Testimony of Hawaii Attorney General Mark J. Bennett
before the House Subcommittee on the Constitution,
Tuesday, July 19, 2005, 2:00 p.m., addressing the Question
"Can Congress Create A Race-Based Government?:
The Constitutionality of H.R. 309/S. 147"

Good afternoon. Thank you for giving me the opportunity to address the important question presented today. Let me begin by noting, with due respect, that the title of this hearing "Can Congress Create a Race-Based Government?" itself reflects a fundamental misunderstanding of what the Akaka Bill does, and assumes a conclusion, erroneous I submit, to the very question it purports to ask.

Simply put, the Akaka Bill does NOT create a race-based government. In fact, the fundamental criterion for participation in the Native Hawaiian Governing Entity is being a descendant of the native indigenous people of the Hawaiian Islands, a status Congress has itself characterized as being non-racial. For example, Congress has expressly stated that in establishing the many existing benefit programs for Native Hawaiians it was, and I quote, "not extend[ing] services to Native Hawaiians because of their race, but because of their unique status as the indigenous people . . . as to whom the United States has established a trust relationship." [Hawaiian Homelands Homeownership Act of 2000, Section 202(13)(B)]. Thus, Congress does not view programs for Native Hawaiians as being "race-based" at all. Accordingly, a Native Hawaiian Governing Entity by and for Native Hawaiians would similarly not constitute a "race-based" government.

This is not just clever word play, and the contention that recognizing Native Hawaiians would create a "racial" classification would be flat wrong, and would ignore decades of consistent United States Supreme Court precedent. The key difference between the category Native Hawaiians and other racial groups, is that Native Hawaiians, like Native Americans and Alaska Natives, are the aboriginal indigenous people of their geographic region. All other racial groups in this country are simply not native to this country. And because of their native indigenous status, and the power granted the Congress under the Indian Commerce Clause, Native Hawaiians, like Native Americans and Alaska Natives, have been recognized by Congress as having a special political relationship with the United States.

Moreover, although the initial voting constituency encompasses all those with Native Hawaiian blood, that simply reflects the unsurprising obvious fact that native peoples, by definition, share a blood connection to their native ancestors. The Supreme Court, in Morton v. Mancari, upheld a congressional preference for employment of Indians within the Bureau of Indian Affairs, even though not all tribal Indians were given the preference, but only those tribal Indians with one-quarter Indian blood.

Those who contend that the Supreme Court in Rice v. Cayetano found the category consisting of Native Hawaiians to be "race-based" under the Fourteenth Amendment and unconstitutional are also simply wrong. The Supreme Court limited its decision to the context of Fifteenth Amendment voting rights, and expressly refused to address the applicability of Mancari to Native Hawaiian recognition. Indeed, the Supreme Court in Rice made no distinction whatsoever between American Indians and Native Hawaiians.

Some opponents of the Akaka Bill argue that including all Native Hawaiians, regardless of blood quantum, is unconstitutional, citing the concurring opinion of Justices Breyer and Souter in Rice v. Cayetano. But that opinion did not find constitutional fault with including all Native Hawaiians of any blood quantum provided that was the choice of the tribe, and not the state. Because the Akaka Bill gives Native Hawaiians the ability to select for themselves the membership criteria for "citizenship" within the Native Hawaiian government, no constitutional problem arises.

The notion that S.147 creates some sort of unique race-based government at odds with our constitutional and congressional heritage contradicts Congress' longstanding recognition of other native peoples, including American Indians, and Alaska Natives, and the Supreme Court's virtually complete deference to Congress' decisions on such matters.

Hawaiians are not asking for "special" treatment -- they're simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress has recognized the great suffering American Indians and Alaska Natives have endured upon losing control of their native lands, and has, as a consequence, provided formal recognition to those native peoples. Hawaiians are simply asking for similar recognition, as the native indigenous peoples of the Hawaiian

Islands who have suffered similar hardships, and who today continue to be at the bottom in most socioeconomic statistics.

The Constitution gives Congress broad latitude to recognize native groups, and the Supreme Court has declared that it is for Congress, and not the courts, to decide which native peoples will be recognized, and to what extent. The only limitation is that Congress may not act "arbitrarily" in recognizing an Indian tribe. Because Native Hawaiians, like other Native Americans and Alaska Natives, are the indigenous aboriginal people of land ultimately subsumed within the expanding U.S. frontier, and not just a racial minority that descends from foreign immigrants, it cannot be arbitrary to provide recognition to Native Hawaiians. Indeed, because Native Hawaiians are not only indigenous, but also share with other Native Americans a similar history of tragic dispossession, cultural disruption, and loss of full self-determination, it would be "arbitrary" to not recognize Native Hawaiians.

The Supreme Court long ago stated that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be," [U.S. v. McGowan] "whether within its original territory or territory subsequently acquired." [U.S. v. Sandoval]

To those who say that Native Hawaiians do not fall within Congress's power to deal specially with "Indian Tribes," because Native Hawaiians simply are not "Indian Tribes," I say they are simply wrong. For the term "Indian," at the time of the framing of the Constitution, simply referred to the aboriginal "inhabitants of our Frontiers." And the term "tribe" at that time simply meant "a distinct body of people as divided by family or fortune, or any other characteristic." Native Hawaiians easily fit within both definitions.

Furthermore, Congress has already recognized Native Hawaiians to a large degree, by not only repeatedly singling out Native Hawaiians for special treatment, either uniquely, or in concert with other Native Americans, but by acknowledging on many occasions a "special relationship" with, and trust obligation to, Native Hawaiians. In fact, Congress has already expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians." [e.g., Haw'n Homelands Homeownership Act of 2000]. The Akaka Bill simply takes this recognition one step further, by providing Native

Hawaiians with the means to re-organize a formal self-governing entity for Congress to recognize, something Native Americans and Native Alaskans have had for decades.

