Calendar No. 314

111TH CONGRESS, *2d Session* | SENATE | REPORT 111–162

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

MARCH 11, 2010.—Ordered to be printed

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

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1011]

The Committee on Indian Affairs, to which was referred the bill (S. 1011) 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, reports thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1011 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. 1011 is the most recent Senate bill establishing a process for reorganizing and recognizing a Native Hawaiian governing entity. Similar bills have been introduced since 1999. These bills are the result of long-standing efforts to address the consequences of the 1893 overthrow of the Kingdom of Hawaii, an event that officers

of the United States participated in and encouraged, and to provide a process by which to organize a federally recognized native group.

The language of S. 1011, as introduced, is identical to legislative language that was negotiated between the Hawaii Congressional Delegation and officials from the Department of Justice, the Office of Management and Budget, and the White House in the 109th and 110th Congresses. The language is intended to address concerns expressed in a July 2005 letter from the Administration regarding land claims, as well as the bill's impact on military readiness, gaming, and civil and criminal jurisdiction in Hawaii.

In 1993, Congress passed an Apology Resolution (Pub. L. No. 103–150) in which it apologized on behalf of the United States to the Native Hawaiians for the United States' role in the overthrow of the Native Hawaiian government and committed the United States to supporting 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,* published 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 native people of Hawaii with whom the United States has a special legal and political relationship. Since 1921, Congress has repeatedly recognized the distinct status of Native Hawaiians. 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 and receive Federal recognition will provide opportunities for Native Hawaiians to preserve their cultural resources, exercise self-governance and self-determination, and develop their own solutions to the problems faced by their community.

Native Hawaiian society before European contact

Hawaii was originally settled by voyagers from central and eastern Polynesia who travelled great distances in double-hulled voyaging canoes to arrive in Hawaii, perhaps as early as 300 A.D.

Hundreds of years of Hawaiian isolation followed the era of "long voyages." 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 com-

[1] The per capita income for Native Hawaiians is almost 35% lower than the statewide figure. *See* Shawn M. Kanaiaupuni et al., Income and Poverty Among Native Hawaiians: Summary of Ka Huakai Findings 4 (2005) (relying on U.S. Census 2000 data). One in seven Native Hawaiian families lives below the poverty level. *Id.* at 7; *see also* Income and Poverty in Hawaii; 2008, Hawaii Dep't of Bus., Econ. Dev., and Tourism 1–2 (2008) (citing U.S. Census Bureau data from the 2008 American Community Survey).

munal 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 be at least 300,000, was relatively stable before the arrival of the first European explorers.[2]

European contact

Hawaii was "discovered" by Europeans in 1778, when Captain James Cook of the British Royal Navy landed. In their logs and diaries, Captain Cook and his officers referred to the people they found in the Hawaiian Islands as "Indians."[3]

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 led to a precipitous decline in 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 to support 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.[6] However, it was replaced by whaling and other mercantile activities.[7] Soon, more than four-fifths of Hawaii's foreign commerce was American; the whaling services industry and mercantile business in Honolulu

---

[2] *See* David E. Stannard, Before the Horror: The Population of Hawaii on the Eve of Western Contact 59 (1989) (arguing that a population estimate of 800,000 is a "low to moderate estimate").

[3] *See, e.g.,* Richard H. Houghton III, *An Argument for Indian Status for Native Hawaiians: The Discovery of a Lost Tribe,* 14 Am. Indian L. Rev. 1, 10 & n.74 (citing 3 Captain Cook's Journals 490–91, 530, 540 (W. Wharton, ed. 1893)).

[4] Lawrence H. Fuchs, Hawaii Pono: A Social History 8–10 (1961).

[5] *Id.* at 8–9.

[6] Melody Kapilialoha MacKenzie, *Historical Background,* Native Hawaiian Rights Handbook 5 (Melody Kapilialoha MacKenzie, ed., 1991).

[7] Fuchs, *supra* note 4, at 10–11; Ralph S. Kuykendall & A. Grove Day, Hawaii: A History, From Polynesian Kingdom to American State 41–43 (rev. ed., Prentice-Hall, Inc. 1961).

were primarily in American hands.[8] Eventually, the principles of communal ownership and cultivation of the land were 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.[9] These influential Westerners sought to limit the power of the Hawaiian King over their legal rights and to implement property law so that they could accumulate and control land. These goals were achieved as a result of foreign pressure.[10]

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").[11]

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.[12]

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. To protect its inter-

---

[8] Fuchs, *supra* note 4, at 18–19; MacKenzie *supra* note 6, at 6, 9–10.

[9] In the mid-1800s, non-Hawaiians were able to acquire land formerly under the control of Native Hawaiians. These non-natives sought and were able to "consolidate their economic gains into political dominance." Cohen's Handbook of Federal Indian Law § 4.07[4][b], at 366–67 (Nell Jessup Newton ed., 2005) [hereinafter Cohen's Handbook].

[10] MacKenzie, *supra* note 6, at 6.

[11] Cohen's Handbook, *supra* note 9, § 4.07[4][b], at 367 (citing Jon Chinen, The Great Mahele 31 (Univ. Haw. Press 1958)).

[12] MacKenzie, *supra* note 6, at 6–9. The makaainana 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 chief, were unable to farm without the traditional common cultivation and irrigation of large areas, or were killed in epidemics or migrated to cities. *Id.* at 8.

ests, the United States entered into a series of four treaties with the Kingdom of Hawaii. American advisors urged the King to pursue international recognition of Hawaiian sovereignty, backed 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 *Great Mahele*. The 1875 Convention on Commercial Reciprocity eliminated the American tariff on sugar from Hawaii and virtually all tariffs that Hawaii had placed on American products.[13] Critically, it also prohibited Hawaii from giving political, economic, or territorial preferences to any other foreign power. When the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.[14]

Overthrow of the Native Hawaiian government

In 1887, King Kalakaua appointed a prime minister who was supported by the Native Hawaiian people and who opposed allowing the United States to establish 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 military 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, 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. This resulted in representatives of the Westerners taking control of the legislature.[15]

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 Western 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.[16]

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

---

[13] S. Exec. Doc. No. 52–77, at 160–63 (1893).

[14] Supplementary Convention, Dec. 6, 1884, U.S.-Haw., art. II, 25 Stat. 1400 (proclaimed Nov. 9, 1887).

[15] Nonetheless, at least one scholar has concluded that "the Native Hawaiians still played an active and usually dominant role in the politics of the islands, because though the new 1887 Constitution increased the political power of the large foreign property-holders in various ways, the suffrage was still in native hands. The 1890 census reported that 13,593 were registered to vote, and of these 8,777 were listed as 'natives' and another 777 were 'half-castes,' i.e., part-Hawaiians." Jon M. Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawaii,* 28 U. Haw. L. Rev. 81, 100 (2005) (internal quotation marks, alterations, and citations omitted). The same scholar concludes more broadly that it is "not in doubt" that "Native Hawaiians constituted the overwhelming majority of the political community that participated in the decision-making in the Kingdom at the time of the 1893 overthrow." *Id.* at 81.

[16] *See* 39 L.A. Thurston, Memoirs of the Hawaiian Revolution 230–32 (1936).

the government building and the palace.[17] The next day, local non-Hawaiian revolutionaries seized the government building and demanded that Queen Liliuokalani abdicate the monarchy.[18] 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.[19] But the Senate Foreign Relations Committee issued a report ratifying Stevens's 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* [a nation controlled by another nation] *of the United States."*[20]

Hawaii's path to statehood, 1893–1959

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 called a constitutional convention whose composition and members it controlled.[21] 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.[22] 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."[23] The overwhelming majority of the Native Hawaiian population, who were loyal to their Queen, refused to swear such an oath and were effectively disenfranchised.[24]

In 1896, William McKinley was elected 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.[25] The annexation treaty failed in the Senate because a two-thirds majority could not be

---

[17] *Id.*

[18] *Id.*

[19] President's Message Relating to the Hawaiian Islands, H. Exec. Doc. No. 53–47, at xv (1893) (asserting that the United States "can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; . . . the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation").

[20] S. Rep. No. 53–227, at 21 (1894) (emphasis added).

[21] Kuykendall & Day, *supra* note 7, at 183.

[22] *Id.* at 184; MacKenzie, *supra* note 6, at 13.

[23] Republic of Haw. Const. art. 101.

[24] U.S. Dep't of the Interior & U.S. Dep't of Justice, From Mauka to Makai: The River of Justice Must Flow Freely 29 (2000) [hereinafter Mauka to Makai Report] (citing NoeNoe K. Silva, *Kanaka Maoli Resistance to Annexation,* 1*Oiwi:* A Native Hawaiian Journal (Dec. 1998)).

[25] 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, 103 & n.48 (1998) (citing Dan Nakaso, *Anti-Annexation Petition Rings Clear,* Honolulu Advertiser, Aug. 5, 1998, at 1).

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 that could be adopted with 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.[26] In July 1898, the Joint Resolution was enacted, "the fruit of approximately seventy-five years of expanding American influence in Hawaii."[27]

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.[28] In 1900, Congress passed the Hawaii Organic Act,[29] 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.

Continuity of Native Hawaiian identity

Even after the overthrow of the Hawaiian monarchy, Native Hawaiians continued to maintain their separate identity as a single distinct political community through cultural, social, and political institutions, and through efforts to develop programs to provide governmental services to Native Hawaiians. For example, the Hawaiian Protective Association—a political organization with bylaws and a constitution that sought to maintain unity among Native Hawaiians, protect Native Hawaiian interests (including by lobbying the legislature), and promote the education, health, and economic development of Native Hawaiians—was organized in 1914 "for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition."[30] To this end, the Association established twelve standing committees, published a newspaper, undertook dispute resolution, promoted the education and the social welfare of the Native Hawaiian community, and developed the framework that became the Hawaiian Homes Commission Act ("HHCA") in 1921. In 1918, Prince Jonah Kuhio Kalanianaole (Prince Kuhio), the Territory of Hawaii's delegate to Congress, and other prominent Hawaiians founded the Hawaiian Civic Clubs, the goal of which was "to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii."[31] The clubs' first project was to secure enactment of the HHCA, and the clubs remain in existence today.

Efforts to maintain a distinct political community have continued through the 20th century to the present day. Examples include the 1988 Native Hawaiian Sovereignty Conference; the Kau Inoa initiative, which registers Native Hawaiians for a movement toward a Native Hawaiian governing entity; the efforts to protect the North West Hawaiian Islands because of their cultural and traditional

---

[26] Kuykendall & Day, *supra* note 7, at 188; MacKenzie, *supra* note 6, at 14.
[27] Fuchs, *supra* note 4, at 36.
[28] Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) (Annexation Resolution).
[29] Act of April 30, 1900, ch. 339, 31 Stat. 141 (Organic Act).
[30] Hawaiian Homes Commission Act, 1920: Hearing on H.R. 13500 Before the S. Comm. on Territories, 66th Cong. 44 (1920) (statement of Rev. Akaiko Akana).
[31] McGregor, *Aina Hoopulapula: Hawaiian Homesteading,* 24 Hawaiian J. of Hist. 1, 5 (1990).

significance; the creation of the Office of Hawaiian Affairs, which serves as an entity to protect Native Hawaiian interests; and the development of traditional justice programs, including a traditional method of alternative dispute resolution, *"hooponopono,"* which has been endorsed by the Native Hawaiian Bar Association.[32]

Moreover, as S. 1011's findings explain, "the Native Hawaiian people have actively maintained native traditions and customary usages throughout the Native Hawaiian community, and the Federal and State courts have continuously recognized the right of the Native Hawaiian people to engage in certain customary practices and usages on public lands."[33] For example, traditional Native Hawaiian fishing and water rights are protected by state law,[34] and a 1978 amendment to the Hawaii Constitution specifically protects *ahupuaa* tenants' traditional and customary rights for subsistence, cultural, and religious purposes.[35] Hawaiian courts have also recognized and upheld traditional gathering and access rights.[36] In addition, Native Hawaiian traditional practices are often permitted on Federal lands, including National Parks.[37]

Further, Native Hawaiian customary law continues to be preserved and recognized by Hawaii state courts, notably in the areas of property and family law.[38] Traditional Hawaiian usage, in the absence of a statute, is controlling over common law to the contrary.[39] Testimony of *kamaaina* witnesses, who have knowledge of ancient traditions, customs, and usages, may be admitted in State-court land disputes.[40] In addition, courts have taken into account a form of customary adoption, *hanai,* in determining, for example, whether a child "issue[d]" from his adoptive parents was entitled to a share of their estates,[41] and in measuring damages for intentional infliction of emotional distress.[42]

These practices and legal protections further reinforce the Native Hawaiian community's continuing status as a distinctly native community.

