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REPORT
110–260

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

FEBRUARY 5, 2008.—Ordered to be printed

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

R E P O R T

[To accompany S. 310]

The Committee on Indian Affairs, to which was referred the bill (S. 310) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 310 is to establish a process for the reorganization of a Native Hawaiian government and, when that process has been completed in accordance with the Act, to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship.

BACKGROUND AND HISTORY

S. 310 is the current bill that establishes a process for the reorganization and recognition of a Native Hawaiian governing entity. Similar bills have been introduced since 1999. These bills are the result of longstanding efforts to address the impacts of the 1893 overthrow of the Native Hawaiian Kingdom, an event that the United States participated in and encouraged.

The language of S. 310 is identical to legislative language that was negotiated between the Hawaii Congressional Delegation and officials from the Department of Justice, Office of Management and Budget, and the White House in the 109th Congress. The language

satisfactorily addresses concerns expressed in a July 2005 letter from the Administration regarding potential liability of the United States involving land claims, the impact of S. 310 on military readiness, gaming, and civil and criminal jurisdiction in Hawaii.

In 1993, Congress passed an Apology Resolution (P.L. 103–150) extending an apology on behalf of the United States to the Native Hawaiians for its role in the illegal overthrow of the Native Hawaiian government and committing the United States to support reconciliation efforts between the United States and the Native Hawaiian people. In response to the Apology Resolution, the Departments of the Interior and Justice initiated a process of reconciliation in 1999 by conducting meetings in Native Hawaiian communities. The result of these reconciliation efforts was a joint report, From Mauka to Makai: The River of Justice Must Flow Freely, from the two Departments in 2000. Since the issuance of the report, the Senators from Hawaii have introduced legislation to implement the findings of the reconciliation report. This Committee held several hearings on the matter, and has continued to hold hearings each Congress.

Native Hawaiians are the indigenous, native people of Hawaii with whom the United States has a trust responsibility. Congress has repeatedly recognized the unique status of Native Hawaiians since 1921. The long-standing policy of the United States has been to protect and advance Native Hawaiian interests.

Native Hawaiians continue to suffer the consequences of the 1893 overthrow of their indigenous government. Today, Native Hawaiians continue to have higher rates of poverty and lower incomes than non-Native Hawaiians in Hawaii.[1] Establishing an avenue for Native Hawaiians to reorganize a government will provide opportunities for Native Hawaiians to exercise self-governance and self-determination and develop their own solutions to the problems faced by their communities. It empowers them to preserve their cultural resources.

Native Hawaiian society before european contact

Native Hawaiians are the indigenous, aboriginal people of the island group that is today the State of Hawaii. Hawaii was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawaii perhaps as early as 300 A.D.

Hundreds of years of Hawaiian isolation followed the end of the era of "long voyages."[2] During these centuries, the Native Hawaiians evolved a system of self-governance and a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion. There was no concept of private land ownership in early Hawaiian thought. The communal nature of the economy and the structure of the society resulted in values strikingly different from those prevalent in more competitive western economies and societies.

Hawaii's social, economic, and political system was highly developed and evolving, and its population, conservatively estimated to

[1] Census Bureau, Hawaii State Data Center, State of Hawaii Data Book.
[2] Id.

be at least 300,000, was relatively stable before the arrival of the first European explorers.[3]

European contact

Hawaii was "discovered" by Europeans in 1778, when the first white foreigner, Captain James Cook of the British Royal Navy, landed. Other foreign vessels soon followed on journeys of exploration or trade.[4] In the years following Cook's arrival, warring Hawaiian chiefs used foreign weapons and fought for control of Hawaii. In 1810, the Native Hawaiian political, economic and social structure was unified under a monarchy led by King Kamehameha I. The authority of the King was derived from the gods, and he was a trustee of the land and other natural resources of the islands which were held communally.

Western contact had an immediate and precipitous decline of the Native Hawaiian population. Between Cook's arrival in 1778 and 1820, disease, famine, and war killed more than half of the Native Hawaiian population. By 1866, only 57,000 Native Hawaiians lived on the islands, compared to the stable pre-1778 population of at least 300,000. The impact of Western contact 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 to instill traditional values and practices. The result was a rending of the social fabric.

This devastating population loss was accompanied by cultural destruction. Western sailors, merchants, and traders did not abide by the Hawaii kapu (taboos) system or religious practices. As a result, the chiefs began to imitate the foreigners whose ships and arms were technologically more advanced than their own.[5] The kapu were abandoned soon after the death of Kamehameha I.

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 to obtain the supplies and valuable sandalwood needed for such trades. As Hawaii's stock of sandalwood declined so did that trade, but it was replaced by whaling and other mercantile activities.[6] More than four-fifths of Hawaii's foreign commerce was American; the whaling services industry and mercantile business in Honolulu were almost entirely in American hands.[7] Even the communal ownership and cultivation of the land was soon replaced by a western system of individual property ownership.