Some opponents of the bill have noted that Hawaiians no longer have an existing governmental structure to engage in a formal government-to-government relationship with the United States. That objection is not only misguided but self-contradictory. It is misguided because Native Hawaiians do not have a self-governing structure today only because the United States participated in the elimination of that governing entity, by facilitating the overthrow of the Hawaiian Kingdom, and later annexing the Hawaiian Islands. Unlike other Native Americans who were allowed to retain some measure of sovereignty, Congress did not leave Native Hawaiians with any sovereignty whatsoever. It cannot be that the United States's complete destruction of Hawaiian self-governance would be the reason Congress would be precluded from ameliorating the consequences of its own actions by trying to restore some small measure of sovereignty to the Native Hawaiian people.

The objection is self-contradictory because one of the very purposes and objects of the Akaka Bill is to allow Native Hawaiians to re-form the governmental structure they earlier lost. Thus, once the bill is passed, and the Native Hawaiian Governing Entity formed, the United States would be able to have a government-to-government relationship with that entity.

Finally, some opponents of the bill contend that because the government of the Kingdom of Hawaii was itself not racially exclusive, that it would be inappropriate to recognize a governing entity limited to Native Hawaiians. This objection is absurd. The fact that Native Hawaiians, over one hundred years ago, were enlightened enough to maintain a government that was open to participation by non-Hawaiians, should not deprive Native Hawaiians today of the recognition they deserve. Indeed, it is quite ironic that those who oppose the Akaka Bill because it purportedly violates our nation's commitment to equal justice and racial harmony would use Native Hawaiians' historical inclusiveness, and willingness to allow non-Hawaiians to participate in their government, as a reason to deny Native Hawaiians the recognition other native groups receive.

The same irony underlies the objection that because Native Hawaiians are not a fully segregated group within the Hawaiian Islands and instead are often integrated within Hawaii society at large, and sometimes marry outside their race, they cannot be

given the same recognition that Native American and Alaska Natives receive. Anyone concerned about promoting racial equality and harmony should be rewarding Native Hawaiians for such inclusive behavior, or as we say in Hawaii, "aloha" for their fellow people of all races, rather than using it against them. In any event, American Indians, too, have intermarried -- at rates as high as 50% or more -- and often venture beyond reservation borders, and yet those facts do not prevent them or their descendants from federal recognition.

In short, there is simply no legal distinction between Native Hawaiians and American Indians or Alaska Natives, that would justify denying Native Hawaiians the same treatment other Native American groups in this country currently enjoy.

The Akaka Bill, under any reasonable reading of the Constitution and decisions of the Supreme Court, is constitutional, just as is the Alaska Native Claims Settlement Act for Alaska Natives, and the Indian Reorganization Act for American Indian tribes -- both of which assured their respective native peoples some degree of self-governance. The Supreme Court, as noted before, has made clear that Congress' power to recognize native peoples is virtually unreviewable.

And so I emphasize and repeat, that Hawaiians are not asking for "special" treatment -- they're simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress long ago afforded American Indians and Alaska Natives formal recognition. The Akaka Bill would simply provide Native Hawaiians comparable recognition, as the indigenous peoples of the Hawaiian Islands. Formal recognition will help preserve the language, identity, and culture of Native Hawaiians, just as it has for American Indians throughout the past century, and Alaska Natives for decades.

The Akaka Bill does not permit total independence; it will not subject the United States or Hawaii to greater potential legal liability; and it does not allow gambling. Nor would passage of the bill reduce funding for other native groups, who, by the way, overwhelmingly support the bill. Instead, the Akaka Bill will finally give official and long overdue recognition to Native Hawaiians' inherent right of self-determination, and help them overcome, as the United States Supreme Court in Rice put it, their loss of a "culture and way of life." The Akaka Bill would yield equality for all of this great country's native peoples, and in the process ensure justice for all.

POSITION STATEMENT OF THE ATTORNEY GENERAL OF THE STATE OF HAWAII

H.R. 309/S. 147 (THE "AKAKA BILL") IS CONSTITUTIONAL

I. Introduction

From our Nation's founding, Congress and the Supreme Court have recognized a special obligation to America's first inhabitants and their descendants -- over whose aboriginal homelands the Nation has extended its domain -- and the Court has held that Congress is empowered to honor that obligation as it sees fit. Congress has recognized that this obligation extends not only to the indigenous people of the lower 48 states, but also to Alaska Natives, even though they are historically and culturally distinct from American Indians, and until recently were not formally recognized as "Indian tribes." And Congress has expressly "affirm[ed] the trust relationship between the United States and Native Hawaiians" -- the "indigenous people with a historical continuity to the original inhabitants of [Hawaii] whose society was organized as a Nation prior to . . . 1778." 42 U.S.C. § 11701(1), (13).

Congress is now considering important legislation (S. 147) that would formally recognize the special status of Native Hawaiians already recognized in numerous prior enactments. Congress may honor, and has honored, the special obligation to indigenous Hawaiians, just as Congress and many states have for centuries attempted to do with respect to America's other indigenous people. Indeed, it would be discriminatory to hold that indigenous Hawaiians may -- or, as some have argued, must -- be treated differently from all other indigenous people.

