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EXPRESSING THE POLICY OF THE UNITED STATES REGARDING THE UNITED STATES RELATIONSHIP WITH NATIVE HAWAIIANS AND TO PROVIDE A PROCESS FOR THE RECOGNITION BY THE UNITED STATES OF THE NATIVE HAWAIIAN GOVERNING ENTITY, AND FOR OTHER PURPOSES

SEPTEMBER 21, 2001.—Ordered to be printed

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

REPORT

[To accompany S. 746]

The Committee on Indian Affairs, to which was referred the bill (S. 746) expressing the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE AND BACKGROUND

The purpose of S. 746 is to authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

On January 17, 1893, the government of the Kingdom of Hawai'i was overthrown by a group of American citizens and others, who acted with the support of U.S. Minister John Stephens and a contingent of U.S. Marines from the U.S.S. *Boston.* One hundred years later, a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government and calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law (Public Law 103–150) ("Apology Resolution"). The Apology Resolution acknowledges that the overthrow of the King-

dom of Hawai'i occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their government or through a plebiscite or referendum.

In December of 1999, the Departments of Interior and Justice initiated a process of reconciliation in response to the Apology Resolution by conducting meetings in Native Hawaiian communities on each of the principal islands in the State of Hawai'i and culminating in two days of open dialogue. In each setting, members of the Native Hawaiian community identified what they believe are the necessary elements of a process to provide for the reconciliation of the relationship between the United States and the Native Hawaiian people. A report, entitled "From Mauka to Makai: The River of Justice Must Flow Freely, ("Reconciliation Report") was issued by the two departments on October 23, 2000. The principal recommendation contained in the Reconciliation Report is set forth below:

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

Id., at 17.

S. 746 provides a process for the reorganization of a Native Hawaiian government, and upon certification by the Secretary of the Interior that the organic governing documents of the Native Hawaiian government are consistent with Federal law and the trust relationship between the United States and the indigenous, native people of the United States, S. 746 provides for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship with the Native Hawaiian government.

NEED FOR LEGISLATION

Since the loss of their government in 1893, Native Hawaiians have sought to maintain political authority within their commu-

nity. In 1978, the citizens of the State of Hawai'i recognized the long-standing efforts of the native people to give expression to their rights to self-determination and self-governance by amending the State constitution to provide for the establishment of a quasi-sovereign State agency, the Office of Hawaiian Affairs. The State constitution, as amended, provides that the Office is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. The Office administers programs and services with revenues derived from lands which were ceded back to the State of Hawai'i upon its admission into the Union of States. The dedication of these revenues reflects the provisions of the 1959 Hawai'i Admissions Act which provides that the ceded lands and the revenues derived therefrom should be held by the State of Hawai'i as a public trust for five purposes—one of which is the betterment of the conditions of Native Hawaiians. The Admissions Act also provides that the new State assumes a trust responsibility for approximately 203,500 acres of land that had previously been set aside under Federal law in 1921 for Native Hawaiians in the Hawaiian Homes Commission Act.

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice* v. *Cayetano,* 528 U.S. 495 (2000). The Supreme Court held that because the Office of Hawaiian Affairs is an agency of the State of Hawai'i, funded in part by appropriations made by the State legislature, the election for the trustees of the Office of Hawaiian Affairs must be open to all citizens of the State of Hawai'i who are otherwise eligible to vote in statewide elections. Upon remand from the U.S. Supreme Court and the Ninth Circuit Court of Appeals, and by order of the U.S. District Court for the District of Hawai'i, the candidates for the Office of Hawaiian Affairs trustees may be either Native Hawaiian or non-Native Hawaiian, and all citizens of the State of Hawai'i may vote for the candidates that register to run for the nine trustee positions.

The native people of Hawai'i have thus been divested of the mechanism that was established under the Hawai'i State Constitution that, since 1978, has enabled them to give expression to their rights as indigenous, native people of the United States to self-determination and self-governance. S. 746 is designed to address these developments by providing a means under Federal law, consistent with the Federal policy of self-determination and self-governance for America's indigenous, native people, for Native Hawaiians to have a status similar to that of the other indigenous, native people of the United States.

FEDERAL DELEGATION OF AUTHORITY TO THE STATE OF HAWAII

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

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

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

From time to time, with the consent of the affected States, the Congress has sought to more effectively address the conditions of the indigenous people by delegating Federal responsibilities to various States. In 1959, the State of Hawai'i assumed the Federally-delegated responsibility of administering 203,500 acres of land that had been set aside under Federal law for the benefit of the native people of Hawai'i. See Haw. Const. Art. XVI, § 7; Hawai'i Admission Act, Pub. L. No. 83–3, § 4,73 Stat. 4, 5 (1959) ("Hawaii Admission Act"). In addition, the State agreed to the imposition of a public trust upon all of the lands ceded to the State upon admission. See Hawai'i Admission Act, § 5(f); Haw. Const., Art. XII, § 4. One of the five purposes for which the public trust is to be carried out is for the "betterment of the conditions of native Hawaiians[.]" Hawai'i Admission Act, § 5(f). The Federal authorization for this public trust clearly anticipated that the State's constitution and laws would provide for the manner in which the trust would be carrier out. ID. §§ 4 & 5 (f).

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

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

HISTORY

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

The indigenous people did not share similar customs or traditions. Their cultures were diverse. Some of them lived near the

ocean and depended upon its bounty for their sustenance. Others made their homes amongst the rocky ledges of mountains and canyons. Some native people fished the rivers, while others gathered berries and roots from the woodlands, harvested rice in the lake areas, and hunted wildlife on the open plains. Their subsistence lifestyles caused some to follow nomadic ways, while others established communities that are well over a thousand years old.

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

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

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

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

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

Native Hawaiians are the indigenous, aboriginal people of the island group that is today the State of Hawai'i. Hawai'i was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawai'i perhaps as early as 300 A.D. The original Hawaiians were thus part of the Polynesian family of peoples, which includes the Maori, Samoans, Tongans, Tahitians, Cook Islanders, Marquesans, and Easter Islanders. 1 Ralph S. Kuykendall, The Hawaiian Kingdom 3 (1938). Hundreds of years of Hawaiian isolation followed the end of the era of "long voyages." Id. During these centuries, the Polynesians living in Hawai'i evolved a unique system of self-governance and a "highly organized, self-sufficient, sub-

sistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution.

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

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

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

"The concept of private ownership of land had no place in early Hawaiian thought." Id. at 4. The authority of the *moʻi* or king was derived from the gods, and he was a trustee of the land and other natural resources of the island. Id. Chiefs owed military service, taxes, and obedience to the king, but neither chiefs, nor skilled laborers, nor commoners were tied to a particular piece of land or master. All lands conferred by the king or chief were given subject to revocation. In turn neither commoners nor skilled laborers were required to stay with the land; if maltreated or dissatisfied, an individual could move to another *ahupuaʻa* or *ʻili.* Id.; see also Fuchs, supra at 5.

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

The language and culture of the Hawaiian people were rich and complex. Hawaiians possessed an "extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth. It consisted of *mele* (songs) of various

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

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

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

Hawai'i was "discovered" by the west in 1778, when the first *haole* or white foreigner, Captain James Cook of the British Royal Navy, landed. Because he arrived during a festival associated with Lono in a ship whose profile resembled Lono's symbol, he was greeted as that long-departed god. Other western ships soon followed on journeys of exploration or trade. E.S. & Elizabeth G. Handy, Native Planters in Old Hawai'i 331 (1972).

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

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

This devastating population loss was accompanied by cultural, economic, and psychological destruction. Western sailors, merchants, and traders did not respect Hawaiian *kapu* (taboos) or religion and were beyond the reach of the priests. The chiefs began to imitate the foreigners whose ships and arms were so superior to their own. The *kapu* were abolished soon after Kamehameha I

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

died. See Fuchs, supra at 8–9. Christianity, principally represented by American missionaries, quickly flowed into the breach. Christianity condemned not only the native religion, but the world view, language, and culture that were intertwined with it. The loss of the old gods, along with the law and culture predicated on their existence, resulted in substantial social conflict and imbalance. Id. at 9; Kuykendall & Day, supra, at 40–41.

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

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

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

In the 1848 Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the main chiefs; he reserved about 1 million acres for himself and his successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawai'i ("Government Lands"). All land remained subject to the rights of native tenants. In 1850, after the division was accomplished, an act was passed permitting non-natives to purchase land in fee simple. The expectation was that commoners would receive a substantial portion of the lands that were distributed to the chiefs because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.[2]

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

Soon after the Mahele, there was a dramatic concentration of land ownership in plantations, estates, and ranches owned by non-natives. Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs.

These economic changes were devastating for the Native Hawaiian people. The communal land system of subsistence farming was replaced by an economic dominated by western-owned plantation agriculture, and water formerly used for taro cultivation was increasingly diverted for irrigation of sugar plantations. Native Hawaiian were not considered sufficiently cheap, servile labor for the backbreaking plantation work, and, indeed, did not seek it. Unable successfully to adjust either to the new economic life of the plantation or to the competitive economy of the city, many Native Hawaiians became part of "the floating population crowding into the congested tenement districts of the larger towns and cities of the Territory' under conditions which many believed would 'inevitably result in the extermination of the race.'" (quoting S. Con. Res. 2, 10th Leg. of the Territory of Hawai'i, 1991 Senate Journal 25–26). Native Hawaiians developed a debilitating sense of inferiority, and descended to the bottom tier of the economy and the society of Hawai'i.