---

[32] *See* Andrew J. Hosmanek, *Cutting the Cord: Ho'oponopono and Hawaiian Restorative Justice in the Criminal Law Context,* 5 Pepp. Disp. Resol. L.J. 359 (2005).

[33] S. 1011, Section 2(12); *see also* S. 1011, Section 2(18) ("Native Hawaiian people are actively engaged in Native Hawaiian cultural practices, traditional agricultural methods, fishing and subsistence practices, maintenance of cultural use areas and sacred sites, protection of burial sites, and the exercise of their traditional rights to gather medicinal plants and herbs, and food sources.").

[34] *See, e.g.,* Haw. Rev. Stat. § 174C–101(c), (d) (stating that certain traditional and customary water rights "shall not be abridged or denied," or "diminished or extinguished," by provision of the State Water Code); *id.* § 187A–23 (providing for recognition of certain "vested fishing rights" linked to "ancient regulations").

[35] Haw. Const. art. XII, § 7. In ancient Hawaii, the islands were divided into landholding units known as *ahupua'a*, self-sufficient areas that generally ran from the sea to the mountains. *In Re Boundaries of Pulehunui,* 4 Haw. 239 (1879).

[36] *See, e.g., Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n,* 903 P.2d 1246 (Haw. 1995); *State v. Hanapi,* 970 P.2d 485 (Haw. 1998); *Kalipi v. Hawaiian Trust Co.,* 656 P.2d 745 (Haw. 1982).

[37] *See, e.g.,* 16 U.S.C. § 396d (Kaloko-Honokohau National Historical Park).

[38] "In modern times the state legislature and courts of Hawaii, to a degree not found in any other state, have recognized and supported an array of traditional rights relating to beach access, fishing, water, access to sacred sites, and language." Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 371 (2005).

[39] *See* Haw. Rev. Stat. § 1–1; *In re application of Ashford,* 440 P.2d 76, 77–78 (1968).

[40] *Id.*

[41] *O'Brien* v. *Walker,* 35 Haw. 104 (Haw. Terr. 1939).

[42] *Leong* v. *Takasaki,* 520 P.2d 758, 767 (Haw. 1974).

RECOGNITION BY THE UNITED STATES OF OBLIGATIONS TO NATIVE HAWAIIANS

In keeping with the special status generally accorded other native groups, Congress has recognized the distinct status of the Native Hawaiians by "extend[ing] services to [them]" on the basis of that status, recognizing that they are "the native people of a prior-sovereign nation with whom the United States has a special political and legal relationship."[43] As evidence of this special relationship, Congress has enacted more than 150 laws addressing the conditions of Native Hawaiians and providing them with benefits. Two important examples—the Hawaiian Homes Commission Act and the Hawaii Admission Act—are discussed in the next two sections. However, numerous other examples of Congress's recognition of the distinct status of the Native Hawaiians could be cited, including the Native American Language Act of 1990, which recognized and clarified the language rights of American Indians, Alaska Natives, and Native Hawaiians and explicitly allowed exceptions to teacher certification requirements for instruction in Native American languages; the Native Hawaiian Education Act of 1988 (Title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988) which awarded $30 million annually in competitive education grants to programs benefitting Native Hawaiian students; the Native Hawaiian Assessment Project of 1983; the Native Hawaiian Health Care Improvement Act; the Native American Graves Protection and Repatriation Act; and the Native American Housing Assistance and Self-Determination Act of 1996.

Hawaiian Homes Commission Act

Congress explicitly recognized the existence of a special legal and political relationship between the Native Hawaiian people and the United States with the enactment of the Hawaiian Homes Commission Act in 1921. Prior to enactment of this law, Congress received testimony from Executive Branch officials analogizing the Federal Government's relationship with, and responsibilities to, Native Hawaiians to its relationship with other Native Americans.

As described above, beginning in the early 1800s, large amounts of land in Hawaii were made available to foreigners and were eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Native Hawaiians were forced off the lands that they had cared for and traditionally occupied. Many of these Native Hawaiians moved into the urban areas, often living in severely overcrowded tenements and contracting diseases for 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 of the monarchy, many concluded that if the native people of Hawaii were to be saved from extinction, they had to have the

[43] S. 1011, Section 2(23)(C); *see, e.g.,* Brief of United States at 4–5, 16 & nn.2–4, *Rice* v. *Cayetano,* 528 U.S. 495 (2000) (citing statutes in which Congress "established special Native Hawaiian programs in the areas of health care, education, employment, and loans"; sought "to preserve Native Hawaiian culture, language, and historical sites; and "by classifying Native Hawaiians as Native Americans . . . extended to Native Hawaiians many of the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities.) (internal citations and quotation marks omitted).

means of regaining their connection to the land, the *aina.*[44] In hearings on the matter, Secretary of the Interior Franklin Lane explained the special 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.[45]

Secretary Lane explained that special programs for Native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[46]

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

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes . . .. The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities, they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[47]

In 1920, Prince Kuhio, the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "[I]f conditions continue to exist as they do today, . . . my people . . . will pass from the face of the earth."[48] Secretary Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded that the Nation must provide similar remedies.[49]

---

[44] The legislative history of the HHCA includes numerous references to the Native Hawaiian community as a "race" or a "dying race." *See, e.g.*, H.R. Rep. No. 66–839, at 2 (1920). This is consistent with the way Federal officials referred to Indian tribes during the same period. *See, e.g.*, *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (referring to "these remnants of a race once powerful, now weak and diminished in numbers" (quoting *United States* v. *Kagama*, 118 U.S. 375, 384 (1886)); *United States* v. *Rickert*, 188 U.S. 432, 437 (1903) (referring to the "weakness and helplessness" of "this dependent race") (internal citation omitted)). The HHCA legislative history also refers to Native Hawaiians as a "people." *See, e.g.*, H.R. Rep. No. 66–839, at 3 (1920) (referring to Native Hawaiians as "a dying people"); *id.* at 4 (referring to Native Hawaiians as a "noble people"). This locution also was used with regard to Indian tribes. *See, e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[45] H.R. Rep. No. 66–839, at 4 (1920).

[46] Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the H. Comm. on the Territories, 66th Cong. 129–31 (statement of Secretary Lane that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians, and citing a Department of the Interior Solicitor's opinion stating that setting aside public lands within the Territory of Hawaii would not be unconstitutional, relying in part on the Congressionally authorized allotment to Indians as precedent for such an action); *see also id.* at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians); *id.* 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").

[47] *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.R. Rep. No. 66–839, at 4 (1920).

[48] 59 Cong. Rec. 7453 (1920) (statement of Delegate Jonah Kuhio Kalanianaole).

[49] H.R. Rep. No. 66–839. at 5 (1920) (statement of Secretary Lane).

The effort to "rehabilitate" Native Hawaiians by returning them to the land led Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act set aside approximately 200,000 acres of the Ceded Lands for homesteading by Native Hawaiians.[50] Congress compared the Act to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands."[51] In support of the Act, the House Committee on the Territories recognized that, prior to the *Great Mahele,* 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.[52]

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,[53] 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, 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.[54]

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 some of the best lands were leased to non-Hawaiians to generate operating funds. Little income remained 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 homelands, made the program an illusory promise for most Native Hawaiians.[55] While the Act did not succeed in its purpose, its enactment is an express affirmation of the United States' special political and legal relationship to and responsibility for the Native Hawaiian people.

The Hawaii Admission Act

As a condition of statehood, the Hawaii Admission Act[56] 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:

---

[50] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67–34, §§ 203–204, 42 Stat. 108, 109–10.

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

[52] *Id.* at 6–7.

[53] 25 U.S.C. §§ 331–334, 339, 342, 348, 349, 381 (1998).

[54] *See* Mauka to Makai Report, *supra* note 24, at 36.

[55] *See id.* at 32–37.

[56] Pub. L. No. 86–3, 73 Stat. 4 (Mar. 18, 1959) (the "Admission Act").

[Section 4.] 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 the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

* * * * * * *

[Section 5(f).] The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds 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 the 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.[57]

These transfers of Federal authority to the new State were not discretionary or permissive. The United States is empowered to sue to compel compliance with the terms of the trust. For example, 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.[58] Moreover, sections 204 and 223 of the Hawaiian Homes Commission Act provide that the consent of the Secretary of the Interior must be obtained for certain

[57] Admission Act §§ 4, 5(f), 73 Stat. at 5–6 (emphasis added).
[58] *Han* v. *United States,* 45 F.3d 333, 337 (9th Cir. 1995).

exchanges of land and reserve to Congress the right to amend that Act.[59]

Treatment of Native Hawaiians compared to other indigenous groups

The Hawaiian Homes Commission Act and the Hawaii Admission Act—the most significant actions the United States has taken to date in respect to the native people of Hawaii—must be understood in the context of the Federal policy towards members of other native groups.

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. Much of the 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. A 25-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 property taxes often had their land seized.

This "allotment era" in Federal Indian policy was responsible for the alienation of more than half of all Indian lands nationwide. Nearly 90 million acres of lands fell out of native ownership in less than half a century, and although the primary objective of the allotment of lands to individual Indians was to "civilize" native people, in part by making them family farmers, thousands of Indians were rendered not only landless but homeless. The fact that the United States thought to impose a similar scheme on the native people of Hawaii in an effort to "rehabilitate" Native Hawaiians by returning them to their land is thus readily understandable in the context of the prevailing Federal Indian policy in 1921.

By 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 Indian tribes and their members and to transfer many of those responsibilities to the several States. A prime example of this Federal policy was the enactment of Public Law No. 83–280,[60] an Act which vested criminal jurisdiction and certain aspects of civil jurisdiction over Indian lands in 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 and imposed a public trust upon the lands that were ceded to the State for five purposes, one of which was the betterment of the conditions for Native Hawaiians.

---

[59] With the adoption of its new Constitution, the State of Hawaii assumed the responsibility of administering the Ceded Lands in accordance with the five 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, 4; *id.* art. XVI, § 7.

[60] 67 Stat. 5884 (1953).

CONGRESS'S AUTHORITY TO ENACT REORGANIZATION LEGISLATION FOR THE NATIVE HAWAIIANS

For more than two hundred years, Congress, the Executive Branch, and the Supreme Court have recognized certain legal rights and protections for America's indigenous peoples. The United States' interactions with indigenous peoples have varied from group to group. Indeed, since the founding of the United States, Congress has exercised constitutional authority over indigenous affairs and has undertaken enhanced responsibility for America's indigenous peoples. This has been done in recognition of the sovereignty possessed by the native groups, which pre-existed the formation of the United States. Congress's exercise of its constitutional authority is also premised upon the status of the indigenous peoples as the original inhabitants of this Nation who occupied and exercised dominion and control over the lands which the United States subsequently acquired.