As discussed below, there is no basis in the Constitution to establish such an unequal regime, and to compound the legitimate, congressionally recognized grievances of Hawaiians by according them second-class status among the Nation's indigenous people. We are aware of no court that has ever invalidated Congress's exercise of its plenary power to recognize special trust relationships with indigenous people of America, and there is no reason to believe any court would reach a different result as to Native Hawaiians. 1/

II. Historical Background

To understand why indigenous Hawaiians should be accorded the same treatment as other indigenous peoples, it is helpful to understand their history. While in some respects unique, the history of the indigenous people of Hawaii fits the same basic pattern of events that mark the history of America's other aboriginal people. Westerners "discovered" the land centuries after humans had first arrived there and organized a society; the newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and

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1/ Rice v. Cayetano, 528 U.S. 495 (2000), did not disturb Congress' findings regarding Native Hawaiians or address Congress' power to recognize a Native Hawaiian governing entity or a trust relationship between the United States and Native Hawaiians. That case addressed a different issue -- whether the Fifteenth Amendment barred the State of Hawaii ("State") from limiting to Native Hawaiians the franchise for trustees of the Office of Hawaiian Affairs ("OHA"). The Court held that because OHA is a state agency, and election of its trustees cannot be characterized as "the internal affair of a quasi-sovereign," the Fifteenth Amendment prohibited the challenged franchise restriction (and would have prohibited an equivalent one for tribal Indians). Id. at 522. The Court expressly declined to decide whether Congress has recognized a trust relationship between the United States and Native Hawaiians, and did not address whether Congress has the power to grant such recognition. Id. at 520.

there eventually came an acknowledgment on the part of the new sovereign -- the United States -- that with the exercise of dominion over a land that others had once known as theirs came a special obligation to and relationship with those once-sovereign, indigenous people. Rice, 528 U.S. at 500-08.

It is believed that Hawaii's first inhabitants migrated here from other islands in the South Pacific, or perhaps even from the Americas, more than a millennium ago. See id. at 500; 1 Ralph S. Kuykendall, The Hawaiian Kingdom 3 (1968); Thor Heyerdahl, American Indians in the Pacific 161-68 (1952). They "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion," and were "organized as a Nation." 42 U.S.C. § 11701(1), (4); accord 20 U.S.C. § 7902(1). The first recorded Western contact with this society occurred in 1778, when Captain James Cook happened upon Islanders whom he and his crew called "Indians." See 1 Kuykendall, supra, at 3-28; Rice, 528 U.S. at 500.

Like the second-comers to the American mainland, Cook and his followers wrought radical changes in the aboriginal society. From 1795 to 1810, Kamehameha I brought the Islands under his control, and established the Kingdom of Hawaii. See id. at 501. Over the following decades, the communal land tenure system was dismantled, and the Islands' four million acres of land divvied up. Id. at 502. The King set aside 1.5 million acres for the Island chiefs and people, known as "Government lands," and kept a million acres for himself and his heirs, known as "Crown lands." The remaining 1.5 million acres were conveyed separately to the Island chiefs. Foreigners not only acquired large tracts of now "private" land, but

gained great economic and political influence; meanwhile, the population and general condition of indigenous Hawaiians declined rapidly. See Neil M. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 848-61 (1975); Lawrence H. Fuchs, Hawaii Pono: A Social History 251 (1961). The United States recognized the Kingdom as a sovereign and independent country, and entered into treaties with it. See Rice, 528 U.S. at 504; Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993).

In 1893, the Kingdom was overthrown by American merchants. Rice, 528 U.S. at 504-05. In furtherance of this coup d'etat, the U.S. Minister to Hawaii, John L. Stevens, caused U.S. Marines to land in Honolulu and position themselves near Iolani Palace. This had the desired effect and, on January 17, 1893, Queen Liliuokalani relinquished her authority -- under protest -- to the United States. See id. at 505. The revolutionaries formed the Republic of Hawaii and sought annexation to the United States. Id. But, in Washington, President Cleveland refused to recognize the new Republic, and denounced -- as did Congress a century later -- the role of United States agents in overthrowing the monarchy, which he likened to an " 'act of war, committed . . . without authority of Congress,' " and called a " 'substantial wrong.' " 107 Stat. at 1511 (quoting address); see Rice, 528 U.S. at 505; 42 U.S.C. § 11701(7)-(9).

The Republic claimed title to the Government and Crown lands, without compensating the Queen or anyone else. See Levy, 63 Cal. L. Rev. at 863. On July 7, 1898, the Republic realized its goal of annexation under the Newlands Joint Resolution. See Rice, 528 U.S. at 505. As part of the annexation, the

Republic "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign," to the United States. 107 Stat. at 1512; see Rice, 528 U.S. at 505. As Congress has recognized, "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." 107 Stat. at 1512. Indeed, they were given no say in the matter.

The Territory of Hawaii was established in 1900. Rice, 528 U.S. at 505. The Organic Act reaffirmed the cession of Government and Crown lands to the United States, and put the lands "in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress." Organic Act, § 91, 31 Stat. 141 (1900); see Rice, 528 U.S. at 505. It did not address -- let alone attempt to resolve -- the land claims of indigenous Hawaiians. Hawaii remained a Territory until 1959, when it entered the Union. Id. at 508.

By the time the Stars and Stripes was raised over Hawaii in 1898, the era of treaty-making with the indigenous people of the American continent had come to an end. As a result -- and as is true with respect to Alaska Natives -- the United States never entered into treaties with indigenous Hawaiians after 1898. Similarly, Congress never formally recognized or dealt with Hawaiians as "Indian tribes" under current statutory or executive definitions of that term, or attempted to sequester them on reservations. Yet -- as is true with respect to Alaska Natives -- Congress has in numerous enactments recognized that it has a special relationship

with indigenous Hawaiians that is, for purposes of Congress' constitutional power to deal with "Indian tribes," the same as its relationship with formally recognized tribes. See infra, Section VI.