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

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

> The United states * * * are more interested in the fate of the islands, and of their government, than any other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the * * * Islands ought to be respected; that no power ought either to take possession of the islands as conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences in matters of commerce.

S. Exec. Doc. No. 52–77, 40–41 (1893) (describing 1842 statement).

America's already ascendant political influence in Hawai'i was heightened by the prolonged sugar boom which followed the Mahele. Sugar planters were eager to eliminate the United States' tariff on their exports to California and Oregon. The mainland sugar growers strongly resisted the lifting of the tariff, but the United States' fear of "incipient foreign domination of the Islands" near its coast was stronger than the mainland growers' lobby. The 1875 Convention on Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw., 19 Stat. 625 (1875) ("Reciprocity Treaty"), eliminated the American tariff on sugar from Hawai'i and virtually all tariffs that Hawai'i had placed on American products. Critically, it also prohibited Hawai'i from giving political, economic, or territorial preferences to any other foreign power. Finally, when the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

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

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

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

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

A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison had authorized him to say that "if conditions in Hawaii compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here."' L.A. Thurston, Memoirs of the Hawaiian Revolution 230–32 (1936). The American annexation group closely collaborated with the United States' Minister in Hawai'i, John Stevens.

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

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

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

3 Kuykendall, supra at 364.

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

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

Sanford Dole was elected President of the Republic of Hawai'i and the United States gave his government prompt recognition.[3]

The election of President McKinley in 1896 gave the annexation movement new vigor. Another annexation treaty was sent to the Senate. Simultaneously, the Native Hawaiian people adopted resolutions sent to Congress stating that they opposed annexation and wanted to be an independent kingdom. Russ, supra at 198, 209.[4] The annexation treaty failed in the Senate. But to avoid the constitutional treaty procedure, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation which required only a simple majority in each House of Congress. The balance was tipped at this moment by the United States' entry into the Spanish-American War. American troops were fighting in the Pacific, particularly in the Philippines, and the United States needed to be sure of a Pacific base. See Kuykendall & Day, supra at 188; MacKenzie, supra at 14. In July 1898, the Joint Resolution was enacted—"the fruit of approximately seventy-five years of expanding American influence in Hawai'i." Fuchs, supra at 36.

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

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

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

In 1826 it was estimated that there were 142,650 full-blooded Native Hawaiians in the Hawaiian islands. By 1919 their numbers had been reduced to 22,600. Historically, the Native Hawaiian's subsistence lifestyles required that they live near the ocean to fish

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[3] A short-lived counter-revolution commenced on January 7, 1895. Republic police discovered it, arrested many royalist leaders, and imprisoned the Queen. Eventually, she was forced to swear allegiance to the new Republic in exchange for clemency for the revolutionaries. MacKenzie, supra at 13; Fuchs, supra at 34–35.

[4] The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population in Hawai'i at that time. See Van Dyke, supra at 103 & n.48 (citing Dan Nakaso, Anti-Annexation Petition Rings Clear, Honolulu Advertiser, Aug. 5, 1998, at 1); Tom Coffman, Nation Within: The Story of America's Annexation of the Nation of Hawai'i 273–82 (1998).

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

and near fresh water streams to irrigate their staple food crop (taro) within their respective *ahupua's*. Beginning in the early 1800's, more and more land was being made available to foreigners and was eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Native Hawaiians were forced off the lands that they had traditionally occupied. As a result, they moved into the urban areas, often lived in severely-overcrowded tenements and rapidly contracted diseases for which they had no immunities.

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

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

> One thing that impressed me * * * was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty.

H.R. Rep. No. 66–839, at 4 (1920).

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

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

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their now homes * * * The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[7]

Prince Jonah Kuhio Kalanian'ole ("prince Kuhio"), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."[8] Secretary of Interior Lane attributed the declining population to health problems like

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

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

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

those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[9]

The effort to "rehabilitate" this dying race by returning Native Hawaiians to the land led the Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside approximately 203,500 acres of public lands (former Crown and Government lands acquired by the United States upon Annexation) for homesteading by Native Hawaiians. Hawaiian Homes Commission Act, § 203. Congress compared the Act to "previous enactments granting Indians * * * special privileges in obtaining and using the public lands." H.R. Rep. No. 66–839, at 11 (1920).

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

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

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

For the next forty years, during the Territorial period (1921–1959) and the first two decades of statehood (1959–1978), inadequate funding forced the Department of Hawaiian Home Lands to lease its best lands to non-Hawaiians in order to generate operating funds. There was little income remaining for the development

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

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

Hawai'i Admission Act

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

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

Hawai'i Admission Act, § 4, 73 Stat. at 5.

> The lands granted to the State of Hawai'i by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands,

> proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Id § 5(f), 73 Stat. at 6.

These were explicit delegations of Federal authority to be assumed by the new State. they were not discretionary. The language is not permissive. The United States did not absolve itself from any further responsibility in the administration or amendment of the Hawaiian Homes Commission Act. Nor did the United States divest itself of any ongoing role in overseeing the use of ceded lands or the income or proceeds therefrom. Sections 4 and 5(f) of the Hawai'i Admission Act, quoted above, clearly contemplate a continuing Federal role, as do sections 204 and 223 of the Hawaiian Homes Commission Act, which provide that the consent of the Secretary of the Interior must be obtained for certain exchanges of trust lands and reserve to congress the right to amend that Act. The Federal and State courts have repeatedly noted that the United States retains the authority to bring an enforcement action against the State of Hawai'i for breach of the section 5(f) trust. *Han* v. *United States*, 45 F3d 333 (9th Cir. 1995); *Pele Defense Fund* v. *Paty*, 837 P2d 1247 (Hawai'i, 1992).

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

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

Subsistence—Ancient Native Hawaiians supplemented the produce of their farms and fishponds by fishing, hunting, and gathering plants. These subsistence activities became increasingly more difficult to pursue as changing land ownership patterns barred access to natural resources. Nonetheless, in predominantly Hawaiian rural areas such as Hana, Puna, and the island of Moloka'i, Native Hawaiians continue to feed their families as their ancestors did be-

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

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

fore them.[12] Hawai'i law has always guaranteed subsistence gathering rights to the people so they may practice native customs and traditions.[13]

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

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

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

Today, there is an extensive and growing network of reclaimed family genealogies, one of which is formally maintained by the Of-

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

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

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

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

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

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

[18] McGregor, supra, at 9.

fice of Hawaiian Affairs (Operation *'Ohana*). Huge Hawaiian family reunions are routinely held throughout the islands, in every week of the year. In honor of a cultural tradition that reveres the taro root as the older brother of the Hawaiian race, these modern activities are called *"ho'i kou i ka mole,"* or "return to the tap-root."

'Iwi (Bones)—In Hawaiian culture, the remains of the deceased carried the *mana* (spiritual power) of the decedent. These remains were treated with great reverence, and fearful consequences were sure to befall any who desecrated them. The protection of the bones of their ancestors remains a solemn responsibility for modern day Native Hawaiians. The State of Hawai'i has recognized the importance of protecting Native Hawaiian burial sites, and has established a Hawaiian Burial Council to ensure the *'iwi* of Hawaiian ancestors are treated with proper respect.[19]

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

'Olelo Hawai'i (Hawaiian Language)—*"I ka 'olelo no ke ola; i ka 'olelo no ka make.* With language rests life, with language rests death."[20] The Hawaiian language was banned from the schools in 1896.[21]

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

The language was kept alive in rural Hawaiian families and in the *mele oli* (songs and chants) of native speakers.[23] In 1978, the Hawai'i state Constitution was finally amended to make Hawaiian

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

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

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

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

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

one of the two official languages of the State.[24] In the two decades since, Hawaiian language has become a required offering in the State Department of Education curriculum, and private non-profit Hawaiian language schools have been established in all major islands with the assistance of Federal funds.[25] In 1997–1998, 1,351 students were enrolled in fourteen Hawaiian language immersion programs throughout the State, from pre-school through high school.[26] Hawaiian remains the first language of the Native Hawaiian community located on the isolated island of Ni'iahu, which was spared the effects of the 1896 ban.[27]

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

Civic Association—Prior to Annexation, Native Hawaiians were active participants in the political life of the Islands. Political associations were organized to protests against the Bayonet Constitution of 1787 and subsequent annexation efforts.[29] Hawaiian Civic Clubs were established at the turn of the century to campaign against the destitute and unsanitary living conditions of Hawaiians in the city of Honolulu and its outskirts.[30] These associations still exist, and count among their membership many of Hawai'i's most distinguished native leaders. In addition, Hawaiians living on Hawaiian Home Lands have, from the program's beginning in 1921, established homestead associations.

La'au Lapa'au (Hawaiian Healing)—Quietly practiced over the past two centuries following European contact, Native Hawaiian medicine has always been an important alternative to western medical care. Today it is a credible form of treatment for many.[31] Practitioners use Hawaiian medicinal plants (*la'au*), massage

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

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

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

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

[28] See generally Victoria Shook, Ho'oponopono, Contemporary Uses of a Hawaiian Problem-Solving Process (185).

[29] Hui Kalaiaina, a Hawaiian political organization, lobbied for the replacement of the 1887 Bayonet Constitution, and led mass, peaceful protests that stalled negotiations for a new Treaty of Reciprocity. 3 Kuykendall, supra, at 448; Noenoe Silva, Kanaka Maoli Resistance to Annexation, 1 O'iwi: A Native Hawaiian Journal 45 (1998).