The mass privatization of Native Hawaiian land

As the middle of the 19th century approached, the islands' small non-Hawaiian population wielded an influence far in excess of its size.[8] These influential westerners sought to limit the absolute power of the Hawaiian King over their legal rights and to imple-

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[3] This estimate is conservative; other sources place the number at one million. David E. Stannard, Before the Horror; the Population of Hawaii on the Eve of Western Contact 59 (1989).
[4] E.S. & Elizabeth G. Handy, Native Planters in Old Hawaii 331 (1972).
[5] Fuchs, supra at 8–9.
[6] Fuchs, supra at 10–11; Kuykendall & Day, supra at 41–3; MacKenzie supra at 5.
[7] Fuchs supra at 18–9; MacKenzie supra at 6, 9–10.
[8] Felix S. Cohen, Handbook of Federal Indian Law 799 (2d ed. 1982).

ment property law so that they could accumulate and control land. These goals were achieved as a result of foreign pressure.[9]

The Westerners' efforts were successful in 1840, when the King of Hawaii promulgated a new constitution, establishing a hereditary House of Nobles and an elected House of Commons. In 1842, the King authorized the Great Mahele, the division of Hawaii's communal land system into private ownership between himself and his royal successors, the chiefs and the Hawaiian government. Ultimately, the Great Mahele led to the transfer of substantial amounts of land into western hands. In 1848, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the konohiki (main chiefs). He reserved about 1 million acres for himself and his royal successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawaii ("Government Lands").

All lands remained subject to the rights of native tenants. However, in 1850, after the division was accomplished, an act was passed permitting non-natives to purchase land from Native Hawaiians in fee simple. This resulted in a dramatic concentration of land ownership in plantations, estates, and ranches owned by non-natives. The law implementing the Great Mahele contemplated that the makaainana (commoners) would receive a substantial portion of the distributed lands 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 Native Hawaiian farmers.[10]

United States enters into treaties with Native Hawaiian government

Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs. The mutual interests of Americans living in Hawaii and those living in the United States became increasingly clear. American merchants and planters in Hawaii wanted access to mainland markets and protection from European and Asian domination. The United States developed a military and economic interest in placing Hawaii within its sphere of influence.

Thus, in order to protect its interests, the United States and Hawaii entered into a series of four treaties. American advisors urged the King to pursue international recognition of Hawaiian sovereignty, backed up by an American guarantee of continued independence.

America's political influence in Hawaii was heightened by the rapid growth of the island sugar industry which followed the Mahele. The 1875 Convention on Commercial Reciprocity[11] eliminated the American tariff on sugar from Hawaii and virtually all tariffs that Hawaii had placed on American products. Critically, it also prohibited Hawaii from giving political, economic, or territorial preferences to any other foreign power. When the Reciprocity Trea-

[9] MacKenzie supra at 6.

[10] MacKenzie, supra at 6–9. The maka'ainana failed to secure a great portion of the land for a number of reasons. Many did not know of or understand the new laws, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the new 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.

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

ty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

Overthrow of the Native Hawaiian government

In 1887, King Kalakaua appointed a prime minister who was supported by the Native Hawaiian people and who was opposed to granting a military base at Pearl Harbor as a part of the Reciprocity Treaty. The business community, backed by the Honolulu Rifles, a military group formed by the children of American missionaries, forced the prime minister's resignation and the enactment of a new constitution. The new constitution, often referred to as the Bayonet Constitution due to the use of militant force, reduced the King to a figure of minor constitutional importance. It extended the right to vote to western males, whether or not they were citizens of the Hawaiian Kingdom. It also 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. This resulted in representatives of the westerners taking control of the legislature.

In 1891, Queen Liliuokalani came to power. Queen Liliuokalani supported promulgating a new constitution that would restore absolute control over the legislature to the reigning sovereign. Realizing that the Hawaiian monarchy posed a continuing threat to the unimpeded pursuit of their interests, the westerners formed a Committee of Public Safety to overthrow the Kingdom of Hawaii. Mercantile and sugar interests also favored annexation by the United States to ensure access on favorable terms to mainland markets and protection from Asian conquest. The American annexation group collaborated closely with the United States' Minister in Hawaii.

On January 16, 1893, at the order of United States' Minister John Stevens, a contingent of United States Marines from the USS Boston marched through Honolulu to a building located near both the government building and the palace. The next day local non-Hawaiian revolutionaries seized the government building and demanded that Queen Liliuokalani abdicate the monarchy. Minister Stevens immediately recognized the rebels' provisional government and placed it under the United States' protection.

Upon hearing the news, United States President Benjamin 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 Grover Cleveland assumed office and withdrew the treaty; he also demanded that the Queen be restored. However, the Senate Foreign Relations Committee issued a report ratifying Stevens' actions and recognizing the provisional government of Hawaii. In doing so, the Senate Foreign Relations Committee described the relations between the United States and Native Hawaiian government as unique because "Hawaii has been all the time under a virtual suzerainty [when a nation controls another nation] of the United States." [12]

[12] S. Rep. No. 53–277 at 21 (1894) (emphasis added).

Hawaii becomes a State of the Union

As a result of this impasse between President Cleveland and the Senate, the United States government neither restored the Queen nor annexed Hawaii. The Provisional Government of Hawaii thus called a constitutional convention whose composition and members it controlled.[13] The convention promulgated a constitution for the new Republic of Hawaii that imposed property and income qualifications as prerequisites for the franchise and for holding elected office.[14] Article 101 of the Constitution of the Republic of Hawaii required prospective voters to swear an oath of support to the Republic and to declare they would not, "either directly or indirectly, encourage or assist in the restoration or establishment of a monarchical form of government in the Hawaiian Islands." The overwhelming majority of the Native Hawaiian population, who were loyal to their Queen, refused to swear such an oath and were effectively disenfranchised.[15]

In 1896, President William McKinley was elected as President of the United States; he quickly sent the Senate another annexation treaty. Simultaneously, the Native Hawaiian people adopted resolutions which they sent to Congress stating that they opposed annexation and wanted to be an independent kingdom.[16] The annexation treaty failed in the Senate because a two-thirds majority could not be obtained as required under the Treaty Clause of the U.S. Constitution.

However, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation in that Chamber of Congress. Adoption of the Joint Resolution required only a simple majority in each House of Congress. The balance was tipped in favor of the Resolution 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.[17] In July 1898, the Joint Resolution was enacted, becoming "the fruit of approximately seventy-five years of expanding American influence in Hawaii."[18]

On August 12, 1898, the Republic of Hawaii ceded sovereignty and conveyed title to its public lands, including the Government and Crown Lands, to the United States.[19] In 1900, Congress passed the Hawaii Organic Act,[20] establishing a Hawaiian territorial government. Ultimately, Congress admitted Hawaii to the Union as the fiftieth state with the enactment of the Admission Act in 1959.

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[13] Kuykendall & Day supra at 183.

[14] Id at 184; MacKenzie supra at 13.

[15] Noenoe Silva, Ke Ku'e Loa Nei Makou: Kanaka Maoli Resistance to Colonization 170 (1999) (Silva).

[16] W.A. Russ, The Hawaiian Republic (1894–1898) 198, 209 (1961). The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population at that time. Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 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 Hawaii 273–82 (1998); Silva supra at 184–206.

[17] Kuykendall & Day, supra at 188; MacKenzie, supra at 14.

[18] Fuchs, supra at 36.

[19] Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) (Annexation Resolution).

[20] Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) (Organic Act).

RECOGNITION BY THE UNITED STATES OF OBLIGATIONS TO NATIVE HAWAIIANS

For over two hundred 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, which pre-existed the formation of the United States. The Congress' exercise of its constitutional authority is also premised upon the status of the indigenous people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands which the United States subsequently acquired.

The United States has recognized again and again that Native Hawaiians are entitled to special rights and considerations, and the Congress has enacted laws to give expression to the respective obligations to Native Hawaiians. As evidence of this special relationship, Congress has enacted over one hundred fifty statutes addressing the conditions of Native Hawaiians and providing them with benefits. The recognition of a special relationship with Native Hawaiians is not new, as Congress and the United States have historically treated Native Hawaiians in a manner similar to the other indigenous groups of America.

Hawaiian Homes Commission Act

Congress explicitly recognized the existence of a special or trust relationship between the Native Hawaiian people and the United States with the enactment of the Hawaiian Homes Commission Act in 1921. Prior to the enactment of this law, Congress received testimony from officials of the Executive Branch analogizing the federal government's relationship and responsibilities to Native Hawaiians as being similar to those to other Native Americans—the federal government as trustee and the Native American as the ward.

Beginning in the early 1800's, large amounts of land were made available to foreigners and were eventually leased to them in order to cultivate pineapple and sugar cane. Large numbers of Native Hawaiians were forced off the lands that they had both cared for and traditionally occupied. As a result, many Native Hawaiians moved into the urban areas, often lived in severely overcrowded tenements and rapidly contracted diseases to which they had no immunities.

By 1920, due to the dramatic decline in the number of Native Hawaiians in the decades leading up to and following the overthrow, there were many people who concluded that the native people of Hawaii were a "dying race." If they were to be saved from extinction, they must have the 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 island 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.[21]

Secretary Lane 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.[22]

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

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes . . .
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> The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[23]

In 1920, Prince Jonah Kuhio Kalaniana'ole (Prince Kuhio), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."[24] Secretary Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[25]

The effort to "rehabilitate" the dying race of Native Hawaiians by returning them 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 the Ceded Lands for homesteading by Native Hawaiians.[26] Congress compared the Act to "previous enact-

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[21] H.R. Rep. No. 66–839, 66th Cong., 2d Sess., at 4 (1920).

[22] Hearings before the Committee on the Territories, House of Representatives, 66th Cong., 2d Sess., on Proposed Amendments to the Organic Act of the Territory of Hawaii , February 3, 4, 5, 7, and 10, 1920, at 129–130 (statement of Secretary Lane that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians, and citing a Solicitor's opinion stating that the setting aside of public lands within the Territory of Hawaii would not be unconstitutional, relying in part on the congressionally authorized allotment to Indians as precedent for such an action); see, also, id. at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians) and at 167–70 (colloquy between Representative Curry, Chair of the Committee, and Representatives Dowell, and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

[23] Id. at 39. Wise's testimony was also quoted and adopted in the House Committee on the Territories' report to the full U.S. House of Representatives, H. Rep. No. 66–839, at 4.

[24] 59 Cong. Rec. 7453 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).

[25] H. Rep. No. 66–839, at 5 (statement of Secretary Lane).