In 1921 Congress passed the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). The HHCA placed about 200,000 acres of the lands that the Republic ceded to the United States in 1898 under the jurisdiction of the Hawaiian Homes Commission -- an arm of the Territorial Government -- to provide residential and agricultural lots for Native Hawaiians with 50% or more Hawaiian blood. HHCA § 203. Congress found support for the HHCA "in previous enactments granting Indians . . . special privileges in obtaining and using the public lands," H.R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920), and has since found that the HHCA "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13). Accord 20 U.S.C. § 7902(8). 2/

Congress took a more elaborate approach in the Admission Act. First, it conveyed to the State the 200,000 acres of Hawaiian Home Lands set aside for the benefit of the Native Hawaiians under the HHCA and -- "[a]s a compact with the United States relating to the management and disposition of [those] lands" -- required the State to adopt the HHCA as part of its own constitution. Admission

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2/ Testifying in support of the HHCA, Secretary of the Interior Franklin D. Lane analogized Native Hawaiians to American Indians. See Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii, 66th Cong. 129-30 (1920) (basis for special preference to Native Hawaiians is "an extension of the same idea" relied upon to grant such preferences to American Indians); H.R. Rep. No. 839, supra, at 4 ("the natives of the islands . . . are our wards . . . for whom in a sense we are trustees").

Act, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959) ("Admission Act"). Second, it conveyed to the State the bulk of the other lands that the Republic ceded to the United States in 1898 (the so-called "section 5(f) lands"), but required the State to hold these lands "as a public trust" for, inter alia, "the betterment of the conditions of native Hawaiians, as defined in the [HHCA], . . . in such a manner as the constitution and laws of . . . [Hawaii] may provide." Admission Act, § 5(b), (f); see Rice, 528 US. at 507-08. Congress left with the federal government the ultimate authority to enforce this trust by authorizing the United States to bring suit against the State for any "breach of [the] trust." Admission Act, § 5(f).

Congress did not stop there. "In recognition of the special relationship which exists between the United States and the Native Hawaiian people, [it] has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13). Thus, Congress has expressly included Native Hawaiians in scores of statutory programs benefiting indigenous people generally. See 42 U.S.C. § 11701(19)-(20) (listing statutes); 20 U.S.C. § 7902(13)-(16) (same); Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol. Rev. 95, 106 n.67 (1998). 3/

In 1993, Congress passed a Joint Resolution signed into law "apologiz[ing] to Native Hawaiians" for the United States' role in the coup, and "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at

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3/ See, e.g., 20 U.S.C. §§ 80q(8), 80q-11; id. §§ 4401, 4441; id. § 7117; id. §§ 7511-17; 25 U.S.C. §§ 2902(1), 2903; id. § 3002; 42 U.S.C. § 254s; id. § 2911a; id. § 3057h; Apology Bill, 107 Stat. at 1513.

1513. The law specifically acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to . . . the land," that land was taken from Hawaiians without their consent or compensation, and that indigenous Hawaiians have "never directly relinquished their claims . . . over their national lands." Id. In other recent acts, Congress has expressly affirmed the "special" -- and "trust" -- relationship between the United States and Hawaiians, and has specifically recognized Hawaiians as "a distinct and unique indigenous people." 42 U.S.C. § 11701(1), (13), (15), (16), (18); accord 20 U.S.C. § 7902(1), (10). For example, when it recently reenacted the Native Hawaiian Education Act ("NHEA"), 115 Stat. 1425, 1934 (2002), 20 U.S.C. §§ 7511-17, Congress stated that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship," id. § 7512(12)(B), and expressly found that the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives." Id. § 7512(12)(D); accord Hawaiian Homelands Homeownership Act of 2000 ("HHHA"), Pub. L. No. 106-568, § 202(13)(B), 114 Stat. 2872 (2000). 4/

4/ A court would give deference to these Congressional findings. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). In addition, they are independently supported by the testimony of experts, including in recent and pending litigation. See, e.g., Office of Hawaiian Affairs Defendants' Submission of Corrected Declarations of Davianna Pomaika'i McGregor at 25-38 ("McGregor Decl.") and of Jon K. Matsuoka ("Matsuoka Decl."), Arakaki v. Lingle, U.S. Dist. Ct. for the Dist. of Haw., Civ. No. 01-00139 SOM-KSC (filed May 14, 2003).

III. Congress Has Plenary Power to Recognize a "Special Trust Relationship" with Any of the Indigenous Peoples of America

Congress has "plenary power over Indian affairs." S. Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). As explained below, that power extends to Congressional recognition of the United States' special trust relationship with indigenous Hawaiians. The power is, in fact, so broad, that we have been unable to identify any case in which a court declared invalid Congress' exercise of it. See also Felix Cohen, Handbook of Federal Indian Law 3-5 (1982) ("No congressional or executive determination of tribal status has been overturned by the courts . . . .").

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." Morton v. Mancari, 417 U.S. 535, 551-52 (1974). It derives from the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3), e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 531 n.6 (1998); the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); the Property Clause (U.S. Const. art. IV, § 3, cl. 2), e.g., United States v. Kagama, 118 U.S. 375, 379-80 (1886); the Debt Clause (U.S. Const. art. I, § 8, cl. 1), e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980); see Pope v. United States, 323 U.S. 1, 9 (1944); and the Foreign Commerce Clause (U.S. Const. art. I, § 8, cl. 3), which authorizes Congress to legislate on account of the separate "Nation" that Hawaiians comprised both before and after 1778. 42 U.S.C. § 11701(1).

This authority is not limited by the words "Indian tribes" in the Indian Commerce Clause. In empowering Congress with the authority to single out

and deal with the indigenous societies they knew as "Indians" or "tribes," the Framers did not intend to restrict Congress' authority to deal with the extension of sovereignty over indigenous groups of which they may never have heard, but which would pose the same basic issues as the Indians occupying the 1789 frontier. During colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789). That is whom Columbus thought he came upon when he discovered America. The Framers -- and generations before them -- of course knew that Columbus had not reached India, but they used "Indian" to refer to "the inhabitants of our Frontiers." Declaration of Independence ¶ 29 (1776). 5/ It is not surprising, then, that Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Kuykendall, supra, at 14 (quoting officer journal).