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

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

(*lomilomi*), and spiritual counseling to heal. Hawaiian health centers established with Federal financial support[32] now incorporate traditional Hawaiian healing methods into their regimen of care.

Halau Hula (Hula Academies)—Once banned by missionaries as sacrilege, the ancient art of *hula*[33] accompanied by chanting in the native tongue, flourishes today. *Halau* exist throughout the islands, and hula and chants are now regularly incorporated into public ceremonies.

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

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

FEDERAL ACTIONS WITHIN THE CONTEXT OF FEDERAL INDIAN POLICY

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

In 1921, when the Hawaiian Homes Commission Act was enacted into law, the prevailing Federal Indian policy was premised upon the objective of breaking up Indian reservations and allotting lands to individual Indians. Those reservation lands remaining after the allotment of lands to individual Indians were opened up to settlement by non-Indians, and significant incentives were authorized to make the settlement of former reservation lands attractive to non-Indian settlers. Indians were not to be declared citizens of the United States until 1924, and it was typical that a twenty-year re-

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

[33] "[A] few chanters, dancers, and teachers among the *po'e hula* [hula people] kept alive the more traditional forms, and with the flowering of the "Hawaiian Renaissance" in the 1970's their knowledge and dedication became a foundation for revitalizing older forms." Dorothy B. Barrére, Mary Kawena Pukui & Marion Kelly, Hula Historical Perspectives 1–2 (1980). Hula was recently designated the state dance. Act 83, Relating To Hula (June 22, 1999) (codified at Haw. Rev. Stat. Chapter § 5–21).

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

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

straint on the alienation of allotted lands was imposed. This restraint prevented the lands from being subject to taxation by the states, but the restraint on alienation could be lifted if an individual Indian was deemed to have become "civilized." However, once the restraint on alienation was lifted and individual Indian lands became subject to taxation, Indians who did not have the wherewithal to pay the taxes on the land, found their lands seized and put up for sale. This allotment era of Federal policy was responsible for the alienation of nearly half of all Indian lands nationwide—hundreds of millions of acres of lands were no longer in native ownership, and hundreds of thousands of Indian people were rendered not only landless but homeless.

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

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

CONSTITUTIONAL SOURCE OF CONGRESSIONAL AUTHORITY

The United States Supreme Court has so often addressed the scope of Congress' constitutional authority to address the conditions of the native people that it is now well-established.[36] Although the authority has been characterized as "plenary," *Morton* v. *Mancari,* 427 U.S. 535 (1974), the Supreme Court has addressed the broad scope of the Congress' authority. *Delaware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977); *United States* v. *Sioux Nation,* 448 U.S. 371 (1980).[37] It has been held to encompass not

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

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

Continued

only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired. *United States* v. *Sandoval,* 231 U.S. 28 (1913).

The ensuing course of dealings with the indigenous people has varied from group to group, and thus, the only general principles that apply to relations with the first inhabitants of this nation is that they were dispossessed of their lands, often but not always relocated to other lands set aside for their benefit, and that their subsistence rights to hunt, fish, and gather have been recognized under treaties and laws, but not always protected nor preserved.

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

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

The exchanges of correspondence between James Monroe and James Madison concerning the construction of what was to become Article I, Section 8, Clause 3 of the Constitution make no reference to Indian tribes, but they do discuss Indians.[38] Nor is the term "In-

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Indians v. *United States,* 307 U.S. 1 (1939); *Delaware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977); *United States* v. *John,* 437 U.S. 634 (1979).

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

dian tribe" found in any dictionaries of the late eighteenth century, although the terms "aborigines" and "tribe" are defined.[39]

Whether the reference was to "aborigines" or to "Indians", the Framers of the Constitution did not import a meaning to those terms as a limitation upon the authority of Congress, but as descriptions of the native people who occupied and possessed the lands that were later to become the United States—whether those lands lay within the boundaries of the original thirteen colonies, or any subsequently acquired territories. This more logical construction is consistent with more than two hundred Federal statutes which establish that the aboriginal inhabitants of America are a class of people known as "Native Americans" and that this class includes three groups—American Indians, Alaska Natives and Native Hawaiians.

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

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

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

This history is accurately reflected in two centuries of U.S. Supreme Court jurisprudence. Beginning with Chief Justice Marshall, the Supreme Court has recognized the power of the United States to provide for the welfare, and to promote the self-governance, of

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

Indian peoples. This recognition of the right of the indigenous, native people of the United States to self-determination and self-governance is part of the structure of America's complex multi-sovereign system of governance.

In the language and understanding of the Founders, "tribes" or "peoples" did not lose their identity as such when conquered or ruled by kings. Like other Native American people, Native Hawaiians lived for thousands of years as "tribes," then as confederations of tribes, now as conquered tribes. All aboriginal peoples of the New World were "Indians." That is what it meant to be an "Indian." The Founders knew that Columbus had not landed in India or the Indies; Columbus's navigational error had been corrected, but his malaprop had survived. And so, in the words of one of the earliest English books about America, the native people were "Indians," for the simple reason that "so caule wee all nations of the new founde lands."[40]

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

There was no understanding in the founding generation that Indians constituted a distinct or separate race. Indians were often assumed by the European settlers to be peoples like themselves. Before the development of modern dating methods that established beyond doubt the great antiquity of early man in America, it was believed that the Indians were offshoots of known civilizations of the Old World. Some scholars argued that they came from Egypt, others that they had broken away from the Chinese, and still others that they were descendants of Phoenician or Green seamen * * *. Another belief, more legend than theory, held that various light-skinned tribes possessed the blood of Welshmen who had come to America in the remote past. * * *[41] Others theorized the Indians were the "lost tribes" of Israel.[42]

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

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

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

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

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

that the Eskimos had come to America via Greenland from "the northern parts of the old continent," i.e., Northern Europe.[44]

Modern scholars might be "puzzled whether they [Eskimos] were Indians, or a separate and somewhat mysteriously distinct people on earth * * *"[45] Others might question whether the native people of Hawai'i are "Indians." Efforts to draw such distinctions would themselves have puzzled the Founding generation. The "Indians" were many peoples, with distinct languages, cultures and socio-political organizations. They had diverse origins, perhaps Asia, perhaps Europe, perhaps the lands of the Bible. But from wherever they came, and whatever their distinct cultures and governments, they were all "Indians," for they were aboriginal inhabitants of the New World. The Founding generation had no difficulty thinking of Eskimos as "Indians." They would have had no more difficulty treating as "Indians" native peoples whose origins lay a thousand years ago in the South Pacific. Indeed, as one historian reports, Captain James Cook, the English "discoverer" of the Hawaiian islands and a contemporary of the Founders, referred to the inhabitants of the Hawaiian Islands as "Indians."[46] As far as the Founders knew, all the "aboriginal inhabitants" of the New World came from the South Pacific via the "imperfect navigation of ancient times."

The Founding generation used "tribes" to denote peoples of like kind or kin. As used in the Constitution, the word "tribe" does not refer to some specific type of government or social organization. All Native American peoples were "tribes," whether they lived in villages or spread out in vast federations or empires. "Tribe" and "nation" were used to refer not to governments, but to groups of people recognizing a common membership or identity as such. Application of the biblical concept of "tribes" to the "Indians" reflected the understanding that the natives of the New World were not one people, but many "peoples," "nations," or "tribes"—terms used interchangeably well into the Nineteenth Century.[47]

Eskimos lived in small clans or villages that some scholars distinguish from "tribes." The Founding era knew no such technical usage. Notwithstanding the absence of clear government, Eskimo peoples were called "tribes" and "nations."[48] More generally, peoples of every sort were "tribes." In Gibbon's already popular Decline and Fall of the Roman Empire (1776), the early inhabitants of Brit-

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[44] Jefferson, Notes, at 226.

[45] Joseph, Supra, at 57; see also Oxford English Dictionary (1st ed.) ("OED"), "Indian" ("The Eskimos * * * are usually excluded from the term * * *").

[46] Gavan Daws, Shoal of Time, A History of the Hawaiian Islands 2, 19, 23, 52 (1968) (Cook "spent several years among the savages of the Pacific, "Indians," as he and everyone else called them."). Multiple references in logs and diaries of Captain Cook and his officers refer to the indigenous people they found in the Hawaiian Islands as "Indians." For example, Cook wrote that his first mate "attempted to land but was prevented by the Indians coming down to the boat in great numbers." J.C. Beaglehole, The Journal of Captain James Cook on His Voyages of Discovery III 267 (1967). David Samwell, the surgeon on Cook's flagship *Discovery,* wrote, "The Indians opened and made a lane from the Marines to pass." id., at 1161.