[26] Hawaiian Homes Commission Act, 203.

ments granting Indians . . . special privileges in obtaining and using the public lands."[27]

In support of the Act, the House Committee on the Territories recognized that, prior to the Great Mahale, Hawaiians had a one-third interest in the lands of the Kingdom. The Committee reported that the Act was necessary to address the way Hawaiians had been short-changed in prior land distribution schemes.[28] Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest 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 people, were taken over by the Republic of Hawaii by an article of [its] constitution . . .
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> 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 Hawaii.
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> 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 . . .[29]

The 1921 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,[30] 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 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.[31]

During the remainder of the Territorial period and the first two decades following statehood, administration of the Hawaiian home lands program was inadequately funded, and the best lands were leased to non-Hawaiians in order to generate operating funds. There was little income remaining for the development of infrastructure or the settlement of Hawaiians on the home lands. The lack of resources-combined with questionable transfers and exchanges of Hawaiian home lands, and a decades-long waiting list of those eligible to reside on the home lands program an illusory

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[27] H. Rep. No. 66–839, at 11 (1920).
[28] Id. at 6–7.
[29] 59 Cong. Rec. 7452–3 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).
[30] 25 U.S.C. 331–334, 339, 342, 348, 349, 381 (1998).
[31] Office of State Planning, Office of the Governor, State of Hawaii, Pt. I, Report on Federal Breaches of the Hawaiian Home Lands Trust, 4–6 (1992).

promise for most Native Hawaiians.[32] While the Act did not succeed in its purpose, its enactment has substantial importance because it constitutes an express affirmation of the United States' trust responsibility to the Native Hawaiian people.

The Hawaii Admission Act

As a condition of statehood, the Hawaii Admission Act[33] required the State of Hawaii to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded by the United States to the new State. The 1959 Compact between the United States and the People of Hawaii by which Hawaii was admitted into the Union expressly provides that:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision 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 in carrying out the provisions of said Act.[34]
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> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsection (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

[32] Id., at 12–18.
[33] Pub. L. No. 86–3, 73 Stat. 4 (March 18, 1959) (the "Admission Act").
[34] Admission Act, § 4, 73 Stat. at 5.

> their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[35]

These explicit delegations of Federal authority to be assumed by the new State were not discretionary or permissive. The sections of the Admission Act quoted above 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 which reserved to Congress the right to amend that Act.[36] The Federal courts have noted that the United States retains the authority to bring an enforcement action against the State of Hawaii for breach of the section 5(f) trust.[37]

Treatment of Native Hawaiians compared to other indigenous groups

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

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 declared citizens of the United States until 1924. A twenty-year restraint on the alienation of allotted lands was typically imposed. This restraint prevented the lands from being subject to taxation by the states, but the restraint could be lifted if an individual Indian was deemed to be "civilized." Once the restraint on alienation was lifted and individual Indian lands became subject to taxation, Indians who could not pay the land taxes had their land seized.

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

In 1959, when the State of Hawaii was admitted into the Union, the Federal policy toward the native peoples of America was designed to divest the Federal government of its responsibilities for the indigenous people and to delegate those responsibilities to the

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[35] Id., § 5(f), 73 Stat. at 6 (emphasis added).

[36] With the adoption of its new Constitution, the State of Hawaii assumed the Federally-delegated responsibility of administering the Ceded Lands in accordance with the 5 purposes set forth in the Admission Act and of managing the 203,500 acres of land that had been set aside by Congress in 1921 for the benefit of the native people of Hawaii under the Hawaiian Homes Commission Act. See Haw. Const. Art. XII, § § 2 and 4, and Art. XVI, 7, respectively.

[37] *Han* v. *United States*, 45 F. 3d 333, 337 (9th Cir. 1995).

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. Similarly, in 1959 the United States transferred most of its responsibilities related to administering the Hawaiian Homes Commission Act to the new State of Hawaii. In addition the United States imposed a public trust upon the lands that were ceded to the State for five purposes, one of which was the betterment of conditions for Native Hawaiians.

Constitutional source of Congressional authority

The United States Supreme Court has often addressed the scope of Congress' constitutional authority to address the conditions of native people and thus has ingrained Congress' role.[38] Although the authority has been characterized as "plenary,"[39] the Supreme Court has addressed the broad scope of the Congress' authority.[40] It has been held to encompass not only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired.[41] The United States interactions with indigenous peoples have varied from group to group. The only general principles that apply to relations with the first inhabitants of this land is that they were dispossessed of their lands. They were often relocated to other lands set aside for their benefit. Their subsistence rights have been recognized under treaties and laws, but have not always been protected nor preserved. Although the relationship between the United States and its native people has not followed a fixed course, it is a history that reveals the special status of the indigenous people in America.

Native Hawaiians and the meaning of "Indian"

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 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.

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[38] "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 existence 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 a duty of protection, and with its 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).

[39] *Morton* v. *Mancari*, 427 U.S. 535 (1974).

[40] *Delaware Tribal Business Council* v. *Weeks*, 430 U.S. 73 (1977); *United States* v. *Sioux Nation*, 448 U.S. 371 (1980). The rulings of the Supreme 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.

[41] *United States* v. *Sandoval*, 231 U.S. 28 (1913).

The Congress's recognition of its power over Alaska Natives since the acquisition of the Alaskan territory,[42] reflects its intent to exercise its constitutional power and responsibility regarding all Native American groups within the United States.