The meaning of the word "tribe" also demonstrates that Congress was given broad powers to recognize and deal with all indigenous people that might inhabit the frontiers of the expanding nation. At the founding, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Sheridan, supra. 6/ That is -- perhaps not coincidentally -- how Congress has

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5/ See also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"); Roger Williams, A Key into the Language of America 84 (1643) (aboriginals were "Natives, Savages, Indians, Wild-men," etc.); The First Three English Books on America 242 (Edward Arber ed. 1835) ("Indians" were " 'all nations of the new founded lands.' ") (quoting Gonzalo Fernandez de Oveido y Valdez, De La Natural Hystoria de Las Indias (1526)).

6/ See II Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) (same); John Walker, A Critical Pronouncing Dictionary and Expositor of the

described Hawaiians, and fittingly so. See 42 U.S.C. § 11701(1); 20 U.S.C. § 7902(1). That "tribe" may mean something else today -- in either legal or lay terms -- should not circumscribe the authority conferred upon Congress to deal with distinct groups of indigenous people by those who ratified the Constitution in 1789.

Congress has historically exercised its Indian affairs power over indigenous people not organized into tribes (at least under then-prevailing definitions), or whose tribal status had been terminated -- and the Supreme Court has upheld that exercise of authority. See Cohen, supra, at 6 ("Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages. . . . Where no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties."). Thus, for most of our history (until 1993), most Alaska Native Villages have not been recognized by the Bureau of Indian Affairs ("BIA") as "Indian tribes," see Hynes v. Grimes Packing Co., 337 U.S. 86, 110 n.32 (1949) ("Indian tribes do not exist in Alaska in the same sense as in [the] continental United States." (quotation marks omitted)); yet the Supreme Court has never questioned Congress' authority to single out and deal with Alaska Natives as such.

English Language (1791) (same); William Perry, The Royal Standard English Dictionary 515 (1788) (defining "tribe" as "a certain generation of people"). These definitions are consistent with the way in which Chief Justice Marshall referred to Indian tribes in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). He analogized them to "nations" and explained that "[t]he very term 'nation,' so generally applied to [Indian tribes], means 'a people distinct from others.' " Id. at 561. As discussed below, Hawaiians were not only a "Nation," but were and remain a "distinct and unique indigenous people." 42 U.S.C. § 11701(1).

See, e.g., Native Village of Venetie, 522 U.S. at 523-24 (discussing the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-27 ("ANCSA")); see generally David S. Case, Alaska Natives and American Laws 195-222 (1984) (discussing federal programs for Alaska Natives).

The same goes for Congress' efforts with respect to Pueblos. In United States v. Joseph, 94 U.S. 614, 617 (1876), the Supreme Court held that "pueblo Indians, if, indeed, they can be called Indians," could not "be classed with the Indian tribes for whom the intercourse acts were made." Yet in United States v. Sandoval, 231 U.S. 28 (1913), the Court rejected the argument that Congress therefore lacked the authority to deal with Pueblos as Indians or tribes. The Court recognized that Pueblos were different from other Indians -- they were citizens, held title to their lands, and lived in "separate and isolated communities." Id. at 39, 47-48. But "[b]e this as it may," Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." Id. at 39. And -- as long as it "cannot be said to be arbitrary" -- Congress' assertion of such a "guardianship" relationship "must be regarded as both authorized and controlling." Id. at 47.

In United States v. John, 437 U.S. 634 (1978), the Court affirmed Congress' power to subject Indians remaining in Mississippi to different criminal laws -- even if they did not belong to formal tribes in the statutory sense. "Neither the fact that [the Indians] are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." Id. at 653. Nor

did the fact that the Executive had previously taken the position that the Indians could not "be regarded as a tribe." Id. at 650 n.20. See also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85, 88 (1977) (upholding Congressional decision to exclude group of Delaware Indians and their descendants from distribution of certain funds, but noting without disapproval a previous enactment in which Congress had included that group even though they were "not a recognized tribal entity, but . . . simply individual Indians with no vested rights in any tribal property"); United States v. McGowan, 302 U.S. at 537 (Congress' authority to single out Indians for special treatment extends to "colony" established for Indians previously "scattered" about Nevada lacking any independent tribal status).

This Congressional power depends not on any particular group's formal designation as a tribe, but derives from the special relationship that the United States has assumed with Native Americans. 7/ Chief Justice Marshall

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7/ Other cases discuss the meaning of the word "tribe" in statutes, see Montoya, 180 U.S. at 264 (discussing statutory definition for purposes of whether Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (addressing whether tribe was subject to equal protection guarantee of the Indian Civil Rights Act), or merely describe particular Indian tribes in other unrelated contexts, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (discussing treatment of Indians under federal statutes in context of limiting state's power to legislate in respect of Indians); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 19 (1831) (describing Cherokee nation in context of deciding that it is not a "foreign state" for purposes of Supreme Court jurisdiction over controversies "between a state or citizens thereof and a foreign state"); Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) (whether Alaskan village had sovereign immunity); United States v. Kagama, 118 U.S. 375, 383 (1886) (whether federal courts have jurisdiction over murder of one Indian by another on reservation). To the extent that many of these cases preceded the Court's later broad construction of Congress' power in this area, see Sandoval, 231 U.S. at 46 (Congress' power limited only by the condition that it not act "arbitrarily"); Yankton Sioux Tribe, 522 U.S. at 343 (Congress' power is

recognized this relationship in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), when he analogized the relationship between Native Americans and the United States to that of a "ward to his guardian." Id. at 17. In subsequent cases, the Court has acknowledged that this relationship stems in part from the fact that, in expanding westward with the frontier, the Federal Government "took possession of [Indians'] lands, sometimes by force, leaving them . . . needing protection." Bd. of Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943). See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); United States v. Kagama, 118 U.S. at 384. See also Morton v. Ruiz, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.").