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

[48] Alexander Fisher, A Journal of a Voyage of Discovery (1821) ("all the Esquimaux tribes") (quotes in Oswalt, Supra, at 74); The Private Journal of Captain G.F. Lyon, (1824) (an Eskimo "tribe") (quoted in Oswalt, Supra, at 19); George Lyon, A brief Narrative of an Unsuccessful Attempt to Reach Repulse Bay (1825); Narrative of the Second Arctic Expedition Made by Charles F. Hall (Nourse, ed., 1879), at 63 (describing "tribe" of "Eskimo"); John Murdoch, Review of The Eskimo Tribes, American Anthropologist, 1:125–133 (1888); Heinrich Rink, Tales and Traditions of the Eskimo 1–5 (1875) (describing small and large divisions of Eskimos as "tribes").

ain were said to live in "tribes."[49] The early Greeks and Romans were "tribes." Welshmen belonged to tribes.[50]

For the Founding generation, "tribes" came into the language from the most widely read account of tribal history—the biblical story of the Twelve Tribes of Israel.[51] The Bible gives the history of the Tribes from the birth of the sons of Israel, through the growth of the families to immense "tribes" numbering in the tens of thousands. The Bible follows the tribes into captivity and exodus and into Canaan, were the "tribes" lived in a unified Kingdom under Kings David and Solomon.[52] Even under the reign of Kings, the peoples remained "tribes," When King Solomon dedicated the temple in Jerusalem, he called together the leaders of the "tribes": "Solomon assembled the elders of Israel, and all the heads of the tribes, the chief of the fathers of the children of Israel, unto King Solomon in Jerusalem, that they might bring up the ark of the covenant of the Lord out of the city of David, which is Zion."[53]

When the Kingdom ended, it divided by tribe. The tribes of Benjamin and Judah fought the other tribes that revolted and were "lost."[54] Throughout all this history, through the unification and monarchical periods, through the revolt and diaspora, the Bible taught that the people of Israel remained "tribes," led by their "chief fathers,"[55] In the New Testament, all the peoples of the earth were "tribes."[56] In the founding generation, "tribes" in the new World, like "tribes" in the Bible, referred not to a form of social organization or government, but to "peoples" who identified themselves by kin, tradition, or faith.

The Founders had seen analogies to the complex tribal history of the Bible. The Founders knew the native peoples evolved, united and divided in ever shifting forms of government. The native peoples had formed "powerful confederac[ies]," tribes united under common chiefs, and federations of tribes joined with other federations.[57] The colonies and the States under the Articles of Confederation had repeatedly dealt with vast federations of tribes, including the "Six Nations" in the north and the "five civilized tribes" in the south.[58] The Indian peoples were "tribes" not because they formed any particular organization, but because they recognized themselves as distinct peoples, with cultures, languages and societies separate from each other and from the European invaders.

By the Founding era, "tribe" had expanded from groups of people to the natural division of plants and animals. Milton asked in Par-

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

[50] OED, "Tribe," def. 2.a–d. 38

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

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

[53] 1 Kings 8:1 ("King James translation" (1611–1769)); 1 Kings 11:12–13

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

[55] Ezra 1:5.

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

[57] Jefferson, Notes, at 221.

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

adise Lost, "Oh flours * * * who now shall reare ye to the Sun, or ranke Your Tribes?" (xi 279). John Adams wrote, "there is, from the highest Species of animals upon this Globe which is generally thought to be Man, a regular and uniform Subordination of one Tribe to another down to the apparently insignificant animalcules in pepper Water."[59] all creation came in tribes. Mankind was organized in tribes, the Animal Kingdom was organized in "tribes," the "Vegetable Kingdom" was organized in "Tribes."[60] To every kind its tribe.

The Founding generation knew Indian peoples who lived in small, leaderless bands; they also knew Indian peoples organized in complex federations and empires. The Europeans and the American colonists understood that the aboriginal peoples warred with and conquered each other, made agreements and alliances, formed confederations and even kingdoms and empires. Through all this complex and still evolving history, the Indian "peoples" were called "nations" and "tribes." The founding generation would have had no difficulty conceiving of Indian tribes who originated in Polynesia, and lived in a "kingdom" under a "king."

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

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

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

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

The Articles had given the Continental Congress "sole and exclusive right and power" of regulating relations with Indians who were "not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." Articles of Confederation, Art. X, March 1, 1778 (emphasis added). As Madison explained, this language created two major problems. First, no one knew when or whether Indians were "members of states"; second, the grant to Congress of "sole and exclusive power," so long as Congress did not "intrud[e] on the internal right" of States was "utterly incomprehensible." The provision had been a source of "frequent perplexity and contention in the federal councils."[61] Capitalizing on the uncertainty, several states (Georgia, New York and North Carolina) had infringed Congress' power by making their own arrangements with local Indians. As a result, during the Constitutional Convention and Ratification, Georgia was in armed conflict, and on the verge of war, with the powerful Creek Nation.

The only debate on the issue in the Convention focused on the need for federal supremacy over the states. Madison objected early on to the "New Jersey Plan" on the ground that it failed to bar states from encroaching on Congress' power over "transactions with the Indians."[62] In August, Madison proposed that Congress be given the power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."[63] Madison's proposal was submitted to the Committee on Detail without discussion. The Committee on Detail recommended that power over Indians be dealt with in the Commerce clause, which would provide Congress with power over commerce "with the Indians, within the limits of any State, not subject to the laws thereof." The proposal provoked no debate.[64] On August 31st, the Convention referred various "parts of the Constitution" (including the Commerce Clause) to a "Committee of eleven," including Madison.[65] Without recorded discussion, the Committee recommended that the language be simplified to commerce "with the Indian tribes."[66] The Convention accepted the recommendation without debate or dissent.[67]

There is no support for the notion that the reference to "Indian tribes" was intended to narrow Congress' authority over Indian affairs. As noted above, the debate in the Convention focused solely on making clear the supremacy of Congress' power. During the ratification debates, the new Constitution was defended on the ground that it gave Congress power over "Indian affairs" and "trade with the Indians."[68] In the only extended discussion of the

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[61] Federalist 42, in XIV Documentary History of the Ratification of the Constitution (J. Kaminiski, ed., 1983) ("Documentary History"), XV:431.

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

[63] 2 Federal Convention, at 321, 324; see also id. at 143 (Rutledge noted that "Indian affairs" should be added to Congress' powers).

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

[65] Id. at 481.

[66] Id. at 493, 496–97, 503 (emphasis added).

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

[68] Federalist 40, in Documentary History, XV: 406 (Constitution represents "expansion on the principles which are found in the articles of confederation," which gave Congress power over "trade with the Indians"); Federal Farmer, October 8, 1787, in id. at XIV: 24 (under the new Constitution, federal government has power over "all foreign concerns, causes arising on the

issue during Ratification, Madison used the phrases "commerce with the Indian tribes" and "trade with Indians" interchangeably; Madison explained that the purpose of the new provision was to eliminate the limitation on Congress' power over trade with the Indians living within the States.[69] The notion that the reference to "tribes" was a limit on Congress' ability to deal with the native peoples is without support and is contrary to the only expressions of the Framers' original intent. The Constitution gave Congress power over the Indian peoples, however and wherever it found them.

The First Federal Congress treated the Constitution as granting broad power to regulate "trade and intercourse" with "Indians," "Indian tribes," "nations of Indians," and "Indian country."[70] Congress understood its power to "operate immediately on the persons and interests of individual citizens."[71] The actions of the new government also show that even when the Framers knew nothing about the organization of Indian peoples, they nevertheless intended to assert Federal power over those peoples. Shortly after taking office, President Washington gave instructions to Commissioners to negotiate with the Creeks. It was, as noted, the war between the Creeks and Georgia that had fostered the apparently universal conclusion that the new Federal government must be given supremacy over Indian affairs. Washington instructed the Commissioners to determine the nature of the Creek's political divisions and governments, including "[t]he number of each division"; "[t]he number of Towns in each District"; "[t]he names, Characters and residence of the most influential Chiefs—and * * * their grades of influence." And, most tellingly, the Commissioners were to learn "[t]he kinds of Government (if any) of the Towns, Districts, and Nation."[72] Washington, like other Founders, did not know how the Creek lived and how (if at all) they governed themselves. But however the Indian peoples lived, and however (if at all) they governed themselves, they were still Indian peoples and they were still subject to the supreme power of the Federal government over Indian tribes.

President Jefferson gave similar instructions to Lewis and Clark. When they encountered unknown Indian peoples, the explorers were to learn the "names of the nations"; "their relations with other tribes or nations"; their "language, traditions, monuments"; and the "peculiarities in their laws, customs & dispositions."[73] Like Washington, Jefferson knew there was much he and his fellow citizens did not know about the "Indian" peoples; but he intended to find out and to assert Federal authority over whatever he found.

It is inconceivable anyone thought that if Washington's Commissioners or Lewis and Clark found a native people living without "chiefs," like many Eskimo, or under a King like Montezuma or Ka-

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seas, to commerce, imports, armies, navies, Indian affairs"); Federal Farmer, October 10, 1787, in id. at 30, 35 (federal power over "foreign concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs"). The Federal farmer Letters are considered "one of the most significant publications of the ratification debate." Id. at 14.

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

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

[71] Madison, Federalist 40, in documentary History, XV: 406.

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

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

mehameha, these people would be beyond Congress' power over Indian "tribes" or nations.

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

"Indians" are expressly singled out for special treatment by the text of the Amendment. In order to eliminate the morally repugnant language which counted slaves as three-fifths persons, the Framers of the Fourteenth Amendment redrafted the apportionment clause. The Framers deleted the "three-fifths persons," but retained the express exclusion of "Indians not subject to tax" (Amend. XIV, § 1), because, while they intended to wipe out the badges and incidents of slavery, they intended to preserve the special relationship between the United States and the Indian people. Before and after the Amendment, Indians were not citizens, they did not vote, they did not count for apportionment, and they were subject to special legislation in furtherance of Congress' historic trust responsibilities.