Constitutional sources of Congressional authority to legislate in respect to Native Groups

It is well-established that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[61] As the Court explained in *United States* v. *Sandoval,* "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts," so long as Congress does not use this power to "arbitrarily" designate a community or body of people an Indian tribe.[62] The Supreme Court has upheld Congress's exercise of this power even in the case of a tribe that the Court assumed had become "fully assimilated into the political and social life of the State," concluding that "the fact that federal supervision over [the tribe] has not been continuous" did not "destroy[] the federal power to deal with them."[63]

The Supreme Court has historically located the sources of Congress's Indian affairs powers in the Indian Commerce Clause[64] and the Treaty Clause.[65] The Court has also recognized that insofar as Indian affairs were traditionally an aspect of military and foreign policy, "Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent

[61] *United States* v. *Lara,* 541 U.S. 193, 200 (2004).
[62] 231 U.S. 28, 46 (1913).
[63] *United States* v. *John,* 437 U.S. 634, 652–53 (1978); *see also Winton* v. *Amos,* 255 U.S. 373, 378 (1921) (The members of the same recognized tribe at issue in *John* had "adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them.").
[64] U.S. Const. art. I, § 8, cl. 3.
[65] *Id.* art. II, § 2, cl. 2; *see Lara,* 541 U.S. at 200; *see also id.* ("The central function of the Indian Commerce Clause, we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs.") (internal quotation marks omitted). Although "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties[,]' . . . treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" *Id.* at 201.

in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'"[66]

In addition, the "existence of federal power to regulate and protect the Indians and their property" is implicit in the structure of the Constitution.[67] "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection. . . . Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation."[68] Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities."[69]

Although the aboriginal "tribes," "nations," or "peoples," over which Congress exercised its Indian affairs authority, were defined in part by common ancestry, the unique constitutional significance of such entities derives from their separate existence as "independent political communities."[70] Native peoples and groups were "nations,"[71] and the relationship between the United States and the natives reflected a political settlement between sovereigns. The Supreme Court has thus repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign political communities," not "racial group[s]."[72]

Congress has frequently enacted legislation that provides for the reorganization of Indian tribes, via an election organized by the Secretary of the Interior and the recognition of native sovereigns pursuant to its Indian affairs powers. For example, the Indian Reorganization Act of 1934 provides that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . which shall become effective when—(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary. . . ."[73]

Similarly, Congress has on numerous occasions enacted specific statutes that "restore" Federal recognition of previously "terminated" tribes. There are many tribal restoration acts throughout Title 25 of the U.S. Code, involving interim council elections set up

---

[66] *Id.*

[67] *Board of County Comm'rs of Creek County* v. *Seber,* 318 U.S. 705, 715 (1943).

[68] *Id.*

[69] *United States* v. *Sandoval,* 231 U.S. 28, 45–46 (1913); *see United States* v. *Kagama,* 118 U.S. 375, 384–85 (1886) ("From [the Indians'] very weakness[,] so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

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

[71] *Id.* at 559–60.

[72] *United States* v. *Antelope,* 430 U.S. 641, 646 (1972); *see Fisher* v. *District Ct. of Sixteenth Jud. District of Mont.,* 424 U.S. 382, 389 (1976); *Morton* v. *Mancari,* 417 U.S. 535, 553–54 (1974); *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).

[73] 25 U.S.C. § 476(a).

and run by the Secretary, with participation based on statutory criteria that include lineal descent or required ancestry, as well as other indicia of connection to the community. Some of these statutes establish a process for nominating and electing members of an interim council or body that has responsibility for functioning as the acting tribal government and developing proposed constitution and bylaws to be voted on by the members in an election conducted by the Secretary.[74] And courts have referred approvingly to treaties or laws that promise to provide for tribal self-government,[75] as well as statutes that prescribe in detail the structure and operation of tribal governments.[76]

Native Hawaiians and the meaning of "Indian Tribes"

Like the previous Congresses that have enacted legislation for the benefit of Native Hawaiians, this Committee concludes that the Native Hawaiians are a distinctly native community that falls within the scope of Congress's power to legislate in respect to "Indian Tribes."[77] The term "Indian" was first applied by Columbus to the native peoples of the New World based on the mistaken belief that he had found a sea route to India. The term has been understood ever since to refer to the indigenous peoples who inhabited the New World before the arrival of the Europeans.[78] As the original, aboriginal occupants of Hawaii before the arrival of the Europeans, the Native Hawaiians fall within the scope of the term "Indian" as used in the Federal Constitution.

To the framers of the Constitution, an Indian tribe simply meant a distinct group of indigenous people set apart by their common circumstances.[79] Because Native Hawaiians today have a direct historic, cultural, and land-based link to the indigenous people who inhabited and exercised sovereignty over the Hawaiian Islands before the first European contact in 1778, and because they are determined to preserve and to pass on to future generations their native lands and their distinct culture, the Native Hawaiian community falls squarely within the scope of Congress's power to legislate in respect to "Indian Tribes."

Indeed, as the 1993 Apology Resolution and other recent Federal statutes extending educational and health benefits to Native Hawaiians make clear, Congress has found that: (1) Native Hawaiians are "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago";[80] (2) Native Hawaiians exercised sovereignty over the Hawaiian Is-

---

[74] *See* 25 U.S.C. 711

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

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

[77] U.S. Const. art. I, § 8, cl. 3.

[78] *See Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 544 (1832) (referring to Indians as "those already in possession [of the land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man"); *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543, 572–74 (1823) (referring to Indians as "original inhabitants" or "natives" who occupied the New World before discovery by "the great nations of Europe").

[79] *See also Worcester,* 31 U.S. (6 Pet.) at 559 (equating Indian tribe and Indian nation and defining "nation" as a "people distinct from others"); *id.* at 583 (Indians are "a separate and distinct people").

[80] 42 U.S.C. § 11701(1); 20 U.S.C. § 7512(1).

lands;[81] (3) the overthrow of the Kingdom of Hawaii was "illegal" and deprived Native Hawaiians of their right to "self-determination";[82] (4) the government installed after the overthrow ceded 1.8 million acres of land to the United States "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government";[83] (5) "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States";[84] and (6) "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."[85]

Those findings demonstrate that indigenous Hawaiians, like numerous tribes in the continental United States, share historical and current bonds within their community. Also like tribes in the continental United States, Native Hawaiians, pursuant to Acts of Congress, have substantial lands set aside for their benefit: 200,000 acres of Homes Commission Act land on which there are thousands of leases to Native Hawaiians that furnish homes to tens of thousands of Hawaiians, and an interest in the income generated by 1.2 million acres of public trust lands under the Admission Act.

The fact that the indigenous Hawaiian community does not presently have an operating tribal government recognized by the Department of the Interior does not remove that community from the scope of Congress's Indian affairs power. The Constitution does not limit Congress's Indian affairs power to groups with a particular government structure. "[S]ome bands of Indians, for example, had little or no tribal organization while others . . . were highly organized."[86] For example, in *United States* v. *John,* the Court upheld Congress's power to provide for a group of Indians that did not have a Federally recognized tribal government, even though Federal supervision had lapsed and a measure of assimilation had occurred.[87] Nor does the Constitution limit Congress's power to groups that continue to exercise all aspects of sovereignty. European "discovery" and the establishment of the United States necessarily diminished certain aspects of Indian sovereignty.[88] Thus, under the Constitution, "Federal regulation of Indian tribes . . . is governance of once-sovereign political communities."[89]

As noted above, the United States' authority over Indian affairs does not emanate simply from the Commerce Clause's reference to "Indian Tribes." Rather, the Constitution implicitly gives Congress power to manage Indian affairs more generally.[90] That power is not limited to native groups that exhibit formal governmental structures of modern sovereigns. The sovereignty of an indigenous

---

[81] 20 U.S.C. § 80q–14(11).
[82] 107 Stat. 1510, 1513 (1993).
[83] *Id.* at 1512.
[84] *Id.*
[85] *Id.* at 1512–13.
[86] *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 664 (1979) (footnote omitted).
[87] 437 U.S. 634 (1978).
[88] *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 45 (1831).
[89] *United States* v. *Antelope,* 430 U.S. 641, 646 (1972).
[90] *Board of County Comm'rs of Creek County* v. *Seber,* 318 U.S. 705, 715 (1943); *United States* v. *Sandoval,* 231 U.S. 28, 45–46 (1913); *United States* v. *Kagama,* 118 U.S. 375, 383–84 (1886).

people may be expressed through informal structures, as well as through a formal government. And the loss of a formal government does not preclude future expression of sovereignty through some formal governmental structure. In the case of Native Hawaiians, a variety of Native Hawaiian organizations have continued to be active in a broad range of native political, cultural, religious, legal, and land-related matters, and furnish vehicles for the expression of self-determination over important aspects of Hawaiian affairs, and form an active "political" community.[91]

Also instructive is Federal legislation concerning Alaska Natives, which reflects Congress's intent to exercise its constitutional power and responsibility regarding *all* the Native American groups within the United States. In January 1932, Representative Howard, Chairman of the House Indian Affairs Committee, wrote to Secretary of the Interior Wilbur seeking an opinion on the legal status of Alaska Natives. In response, Interior Solicitor Finney issued a comprehensive opinion, which Secretary Wilbur forwarded to Chairman Howard in March 1932. Finney concluded his opinion by stating: "[I]t is clear that no distinction has been made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not[,] as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States."[92]

In 1934, when Congress passed the Indian Reorganization Act, the landmark legislation intended to revitalize tribes' government-to-government relationship with the United States, it defined "Indian" to include all aboriginal people of Alaska, even though Congress knew that Alaska's aboriginal population included Eskimos and Aleuts, two distinct cultural and ethnic groups, as well as Indians similar to those in the contiguous 48 States.[93]

Like Native Hawaiians, the Eskimo peoples are linguistically, culturally, and ancestrally distinct from other American "Indians." Yet Native Alaskan villages are Federally recognized tribal entities within Congress's Indian affairs authority.[94] Modern scholars typically do not use the word "Indian" to describe Eskimos or the word "tribe" to describe their nomadic family groups and villages. But the Constitution's Framers would not have recognized these kinds of distinctions. To them, "Indians" were many peoples, with distinct languages, cultures, and sociopolitical organizations; but for all their distinct cultures and governments, they were all "Indians," because they were aboriginal inhabitants of the "New World." Because Eskimos—like Native Hawaiians—were aboriginal peoples, they too would therefore have been considered "Indians."[95] Courts have supported this construction by recognizing "that the term 'Indians' includes all native people in the United States."[96]

---

[91] Cf. 25 C.F.R. 83.7(c) (discussing political and comparable activity as a criterion for Interior Department acknowledgment).

[92] 53 I.D. 593, 605, 1 Op. Sol. On Indian Affairs 303, 310 (1932).

[93] 25 U.S.C. §479. In 1936, Congress amended the Indian Reorganization Act to allow qualifying Alaska Native villages to reorganize under that Act. *See* 25 U.S.C. §473a.

[94] In 1993, the Department of the Interior included Alaska Native villages on the revised list of Federally recognized tribes. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993).

[95] *See* S. Rep. 107–66, at 35 nn.43–44 (2001).