IV. Courts Review an Exercise of Congress' Power to Deal with Native Americans Under a Deferential Standard

"It is for [Congress], and not for the courts," to determine when the United States should assume such a relationship with an indigenous people, and to decide "when the true interests of the Indian require his release from such condition of tutelage." United States v. Candelaria, 271 U.S. 432, 439 (1926) (quotation omitted). Accord United States v. Chavez, 290 U.S. 357, 363 (1933); United States v. Nice, 241 U.S. 591, 597 (1916). Likewise, the Constitution gives Congress -- not the

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"plenary"), of course they should not be construed as narrowing that power. More to the point, these cases do not even purport to limit Congress' constitutional authority to recognize a trust relationship with an Indian tribe. They simply do not address the scope of that power at all.

courts -- authority to acknowledge and extinguish claims based on aboriginal status. Congress may exercise that power based upon its judgment. Even when there is "no legal obligation[ ]" to redress such wrongs, Congress may make such amends as "its judgment dictates." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 358 (1945) (Jackson, J., concurring). "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization," and Congress may address such acts "as a matter of grace, not because of legal liability." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-82 (1955); see Blackfeather v. United States, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Indeed, many Supreme Court decisions -- including recent ones like Native Village of Venetie, 522 U.S. at 534 -- treat the exercise of Congress' authority over Indian affairs as something at least akin to a "political question." See id. ("Whether the concept of Indian country should be modified is a question entirely for Congress." (emphasis added)).

A court thus would review with great deference Congress' decision to recognize the United States' special trust relationship with Native Hawaiians. As the Court said in Sandoval, "the Constitution expressly authorize[s] Congress to regulate commerce with the Indian tribes," and thus "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." 231 U.S. at 45-46 (emphasis added). A court will not strike down such a congressional decision unless it is "arbitrary." Id. at 47. To our knowledge, no court has done so. See also Cohen, supra, at 3-5. As discussed below, Congress' decision to recognize Native Hawaiians as sufficiently similar to Native Americans easily passes this deferential test.

V. The Constitution Does Not Require Congress to Treat Indigenous Hawaiians Differently from Other Indigenous Groups

It would be wrong to relegate Hawaiians to second-class status among America's indigenous people by denying Congress the authority to address the wrongs it and the Supreme Court already have recognized have been inflicted upon Hawaiians. See 107 Stat. at 1511-13; Rice, 528 U.S. at 505-06. Indeed, Congress has expressly found that "[its] authority . . . under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17) (emphasis supplied). That finding, and the recognition of a Native Hawaiian governing entity proposed in S. 147, more than satisfies the deferential standard set forth in Sandoval, for it is certainly not arbitrary for Congress to conclude that Hawaiians are a "distinctly Indian community."

The Hawaiian people, just like the Indians, are native indigenous people, whose lands were taken "by force, leaving them a . . . people, needing protection against the selfishness of others." Mancari, 417 U.S. at 552. First, it is

beyond serious dispute that Hawaiians are a distinct and indigenous people. 8/ And, as discussed above, Hawaiians had their lands and sovereignty taken from them by force, leaving them vulnerable. See Apology Resolution, 107 Stat. at 1512-73; HHHA § 202(13)(A) (Hawaiians "never relinquished [their] claim to sovereignty or their sovereign lands"); Rice, 528 U.S. at 505.

Even today, Native Hawaiians remain remarkably distinct as a people, particularly considering a history characterized by unceasing outside pressure to accommodate European and American interests. See U.S. Dep'ts of Justice & Interior, From Mauka to Makai: The River of Justice Must Flow Freely 4 (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000) (finding based on reconciliation process mandated by Public Law Number 103-150 (1993) that "the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions"); OHA v. HCDCH, Civ. No. 94-0-4207 (SSM) (Haw. 1st Cir. Dec. 5, 2002), slip op. at 45 ("The

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8/ See HHHA, § 202(13)(B) (Hawaiians are "the indigenous people of a once sovereign nation"); Rice, 528 U.S. at 500 ("[T]he first Hawaiian people . . . were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own."); 107 Stat. at 1512 (referring to "the indigenous Hawaiian people"); Naliielua v. Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States."), aff'd, 940 F.2d 1535 (9th Cir. 1991); 20 U.S.C. § 7902(1) ("Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago . . . ."); 42 U.S.C. § 11701(1) (same); McGregor Decl., supra, at 25-38; Matsuoka Decl., supra.

Native Hawaiian People continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices, and institutions."); 20 U.S.C. § 7512(20) (Native Hawaiians "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."); McGregor Decl., supra, at 25-38 (generally discussing Native Hawaiians' enduring cultural distinctness and resistance to assimilation, particularly in rural areas); Matsuoka Decl., supra.

In Montoya v. United States, 180 U.S. 261 (1901), the Supreme Court defined "tribe" for statutory purposes as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Id. at 266. That definition did not purport to restrict Congress' constitutional power to recognize an indigenous group; it merely provided a statutory definition of "tribe" that was limited to the purposes of the statute at issue: whether the Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians belonging to "a band, tribe, or nation in amity with the United States." Id. at 264. But a court that applied even this narrow definition would find that Native Hawaiians meet all three of its prongs.