The only debate during the drafting and ratification of the Fourteenth Amendment was not about whether the special relationship with the Indian people should be preserved, but about how to make certain it was preserved. When one Senator suggested that specific reference be made excluding "Indians" from the citizenship clause, the Senator presenting the clause argued this was unnecessary. The Amendment provided citizenship only to persons "within the jurisdiction" of the United States,[74] and Indian nations were treated like alien peoples not fully within the jurisdiction of the government:

> in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with Indian tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes.[75]

Congress debated what language to adopt in order to make certain that the special status of the Indian tribes was preserved.[76] There was no support for, or consideration given to, eliminating the special relationship between the United States and the Indian peoples. The uniform intent was to preserve Congress' ability to decide when Indians would be granted citizenship, when Indians would be taxed, and when Indians would be subject to special legislation.[77]

For two hundred years, the Supreme Court has recognized the political distinction the Constitution draws between "Indian tribes"

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

[75] Cong. Globe, 39th Congress, 1st Sess. 2895.

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

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

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

Marshall knew that the constitutional text reflected this preexisting nation-to-nation relationship. The Indian Commerce Clause, U.S. Const. art. I., § 3, cl. 8, and the Treaty Clause, Id. art. II, § 2, cl. 2, granted Congress board power to regulate Indian affairs. These provisions permitted the United States to fulfill its obligations to the dependent Indian "nations" that were its "wards." *Cherokee Nation,* 30 U.S. (5 Pet.) at 17–18; *Worcester;* 31 U.S. (6 Pet.) at 558–59. As "guardian," Congress had both the obligation and the power to enact legislation protecting the Indian nations. See *Worcester;* 31 U.S. (6 Pet.) at 560–61 accord Cherokee Nation, 30 U.S. (5 Pet.) at 17 ("[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants").

Marshall defined "Indians" broadly to include all of the "original inhabitants" or "natives" who occupied America when it was discovered by "the great nations of Europe." *Johnson,* 21 U.S. (8 Wheat.) at 572–74; *Worcester;* 31 U.S. (6 Pet.) at 544 (1832) (Indians are "those already in possession [of land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man").[78]

He also conceived of "tribes" in broad, inclusive terms. He used "tribe" and "nation" interchangeable: A "tribe or nation," he noted, "means a people distinct from others"—a "distinct community," *Worcester;* 31 U.S. (6 Pet.) at 559, 561.[79] Like the Founders, Marshall defined an "Indian tribe" as nothing more than a community, large or small, of descendants of the peoples who inhabited the New World before the Europeans.

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

The Supreme Court has kept faith with Marshall's conception. The Indian nations have always been defined by ancestry and political affiliation. In the native cultures, the two are inextricably

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

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

intertwined. The Supreme Court's definition is legal, and the Native American's self-definition is historic, religious or cultural; but the two reduce to the same elements: "Indians" are (i) the descendants of aboriginal peoples who (ii) belong to some Native American "people," "nation," "tribe," or "community," as the founding generation understood those terms.[80]

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

Nor does the use of blood quantum as part of the formula to determine who is and is not a Native American constitute an impermissible "racial" discrimination. The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign political communities"—not "racial groups."[81] The Court has long recognized that a tribe's "right to determine its own membership" is "central to its existence as an independent political community."[82] From time immemorial, Native American communities have defined themselves at least in part by family and ancestry.[83] Kinship and ancestry is part of what it means to be an "Indian." Indians by ancestry or blood is what the Framers meant by "Indians." It is what Chief Justice Marshall meant by "Indians." It is what the Framers of the Fourteenth Amendment meant by "Indians." This central conception of "Indian" identity is woven into the Constitution and the entire body of law that has grown up in reliance on that conception.

Congressional authority to use such traditional requirements for tribal membership or benefits has never been doubted. In *John*, the Supreme Court approved Congress' creation of an Indian reservation for the benefit of "Chocktaw Indians of one-half or more Indian blood, resident in Mississippi," id., 437 U.S. at 646. The Court unhesitatingly applied the definition of "Indian" that appears in the Indian Reorganization Act, which has governed Indian tribes since 1934: "'all other persons of one-half or more Indian blood.'" Id. at 650 (quoting 25 U.S.C. § 479). Similarly, the Alaska Native claims Settlement Act's use of a blood quantum formula as one factor in determining "native" status is a valid method of defining those belonging to the group eligible for statutory benefits, and the

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[80] See, e.g., *Montoya* v. *United States,* 180 U.S. 261, 266 (1901) ("a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"); *United States* v. *Candelarid,* 271 U.S. 432, 442 (1926); see *Oklahoma Tax Comm'n* v. *Sac & Fox Nation,* 508 U.S. 114, 123 (1993); *United States* v. *Antelope,* 430 U.S. 641, 647 n.7 (1977) (individuals "anthropologically" classified an Indians may be outside Congress' Indian commerce power if they sever relations with tribe).

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

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

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

use of the blood quantum "does not detract from the political nature of the classification."[84] The use of blood ties is integral to the nature of the political deal struck between the conquering Europeans and the native peoples, as they set out to maintain partially separate existences while inhabiting the same country.

The constitutional text and historic relationship gives Congress not just the "right" to discriminate between Native Americans and others, but the responsibility to do so. As the Supreme Court has long recognized, from the relationship between these former sovereign peoples and the "superior nation" that conquered them arises "the power and the duty" of the United States to "exercis[e] a fostering care and protection over all dependent Indian communities within its borders. * * *"[85] Recently, the Supreme Court acknowledged the continued significance of this historic trust relationship.[86]

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

Fifty years later, the Court approved similar tribal designation for the Pueblo Indians of New Mexico. After long experience under Spanish rule, the Pueblo Indians seemed little like the "savages" of James Fennimore Cooper. The Pueblo Indians lived in villages with organized municipal governments; they cultivated the soil and raised livestock; they spoke Spanish, worshiped in the Roman Catholic Church; prior to the acquisition of New Mexico by the United States, they enjoyed full Mexican citizenship. *See United States* v. *Joseph,* 94 U.S. (4 Otto.) 614, 616 (1877). Nevertheless, the Pueblo Indians lived in "distinctly Indian communities," and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes." *United States* v. *Sandoval,* 231 U.S. 28, 46–47 (1913); *Candelaria,* 271 U.S. at 439–40, 442—43. For Native American "communities," the Court held that "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress * * *" *Sandoval,* 231 U.S. at 46; accord *Tiger* v. *Western Inv. Co.,* 221 U.S. 286, 315 (1911).

Sixty years later, in *United States* v. *John,* 437 U.S. 634 (1978) the Court recognized Congress' authority to create a reservation for the benefit of Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had

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

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

[86] See *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 193 (1999) (recognizing "special federal interest in protecting the welfare of Native Americans").

moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State. 437 U.S. at 652–53. The Mississippi Choctaw were Indians. They had recently organized into a distinctly Indian community. The Court therefore deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law." *Id.* at 650 n.20; 652–53.

Similarly, the Supreme Court has recognized Congress' broad authority to deal with individual "Indians"[87] or large organizations comprised of numerous "tribes."[88] Congress may create or recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress' trust obligation to the historic Indian peoples.[89] Congress' treatment of the Alaska native people—including the creation of unique regional corporations whose shareholders comprise numerous Native villages—has properly been upheld as within Congress' special power over and responsibility for the Native American peoples.[90]

DEMOGRAPHICS OF THE NATIVE HAWAIIAN POPULATION

Housing

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

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

The Commission concluded that the unique circumstances of Native Hawaiians require the enactment of new legislation to alleviate and address the severe housing needs of Native Hawaiians and recommended that the Congress extend to Native Hawaiians the

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

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

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

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

same Federal housing assistance programs that are provided to American Indians and Alaska Natives under the Low-Income Rental, Mutual Help, Loan Guarantee Program and Community Development Block Grant programs. Subsequently, the Community Development Block Grant program authority was amended to address the housing needs of Native Hawaiians.

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

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

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

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

Health status

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

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

> The Native Hawaiian population living in Hawai'i consists of two groups, Hawaiians and part-Hawaiians, who are distinctly different in both age distributions and mortality rates. Hawaiians comprise less than 5 percent of the total Native Hawaiian population and are much older than the young and growing part-Hawaiian populations.
>
> Overall, Native Hawaiians have a death rate that is 34 percent higher than the death rate for the United States all races, but this composite masks the great differences that exist between Hawaiians and part-Hawaiians. Hawaiians have a death rate that is 146 percent higher than the U.S. all races rate. Part-Hawaiians also have a higher death rate, but only 17 percent greater. A comparison of age-adjusted death rates for Hawaiians and part-Hawaiians reveals that Hawaiians die at a rate 110 percent higher than part-Hawaiians, and this pattern persists for all except one of the 13 leading causes of death that are common to both groups.
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> As in the case of the U.S. all races population, Hawaiian and part-Hawaiian males have higher death rates than their female counterparts. However, when Hawaiian and Part-Hawaiian males and females are compared to their U.S. all races counterparts, females are found to have more excess deaths than males. Most of these excess deaths are accounted for by diseases of the heart and cancers, with lesser contributions from cerebrovascular diseases and diabetes mellitus.
>
> Diseases of the heart and cancers account for more than half of all deaths in the U.S. all races population, and their pattern is also found in both the Hawaiian and part-Hawaiian populations, whether grouped by both sexes or by male or female. However, Hawaiians and part-Hawaiians have significantly higher death rates than their U.S. all races counterparts, with the exception of part-Hawaiian males, for whom the death rate from all causes is approximately equal to that of U.S. all races males.
>
> One disease that is particularly pervasive is diabetes mellitus, for which even part-Hawaiian males have a death rate 128 percent higher than the rate for U.S. all races males. Overall, Native Hawaiians die from diabetes at a rate that is 222 percent higher than for the U.S. all races. When compared to their U.S. all races counterparts, deaths from diabetes mellitus range from 630 percent

higher for Hawaiian females and 538 percent higher for Hawaiian males, to 127 percent higher for part-Hawaiian females and 128 percent higher for part-Hawaiian males.