[96] Jon M. Van Dyke, *The Political Status of Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 146 (1998) (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*

Although these general principles governing Congress's power over Indian affairs are well established in Supreme Court decisions, the Court has never specifically considered the application of those principles to Native Hawaiians. Most recently, in *Rice* v. *Cayetano*,[97] the Court called that question "a matter of some dispute," which it did not need to decide in that case.[98] Indeed, the Court specifically reserved a number of other important questions in that case, such as the extent to which Congress had already exercised or delegated such powers.[99] The Court made clear that its opinion "stay[ed] far off that difficult terrain."[100] Thus, although the Court struck down a Hawaii law limiting eligibility to vote in elections for trustee of the State Office of Hawaiian Affairs (OHA), it did so because OHA "is a state agency" and the elections were "elections of the State, not of a separate quasi sovereign."[101] The elections therefore had to be open to all citizens of the State of Hawaii who were otherwise eligible to vote in statewide elections.[102] By resolving the case on that ground, the Court did not need to reach any question about Congress's authority to treat Native Hawaiians the same way it treats Indian tribes on the continental United States. Nor has the Court returned to the issue since.

NEED FOR LEGISLATION

The primary goal of S. 1011 is to establish a process for the reorganization of a Native Hawaiian government and to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship. Congress has consistently recognized Native Hawaiians as among the native peoples of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause and other relevant provisions of the Constitution. But Congress has not yet acted to provide a process for reorganizing a Native Hawaiian governing entity.

That inaction has placed Native Hawaiians at a unique disadvantage. Of the three major groups of Native Americans in the United States—American Indians, Alaska Natives, and Native Hawaiians—only Native Hawaiians currently lack the benefits of democratic self-government. In earlier eras, similar deprivations wreaked havoc on countless American Indians and Alaska Natives. As President Obama recently stated, "History has shown that failure to include the voices of tribal officials in formulating policy af-

---

Am. 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); *Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d 1161, 1168–69 (Haw. 1982)).

[97] 528 U.S. 495 (2000).

[98] *Id.* at 518.

[99] *See id*.

[100] *Id*. at 519.

[101] *Id*. at 520, 522.

[102] The Court explained that "[i]f 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 Court did not need to rule on the applicability of that principle to Native Hawaiians, because it concluded that the election was conducted by the State of Hawaii rather than by any such recognized quasi sovereign entity. *Id*. at 520.

fecting their communities has all too often led to undesirable and, at times, devastating and tragic results." [103]

For nearly a half century now, Congress has pursued a strong policy of Indian self-determination and self-government, with the "overriding goal of encouraging tribal self-sufficiency and economic development." [104] The results of that policy have been striking. As the co-director of the Harvard Project on American Indian Economic Development recently wrote, "the evidence is overwhelming that political self-rule is the only policy" that has succeeded in overcoming Native Americans' "social, cultural, and economic destruction." [105] For Native Americans, economic development "is first and foremost a political problem. At the heart of it lie sovereignty and the governing institutions through which sovereignty can be effectively exercised." [106] By establishing a process that would lead to the reorganization of a sovereign Native Hawaiian government, S. 1011 will finally put Native Hawaiians on a par with other Native Americans, giving them equal access to the benefits of accountable, local, democratic self-rule.

The Committee recognizes that there is a Federal Acknowledgment Process defined by the Department of the Interior's regulations in 25 CFR Part 83. However, these regulations exclude Native Hawaiians. Thus, legislation is the only mechanism available for Congress to recognize Native Hawaiians at this time.

LEGISLATIVE HISTORY

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

A House companion measure to S. 1011, H.R. 2314, was introduced on May 7, 2009, by Representative Abercrombie for himself and Representative Hirono, and referred to the Committee on Natural Resources. The Natural Resources Committee met to consider the bill on June 11, 2009. On December 16, 2009, the bill was favorably reported without amendment to the House of Representatives by the Yeas and Nays 26–13. On February 23, 2010, the House of Representatives considered H.R. 2314 and passed by the Yeas and Nays 245–164 with an amendment in the nature of a substitute offered by Representative Abercrombie. Other versions

---

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

[104] *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)) (internal quotation marks omitted).

[105] Joseph P. Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in American Indian Constitutional Reform and the Rebuilding of Native Nations 184 (Eric D. Lemont ed., 2006).

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

of the bill, H.R. 862 and H.R. 1711, were introduced but not considered by the Natural Resources Committee.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

A number of amendments were made to S. 1011, all of which were included in a substitute amendment accepted by the Committee on December 17, 2009. These changes were made to address concerns with the legislation, a number of which were raised by the Attorney General of the State of Hawaii, to further refine the process for reorganization, and to clarify definitions, among other issues. The Committee expects the language will continue to be modified to bring clarity to some issues.

Section 1. Short title

Section 1 was not amended.

Section 2. Findings

The findings of the underlying bill were amended to reaffirm the authority of Congress to legislate on behalf of Native Hawaiians as a distinctly native community. Congress exercised this authority in enacting the Hawaiian Homes Commission Act (HHCA) to set aside land for Native Hawaiians. The changes in the substitute amendment reflect the Native Hawaiian people's active commitment to maintaining their native traditions, their connection to the indigenous people who exercised sovereignty over the Hawaiian Islands, and the courts' recognition of their ability to engage in certain customary practices on public lands. Because the Native Hawaiian people have steadfastly maintained their native traditions and customary practices since the overthrow of the Kingdom of Hawaii in 1893, there is continuity between the native citizens of the Kingdom of Hawaii and their successors, the Native Hawaiian people today.

Section 3. Definitions

Section 3, was amended to redefine those eligible to participate in the reorganization of the Native Hawaiian governing entity. The definitions of "adult member" and "Native Hawaiian" were struck and incorporated into the new definition of "qualified Native Hawaiian constituent". "Native Hawaiian programs or services" was also struck from the section on definitions.

The term "Native Hawaiian membership organization" was added to identify organizations through which Native Hawaiians have sought to preserve their culture, native traditions, and self-governance. These organizations are an important, though not the exclusive, means through which Native Hawaiians have succeeded in maintaining their native traditions and culture, and in giving expression to their rights to self-determination and self-governance. Indeed, Congress has relied on such organizations to function as official representatives of the Native Hawaiian community in other Federal laws. In the Native American Graves Protection and Repatriation Act (NAGPRA), for example, Native Hawaiian organizations function as representatives of the Native Hawaiian community with respect to the treatment and protection of Native Hawaiian remains and funerary objects, just as Federally recognized In-

dian tribes represent their communities with respect to Indian remains and objects.[107]

The definition of "qualified Native Hawaiian constituent" was added to require not only descent from the aboriginal, indigenous, native inhabitants of Hawaii, but also maintenance of "a significant cultural, social, or civic connection to the Native Hawaiian community."

An individual must demonstrate this connection by satisfying at least two of ten listed criteria, which include, among others, residence in Hawaii, residence on Hawaiian Homes Commission Act lands (or status as the child or grandchild of such a resident), eligibility to be a beneficiary of Hawaiian Homes Commission Act programs, status as the child or grandchild of a person with such eligibility, residence or ownership interest in "*kuleana* land"[108] that is owned in whole or in part by a verified lineal descendant of the person who received original title to such land (or status as a child or grandchild of a person with such a residence or ownership interest), attendance for at least one school year at a school or program taught through the medium of the Hawaiian language or at a school founded and operated primarily or exclusively for the benefit of Native Hawaiians (or status as the child or grandchild of a person who attended such a program for at least one school year), membership in a Native Hawaiian organization,[109] or recognition as Native Hawaiian and as the son or daughter of a person recognized as Native Hawaiian by certain other members of the Native Hawaiian community.[110] The inclusion of these criteria will provide that the persons who participate in the reorganization of the Native Hawaiian governing entity are persons with Native Hawaiian ancestry who have established ties to the Native Hawaiian community.

There is precedent for using associative factors such as kinship, land, and participation in native organizations to determine tribal

---

[107] *See* 25 U.S.C. §§ 3001–3013.

[108] "Kuleana land" is defined as "lands granted to native tenants pursuant to Haw. L. 1850, p. 202, entitled 'An Act Confirming Certain Resolutions of the King and Privy Council Passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges', as amended by Haw. L. 1851, p. 98, entitled 'An Act to Amend An Act Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges' and as further amended by any subsequent legislation." Kuleana lands are parcels of land granted to native Hawaiian tenant farmers between 1850 and 1855. From 1845 to 1848, in what is known as the Great Mahele, King Kamehameha III divided up land among the Kingdom, high-ranking chiefs, and the territorial government, subject to the rights of the native tenants. Law of June 7, 1848, *reprinted in* 2 Rev. Laws Haw. 2152, 2174 (1925); Mauka to Makai Report, *supra* note 24. The Act of Aug. 6, 1850 (the Kuleana Act) provided a process by which native tenants who had occupied and improved the land could apply to the Land Commission for a royal patent and obtain fee title to those parcels of land. *Id.* at 24. Less than 30,000 acres of land were awarded under the Kuleana Act. Cohen's Handbook, *supra* note 9, § 4.07[4][b], at 367 (citing Jon Chinen, The Great Mahele: Hawaii's Land Division 31 (1958)).

[109] Any person who has been a member since September 30, 2009, of two or more Native Hawaiian membership organizations would satisfy the requirement of maintaining a significant cultural, social, or civic connection to the Native Hawaiian community.

[110] To execute a sworn affidavit stating that a person is, and his or her mother or father is or was, regarded as Native Hawaiian by the Native Hawaiian community, the affiant must himself or herself be a "qualified Native Hawaiian constituent" and also must be certified by the Commission as "possessing expertise in the social, cultural, and civic affairs of the Native Hawaiian community." The Commission should construe the latter phrase broadly, to include elders or *kupuna*; heads of extended families; cultural practitioners; leaders and long-standing members of Native Hawaiian political, civic, cultural, artistic, literary, spiritual, or social organizations; teachers or scholars of Native Hawaiian studies, language, or history; and any other qualified Native Hawaiian constituent who understands, has daily interactions with, and is involved with the social, cultural, or civic life of the Native Hawaiian community.

membership.[111] The last criterion, recognition as Native Hawaiian by the Native Hawaiian community, is also akin to criteria used to define membership in a native community in other contexts.[112] The definition of "qualified Native Hawaiian constituent" will ensure that the persons who participate in the reorganization of the governing entity demonstrate a significant cultural, social, or civic connection to the Native Hawaiian community and further ensures that the Native Hawaiian governing entity will represent a distinctly Native American community.[113]

Section 4. United States policy and purpose

Section 4 was amended to further enumerate portions of the Constitution from which Congress derives its authority to deal with Native Hawaiians.

