCH

1. Does this bill, upon enactment create a separate entity or establish a process to reorganize and ultimately recognize a governing entity? Is this an important distinction, please explain?

2. For those that may be unfamiliar with Indian law and federal authority, can you explain if the practice of federally recognizing an indigenous people and interacting with them through a government-to-government relationship is a new policy?

3. In the absence of federal recognition for Native Hawaiians, we have witnessed how governments, businesses, and non-Native Hawaiians have difficulty knowing who to consult with and interact with on joint ventures and initiatives. Based on the experience of Alaska Natives and American Indians could we expect a government-to-government relationship to help address the unique needs of Native Hawaiians, clarify jurisdiction, governmental authority? Would this also improve how governments (federal, state, and local), businesses, and non-members interact with the proposed Native Hawaiian governing entity?

4. How does the bill affect personal property, social services, and rights of US citizens? Upon enactment of the legislation, would Native Hawaiians be subject to the laws of the United States? Please explain.

5. There are claims that there are no provisions in the bill that provide for the protection of the civil rights of members or non-members. Can you explain whether or not this is a true statement given the criteria that must be included in the organic governing documents by the Interim Governing Council and certified by the Secretary of the Interior?

6. Congress has acknowledged and enacted bipartisan supported legislation to address the needs of Native Americans – the indigenous people of Hawaii, Alaska, and Indian tribes in the lower 48 States. Does Congress have the power to treat Native Hawaiians just as it treats Native Americans? Has Congress through statute or policy treated Native Hawaiians as it does Native Americans?

7. Has Congress previously exercised Indian affairs power to address the needs of Native Hawaiians? Would enactment of the Hawaiian Homes Commission Act and the Admissions Act for the State of Hawaii be examples? Are these the only examples of Congress addressing the needs of Native Hawaiians?

8. What does it mean to be an "Indian" within the meaning of the Constitution? Can you indicate whether it is significant that early Western explores such as Captain James Cook referred to Native Hawaiians as Indians?

9. What does it mean to be an "Indian Tribe" within the meaning of the Constitution? Is it significant that the United States had treaties with the Kingdom of Hawaii prior to the overthrow? Is it significant that the United States minister and military forces participated in the overthrow?

10. Does Congress have the power to treat Native Hawaiians just as it treats Native Americans? Do American Indians lose their citizenship when they leave their reservation and are they subject to the laws of the United States?

11. What kinds of criteria have Indian tribes used to demonstrate they are distinctly native communities? Is there precedent for the use of lineal descent or a blood quantum?

12. On May 3, 2007, during the Committee's hearing on S.310, a bill introduced in the 110th Congress that appears to be identical in pertinent respects to S.1011 of the 111th Congress, the Principal Deputy Associate Attorney General Gregory G. Katsas expressed several policy and constitutional concerns regarding S.310. Neither your written nor your oral testimony at the hearing on August 6th mentioned any of the policy or constitutional concerns about S.1011 that the Department expressed a little over 2 years ago regarding S.310. Does the Department have any of the policy concerns regarding S.1011, as introduced, that it had with S.310? If so, please state all such policy concerns that the Department has. Does the Department have any of the constitutional concerns regarding S.1011, as introduced, that it had with S.310? If so, please state all such policy concerns that the Department has.

13. Although the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 405 (2000), did not reach the question of whether Congress had the power or authority to recognize a Native Hawaiian "tribe," it did characterize this question as "difficult terrain." Does S.1011, as introduced, venture into this "difficult terrain"? If it does, please explain (1) what aspects of the bill are problematic in this regard, and (2) how the bill should or might be amended to at least reduce the risk that a Federal court will rule it to be an unconstitutional exercise of Congressional power to recognize or "reorganize" a Native Hawaiian government in the manner of an Indian tribe.

WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO STUART M. BENJAMIN

1. Although, as currently formulated, the Federal recognition process within the Department of Interior for recognizing Indian tribes is not available to the Native Hawaiians, the fact is that the most conventional or common method for federal recognition of an Indian tribe is through an administrative process. Do you think an Executive body or agency would be better suited than the Congress to make the factual, historical, and/or ethnographical determinations needed in deciding whether Native Hawaiians should be treated as the equivalent of an Indian tribe? If your answer is "yes," please explain why you think so, and if "no," please explain why you think not.

2. There have been several legal challenges to Native Hawaiian programs, and it seems unlikely that the eventual enactment of S.1011 into law would bring an end to current or future lawsuits over these programs. In your testimony before the Committee on August 6th, you indicated that some of the constitutional questions raised by the bill are difficult and have not been resolved in the courts. Do you think there is a significant risk that the constitutionality of this bill will eventually be a question before the Supreme Court? If you do think the risk is significant, please explain why you think that is so.

3. If a court challenge to the bill were to reach the Supreme Court, what are some of the possible outcomes above and beyond the validity of this bill—in other words, could a Supreme Court ruling on the bill pose legal risks for Indian country in general? If your answer to the previous question is "yes," please explain what you think some of those risks are?

4. Besides what you mentioned in your oral testimony at the hearing regarding limiting the potential "universe" of members of the Native Hawaiian group (i.e., to persons living in Hawaii), what are some other ways the bill might be amended so as to reduce the risks of a court holding this bill unconstitutional?

The June 7, 2006 Legislative Notice on S. 147 and the Brief Amicus Curiae of Pacific Legal Foundation, The Cato Institute, and the Center for Equal Opportunity in Support of Petitioners—Docket No. 07-1372 have been retained in Committee files and can be found at:

*http://rpc.senate.gov/public/*__files/L40S147NatHawJune706SD.pdf
*http://www.cato.org/pubs/legalbriefs/Hawaii*__v__OHA.pdf

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