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. However, it seems unlikely that the Framers would recognize such a technical distinction in the common understanding of the time. Eskimos, like Native Hawaiians were aboriginal peoples; therefore, they were "Indians."[43] Courts have supported this construction by recognizing "that the term 'Indians' includes all native people in the United States."[44] Congress's special power over aboriginal peoples is well established.[45]

During the Founding Era and Constitutional Convention, the terms "Indian" and "tribe" were used to encompass the diversity of aboriginal peoples of the "New World" and the wide range of their social and political organizations. The Framers drafted the Constitution not to limit Congress's power over Indians, but to make clear the supremacy of Congress's power over Indian affairs. The Congress has exercised the power to promote the welfare of all Native American peoples, and foster the evolving means and methods of self-governance as exercised by Native people.

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

Modern scholars might be puzzled whether Eskimos were Indians, or a separate and somewhat mysteriously distinct people on earth.[46] Others might question whether the native people of Hawaii are "Indians." Such distinctions would likely have been irrelevant to the Framers. The "Indians" were many peoples, with distinct languages, cultures and socio-political organizations. Whatever their distinct cultures and governments, they were all "Indians," for they were aboriginal inhabitants of the "New World."[47]

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[42] See Atr. III, Treaty of March 30, 1867, 15 Stat. 539.

[43] See S. Rep. 107–66, at 35, footnotes 43 and 44 (2001); see also footnote 48, below.

[44] Jon M. Van Dyke, The Political Status of Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998) at 146 (citing *Alaska Pac. Fisheries* v. *United States, 248 U.S. 78 (1918); Native Village of Tyonek* v. *Puckett*, 957 F.2d 631 (9th Cir. 1992); *Alaska Chapter, Assoc. Gen. Contractors of America* v. *Pierce*, 694 F.2d 1162 (9th Cir. 1982); *Pence* v. *Kleppe*, 529 F.2d 135 (9th Cir. 1976); *Alaska* v. *Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923); *Cape Fox Corp.* v. *United States*, 4 Cl. Ct. 223 (1983); *Aguilar* v. *United States*, 474 F. Supp. 840 (D. Alaska 1979); *Eric* v. *HUD*, 464 F. Supp. 44 (D. Alaska 1978); *Naliielua* v. *State of Hawaii*, 795 F. Supp. 1009 (D.Haw. 1990); and *Ahuna* v. *Department of Hawaiian Home Lands, 640 P.2d 1161, 1168–69 (Haw. 1982)*.

[45] See 42 U.S.C. 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii").

[46] A.M. Joseph, Jr., The Indian Heritage of America 57 (rev. ed. 1991); see also Oxford Dictionary (1st ed.) ("OED"), "Indian" ("The Eskimos * * * are usually excluded from the term * * *").

[47] As Hawaii Attorney General Mark J. Bennett stated in his written testimony submitted at the Committee's hearing on S.310 on May 3, 2007 (citing Kuykendall's The Hawaiian Kingdom), Captain Cook and his crew, when arriving at the Hawaiian Islands in 1778, referred to the na-

Continued

The important distinction between European settlers and Native American peoples, one which both groups acknowledged and understood, was political. The nations-to-nation relationship survived the settlement of the West, the Civil War Amendments to the Constitution, and two hundred years of Congressional action and judicial construction.

Indian tribes and blood quantum

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."[48] The race of Indian peoples was constitutionally irrelevant. Native peoples were "nations,"[49] and the relationship between the United States and the natives reflected a political settlement between conquered and conquering nations.

The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once sovereign political communities," not "racial groups."[50] 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."[51]

Like the 561 Indian tribes currently recognized by the United States, Native Hawaiians are a group of people defined by their common descent from an ancestral class. Congress may recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress's trust obligation to Indian people.[52]

The significance of "federal recognition"

It is important to recognize the legal distinctions that have been drawn in contemporary times between Indian tribes that are "acknowledged" by the Department of the Interior[53] or "recognized" by Congress and those who are not "acknowledged" or "recognized." "Recognized" tribes have a direct government-to-government relationship with the United States and are thereby eligible for various federal benefits, whereas Native American groups that are not recognized do not have such a government-to-government relationship. This is a relatively recent phenomenon. "[A] close scrutiny of the various executive orders, Congressional legislation, departmental policies, Solicitor's opinions, and judicial decisions since 1783 * * * discloses an astonishing oblivion of the need for an express declaration or statement regarding which Indian tribes were to be recognized, until the enactment of the Wheeler-Howard (Indian Reorganization) Act of 1934,"[54] thirteen years after the enact-

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tive people greeting his ships as "Indians." See, Testimony of Hawaii Attorney General Mark J. Bennett Before the U.S. Senate Committee on Indian Affairs, May 3, 2007, at footnote 11.

[48] *Worcester* v. *Georgia*, 31 U.S. 515 (1832) at 559.

[49] Id at 559–60.

[50] *United States* v. *Antelope*, 430 U.S. 641, 646 (1972); see *Fisher* v. *District Court*, 424 U.S. 382, 389 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 553–4 (1974); see also *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975).

[51] *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, 222–3 (1897).

[52] *United States* v. *John*, 437 U.S. 634, 652–3 (1978); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976).

[53] See 25 C.F.R. Part 83.