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

Native Hawaiians premise the high mortality rates and the incidence of disease that far exceed that of other populations in the United States upon the breakdown of the Hawaiian culture and belief systems, including traditional healing practices, that was brought about by western settlement, and the influx of western diseases to which the native people of the Hawaiian Islands lacked immune systems. Further, Native Hawaiians predicate the high incidence of mental illness and emotional disorders in the Native Hawaiian population as evidence of the cultural isolation and alienation of the native peoples, in a statewide population in which they now constitute only 20 percent. Settlement from both the east and the west have not only brought new diseases which decimated the Native Hawaiian population, but which devalued the customs and traditions of Native Hawaiians, and which eventually resulted in Native Hawaiians being prohibited from speaking their native tongue in school, and in many instances, at all.

In 1998, Papa Ola Lokahi, a Native Hawaiian organization which oversees the administration of the Federally-authorized Native Hawaiian health care systems, updated the health care statistics from the original E Ola Mau report. In addition, on an annual basis, Papa Ola Lokahi extrapolates the data on Native Hawaiians gathered yearly by the Hawai'i State Department of health from the Department's behavioral risk assessment and health surveillance survey. The findings from those assessments revealed that—

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

• With respect to breast cancer, Native Hawaiians have the highest mortality rates in the State of Hawai'i, and nationally Native Hawaiians have the third highest mortality rates due to breast cancer.

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

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

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

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

• Native Hawaiians have the lowest life expectancy of all population groups in the State of Hawai'i. Between 1910 and 1980, the life expectancy of Native Hawaiians from birth has ranged from five to ten years less than that of the overall State population average, and the most recent data for 1990 indicates that Native Hawaiians life expectancy at birth is approximately five years less than that of the total State population.

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

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

• In 1996, Native Hawaiian fetal mortality rates comprised 15 percent of all fetal deaths for the State of Hawai'i. 32 percent of all fetal deaths occurring in mothers under the age of eighteen years were Native Hawaiians, and for mothers eighteen through twenty-four years, 28 percent were Native Hawaiians.

Education

In 1981, the Senate instructed the Office of Education to submit to Congress a comprehensive report on Native Hawaiian education. The report, entitled the "Native Hawaiian Educational Assessment Project," was released in 1983 and documented that Native Hawaiians scored below parity with regard to national norms on standardized achievements tests, were disproportionately represented in many negative social and physical statistics indicative of special educational needs, and had educational needs that were related to

their unique cultural situation, such as different learning styles and low self-image.

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

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

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

(i) late or no prenatal care;

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

(iii) high rates of births to teenage parents;

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

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

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

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

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

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

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

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

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

(H) Native Hawaiians now comprise over 23 percent of the students served by the State of Hawai‘i Department of Education, and there are and will continue to be geographically

rural, isolated areas with a high Native Hawaiian population density.

In the 1998 National Assessment of Educational progress, Native Hawaiian fourth-graders ranked thirty-ninth among groups of students from thirty-nine States and the District of Columbia in reading. Given that Native Hawaiian students rank among the lowest groups of students nationally in reading, and that Native Hawaiian students rank the lowest among Hawai'i students in reading, it is imperative that greater focus be placed on beginning reading and early education and literacy in Hawai'i.

S. 746

S. 746 was introduced on April 6, 2001, by Senator Daniel Akaka, for himself and Senator Daniel Inouye, and was referred to the Committee on Indian Affairs. A House companion measure, H.R. 617, was introduced in the House of Representatives by Representative Neil Abercrombie, for himself and Representatives Patsy Mink, Eni Faleomavaega, James Hansen, Dale Kildee, Nick Rahall, and Don Young, and was referred to the Committee on Resources.

In the 106th session of the Congress, a bill which was similar in purpose to S. 746, S. 2899, was introduced by Senator Akaka, for himself and Senator Inouye, and was referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives in the 106th session of the Congress. In addition to the provisions now contained in S. 746 and H.R. 617, both bills that were introduced in the 106th Congress addressed a specific and detailed process for the reorganization of a Native Hawaiian government, in a manner similar to that addressed in the Indian Reorganization Act of 1934.

For instance, the bills provided for the development of a roll of those Native Hawaiians who wished to be involved in the organization of a Native Hawaiian government and the certification of that roll by the Secretary of the Interior. Secondly, the bill provided authority for the Secretary to conduct an election for a Native Hawaiian Interim Governing Council that would be charged with the development of organic governing documents. Once the organic governing documents were finalized, the bills provided authority for the Secretary to conduct a referendum for the adoption of the organic governing documents, and thereafter, authority for the Secretary to conduct an election for the election of officers to the Native Hawaiian government.

Five days of hearings were held on S. 2899 and H.R. 4904 in joint hearings of the House Resources Committee and the Senate Indian Affairs Committee in Hawai'i from Monday, August 28, 2000 through Friday, September 1, 2000. An additional hearing on S. 2899 was held in Washington, D.C. on September 13, 2000.

S. 2899 was ordered favorably reported to the full Senate by the Senate Committee on Indian Affairs on September 13, 2000. H.R. 4904 was ordered favorably reported by the House Resources Committee and passed the House on September 26, 2000. H.R. 4904 failed to pass the Senate before the sine die adjournment of the 106th session of the Congress.

The findings of S. 746 focus on the history of Native Hawaiians and the United States policy as it relates to Native Hawaiians, in-

cluding the enactment of over 160 public laws to address the conditions of Native Hawaiians. S. 746 provides a process for the recognition of a Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

Native Hawaiians are actively engaged in a process of reorganizing a Native Hawaiian government. Upon the ratification of the organic governing documents and the election of officers to the Native Hawaiian government, the governing documents are to be submitted to the Secretary of the Interior for certification that they are consistent with Federal law and the special trust relationship between the United States and native people. The Secretary is also authorized to certify that the governing documents provide for the protection of the civil rights of the citizens of the Native Hawaiian government and any others who would come within the jurisdiction of the government. Further, the Secretary is to certify that the State of Hawai'i supports the recognition by the United States of a Native Hawaiian government for purposes of entering into a government-to-government relationship. Resolutions of support for legislation which provides for the Federal recognition of a Native Hawaiian government have been enacted by the Hawai'i state legislature in the several sessions of the legislature.[91] Once the Secretary has made these certifications, the bill provides authority for the United States' recognition of the Native Hawaiian government. Upon recognition, the definition of "Native Hawaiian" for purposes of Federal law, would be as provided for in the organic governing documents of the Native Hawaiian government.

S. 746 also provides authority for the establishment of a United States Office of Native Hawaiian Relations within the Office of the Secretary of the U.S. Department of the Interior. The Office is to be the principal entity through which the United States will carry on relations with the Native Hawaiian people until a Native Hawaiian government is formed. The Office would also serve as the primary agent of ongoing efforts to effect the reconciliation that is authorized in the Apology Resolution. The Office would also serve as lead agency for the work of a Native Hawaiian Interagency task Force that is authorized to be established in S. 746.

INDIAN AND NATIVE HAWAIIAN PROGRAM FUNDING

As referenced above, since 1910, the Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives. Consistent with this practice, S. 746 provides authority for a separate and distinct appropriation that does not impact in any way on existing authorizations for American Indian and Alaska Native programs. It is also important to note that Federal programs addressing health care, education, job training, graves protection, arts and culture, and language preservation for Native Hawaiians are already in place.

[91] The Hawai'i State Senate and House of Representatives each passed resolutions in 2000 and 2001 supporting the recognition of an official political relationship between the United States government and the Native Hawaiian people, as well as the need to develop a government-to-government relationship between a native Hawaiian nation and he United States. See H. Con. Res. 41 (2000); S. Res. 45 (2000); H. Con. Res. 23 (2001); S. Res. 97 (2001) (reprinted in Appendix A hereto).

Accordingly, new impacts on the Federal budget that might otherwise be anticipated with the Federal recognition of a native government will not be forthcoming as a result of the recognition of a Native Hawaiian government. S. 746 does authorize appropriations for the establishment of the U.S. Office of Native Hawaiian Relations within the Department of the Interior, but the costs associated with these activities are not expected to be significant.

GAMING

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

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

There are no Indian tribes in the State of Hawai'i, no Indian reservations or Indian lands, nor are there any Indian reservations or Indian lands over which a tribal government exercises jurisdiction. Hawai'i is one of only two states in the Union (the other is Utah) that criminally prohibit all forms of gaming. Accordingly, a reorganized Native Hawaiian government could not conduct any form of gaming in the State of Hawai'i under the authority of the Indian Gaming Regulatory Act.

In an effort to address concerns about the application of the Indian Gaming Regulatory Act, S. 746 provides that nothing in S. 746 is to be construed as an authorization for the Native Hawaiian government to conduct gaming activities under the authority of the Indian Gaming Regulatory Act.

EXPLANATION OF AMENDMENTS

As referenced above, in the 106th session of the Congress, S. 2899, the bill which was the predecessor bill to s. 746, was the subject of six hearings, five in Hawai'i and one in Washington, D.C. Following the customary practice of Senate committees, the bill was revised based on testimony received from those hearings and was introduced as S. 746.

In section five of S. 746, the Committee responded to testimony received on S. 2899 advocating an administratively more feasible process for the conduct of the work of the Interagency Coordinating Group by designating the Interior Department as the single lead agency for the Interagency Coordinating Group.