First, because Native Hawaiians are descended from common ancestors who settled the Hawaiian islands centuries before European contact, they are of the same or similar "race," at least as the Court in 1901 would have understood that word. See Rice, 528 U.S. at 514-15 (citing shared "ethnic

backgrounds" and "physical characteristics" of "Native Hawaiians). Second, Native Hawaiians certainly inhabit a particular territory, the Hawaiian Islands. In fact, the territory they inhabit, and the more specific claim they have to particular territory -- the 200,000 acres of Hawaiian Homelands and the 1,800,000 acres of section 5(f) lands -- are more precisely defined than those of many Indian tribes. 9/

Third, Native Hawaiians lived in a self-governing community until Western conquest wrested that community and their sovereignty from them. See 107 Stat. at 1510, 1512 ("prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion"); Rice, 528 U.S. at 500. In recent years the Native Hawaiian community has taken steps to reorganize itself as a sovereign government. 10/ Indeed,

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9/ Cf. Encyclopedia of North American Indians – Cherokee ("At the time of European contact, the Cherokees . . . controlled more than forty thousand square miles of land" in "parts of eight present states"), available at http://college.hmco.com/history/readerscomp/naind/html/na_006500_cherokee.htm; Encyclopedia of North American Indians – Ojibwa (noting that Ojibwas "are spread over a thousand miles of territory" and, although "classed as one people," are "divided into about one hundred separate bands or reservation communities"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026100_ojibwa.htm.

10/ In 1978, the Hawaiian people through a Constitutional Convention created, in OHA, a mechanism for gaining greater political independence and control over their affairs. OHA provided for "accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people." I Proceedings of the Const. Convention of Hawaii of 1978 (Stand. Comm. Rep. No. 59) at 646. The Convention recognized "the right of native Hawaiians to govern themselves and their assets," id., and expressly "look[ed] to the precedent of other native peoples" who "have traditionally enjoyed self-determination and self-government . . . . Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of

advancing that process is a core purpose of S. 147. See S. 147, 109th Cong. (May 16, 2005), §§ 2(19), 4(b), 7. The Constitution does not limit Congress' Indian affairs power to groups with a particular governmental structure. See Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) ("Some bands of Indians, for example, had little or no tribal organization, while others . . . were highly organized" (footnote omitted)); see Cohen, supra, at 6. That is logical, because American conquest and dominion have meant that no Indian tribe remained fully sovereign. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 n.9 (1st Cir. 1975) ("test of tribal existence" does not turn on "whether a given tribe has retained sovereignty in [an] absolute sense"). Since it is well-accepted that Congress has "plenary authority" to "eliminate the powers of local self-government which the tribes otherwise possess," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978), it may deal with "Indians upon a tribal basis," even after their "tribal relation[s] ha[ve] been dissolved." Chippewa Indians of Minnesota v. United States, 307 U.S. 1, 4 (1939).

This is similar to Congress' approach to Alaska Natives. In ANCSA Congress gave Alaska Natives fee ownership over certain aboriginal lands -- rather

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regulation over their internal and social problems." I Proceedings, supra (Comm. of the Whole Rep. No. 13) at 1018. "The establishment of the Office of Hawaiian Affairs," the Convention explained, "is intended to grant similar rights to Hawaiians." Id. Congress has recognized that the "constitution and statutes of the State of Hawaii . . . acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust," and "reaffirm and protect the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language." 42 U.S.C. § 11701(3)(B); see 20 U.S.C. § 7902(21).

than subjecting such lands to the federal superintendence that denotes "Indian country" -- but Congress has continued the federal guardianship over Alaska Natives in other respects. See Native Village of Venetie, 522 U.S. at 533-34. With respect to Hawaii, Congress has recognized that the once-sovereign Hawaiians were deprived of their right to self-determination. It may constitutionally determine, as it has in the past and as S. 147 would continue to do, that they should remain subject to a special relationship with the United States.

It would be perverse for a court to hold that Congress was precluded from exercising its authority to recognize Native Hawaiians as having a status similar to Native Americans and Alaska Natives on the grounds that the conquest of Native Hawaiians was so complete that they ceased to be a self-governing community. See Rice, 528 U.S. at 524 ("the culture and way of life of [the Hawaiian] people [were] all but engulfed by a history beyond their control"). In its Supreme Court amicus brief in Rice, the United States agreed with us on this point: "It would be extraordinarily ironic if the very reasons that the United States has a trust responsibility to the indigenous people of Hawaii served as an obstacle to the fulfillment of that responsibility. Fortunately, the Constitution is not so self-defeating. Congress may fulfill its trust responsibilities to indigenous peoples, whether or not they currently have a tribal government as such." Brief for the United States as Amicus Curiae, Rice v. Cayetano, 1999 WL 569475, at *18 (1999). Indeed, it is precisely those indigenous groups that have lost their sovereignty and the means to govern themselves for whom the United States acquires a heightened trust responsibility. See Seber, 318 U.S. at 715 (once the United States overcame

the Indians and took possession of their lands, it "assumed the duty of furnishing . . . protection, and with it the authority to do all that was required to perform that obligation"); Sandoval, 231 U.S. at 45-46 (United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities"); Kagama, 118 U.S. at 384 (through its course of dealings with Indian Tribes, the United States acquired a "duty of protection" for the "remnants" of once sovereign nations).

Indeed, Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992), although not directly pertinent to the question of Congress' power to recognize a special trust relationship, is instructive on this issue. There, an Alaskan village argued that it was a tribe for purposes of sovereign immunity. That question did not give the court occasion to address whether Congress had the power to recognize the village as a tribe. Rather, the court merely noted "certain factors that may be considered in determining whether an Alaskan village constitutes a tribe" and stated that "we have required that the group claiming tribal status show that they are 'the modern-day successors' to a historical sovereign entity that exercised at least the minimal functions of a governing body." Id. at 635 (citation omitted). Nonetheless, Native Hawaiians satisfy even that differently geared test because, as a group, they are the "modern-day successors" to the sovereign Hawaiian Kingdom. And, to the extent that the Hawaiian people today do not exercise "functions of a governing body," that is no accident -- it is so precisely because their sovereignty was destroyed by the forced act of annexation perpetrated by the United States a century ago. See 107 Stat. at 1511; 42 U.S.C. § 11701(7)-(9).