[54] William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Leg. Hist. 331, 332 (1990) (citing 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. 461 et seq.)); see generally, William W. Quinn, Jr., Federal

ment of the Hawaiian Homes Commission Act. In fact, there was no systematic procedure by which a Native American group could petition the United States for recognition until 1978, when regulations were promulgated to implement the Federal Acknowledgment process.[55]

Although the authority of Congress to formally "recognize" tribes through legislation is unquestioned, the Department of the Interior's regulations for the administrative process for the acknowledgement of tribes pursuant to 25 C.F.R. Part 83 exclude Native Hawaiians from that process, and thus legislation is the only mechanism available to Native Hawaiians at this time.[56]

NEED FOR LEGISLATION

The primary injury that S. 310 is intended to address is the loss of a sovereign governing entity resulting from the 1893 overthrow of the government of the Kingdom of Hawaii, an event made possible by the actions of United States officials and citizens. Congress has consistently recognized Native Hawaiians as among the Native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause. However, it has not yet acted to provide a process for the reorganization of a Native Hawaiian governing entity. S. 310 provides authority for that process.

In 1978, in furtherance of the provisions of the Admission Act, the citizens of the State of Hawaii amended the State constitution to provide for the establishment of a quasi-independent State agency, the Office of Hawaiian Affairs (OHA). The State constitution, as amended, provides that the OHA is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. In accordance with laws enacted by the State following the 1978 constitutional amendment, OHA administers programs and services using revenues derived from the Ceded Lands consistent with the conditions of Sec. 5 of the Admission Act and Public Law 88–233.

OHA's use of these revenues to provide programs and services for Native Hawaiians reflects the provision in section 5(f) of the Admission Act requiring that the ceded lands and the revenues derived therefrom be held by the State of Hawai'i as a public trust for five stated purposes, one of which is the betterment of the conditions of native Hawaiians. The Admission Act also provides that the new State assumes a trust responsibility for the approximately 203,500 acres of land set aside for Native Hawaiians pursuant to the Hawaiian Homes Commission Act.

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice* v. *Cayetano*, holding unconstitutional the eligibility requirements for voting in elections of OHA trustees. The Court held that because OHA is an agency of the State of Ha-

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Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83, 17 Am. Indian L. Rev. 37 (1992); L.R. Weatherhead, What is an "Indian Tribe"? The Question of Tribal Existence, 8 Am. Indian L. Rev. 1 (1980).

[55] 25 C.F.R., Part 83. Quinn 1992, at 40–41.

[56] See 25 C.F.R. 83.1, 83.3 (administrative process available only to groups within the "continental United States," defined as the "contiguous 48 states and Alaska"). Native Hawaiians have twice sought unsuccessfully to challenge their exclusion from this process. *Price* v. *State of Hawaii*, 764 F.2d 623 (9th Cir. 1985); *Kahawaiolaa* v. *Norton*, 222 F.Supp. 2d 1213 (D. Haw. 2002).

waii, funded in part by appropriations made by the State legislature, the election for the trustees of the OHA must be open to all citizens of the State of Hawaii who are otherwise eligible to vote in statewide elections.

The State of Hawaii had argued in *Cayetano* that the state law excluding non-Hawaiians from voting in OHA elections should be analyzed in accordance with the Court's rule enunciated in *Morton* v. *Mancari*, wherein the Court upheld against an equal protection challenge the policy for Indian preference in hiring within the Bureau of Indian Affairs. The *Cayetano* Court rejected the State's *Mancari* argument, reasoning as follows:

> If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii, established by the State Constitution, responsible for the administration of state laws and obligations."

Following the Supreme Court's decision in *Cayetano*, new civil actions were filed challenging the constitutionality of other aspects of OHA as well as Hawaii's provision of programs and services to Native Hawaiians. In *Arakaki* v. *State of Hawaii*, the Court of Appeals for the Ninth Circuit ruled that the State law requiring candidates for the OHA Board of Trustees to be Native Hawaiian was unconstitutional on grounds similar to those in *Cayetano*. Accordingly, all citizens of the State of Hawaii may now vote for the candidates for the nine trustee positions and may themselves be candidates for these offices.

Other civil actions filed since the *Cayetano* decision have gone beyond the voting rights issues raised in that case and in *Arakaki* v. *Hawaii*. These other cases target the provision of programs and services to Native Hawaiians by OHA, the Hawaiian Homes Commission and the Department of Hawaiian Home Lands on the grounds that providing benefits exclusively to Native Hawaiians is racially discriminatory under the Equal Protection clauses of the Fifth and Fourteenth Amendments.

S. 310 establishes a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States. Eventually, the programs and services or a portion of them now provided by OHA in furtherance of the provisions of the Admission Act may likely be provided instead by the Native Hawaiian governing body to its members. That is, to persons who have a political affiliation with a federally recognized Native Hawaiian governing entity with which the United States would have a formal, government-to-government relationship, so that equal protection challenges to those programs and services would be subject to the analysis of *Morton* v. *Mancari*.

Accordingly, apart from providing Native Hawaiians with a vehicle for reorganizing a governing entity through which they might, as have other native peoples in the United States, pursue the goals of self-determination and

greater control over the future of their own resources and culture, another purpose of S. 310 is to assure that the longstanding Congressional policy of protecting and advancing the interests of Native Hawaiians—dating back at least to the 1921 Hawaiian Homes Commission Act—and the bargained-for conditions that were made part of the 1959 compact that led to the admission of the State of Hawaii into the Union, are not ultimately frustrated as a result of these recent legal challenges.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 sets forth the short title for the bill as the "Native Hawaiian Government Reorganization Act of 2007."