The purpose of the Act is to provide a process for the reorganization of a 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. In acting to promote Native Hawaiian autonomy and self-government, Congress is acting in accord with the United States' policy over the last several decades toward Indian tribes and Native Americans generally.[114]

Section 5. United States Office for Native Hawaiian Relations

Section 5 was amended to require timely notice and consultation between the Native Hawaiian governing entity and the United States Office for Native Hawaiian Relations before beginning any

---

[111] *See, e.g.*, 25 CFR § 83.7(b)(1)(vii), (2)(iv) (including "language" and "kinship organization[s]" among the criteria the Department of the Interior considers in determining whether petitioning tribes can establish that they are a distinct community). In its tribal acknowledgment process, the Department of the Interior has repeatedly relied on participation in community organizations as an important indicator of the existence of a distinct community. Activities that the Department has cited in support of the existence of a community include churches, organizations devoted to management of group cemeteries, the existence of organized social functions or collective economic activity, and organized participation in political activities and debate. Branch of Acknowledgment & Research, U.S. Dep't of the Interior, Acknowledgment Precedent Manual 26–32 (Draft, Mar. 1, 2002) [hereinafter Acknowledgment Precedent Manual]. For example, in concluding that it was appropriate to acknowledge the Jena Band of Choctaw Indians as a sovereign tribe, the Department cited, among other considerations, the Band's collective maintenance of a cemetery and associated traditional practices, and the existence of a tribal organization that "conducts Choctaw language and history classes at the tribal center after school hours and during the summer." Proposed Finding for Federal Acknowledgment of the Jena Band of Choctaw Indians, 59 Fed. Reg. 54,496 (Oct. 31, 1994); *see also* Final Determination for Federal Acknowledgment of the Jena Band of Choctaw Indians, 60 Fed. Reg. 28,480 (May 31, 1995) (final acknowledgment). Likewise, the ability of leaders to organize a community to address a particular issue has been cited as evidence of the existence of internal political organization, another criterion for acknowledgment. For example, the Acknowledgment Precedent Manual cites the ability of a Narragansett leader to organize opposition to the draining of a cedar swamp as evidence supporting acknowledgment of that group. Acknowledgment Precedent Manual, *supra*, at 40.

[112] *See, e.g.*, Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(b) (ANCSA).

[113] *See United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (referring to "distinctly Indian communities"); *see also United States* v. *Chavez*, 290 U.S. 357, 363 (1933) (same); *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926) (same).

[114] *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(a) (recognizing the United States' obligation to advance Indian "self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (expressing Congress's policy "to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources"); *see also* Exec. Order No. 13,175, 59 Fed. Reg. 22,951 (Nov. 9, 2000) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.").

action that may affect Native Hawaiian resources, rights, or lands. This section also contained some technical amendments.

Section 6. Interagency Coordinating Group

Section 6 was amended to add the White House Office of Intergovernmental Affairs as a co-leader of the Interagency Coordinating Group.

The entities established in sections 5 and 6 provide advice and consultation during the formation of the Native Hawaiian governing entity and after its recognition by the United States. The nature and form of the consultation between these entities is expected to parallel the consultation process for Indian tribes, which is guided by the requirements of Executive Order 13175 and by the President's November 5, 2009 memorandum on the implementation of that Order. Executive Order 13175 requires that Federal agencies have in place a process to allow meaningful input from tribes in the development of regulations and policies that have significant implications for tribes. The Committee anticipates that the consultation envisioned by sections 5 and 6 will proceed in a similar manner with regard to the Native Hawaiian governing entity.

Section 7. Department of Justice representative

Section 7 is a new section which requires a Department of Justice official to assist the Office for Native Hawaiian Relations in the implementation and protection of the rights of Native Hawaiians and the Native Hawaiian governing entity. The Department of Justice already has an office that performs a similar function with respect to the Department's relationship with Indian tribes, the Office of Tribal Justice. The Committee anticipates that the official designated under this section will carry out his or her functions in a similar manner.

Section 8. Process for reorganization and federal recognition

All portions of section 8 were amended to reflect the definition changes in section 3. Section 8 was originally section 7 in the introduced version.

The underlying bill establishes a Commission to prepare and maintain a roll of the "qualified Native Hawaiian constituents" who elect to participate in the reorganization of a single Native Hawaiian governing entity. In section 8(b)(2), the section defining the membership of the Commission, the substitute amendment allows for traditional cultural experience to be considered in looking at candidates for appointment to the Commission.

Section 8(c)(1), entitled "Roll", was amended to allow a presumption of meeting the lineal descent requirement for an individual presenting evidence that he or she satisfies the definition in Section 2 of Public Law 103–150, the Apology Resolution. It was also amended to allow an individual's lineal ancestors on the 1890 census by the Kingdom of Hawaii shall to be considered reliable proof of lineal descent from the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893. The substitute amendment further adds a provision to allow elderly Native Hawaiians and others lacking birth certificates or other documentation to establish lineal descent

by sworn affidavits from two or more qualified Native Hawaiian constituents.

This subsection was further amended to establish a process to ensure authenticity of submitted documents and inform an individual whether they have been deemed a qualified Native Hawaiian constituent and of their right to appeal if they were not. A provision outlining the Secretary's failure to act regarding publication of the roll was struck in the substitute amendment. The notice of certification of the roll will be published in the Federal Register by the Commission, regardless of pending appeals. Additional amendments require the Secretary, in consultation with the Commission, to establish an Administrative appeals process. The Commission must provide a copy of the roll and any updated rolls to the Council.

Section 8(c)(2), renamed "Organization of Council," was amended to require the Commission, in consultation with the Secretary, to hold a minimum of three meetings of at least two working days of the qualified Native Hawaiian constituents listed on the roll to develop criteria for candidates, determine the structure of the Council, including the number of Council members, and to elect Council members from the individuals listed on the roll.

The section was further amended to require the Council to perform certain duties as opposed to simply permitting the Council to perform such duties. These duties include representing those listed on the roll, conducting a referendum of those individuals as to the governing documents of the Native Hawaiian governing entity, developing proposed organic documents based on that referendum, and publishing notice of the availability of such documents. The Council may ask the Secretary to ensure that draft organic governing documents comply with this Act and Federal law.

Additional subsections were added to this section to require the Council, with assistance of the Secretary, to hold elections for the purpose of ratifying the proposed organic government documents not sooner than 180 days after the documents are drafted and distributed and 60 days after publishing notice of an election.

Upon certification of the organic governing documents by the Secretary, the Council, with the assistance of the Secretary, is now required to hold elections of the officers of the Native Hawaiian governing entity. In the introduced version, the Council was merely permitted to hold these elections. In addition, the Secretary must, within 180 days of the Council's submission of the organic governing documents, which may be extended an additional 90 days if the Secretary deems necessary, certify or decline to certify that the documents establish membership criteria for the Native Hawaiian governing entity, were adopted by a majority of those listed on the roll who voted in the election, and provide for the exercise of inherent and other appropriate governmental authorities by the Native Hawaiian governing entity. The certifications will be deemed to have been made if the Secretary does not act within 180 days after the date of the Council's submission of the organic governing documents to the Secretary. The introduced version of the bill gave the Secretary 90 days.

Additional subsections were added by the substitute amendment to require the Council to provide a copy of the roll to the governing body of the Native Hawaiian governing entity and to terminate the

Council after the officers of the governing body are elected and installed.

The final subsection of section 8 was amended to clearly state that the special political and legal relationship between the United States and the Native Hawaiian people is reaffirmed and Federal recognition is extended to the Native Hawaiian governing entity as the representative sovereign body of the Native Hawaiian people. This occurs only after approval of the organic governing documents by the Secretary and installation of the officers of the governing body except where expressly limited. The Committee expects the Native Hawaiian governing entity to have the same aspects of sovereignty as other native groups and Indian tribes that have received Federal recognition.

Congress has a long history of enacting such legislation under its Indian affairs power. S. 1011's process for recognizing a Native Hawaiian governing entity is analogous to the process established by prior tribal-reorganization legislation, and is also analagous to the process by which the United States recognizes Indian tribes. For example, S. 1011 would establish a roll of Native Hawaiian constituents that would define those individuals who are qualified to participate in reorganizing the Native Hawaiian governing entity based on lineal descent and continued connection to the Native Hawaiian community and Native Hawaiian lands.

The Commission is expected to be an expert body, with particular expertise in Native Hawaiian genealogy and culture. The Committee recognizes that the task of compiling a roll of qualified Native Hawaiian constituents is likely to be complex and may require technical decisions as to which individuals have a sufficient connection to the Native Hawaiian community, based on the criteria set forth in this legislation. The Committee expects that courts and government agencies will accord significant deference to the Commission's expert decisions and will allow the Commission to make eligibility decisions in the first instance. There is a provision in Section 8(c) for an administrative appeal for any person whose name is excluded from the roll.

Moreover, the Committee emphasizes that the Commission is expected to complete a roll of qualified Native Hawaiian constituents without delay, to allow the organizing process to proceed on schedule. The Committee anticipates that the Commission will establish appropriate deadlines, rules of procedure, and other requirements to allow the timetables set forth in this legislation to be met while giving due consideration to the claims of those seeking to be included on the roll. The sole purpose of the roll established by the Commission is to compile a list of those qualified Native Hawaiian constituents who can take part in the initial reorganization of a Native Hawaiian government. Prior tribal-restoration acts have similarly relied on an initial roll in determining eligibility to participate in tribal-reorganization elections.[115]

The substitute amendment permits elderly Native Hawaiians and other qualified Native Hawaiian constituents lacking birth certificates or other documentation due to birth on Hawaiian Home Lands or other similar circumstances to establish lineal descent by sworn affidavits from two or more qualified Native Hawaiian con-

[115] *See, e.g.*, 25 U.S.C. § 711b(a), (b).

stituents. This provision was included to address cases of hardship, and is not expected to be applied routinely. The Committee anticipates that the Commission will establish specific prerequisites allowing individuals to demonstrate that they are unable to obtain a birth certificate.

In general, Section 8 calls for the Federal Government to play a relatively minor role in setting the rules for the election of officers of the Native Hawaiian governing entity. In particular, while the Federally created Commission will call an initial meeting for persons on the roll, it is these roll members who will determine the criteria for candidates to serve on the Council, determine the structure of the Council, and elect its members. The Committee emphasizes the importance of the deadlines established by this legislation. Barring unusual circumstances, the existence of pending disputes as to the inclusion of particular individuals on the roll should not be allowed to delay the reorganization process set forth in this section. The degree of Federal involvement contemplated by S. 1011 is thus consistent with the historical role Congress has played in assisting Indian tribes and other native groups in reorganizing politically.[116]

Section 9. Negotiations and claims

Section 9 was amended to clarify that in the interim period between recognition of the Native Hawaiian governing entity and any agreements between the three sovereigns, the Native Hawaiian governing entity would, unless expressly limited, exercise powers and authorities typically exercised by Indian tribes and native groups recognized by the United States. This section was further amended to specify that State of Hawaii lands and surplus Federal lands would be part of the negotiations among the three governments.

Section 9(b)(3) was amended to clarify that the Native Hawaiian governing entity would be vested with the inherent powers of a native government, modifiable only by agreement among the three governments. Nothing in the Act, unless agreed upon, preempts Federal or State authority over Native Hawaiians or their property or authorizes the State to tax or regulate the Native Hawaiian governing entity.

A subsection was added to reaffirm that once the Native Hawaiian governing entity is extended federal recognition, it retains the inherent authority to determine its own membership, membership criteria, and whether to grant, deny, revoke, or qualify membership without regard to the definitions in this Act.

A subsection on "Claims" was amended to confirm and clarify that nothing in this Act alters the obligations of the United States or the State of Hawaii relating to events that occurred prior to recognition of the Native Hawaiian governing entity. It clarifies that nothing creates, enlarges, revives, modifies, diminishes, extinguishes, waives, or otherwise alters any claim or cause of action against the United States or its officers or the State of Hawaii or its officers, or any defense to any such claim or cause of action, or

[116] *See id.* § 476(a) (noting that special elections for ratifying tribal constitutions and bylaws may be "authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe . . . ."); *id.* §§ 711a–711f.

amends any Federal statute except as expressly amended by this Act.

In general, Section 9 affirms the inherent powers and privileges of the Native Hawaiian governing entity upon Federal recognition. The specific demarcations of authority among the State, the Native Hawaiian sovereign, and the United States are most appropriately determined by agreement among those three sovereigns, as provided for by Section 9(b). Recognition of the Native Hawaiian sovereign is a necessary precondition to negotiating such an agreement.