In S. 2899, a detailed process for the reorganization of a Native Hawaiian government was set forth in section 7 of the bill. Testimony received by the Committee indicated that it was the view of most Native Hawaiians that the process for the reorganization of a Native Hawaiian government should be determined by the Native Hawaiian people, consistent with the Federal policy of self-determination and self-governance for the native peoples of the

United States. Accordingly, the detailed process for the reorganization of a Native Hawaiian government was omitted from S. 746.

Further, because the legislature of the State of Hawai'i has consistently adopted resolutions supporting the recognition by the United States of a Native Hawaiian governing entity, the Committee included a provision which is intended only to provide the necessary assurances to the United States that the State of Hawai'i supports Federal recognition of a Native Hawaiian government. The Committee does not intend that the State of Hawai'i have any role in determining the Native Hawaiian governing entity that is to be recognized by the United States.

Although, as stated above, the Committee does not believe that the Indian Gaming Regulatory Act has any application in the State of Hawai'i, language was added to S. 746 to clarify the application of the Act. In addition, to address concerns that the recognition of a Native Hawaiian government might in some way make Native Hawaiians eligible for the programs and services provided by the Bureau of Indian Affairs to American Indians and Alaska Natives, the Committee has added language to make clear that nothing in the Act is to be construed as an authorization for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs for any persons who are not otherwise eligible for such programs or services.

S. 2899 also contained a section ten, which provided that "Nothing in this Act is intended to serve as a settlement of any claims against the United States, or to affect the rights of the Native Hawaiian people under international law." While S. 746 retains the language of S. 2899 regarding the fact that nothing in the Act is intended to serve as a settlement of any claims against the United States, the language addressing the rights of the Native Hawaiian people under international law was removed based upon a legal assessment that the laws of the United States do not affect the rights of any American citizens under international law.

SECTION-BY-SECTION ANALYSIS

Section 1. Findings

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

Section 2. Definitions

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

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

Ceded Lands—The term "ceded lands" is intended to include submerged lands and natural resources.

Section 3. The United States policy and purpose

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a trust relationship. It also affirms that Native Hawaiians have the right to self-determination and that it is Congress' intent to provide a process for the reorganization of a Native Hawaiian government and for Federal recognition of the Native Hawaiian government for purposes of continuing a government-to-government relationship.

Section 4. Establishment of the United States Office for Native Hawaiian Relations

This provision provides authority for the establishment of the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of Interior. This Office is charged with: (1) effectuating and coordinating the special trust relationship between the Native Hawaiian people and the United States; (2) continuing the process of reconciliation with the Native Hawaiian people, and upon recognition of the Native Hawaiian governing entity by the United States, continuing the process of reconciliation with the Native Hawaiian governing entity; (3) fully integrating the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people and the Native Hawaiian governing entity prior to taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; (4) consulting with the Native Hawaiian Interagency Coordinating Group, other Federal agencies, and with relevant agencies of the State of Hawai'i on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and (5) preparing and submitting to the Senate Committee on Indian Affairs, Senate Committee on Energy and Natural Resources, and House Resources Committee on annual report detailing the Interagency Coordinating Group that are undertaken with respect to the continuing process of reconciliation and to effect meaningful consultation with the Native Hawaiian governing enti-

ty and providing recommendations for any necessary changes to existing Federal statutes or regulations promulgated under the authority of Federal law.

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

Section 5. Native Hawaiian Interagency Coordinating Group

This section authorizes the establishment of an Interagency Coordinating Group composed of officials from each Federal agency, to be designated by the President, and a representative from the U.S. Office of Native Hawaiian Relations. The Department of Interior is to serve as the lead agency of the Coordinating Group. The primary responsibility of the Interagency Coordinating Group is to coordinate Federal policies or acts that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Coordinating Group is also charged with assuring that each Federal agency develops a Native Hawaiian consultation policy and participates in the development of the report to Congress authorized in section 4.

Section 6. Process for the Federal recognition of the Native Hawaiian governing entity

Subsection (a) sets forth the recognition by the United States that the native Hawaiian people have the right to organize for their common welfare and to adopt appropriate organic governing documents.

It is anticipated that in the process of reorganizing a Native Hawaiian government, those adult members of the Native Hawaiian community who wish to participate in the reorganization of a Native Hawaiian government would prepare a roll for the purpose of organizing a Native Hawaiian Interim Governing Council. The roll would likely include the names of the adult members of the Native Hawaiian community who wish to voluntarily become citizens of a Native Hawaiian government and who are the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawai'i on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including all Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act and their lineal descendants. The roll might also include the names of the children of the adult members who wish to participate in the reorganization of a Native Hawaiian government. Participation in the reorganization of the government, however, would likely be limited to the adult members listed on the roll. It is the intent of the Committee that the determination of who is a Native Hawaiian be resolved by Native Hawaiians.

It is also anticipated though not required by Federal law, that the adult members on the roll will develop the criteria for candidates and the structure of the Interim Governing Council. The Committee anticipates that the adult members may consider a number of methods of representation which could include representation by island, district, *ahupua'a,* family, or any other form.

The Council might be authorized to represent those on the roll in implementing the Act. The Council could be authorized to enter into contracts or grants to carry out its activities, to assist in the conduct of a referendum on the Native Hawaiian government's form, powers, and the proposed organic governing documents. Thereafter, the Council might be authorized to conduct an election for the purpose of ratifying the organic governing documents and, upon ratification of the organic governing documents, to elect the officers of a Native Hawaiian governing entity.

Subsection (b) sets forth the process for securing Federal recognition. Subsection (1) provides that following the organization of the Native Hawaiian governing entity, the adoption of organic governing documents, and the election of officers of the Native Hawaiian governing entity, the duly elected officers of the Native Hawaiian governing entity are to submit the organic governing documents to the Secretary of the Department of the Interior for certification. Subsection (2) provides that the Secretary shall make the following certifications within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity submit the organic governing documents to the Secretary:

- That the organic governing documents establish criteria for citizenship in the Native Hawaiian governing entity;
- That the organic governing documents were adopted by a majority of the citizens of the Native Hawaiian governing entity;
- That the organic governing documents provide for the exercise of governmental authorities by the Native Hawaiian governing entity;
- That the organic governing documents provide authority for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;
- That the organic governing documents prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity;
- That the organic governing documents provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons subject to the authority of the Native Hawaiian governing entity, and ensure that he Native Hawaiian governing entity exercises its authority consistent with the requirements of section 202 of the Act of April 11, 1968, (25 U.S.C. § 1302); and
- That the organic governing documents are consistent with applicable Federal law and the special trust relationship between the United States and the indigenous native people of the United States.

If the Secretary determines that any provision of the organic governing documents does not comply with applicable Federal law, the Secretary shall resubmit the organic governing documents to the

duly elected officers of the Native Hawaiian governing entity along with a justification for each of the Secretary's findings as to why he believes the provisions are not consistent with such law. The Native Hawaiian governing entity is authorized to amend the organic governing documents to ensure their compliance with applicable Federal law. After the organic governing documents are amended, the Native Hawaiian governing entity may resubmit the organic governing documents to the Secretary for certification.

The certifications shall be deemed to have been made if the Secretary has not acted within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity have submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.

Upon election of the Native Hawaiian governing entity's officers and the certifications (or deemed certifications) by the Secretary, Federal recognition is extended to the Native Hawaiian governing entity.

Subsection (3) provides that upon election of the Native Hawaiian government officers and the certifications (or deemed certifications) by the Secretary, Federal recognition is extended to the Native Hawaiian government.

Section 7. Authorization of appropriations

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

Section 8. Reaffirmation of delegation of Federal authority; negotiations

This section reaffirms the United States' delegation of authority to the State of Hawai'i in the Admissions Act to address the conditions of Native Hawaiians. Upon Federal recognition of the Native Hawaiian government, the United States is authorized to negotiate with the State of Hawai'i and the Native Hawaiian government regarding the transfer to the Native Hawaiian government of lands, resources and assets dedicated to Native Hawaiian use under existing law. It is the Committee's intent that the reference to "lands, resources and assets dedicated to Native Hawaiian use" include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands as defined in section 2. The Committee believes that if an inventory of the ceded lands is required to facilitate negotiations addressing ceded lands, then such an inventory should be conducted.

Section 9. Applicability of certain Federal laws

This section provides that nothing is this Act shall be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act or for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs.

Section 10. Severability clause

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

LEGISLATIVE HISTORY

S. 746 was introduced on April 6, 2001, by Senator Daniel Akaka, for himself and Senator Daniel Inouye, and was referred to the Committee on Indian Affairs. A House companion measure, H.R. 617, was introduced in the House of Representatives by Representative Neil Abercrombie, for himself and Representatives Patsy Mink, Eni Faleomavaega, James Hansen, Dale Kildee, Nick Rahall, and Don Young, and was referred to the Committee on Resources.

In the 106th session of the Congress, a bill which was similar in purpose to S. 746, S. 2899, was introduced by Senator Akaka, for himself and Senator Inouye, and was referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives in the 106th session of the Congress.

Five days of hearings were held on S. 2899 and H.R. 4904 in joint hearing of the House Resources Committee and the Senate Indian Affairs Committee in Hawai'i from Monday, August 28th, 2000 through Friday, September 1st, 2000. An additional hearing on S. 2899 was held in Washington, D.C. on September 13, 2000.

S. 2899 was ordered favorably reported to the full Senate by the Senate Committee on Indian Affairs on September 13, 2000. H.R. 4904 was ordered favorably reported by the House Resources Committee, and passed the House on September 26, 2000. H.R. 4904 failed to pass the Senate before the *sine die* adjournment of the 106th session of the Congress.