Section 2. Findings

Section 2 sets forth findings, including findings regarding the history of Native Hawaiians; their interactions with the United States; Congress's authority over Native Hawaiians; Congress's past declaration of the political and legal relationship with Native Hawaiians; and Native Hawaiians' expression of their rights to self-determination, self-governance, and economic self-sufficiency.

Section 3. Definitions

Section 3 sets forth definitions of terms used in this Act, including definitions for the term "Aboriginal, Indigenous, Native People" and "Native Hawaiian." The term "Aboriginal, Indigenous, Native People" is defined as the "people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States." The term "Native Hawaiian" is generally defined as "an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii ; or an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual."

Section 4. United States policy and purpose

Section 4 reaffirms policies of the United States, including that Native Hawaiians are indigenous, native people; the United States has a political and legal relationship with Native Hawaiians; that Congress has the authority under Article I, section 8, clause 3 of the United States Constitution to enact legislation to address the conditions of Native Hawaiians and has done so in more than 150

Federal laws; that Native Hawaiians have an inherent right to autonomy in their internal affairs, an inherent right of self-determination and self-governance, the right to reorganize a Native Hawaiian governing entity, and the right to become economically self-sufficient; and that the United States shall continue to engage in the process of reconciliation and political relations with Native Hawaiians.

This section also sets forth the purpose of the Act, which is to provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

Section 5. United States Office for Native Hawaiian Relations

Section 5 establishes the United States Office for Native Hawaiian Relations (Office) in the Office of the Secretary of the Department of Interior and sets forth the duties of the Office. The duties include continuing the process of reconciliation with Native Hawaiians; effectuating and coordinating the political and legal relationship between the Native Hawaiian governing entity and the United States; consulting with the Native Hawaiian governing entity before taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; consulting with the Interagency Coordinating Group, other Federal agencies, and the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and preparing and submitting an annual report containing certain information to specified Committees of Congress and providing recommendations for any necessary changes to Federal law or regulations.

This section does not apply to the Department of Defense but the Secretary of Defense may designate one or more officials as liaison to the Office.

Section 6. Native Hawaiian Interagency Coordinating Group

Section 6 establishes the Native Hawaiian Interagency Coordinating Group, which is to be composed of officials from each Federal agency that administers Native Hawaiian programs, establishes or implements policies that affect Native Hawaiians, or whose actions may significantly or uniquely impact Native Hawaiian resources, rights, or lands, and the Office for Native Hawaiian Relations. The specific duties of the Interagency Coordinating Group are set forth but, generally, the Group will coordinate Federal programs and policies affecting Native Hawaiians and consult with the Native Hawaiian governing entity.

This section does not apply to the Department of Defense but the Secretary of Defense may designate one or more officials as liaison to the Interagency Coordinating Group.

Section 7. Process for the reorganization of the Native Hawaiian Governing Entity and the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian Governing Entity

Section 7 addresses the process for the reorganization of the Native Hawaiian governing entity and provides for the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity.

This section recognizes the right of Native Hawaiians to reorganize a single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents. A Commission composed of 9 members is established to prepare and maintain a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of a single Native Hawaiian governing entity and to certify that the adult members of the Native Hawaiian community, who have submitted sufficient documentation and are proposed for inclusion on the roll, meet the definition of "Native Hawaiian."

Commission members will be appointed by the Secretary of the Interior not later than 180 days after the date of enactment of the Act. In making an appointment, the Secretary must take into consideration any recommendation made by any Native Hawaiian organization. Commission members must have at least 10 years of experience in the study and determination of Native Hawaiian genealogy and an ability to read and translate into English documents written in the Hawaiian language.

The Commission will receive compensation for its work and may appoint personnel as necessary to enable the Commission to perform its duties. An employee of the Federal government may be detailed to the Commission.

Duties of the Commission include preparing and maintaining a roll of the adult members of the Native Hawaiian community and certifying to the Secretary that each of the adult members proposed for inclusion on the roll meet the definition of "Native Hawaiian" set forth in this Act. The certified roll shall be published in the Federal Register. An appeal mechanism may be established by the Secretary of the Interior for any person whose name is excluded from the roll but who claims to meet the definition of "Native Hawaiian." The Secretary is responsible for updating the roll.

The adult members listed on the certified roll may develop criteria for candidates to serve on the Native Hawaiian Interim Governing Council, determine the structure of the Council, and elect members of the Native Hawaiian community to serve on the Council. This section sets forth the powers and activities of the Council, which include developing organic governing documents for the Native Hawaiian governing entity and holding elections to ratify such organic documents.

Following ratification, the organic governing documents shall be submitted to the Secretary. The Secretary must certify that the organic documents contain certain information, including criteria for citizenship in the Native Hawaiian governing entity; civil rights protection for citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian governing entity; and that the organic documents are consistent with applicable Federal law and

the special political and legal relationship between the United States and the indigenous, native people of the United States.

Upon certification of the organic governing documents and the election of officers of the Native Hawaiian governing entity, the political and legal relationship between the United States and the Native Hawaiian governing entity will automatically be reaffirmed and Federal recognition shall be extended to the Native Hawaiian governing entity.