It is the Committee's expectation that the parties will engage in these negotiations in good faith to resolve the issues in a just manner, accounting for the unique history and circumstances of the Native Hawaiian people. This should be done without compromising the inherent authority of the Native Hawaiian governing entity to exercise those powers, privileges, and immunities typically exercised by governments representing the native peoples of the United States. Historically, when Congress has enacted legislation allowing for the reorganization of native governments, it has recognized that those governments are vested with inherent tribal authority under existing Federal law.[117]

Although, the substitute amendment made improvements to clarify the provisions of the bill, the Committee believes that this section would benefit from further clarifying certain limitations on the interim powers of the Native Hawaiian governing entity during the period prior to the completion of negotiations. Any such limitations would be intended to be temporary, remaining in place until such time as the negotiations are concluded and any necessary implementing legislation is enacted. Limitations that may be placed on the inherent powers of the Native Hawaiian governing entity during the period of negotiations may include the following: that (1) there will be no "Indian country" or territory akin to "Indian country" over which the governing entity may assert governmental authority;[118] (2) the United States will not take land into trust for the Native Hawaiian government or its members; (3) that while the Native Hawaiian government will be able to exercise jurisdiction or authority over its own members (membership being voluntary), it will lack any territory-based jurisdiction or authority; (4) the Native Hawaiian governing entity will not be able to exercise jurisdiction or authority over nonmembers (or entities owned wholly or mostly by nonmembers) without their express consent; (5) individual Native Hawaiians will continue to be subject to the civil and criminal jurisdiction of Federal and State courts; and (6) the State can continue to regulate and tax individual Native Hawaiians and their property. In the substitute amendment, these points are for the most part not express, but may be inferred from paragraphs (1) to (4) of Section 9(b). The Committee believes that the Act could benefit from making these points express.

---

[117] *See* Indian Reorganization Act of 1934, 25 U.S.C. § 476(e)–(h); Amendment to Indian Reorganization Act for Alaska (1936), 25 U.S.C. 473a.

[118] "Indian country" is a term codified by Federal statute. 18 U.S.C. § 1151. Although section 1151 defines "Indian country" for the purpose of delineating the scope of Federal criminal jurisdiction over Indians, the Supreme Court has applied the definition to determine the scope of tribal territorial jurisdiction, as well. *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *DeCoteau* v. *District County Ct. for the Tenth Jud. District*, 420 U.S. 425, 427 n.2 (1975).

Further, any such interim limitations are not intended to express the will of Congress with respect to the inherent powers and privileges of native self-government that may be properly exercised by the Native Hawaiian governing entity following the negotiations and the enactment of any implementing legislation.

The inherent powers and privileges of self-government that vest in the Native Hawaiian governing entity upon Federal recognition include, but are not limited to, Native Hawaiians' inherent right to autonomy in their internal affairs, and their inherent right to self-determination and self-governance. This inherent, internal power of self-government, includes, but is not limited to, the power to operate under a form of government of the Native Hawaiians' choosing, the power to define conditions of membership,[119] the authority to regulate domestic relations of members,[120] the power to provide governmental programs and services to members, and sovereign immunity.

During this initial period of negotiation between Federal recognition and any implementing legislation, the substitute amendment protects the authority and interests of the State of Hawaii by providing that "nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law."

The final clause of Section 9(b)(3) is designed to safeguard the governing entity's independence from State and local taxation and regulation when it undertakes core governmental functions. The scope of this protection, once again, is not express, but may be inferred from Section 9(b)(1)–(4), as well as from Federal common law regarding the authority of States to tax and regulate tribes in analogous situations.[121]

The Act would benefit from clarifying the scope of the Native Hawaiian governing entity's immunity from State regulation and taxation. Such a clarification could provide that the State have the ability during the interim period to regulate and tax the non-governmental activities and property of the Native Hawaiian governing entity (and of entities owned by the Native Hawaiian governing entity). Such a clarification should continue, however, to prohibit the State from regulating or taxing governmental, nonbusiness, noncommercial activities undertaken by the Native Hawaiian governing entity (or by entities wholly owned by the Native Hawaiian governing entity). Such activities would include the provision of health care, housing and public safety to members of the Native Hawaiian governing entity, and activities that support those and similar government functions. It is unlikely that the Native Hawaiian governing entity's governmental, nonbusiness, noncommercial activities would have much impact on anyone other than its own Native Hawaiian members. So this potential clarification of the State's power to tax and regulate the Native Hawaiian governing entity during the interim period would be a narrow one and would prevent the State from unduly interfering with Native

---

[119] *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978). Membership in the Native Hawaiian governing entity will be voluntary, paralleling the applicable rule for tribes. Accordingly, no person could be involuntarily subject to the governing entity's inherent powers and privileges.

[120] *See Fisher* v. *District Ct. of the Sixteenth Jud. District of Mont.,* 424 U.S. 382, 387–89 (1976) (per curiam).

[121] *Cf. John* v. *Baker*, 982 P.2d 738 (Alaska 1999) (analyzing a Federally recognized Native tribe's inherent sovereign powers outside of Indian country), *cert. denied*, 528 U.S. 1182 (2000).

Hawaiians' inherent rights to autonomy in their internal affairs, to self-determination, and to self-governance.

In addition, upon Federal recognition, the Native Hawaiian governing entity would be entitled to sovereign immunity from suit.[122] The common-law sovereign immunity possessed by tribes is a "necessary corollary to Indian sovereignty and self-governance."[123] Immunities have a range of functions, including preventing "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[124] In upholding tribal sovereign immunity, courts have recognized Congress's desire, expressed through legislation, to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[125] Accordingly, the Committee believes that the Native Hawaiian sovereign should enjoy the same immunity from lawsuits in Federal and State courts that sovereign Indian tribes and native groups in the continental United States enjoy.[126]

Likewise, the Committee believes that officers and employees of the Native Hawaiian governing entity should enjoy the same common-law immunities as the officers and employees of any Indian tribe. These immunities are similar to those enjoyed by officers and employees of State governments. As with tribal officers, officers of the Native Hawaiian governing entity might be sued for declaratory or injunctive relief under principles akin to the doctrine of *Ex parte Young*.[127] As is also the case with Indian tribal officers, in some circumstances an official of the Native Hawaiian sovereign who acts outside the scope of his or her authority might be liable to a suit for money damages. For example, the Committee believes that a Native Hawaiian legislator could not be sued for libel based on statements made in the course of deliberations by the sovereign's legislative body, as the immunity of the Native Hawaiian sovereign would encompass such conduct. But if an official of the Native Hawaiian governing entity were to defraud a State agency for personal profit in violation of State law, he or she would not have individual immunity for such conduct.

Absent sovereign immunity and protection of the core governmental functions of the Native Hawaiian governing entity from State taxation and regulation, the State could wield vast power against the governing entity. That imbalance would give the State little incentive to negotiate for a fair, long-term allocation of powers, authorities, and immunities among the three sovereigns.

---

[122] *See Kiowa Tribe of Oklahoma* v. *Mfg. Techs, Inc.,* 523 U.S. 751, 764 (1997); *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 58 (1978). Tribal sovereign immunity applies to activities either within or outside Indian country. *See Kiowa Tribe,* 523 U.S. at 764; *Runyon ex rel. B.R.* v. *Ass'n of Village Council Presidents,* 84 P.3d 437, 439 & nn.3–4 (Alaska 2004).

[123] *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g,* 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978)).

[124] *Harlow* v. *Fitzgerald,* 457 U.S. 800, 816 (1982).

[125] *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 510 (1991) (quoting *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987)).

[126] As is the case for Indian tribes generally, the Native Hawaiian governing entity could waive its sovereign immunity (by contract or by statute), provided that it does so clearly and unequivocally; and the Native Hawaiian governing entity would not be immune from any lawsuit brought by the United States in any Federal court. Furthermore, real property owned in fee simple by the Native Hawaiian governing entity would not be immune from any in rem action filed by the State. *See County of Yakima* v. *Confederated Tribes,* 502 U.S. 251, 265 (1992); *Keweenaw Bay Indian Cmty.* v. *Rising*, 477 F.3d 881, 894–95 (6th Cir. 2007).

[127] *Ex parte Young,* 209 U.S. 123 (1908).

At some point after the United States' initial recognition of the newly reorganized Native Hawaiian governing entity, negotiations among the three sovereigns—the United States, the State of Hawaii, and the Native Hawaiian governing entity—could alter many of the above-discussed ground rules that are implicit in section 9(b) of the substitute amendment. For example, if the three sovereigns eventually agreed to the creation of Indian country within the State of Hawaii, and legislation was enacted to implement that agreement, it is possible that the Native Hawaiian governing entity could then exercise certain limited types of authority or jurisdiction over nonmembers.

Once the Native Hawaiian governing entity is reorganized, the United States will recognize and affirm the entity's inherent power and authority (akin to the inherent power and authority of any Indian tribe) to determine its own membership criteria, to determine its own membership, and to grant, deny, revoke, or qualify membership without regard to whether any person was or was not deemed to be a "qualified Native Hawaiian constituent" under this Act. Membership criteria set forth in the Native Hawaiian governing entity's organic governing documents should provide that membership is voluntary and can be relinquished, as is typically the case with Indian tribes.

As noted in section 9(c), this legislation does not provide the basis for the Native Hawaiian governing entity or other Native Hawaiian groups to relitigate claims that have already been resolved by the courts or to retroactively impose new obligations on the Federal Government or the State of Hawaii. Native Hawaiian claims—in contrast to those of most newly recognized tribes—have been extensively litigated over the past 100 years. There has been extensive litigation relating to land claims, claims for money damages, and other types of claims, dating back at least to 1908.[128] The Committee envisions that issues concerning asserted historic or moral wrongs may be the subject of negotiations among the Native Hawaiian governing entity, the State of Hawaii, and the United States, together with the other issues encompassed within the process set forth in section 9(b) of this Act, and that such negotiations will provide an appropriate forum in which to address these claims questions.

Section 10. Applicability of Federal laws

Section 10 was amended to state that the Council, established by section 8(c)(2), and the subsequent Native Hawaiian governing entity will be considered an "Indian tribe" for the purposes of sections 201 through 203 of the Indian Civil Rights Act of 1968.

In addition, the substitute amendment clarifies that nothing in this Act would extend eligibility for any Indian program for the Na-

[128] *E.g., Hawaii* v. *Office of Hawaiian Affairs,* 129 S. Ct. 1436 (2009); *Han* v. *Department of Justice,* 824 F. Supp. 1480, 1486 (D. Haw. 1993), *aff'd*, 45 F.3d 333 (9th Cir. 1995); *Keaukaha-Panaewa Cmty. Ass'n* v. *Hawaiian Homes Comm'n,* 588 F.2d 1216, 1224 n.7 (9th Cir. 1979); *Na Iwi O Na Kupuna O Mokapu* v. *Dalton,* 894 F. Supp. 1397 (D. Haw. 1995); *Liliuokalani* v. *United States,* 45 Ct. Cl. 418 (1910); *see also Burgert* v. *Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661 (9th Cir. 2000); *'Ohana* v. *United States,* 76 F.3d 280 (9th Cir. 1996); *Price* v. *Akaka,* 3 F.3d 1220 (9th Cir. 1995); *Ulaleo* v. *Paty,* 902 F.2d 1395 (9th Cir. 1990); *Bush* v. *Watson,* 918 P.2d 1130 (Haw. 1996); *Aged Hawaiians* v. *Hawaiian Homes Comm'n,* 891 P.2d 279 (Haw. 1995); *Bush* v. *Hawaiian Homes Comm'n,* 870 P.2d 1272 (Haw. 1994); *Pele Defense Fund* v. *Paty,* 837 P.2d 1247 (Haw. 1992); *Territory* v. *Kapiolani,* 18 Haw. 640 (Haw. Terr. 1908); *Territory* v. *Puahi,* 18 Haw. 649 (Haw. Terr. 1908).

tive Hawaiian governing entity or its members unless it explicitly states they are eligible. Again, unlike most newly recognized native governments, Congress has consistently established separate programs for Native Hawaiians. The Committee expects that for the foreseeable future, funding for Native Hawaiians remains separate, but with the understanding that sometime in the future, it may make sense to include Native Hawaiians in other native programs and extinguish some of the Native Hawaiian specific programs. A similar approach was taken with Alaska Natives. Nothing in this Act affects eligibility for any program or service in effect before the date of enactment of this Act.