S. 746 was ordered favorably reported to the full Senate by the Committee on Indian Affairs on July 24, 2001. H.R. 617 was ordered favorably reported to the full House of Representatives by the House Committee on Resources on May 16, 2001.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, on July 24, 2001, in an open business meeting, recommended that the Senate pass S. 746, a bill expressing the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, and for other purposes.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of the Congressional Budget Office on S. 746 is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 27, 2001.

Hon. DANIEL K. INOUYE,
Chairman, Committee on Indian Affairs,
U.S. Senate Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 746, a bill expressing the policy of the United States regarding the United States' relationship with Native Hawaiians and to provide a process for the reor-

ganization by the United States of the Native Hawaiian governing entity, and for other purposes.

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

Sincerely,

STEVEN LIEBERMAN
(For Dan L. Crippen, Director).

Enclosure.

S. 746—A bill expressing the policy of the United States regarding the United States' relationship with Native Hawaiians and to provide a process for the reorganization by the United States of the Native Hawaiian governing entity, and for other purposes

S. 746 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing S. 746 would have no significant impact on the federal budget. The bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 746 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government to represent native Hawaiians. The transfer of any lands or other assets to this new government, including lands now controlled by the state of Hawaii, would be the subject of future negotiations. Similarly, federal payments to native Hawaiians following recognition of a Native Hawaiian government would depend on future legislation.

The bill would establish the United States Office for Native Hawaiian Affairs within the Department of the Interior (DOI) to coordinate services to native Hawaiians. In addition, S. 746 would establish the Native Hawaiian Interagency Coordinating Group to coordinate federal programs and policies that affect native Hawaiians. Based on information from DOI, CBO expects that the agency would require up to five additional employees to implement the bill. Therefore, CBO estimates that implementing S. 746 would cost less than $500,000 a year, subject to the availability of appropriated funds.

On May 23, 2001, CBO transmitted a cost estimate for H.R. 617, a similar bill that was ordered reported by the House Committee on Resources on May 16, 2001. The two cost estimates are identical.

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

EXECUTIVE COMMUNICATIONS

Although the Committee requested the views of the Administration on S. 746 in March of 2001, the Committee has not received a communication from the Administration on S. 746.

REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate require each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 746 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

The provisions of S. 746 do not effect any change in existing law.

APPENDIX A

HOUSE OF REPRESENTATIVES
TWENTIETH LEGISLATURE, 2000
STATE OF HAWAII

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

HOUSE CONCURRENT RESOLUTION

SUPPORTING FEDERAL RECOGNITION OF A NATIVE HAWAIIAN NATION.

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

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

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

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

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

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

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

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

Chief Clerk
House of Representatives
State of Hawaii

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

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

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

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

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

THE SENATE
TWENTIETH LEGISLATURE, 2000
STATE OF HAWAII

S.R. NO. 45 S.D. 1

SENATE RESOLUTION

REQUESTING THAT THE PRESIDENT AND CONGRESS RECOGNIZE AN OFFICIAL POLITICAL RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND THE NATIVE HAWAIIAN PEOPLE.

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

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

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

WHEREAS, the U.S. Supreme Court's recent decision in Rice v. Cayetano, although narrowly focusing on the constitutionality of a voting restriction, challenges Congress' treatment of Native Hawaiians as similar to Native Americans and Alaska Natives in over 150 pieces of federal legislation and reinforces the importance of obtaining a clear statement from Congress on the political status of Native Hawaiian people to effectuate the intent of Public Law 103-150; and

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

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

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the President of the United States, the Majority Leader of the United States Senate, the Speaker of the United States House of Representatives, each member of Hawaii's Congressional Delegation, the Governor of the State of Hawaii, and the Trustees of the Office of Hawaiian Affairs.

I hereby certify that the foregoing is a true and correct copy of Senate Resolution No. 45 SD1 which was duly adopted by the Senate of the State of Hawaii on April 13, 2000.

Dated: May 8, 2000

Assistant Clerk of the Senate

Report Title:

Hawaiian Nation, Federal Recognition Of

HOUSE OF REPRESENTATIVES
TWENTY-FIRST LEGISLATURE, 2001
STATE OF HAWAII

H.C.R. NO. 23 H.D. 1

HOUSE CONCURRENT RESOLUTION

REQUESTING FEDERAL SUPPORT OF HAWAIIAN self-governance.

WHEREAS, the Hawaiian people, the indigenous people of the Hawaiian islands, lived in their own kingdom, one recognized by nations around the world, until the kingdom was overthrown in 1893 and eventually annexed by the United States in 1898; and

WHEREAS, the United States Congress passed, and the President signed, Public Law 103-150 (the Apology Law), acknowledging the illegal overthrow of the Kingdom of Hawaii and the need for reconciliation between the United States and Hawaiians; and

WHEREAS, the United States adopted the Hawaiian Homes Commission Act in 1920 to recognize the special status of Hawaiian people; and

WHEREAS, there exists a trust relationship between the United States and Hawaiians through the Hawaiian Homes Commission Act of 1920, which was enacted to provide Hawaiians of fifty per cent or more Hawaiian blood with long-term leases of residential, farm, and agricultural lots; and

WHEREAS, Congress has oversight of substantive amendments to the

Hawaiian Homes Commission Act and is entitled to sue for its breach; and

WHEREAS, the State of Hawaii has long recognized the unique status of the Hawaiian people as the indigenous people of the State, whose lifestyle was disrupted by the influx of Western culture and whose public lands were taken over by the State; and

WHEREAS, in making reparations to the Hawaiian people, the State of Hawaii adopted, by constitutional amendment, the Office of Hawaiian Affairs to benefit all Hawaiians and codified the traditional and customary rights of Hawaiian people traditionally exercised for subsistence, cultural, and religious purposes; and

WHEREAS, recent federal lawsuits have challenged these rights; and

WHEREAS, the State believes that the Hawaiian people, as the indigenous people of Hawaii, should enjoy the same rights as the indigenous Native Americans recognized by the federal government, which would clarify the status of the Hawaiian people and shield them from further assault on their rights; and

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

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

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

BE IT RESOLVED by the House of Representatives of the Twenty-first Legislature of the State of Hawaii, Regular Session of 2001, the Senate concurring, that the Legislature supports the sovereign rights of Native Hawaiians and recognizes an immediate need to develop a government-to-government relationship between a Hawaiian nation and the United States; and

BE IT FURTHER RESOLVED that the Legislature of the State of Hawaii respectfully requests that the Secretary of the Interior meet with representatives of the Hawaiian people to initiate the process of articulating and implementing a federal policy of Hawaiian self-government with a distinct, unique, and special trust relationship; and

BE IT FURTHER RESOLVED the Legislature of the State of Hawaii respectfully urges Congress to support any legislation introduced for the purpose of achieving Hawaiian self-government; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Governor of the State of Hawaii, the members of the Congress of the United States, the Secretary of the Interior, and the President of the United States.

THE SENATE
TWENTY-FIRST LEGISLATURE, 2001
STATE OF HAWAII

S.R. NO. 97 S.D. 1

SENATE RESOLUTION

SUPPORTING THE FUTURE PRESERVATION OF MAHA`ULEPU.

WHEREAS, Maha`ulepu is a heritage landscape where it is possible to preserve and restore diverse and significant natural, scenic, cultural, archaeological, historic, scientific, and recreational resources; and

WHEREAS, Maha`ulepu is a living cultural landscape and a place sacred to many Native Hawaiians, particularly to those of the Kaloa area whose ancestral remains are buried at Maha`ulepu; and

WHEREAS, it is in the economic and social interest of the State of Hawaii to conserve its valuable natural and cultural resources, and to create parks and preserves for the future; and

WHEREAS, the ahupua'a of Maha`ulepu is directly adjacent to Kipu Kai, an entire ahupua'a which is a future State land preserve; and

WHEREAS, the unique opportunity to apply the ahupua'a framework of care-taking and management of watersheds from mountain peak to the ocean exists at both Kipu Kai and Maha`ulepu; and

WHEREAS, the County of Kauai General Plan states that Maha`ulepu needs a community-based planning effort that engages the landowner and local community interests, drawing upon the County government, the Department of Land and Natural Resources, and various professional experts; and

WHEREAS, the County of Kauai has expressed its gratitude to the Grove Farm Company, Inc. for keeping Maha`ulepu open to the public, both residents and visitors; and

WHEREAS, Governor Benjamin Cayetano has declared his support for the preservation of Maha`ulepu; now, therefore,

BE IT RESOLVED by the Senate of the Twenty-First Legislature of the State of Hawaii, Regular Session of 2001, that it supports a collaborative planning effort to explore options that would make it possible to preserve the irreplaceable natural and cultural resources of Maha`ulepu, and to sustain the special experience of this place; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the members of Hawaii's Congressional Delegation, the Honorable Benjamin J. Cayetano, Governor of the State of Hawai'i, the Honorable Mazie K. Hirono, Lieutenant Governor of the State of Hawai'i, the Honorable Maryanne W. Kusaka, Mayor of the County of Kaua'i, Members of the State Board of Land and Natural Resources, Members of the Council of the County of Kaua'i, and the President and Chief Operating Officer of Grove Farm Company, Inc.

I hereby certify that the foregoing is a true and correct copy of Senate Resolution No. 97 SD1, which was duly adopted by the Senate of the State of Hawaii on APR 12 2001.

Dated: APR 12 2001

Assistant Clerk of the Senate

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