Section 8. Reaffirmation of delegation of Federal authority; negotiations; claims

Section 8 reaffirms the delegation of authority to the State of Hawaii to address the conditions of Native Hawaiians. It provides that upon reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity, the United States and the State of Hawaii may negotiate with the Native Hawaiian governing entity on certain issues. Negotiation topics include the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources; the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use; the exercise of civil and criminal jurisdiction; the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawaii; any residual responsibilities of the United States and the State of Hawaii; and grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii. Upon agreement of any matters, the parties may submit proposed amendments to Federal or State law to the Congress or the State of Hawaii, respectively. Any governmental power or authority of the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall only be exercised by the Native Hawaiian governing entity as agreed to in negotiations under this section.

Additionally, this section provides that this Act does not create a cause of action against the United States or any other entity or person; alter existing law regarding obligations on the part of the United States or the State of Hawaii with regard to Native Hawaiians or any Native Hawaiian entity; create obligations that did not exist in any source of Federal law prior to the date of enactment of this Act; or establish authority for the recognition of more than one Native Hawaiian governing entity. In addition, nothing in this Act creates any breach-of-trust actions, land claims, resource-protection or resource-management claims by or on behalf of Native Hawaiians or the Native Hawaiian governing entity and the United States retains its sovereign immunity from suit to any claim that exists prior to enactment of this Act which could be brought by Native Hawaiians or a Native Hawaiian governing entity. Any claims that may have already accrued and may be brought against the United States shall be rendered nonjusticiable.

The State of Hawaii also retains its sovereign immunity unless waived in accordance with State law. Finally, nothing in this Act may be construed as overriding section 5 of the Fourteenth Amendment or State sovereign immunity held under the Eleventh Amendment.

Section 9. Applicability of certain Federal laws

This section prohibits the Native Hawaiian governing entity and Native Hawaiians from conducting gaming as a matter of claimed inherent authority or under any Federal law, including the Indian Gaming Regulatory Act in the State of Hawaii or within any other State or Territory of the United States.

The Secretary may not take land into trust for Native Hawaiians or on behalf of the Native Hawaiian governing entity. It makes clear that the Indian Trade and Intercourse Act does not, has never, and will not apply after enactment to lands or land transfers present, past, or future, in the State of Hawaii. If a Court construes otherwise, any land transfers before the date of enactment of this Act shall be deemed to have been made in accordance with the Indian Trade and Intercourse Act.

Only one Native Hawaiian governing entity may be recognized pursuant to this Act. Any other groups shall not be eligible for the Federal Acknowledgment Process.

Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii, unless otherwise negotiated pursuant to section 8.

Native Hawaiians shall not be eligible for programs and services available to Indians unless otherwise provided under applicable Federal law. The Native Hawaiian governing entity and its citizens shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws.

Section 10. Severability

The section provides that if any section or provision of this Act is found to be invalid, the remaining sections or provisions shall continue in full force and effect.

Section 11. Authorization of appropriations

This section authorizes such sums as necessary to carry out this Act.

LEGISLATIVE HISTORY

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

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

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On May 10, 2007, in an open business meeting, the Committee considered S.310 and ordered the bill to be favorably reported, without amendment, to the Senate by voice vote.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of the Congressional Budget Office on S. 310 is set forth below:

S. 310—Native Hawaiian Government Reorganization Act of 2007

S. 310 would set forth a process for establishing and recognizing a Native Hawaiian governing entity that would act on behalf of its members with the state and the federal government. CBO estimates that implementing S. 310 would cost about $1 million per year over the 2008–2010 period and less than $500,000 in each subsequent year, assuming the appropriation of the necessary funds. Enacting the bill would not affect direct spending or revenues.

The bill would establish the United States Office for Native Hawaiian Relations within the Department of the Interior (DOI). This office would be responsible for developing and overseeing the federal relationship with the Native Hawaiian governing entity. Based on information from DOI, CBO expects that this office would require up to three full-time staff. S. 310 also would create a nine-member commission responsible for collecting and certifying a membership roll of adult Native Hawaiians. Based on the deadlines specified in the bill as well as information from DOI, CBO expects that this commission would need three years and three full-time staff to complete its work.

S. 310 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 land or other assets to this new government, including land now controlled by the state of Hawaii, would be the subject of future negotiations.

On May 15, 2007, CBO transmitted a cost estimate for H.R. 505, the Native Hawaiian Government Reorganization Act of 2007, as ordered reported by the House Committee on Natural Resources on May 2, 2007. The two versions of the bill are similar, and our cost estimates are the same.

The CBO staff contacts for this estimate are Daniel Hoople (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

The Committee held a hearing on S. 310 on May 3, 2007, at which Gregory G. Katsas, Principal Deputy Associate Attorney General, presented a statement on behalf of the Administration. In this statement, Mr. Katsas acknowledged that many of the Administration's concerns with previous versions of the Native Hawaiian Government Reorganization Act had been addressed in S. 310, but that the Administration continued to have "broader policy and con-

stitutional concerns" with S. 310. These concerns are described in Mr. Katsas' statement, which was made a part of the hearing record for the Committee.

After the hearing, written questions were submitted to Mr. Katsas by the Committee. The Department of Justice provided responses to these questions on July 23, 2007. These responses are included in the Committee files.

REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires 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. 310 will have a minimal impact on regulatory or paperwork requirements.

CHANGES TO EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the provisions of S. 310 do not affect any change in existing law.