Subsections were added to clarify that the terms "Indian" and "Native American" in Federal statutes or regulations in force prior to United States' recognition of the Native Hawaiian governing entity, do not apply to the Native Hawaiian governing entity or its members unless it expressly does so. In addition, new subsections clarify that the Indian Trade and Intercourse Act does not apply to any land transfer involving Native Hawaiians or Native Hawaiian entities that occurs prior to recognition of the Native Hawaiian governing entity.

As stated above, the substitute amendment expressly makes the Indian Civil Rights Act of 1968[129] applicable to the Council and the Native Hawaiian governing entity. The Indian Civil Rights Act (ICRA) provides certain protections similar to those under the Bill of Rights and the Fourteenth Amendment.[130] Similar to how the Bill of Rights and Fourteenth Amendment operate to constrain the United States and the several states in the exercise of their powers, ICRA will restrict the actions of the Native Hawaiian governing entity and will prohibit it from violating, for example, the due-process and equal-protection rights of members and nonmembers alike.

Importantly, because this provision makes ICRA expressly applicable to the Native Hawaiian governing entity, a person would be able to file a habeas corpus petition in Federal court to challenge the legality of his detention by an order of the Native Hawaiian governing entity.[131] While ICRA allows a person to bring a habeas action, and thus serves as a limited waiver of the Native Hawaiian governing entity's sovereign immunity, it is not a general waiver of the entity's sovereign immunity.[132]

By incorporating only those statutes that expressly reference Native Hawaiians, Section 10(d)(2) attempts to provide clear direction to Federal agencies regarding which programs and statutes are available to Native Hawaiians, and to avoid statute-by-statute litigation over the scope of these statutes. The Committee anticipates that a body of law addressing Native Hawaiians will develop over time, based on currently existing statutory and regulatory provisions and new legislation and court decisions.

This language is intended to avoid uncertainty, and potential litigation, as to whether Native Hawaiians are properly considered "Indians," or the Native Hawaiian sovereign is properly considered an "Indian tribe" under every existing statute involving Indians

[129] 25 U.S.C. §§ 1301–03.
[130] *See id.* § 1302.
[131] *Id.* § 1303.
[132] *See Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 58–59 (1978).

and Indian tribes. These terms occur throughout the United States Code and associated implementing regulations. Such references to "Indians" and "tribes" were not generally intended to encompass Native Hawaiians. When Congress has wanted to reference Native Hawaiians, it has done so expressly. There is an extensive body of Federal Indian statutes and regulations specifically addressing Native Hawaiians, often in conjunction with other Native Americans.[133]

Section 10(e) addresses the Indian Trade and Intercourse Act. First enacted in 1790, that Act requires Congressional assent to transfers of Indian land title to third parties. The Indian Trade and Intercourse Act has never been thought to apply to the alienation of Native Hawaiian lands. As a result, parties have not sought Congressional ratification pursuant to 25 U.S.C. § 177 prior to the transfer of these lands. To apply the Indian Trade and Intercourse Act retroactively could impose significant liabilities on landowners in Hawaii, as well as on the State of Hawaii and the Federal Government. The provision in section 10(e) eliminates the possibility of a cloud on title issuing from the Indian Trade and Intercourse Act. Section 10(e) is primarily directed to the State and private parties, but the language is written to include all transactions, including those involving the Federal Government, to avoid future uncertainty and litigation.

Section 11. Severability

Other than to change the section number from 10 to 11, this section was not amended.

Section 12. Authorization of appropriations

Other than to change the section number from 11 to 12, this section was not amended.

SECTION-BY-SECTION OF S. 1011, AS AMENDED

Section 1. Short title

Section 1 sets forth the short title for the bill as the "Native Hawaiian Government Reorganization Act of 2009."

Section 2. Findings

Section 2 sets forth Congressional findings that support this legislation. These findings, among other things, identify some of the key respects in which Congress has previously legislated for the benefit of the Native Hawaiian people—thereby recognizing them as a distinctly native community within Congress's power to legislate in respect of Indian tribes. The findings also discuss some of the past and current ways in which the Native Hawaiian people have preserved their culture, traditions, and identity as a distinctly native people, and have given expression to their rights as native people to self-determination, self-governance and economic self-sufficiency.

---

[133] *E.g.,* American Indian Religious Freedom Act, 42 U.S.C. § 1996; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013; Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992d.

Section 3. Definitions

Section 3 sets forth a number of definitions of terms used in this Act, including definitions for the term "aboriginal, indigenous, native people," "Native Hawaiian membership organization", and "qualified Native Hawaiian constituent".

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 membership organization" is defined as "an organization that . . . serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs; . . . has leaders who are elected democratically, or selected through traditional Native leadership practices, by members of the Native Hawaiian community; . . . advances the cause of Native Hawaiians culturally, socially, economically, or politically; . . . is a membership organization or association; and . . . has an accurate and reliable list of Native Hawaiian members."

The term "qualified Native Hawaiian constituent" identifies adult U.S. citizens who, subject to the procedures and provisions of Section 8 of the Act, will be eligible to participate in the reorganization of the Native Hawaiian governing entity. The term is defined in part 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, 1920 (42 Stat. 108, chapter 42), or a direct lineal descendant of that individual."

In addition to certifying lineal descent requirements, as provided above, qualified Native Hawaiian constituents must be U.S. citizens, 18 years of age or older, wish to participate in the reorganization process, and maintain a significant cultural, social, or civic connection to the Native Hawaiian community, as evidenced by satisfying two or more of the ten listed criteria.

Section 4. United States policy and purpose

In section 4, the United States reaffirms its political and legal relationship with the Native Hawaiian people, and the distinctly native nature of the Native Hawaiian community. Section 4 also explains that Congress is exercising its authority to enact legislation directed to Native Hawaiians, as it has previously done in more than 150 Federal laws. This section also reaffirms 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. This section states 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 a 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 the Interior and sets forth the duties of the Office. 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. Designation of Department of Justice representative

Section 7 provides for a representative from the Department of Justice to assist the Office for Native Hawaiian Relations with the implementation of this Act to ensure that all constitutional parameters, rights, and protections are observed.

Section 8. Process for reorganization of Native Hawaiian Governing Entity and reaffirmation of special political and legal relationship between United States and Native Hawaiian Governing Entity

Section 8 outlines the process for the reorganization of the Native Hawaiian governing entity. Section 8 initially establishes that the United States recognizes the right of the qualified Native Hawaiian constituents to reorganize the single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents.

A Commission composed of nine members is established to prepare and maintain a roll of the "qualified Native Hawaiian constituents" who elect to participate in the reorganization of a single Native Hawaiian governing entity. The qualifications for appointment by the Secretary to the Commission as well as the duties and parameters of the Commission are outlined in this section.

Following the establishment of the Commission, a process for reorganization of a single Native Hawaiian governing entity is set forth. First, a roll of the names of the qualified Native Hawaiian

constituents is established, as defined by section 3. The Commission is required to determine the types of documentation that can be submitted to the Commission for a determination to be made on whether an individual meets the definition of "qualified Native Hawaiian constituent" for the purposes of establishing a roll. The Commission must submit to the Secretary of the Interior an established roll and certify that individuals on the list satisfy the requirements of the definition in section 3. The certified roll shall be published in the Federal Register. An appeal mechanism shall be established by the Secretary of the Interior in consultation with the Commission for any person whose name is excluded from the roll but who claims to meet the definition of "qualified Native Hawaiian constituent." The Commission is responsible for updating the roll.

The Commission, in consultation with the Secretary, will hold a minimum of three meetings that are at least two working days of the qualified Native Hawaiian constituents listed on the roll to organize the Native Hawaiian Interim Governing Council. The qualified Native Hawaiian constituents 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 from individuals listed on the roll 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 of the organic governing documents, they shall be submitted to the Secretary. The Secretary must certify that the organic documents contain criteria for future membership in the Native Hawaiian governing entity; were adopted by a majority vote of the qualified Native Hawaiian constituents on the published roll who chose to vote in the election; provide authority for the Native Hawaiian entity to negotiate; provide for the exercise of inherent authorities of the Native Hawaiian governing entity; prevent the sale, disposition, lease, or encumbrance of lands, interests in lands or other assets of the Native Hawaiian governing entity; provide for 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 governing documents are consistent with applicable Federal law.

Upon certification of the organic governing documents and the election and installation of officers of the Native Hawaiian governing entity, the Council shall cease to exist. Once this occurs, 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 as the representative sovereign governing body of the Native Hawaiian people.

Section 9. Reaffirmation of delegation of Federal authority to State of Hawaii; negotiations; claims

Section 9 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 enter into negotiations with the Native Hawaiian governing

entity. The Native Hawaiian governing entity will exercise the inherent governmental powers of a native government under existing law, only modified by agreement among the Native Hawaiian governing entity, the United States, and the State. These agreements address such matters as the transfer of State of Hawaii lands and surplus Federal 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 exercise of other powers and authorities that are recognized by the United States as powers and authorities typically exercised by governments representing indigenous, native people of the United States; 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 on any matter or matters, negotiated with the United States or the State of Hawaii, and the Native Hawaiian governing entity, the parties may submit recommendations for proposed amendments to Federal law that will enable the implementation of these agreements to both the Federal and State governments.

This section clarifies that the Native Hawaiian governing entity shall be vested with the inherent powers and privileges of self-government of a native government under existing law. These powers may be modified through negotiations and by agreement between the three entities, with the exception of section 10(a) of the Act. Nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law or authorize the State to tax or regulate the Native Hawaiian governing entity, unless so agreed by the three entities. In addition, the United States recognizes and affirms the Native Hawaiian governing entity's inherent power and authority to determine its own membership once Federal recognition is extended.

Finally, this section further addresses potential or existing causes of action against the United States or any other entity or person. It specifically states that nothing in this Act alters existing law, including case law, regarding obligations of the United States or the State of Hawaii relating to events or actions that occurred prior to recognition of the Native Hawaiian governing entity. In addition, this Act does not create, enlarge, revive, modify, diminish, extinguish, waive, or otherwise alter any claim or cause of action against the United States or its officers or the State of Hawaii or its officers, or any defense (including the defense of statute of limitations) to any such claim or cause of action. Nor does the Act alter the applicable statutes of limitations. This section also lists a number of other Acts which this Act would not amend unless expressly stated in this Act.

Section 10. Applicability of certain Federal laws

Section 10 prohibits the Native Hawaiian governing entity and Native Hawaiians from conducting gaming as a matter of claimed inherent authority or under any Federal law, in the State of Hawaii or within any other State or Territory of the United States.

Only one Native Hawaiian governing entity may be recognized pursuant to this Act. The Council and the subsequent governing entity recognized under this Act shall be an Indian tribe as defined in the Indian Civil Rights Act of 1968. No other groups shall be eligible for the Federal Acknowledgment Process. In addition, this section clarifies that 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 members shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws.

Finally, this section makes clear that the Indian Trade and Intercourse Act does not apply to land conveyances, titles or claims involving Native Hawaiians or Native Hawaiian organizations prior to the date of the United States' recognition of the Native Hawaiian governing entity.

Section 11. 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 12. Authorization of appropriations

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

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On December 17, 2009, in an open business meeting, the Committee considered S. 1011 and ordered, by voice vote, that the bill be favorably reported with an amendment in the nature of a substitute to the Senate, and that the bill, as amended, do pass.

COST AND BUDGETARY CONSIDERATIONS

S. 1011—Native Hawaiian Government Reorganization Act of 2009

S. 1011 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing this legislation would cost about $1 million annually over the 2010–2012 period and less than $500,000 in each subsequent year, assuming the availability of appropriated 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) to consult and coordinate the relationship with the Native Hawaiian governing entity. Based on information from DOI, CBO expects that the office would require up to three full-time personnel. S. 1011 also would establish the Native Hawaiian Interagency Coordinating Group, consisting of officials from DOI and certain other federal agencies. Finally, the bill would create a nine-member commission responsible for creating and certifying a roll of adult Native Hawaiians. Based on information from DOI, CBO expects that this commission would need three years and three full-time staff to complete its work.

CBO has determined that section 10(c) of S. 1011 is excluded from review for mandates under the Unfunded Mandates Reform Act (UMRA) because it enforces constitutional rights of individuals. Other provisions of the bill contain no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government unit to represent Native Hawaiians. The transfer of any land or other assets, including land now controlled by the state of Hawaii, would be the subject of future negotiations.

On January 7, 2010, CBO transmitted a cost estimate for H.R. 2314, the Native Hawaiian Government Reorganization Act of 2009, as ordered reported by the House Committee on Natural Resources on December 16, 2009. S. 1101 contains a provision not included in H.R. 2314 that enforces certain constitutional rights. That difference in the bills is reflected in the mandates statements of the cost estimates. Otherwise, the two bills are similar, and the estimated costs are the same.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF VICE CHAIRMAN BARRASSO

I have given my views on this bill, S. 1011, during the Committee's hearing in August of 2009 and during the business meeting last December during which the Committee approved by voice vote the substitute amendment: I cannot support this bill.

There are many aspects of the substitute amendment that are either troubling or give me great pause, but for purposes of this statement of additional views I will confine my remarks to what I think is the principal problem of this bill, both as introduced and as it would be amended by the substitute. In short, the bill presupposes that the group, entity or organization that would emerge from the process authorized in the bill is an "Indian tribe" within the meaning of the United States Constitution, or is at least the functional equivalent of an Indian tribe for constitutional purposes.

That is a presupposition that I am unable and unwilling to make.

Many people take the position that, as a matter of law and fact and history, Native Hawaiians simply cannot be recognized as a group in the same way that Indian tribes are recognized. On the other hand, many others take the position that indeed Native Hawaiians can be recognized that way, as a group that is functionally and legally the equivalent of an American Indian tribe. In our Committee hearings on this and prior versions of the Native Hawaiian recognition bill we have heard from proponents of both sides of the question.

During the Committee hearing on S. 1011 in August of 2009, Professor Stuart Minor Benjamin of Duke Law School submitted testimony suggesting that the question whether a Native Hawaiian government can or should be federally recognized is an exceedingly difficult one, fraught with many legal and constitutional issues that deserve serious consideration.

The significance of Federal recognition of an Indian tribe is far reaching—for the tribe, for its members, and for the United States.

That is why we have an administrative recognition process in the Department of the Interior: to determine which native groups should be recognized by the Federal government as Indian tribes, and which native groups should not. The analysis that goes into that determination is very exacting, covering a number of historical, ethnographic, and other relevant factors relating to the tribal group and its members.

I appreciate that the substitute amendment includes provisions that would impose a number of new requirements for enrollment to participate in the referendum process authorized by the bill. These new requirements would likely limit the size of the population that would vote on the governing documents, including a requirement that, to be eligible to enroll, a person of Native Hawaiian descent also would have to provide evidence of minimum ties

or relationships to "the Native Hawaiian community," such as ties to certain Native Hawaiian lands, eligibility for benefits under the Hawaiian Homes Commission Act, or participation in Native Hawaiian organizations.[1] Nevertheless, these new requirements seem rather minimal and arbitrary, and in any event give me little or no comfort that what we are coming up with in this bill is an Indian tribe, or the constitutional equivalent of an Indian tribe.[2]

I continue to believe that the best way to determine whether Native Hawaiians should be treated as an Indian tribe is not to have Congress deem them to be so as this bill would do but instead to authorize them to pursue the same administrative process at the Department of the Interior that other native groups must pursue, so that they, like these other groups, can make their best case for Federal recognition within that process.

S. 1011, as introduced and as embodied in the substitute amendment filed by Senator Akaka, jumps to the conclusion that the group that ultimately organizes under the bill should be treated like a federally recognized Indian tribe. Respectfully, I do not think that we, as members of this Committee and of the Senate, can or should make the determination that the Native Hawaiian governing entity should be treated as a federally recognized Indian tribe.

For that reason I cannot support this bill.

JOHN BARRASSO.

---

[1] *See* the definition of "qualified Native Hawaiian constituent" in section 3(12) of the substitute amendment. In addition to other requirements, this definition sets forth a list of 10 criteria, any 2 or more of which will suffice to demonstrate that the person maintains "a significant cultural, social, or civic connection to the Native Hawaiian community. . . ."

[2] The reorganization process set forth in section 8 of the bill seems almost outcome determinative. Would many "qualified Native Hawaiian constituents" who do *not* support recognition of a Native Hawaiian government gather the evidence of eligibility necessary to enroll under the substitute amendment, pursue the enrollment process, and then cast their votes *against* ratification of governing documents? Perhaps, but it seems highly unlikely. To the contrary, the process appears to be one that will tend to enroll those who favor recognition and not those who are either opposed or indifferent to recognition.

ADDITIONAL VIEWS FROM SENATOR MCCAIN

For years, the Senate Committee on Indian Affairs has been considering legislation that would establish a process for reorganization and federally recognizing a native Hawaiian government. I understand that this legislation has been offered in response to several concerns expressed by the members of the Hawaii delegation. I am very much aware that one of the purposes of this legislation is to insulate current native Hawaiian programs from constitutional attack in the courts, and I am sympathetic to that purpose. However, that does not change the fact that I have serious doubts about the wisdom of this legislation.

If enacted, S. 1011 would result in the formation of a sovereign government for Native Hawaiian people, which carries with it the privilege of sovereign immunity from lawsuits, and the powers to tax, to promulgate and enforce criminal code, and to exercise eminent domain. I cannot turn away from the fact that this bill bases this new nation exclusively—not primarily, not in part, but exclusively—on race. This approach has drawn criticism from the U.S. Commission on Civil Rights, which recommended against passage of a similar native Hawaiian bill, S. 147, during the 109th Congress, and warned that the proposal would "discriminate on the basis of race" and "further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

The Constitution provides the federal government with the power to recognize tribes with a continuous history of separate self-governance, but it does not give it the power to reconstitute or create a new tribe made up of a collection of United States citizens demanding special status. Regrettably, at its core, this bill embraces the dangerous concept of conferring special privileges on one racial group over others. This is unacceptable to me, and it is unacceptable, I am sure, to most other citizens of this Nation who agree that we must continue our struggle to become and remain one people—all equal, all Americans.

JOHN MCCAIN.

ADDITIONAL VIEWS OF TOM COBURN

I want to thank my colleagues for this opportunity to express my grave concerns with S. 1011, "the Native Hawaiian Government Reorganization Act," now being reported by the Indian Affairs Committee.

As my colleagues on the committee know well, this bill has been around for some time. I have many serious objections to this bill, and have submitted a series of documents to the Committee outlining most of those concerns.

I will focus my many comments on the one question that matters most: Does Congress have the Constitutional authority to take this unprecedented action?

IS THE BILL CONSTITUTIONAL?

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

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

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

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

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

I have submitted volumes of information in the official committee hearing record from constitutional scholars and historians that underscore this lack of authority and the serious harm this precedent will establish. I encourage my colleagues to examine those documents in detail. The evidence is quite clear.

Ironically, many of the bill's strongest opponents have previously agreed with these concerns. For instance:

In 1998, the State of Hawaii (now one of the strongest supporters of the bill—expending considerable resources) had this to say in a

brief before the U.S. Supreme Court: "*the tribal concept simply has no place in the context of Hawaiian history.*"[1]

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

Senator Inouye went on to say: ". . . That is why concerns which are premised on the manner in which Federal Indian law provides for the respective governmental authorities of the state governments and *Indian tribal governments simply don't apply in Hawaii.*"[2]

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

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

If the statements of the bill's supporters are accurate, it is not even clear whether the Indian Affairs Committee had proper jurisdiction to review this bill.

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

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

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

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

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

WHAT IS THE SOLUTION?

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

---

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

[2] Inouye, Daniel Senator, "Statement on Introduced Bills and Resolutions." January 25, 2005.

[3] *http://memory.loc.gov/ammem/today/jun02.html*

[4] *http://www.capitol.hawaii.gov/hrscurrent/Vol01__Ch0001-0042F/03-ORG/ORG__0004.HTM*

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

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

This committee should take the supporters of Native Hawaiian governmental recognition at their word. If they are indeed a distinct Indian community with historic ties to the federal government, and who has continued to exercise continuous governmental authority after an official termination, a Native Hawaiian entity should submit an application to OFA. If it believes it is not eligible for this process, Congress can easily authorize it to submit an application.

THE LEGISLATIVE PROCESS

Even though the Committee has officially reported S. 1011, it is my hope that the people of Hawaii—those most immediately impacted by this bill—will have an opportunity to have their voices heard in Congress. While I mean no disrespect to the panelists who have testified during the legislative hearing, it is clear that those most strongly favoring the creation of a separate Native Hawaiian government have had a dominant voice.

Further, the last minute changes made to this bill during the business meeting have heightened my concerns and should give the State of Hawaii considerable heartburn. The amendment in the nature of a substitute will severely weaken the sovereignty of the State of Hawaii and place it on a path towards two separate Hawaiis—one subject to the Constitution of the United States and built on the proudest traditions of American diversity and the other with undefined "inherent" authority that will reshape the State of Hawaii, and place many of its residents outside the full protections of the Bill of Rights.

In an effort to preserve subsidies put in place for Native Hawaiians and jeopardized by recent Court decisions, this Congress is being asked to act outside of its Constitutional bounds and completely redefine the Indian Commerce Clause. This is a dangerous precedent for our nation.

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

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

TOM COBURN.

EXECUTIVE COMMUNICATIONS

The Committee held a hearing on S. 1011 on August 6, 2009, at which Sam Hirsch, Deputy Associate Attorney General, U.S. Department of Justice, presented a statement on behalf of the Administration. In this statement, Mr. Hirsch acknowledged that many of the Administration's concerns with previous versions of the Native Hawaiian Government Reorganization Act had been addressed in S. 1011. He also stated that the Department of Justice strongly supported the core policy goals of this bill, while recognizing that some of the specific details of the legislation were still being addressed. Mr. Hirsch's statement was made a part of the hearing record for the Committee.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impact of S. 1011 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 1011 will not make any changes in existing law.