For these reasons, Congress' recognition of the wrongs inflicted upon Hawaiians, see Apology Bill; 42 U.S.C. § 11701(8)-(11), and efforts to redress such wrongs -- including by according Hawaiians the same special treatment accorded American Indians -- are a constitutional and honorable attempt to do "what in the conditions of this twentieth century is the decent thing." Northwestern Bands of Shoshone Indians, 324 U.S. at 355 (Jackson, J., concurring).

That Congress granted indigenous Hawaiians citizenship and subjected them to the same laws as other citizens does not alter the special legal and political status that Hawaiians occupy under federal law. Congress treated Alaska Natives in a similar fashion, see Metlakatla Indian Cmty. v. Egan, 369 U.S. at 51, and "the extension of citizenship status to Indians does not, in itself, end the powers given to Congress to deal with them." John, 437 U.S. at 653-54; see Nice, 241 U.S. at 598 ("Citizenship is not incompatible with tribal existence or continued guardianship . . . ."). If it did, Congress would not have the power to deal with any Indians, because all of them were granted citizenship in 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

The fact that since 1778 Hawaiian society has included nonindigenous people also does not defeat Congress' plenary power to recognize a special trust relationship with Native Hawaiians. Cf. United States v. S. Dakota, 665 F.2d 837, 841 (8th Cir. 1981) (housing project was a "dependent Indian community" within meaning of federal statute although residents included non-Indians, had "social and economic connections" with the city, and relied on the city for all vital services); United States v. Mound, 477 F. Supp. 156, 159 (D.S.D. 1979) (similar);

Encyclopedia of North American Indians – Osage (noting presence of "many non-Indians" living "among the Osages before the tribal lands were allotted in 1906"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026800_osage.htm. It would be a gross distortion of the policy underlying the American trust responsibility to bar Congress from recognizing a trust relationship with an indigenous group on the ground that the group was too open and inclusive, while permitting such recognition with respect to more exclusive, discriminatory societies. Further, participation of non-Hawaiians in the government of the Hawaiian Kingdom was a direct result of pressure and conquest by Europeans and Americans. See Rice, 528 U.S. at 504 ("the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general" and "Westerners forced the resignation of the Prime Minister" in 1887); id. at 504-05 (describing coup); 107 Stat. at 1511 (same). The unfortunate history of Western influence over the sovereign affairs of the Hawaiians heightens, rather than lessens, Congress's trust obligation.

Similarly, the fact that Native Hawaiians are dispersed throughout the Hawaiian Islands does not make them any less eligible for special recognition by Congress than Indian tribes who may be confined to smaller geographic areas. See United States v. Pelican, 232 U.S. 442, 450 (1914) ("[T]he territorial jurisdiction of the United States [does not] depend upon the size of the particular areas which are held for Federal purposes." (citation omitted)). The Islands comprise an area that is no more than one-fifth the size of the aboriginal lands of other groups that Congress has recognized as tribes. Compare State of Hawaii Data Book: A

Statistical Abstract 1993-1994 (total land area of the eight inhabited major Islands is 4.1 million acres), with United States v. Dann, 865 F.2d 1528, 1534 (9th Cir. 1989) (noting that aboriginal Western Shoshone land comprised 22 million acres in Nevada) and Encyclopedia of North American Indians – Cherokee, supra (forty thousand square miles). Further, many tribes are confined to a smaller area only because the United States government required them to live on reservations. Concentration on a reservation is not a prerequisite to Congressional recognition of an indigenous group's special status in relation to the United States, particularly where the group shares a common language, history and culture. See United States v. Wright, 53 F.2d 300, 306 (4th Cir. 1931) ("The fact that the Eastern Band of Cherokee Indians had surrendered the right of their tribal lands, had separated themselves from their tribe, and had become subject to the laws of North Carolina, did not destroy the right or duty of guardianship on the part of the federal government."). And the fact that many Native Hawaiians are integrated in their communities and have leadership roles as citizens or public officials does not set them apart from, for example, many Alaska Natives. See Metlakatla Indian Community, 369 U.S. at 50-51 (describing how the "Indians of southeastern Alaska . . . have very substantially adopted and been adopted by the white man's civilization").

Congress' power in this regard also is not defeated by the breadth or narrowness of the definition of "Native Hawaiian" used prior to recognition, in

S. 147, of the Native Hawaiian governing entity. 11/ Other federal legislation -- including, but by no means limited to, the numerous statutes that include "Hawaiians" among the indigenous groups benefited -- recognizes the special status of lineal descendants of indigenous people without a blood quantum requirement. See, e.g., Weeks, 430 U.S. at 88 (citing federal statute distributing funds to "all lineal descendants of the tribe as it existed in 1818"); Thomas v. United States, 180 F.3d 662, 665 (7th Cir. 1999) (noting proposal in tribal election to "redefin[e] tribal membership in terms of lineal descendancy rather than blood quantums"); Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997) (because the "trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation," United States had trust responsibility to lineal descendants of tribe (internal punctuation and citation omitted)). Clearly, then, this definition is within Congress' "plenary" power to decide which groups to recognize as dependent tribes. See Sandoval, 417 U.S. at 46. In any event, the pre-recognition definition has little practical consequence in S. 147, because the legislation provides that the Native Hawaiians themselves, like

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11/ S. 147 defines "Native Hawaiian" to mean "(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who -- (I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and (II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or (ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual." S. 147 § 3(10)(A).

virtually every Indian tribe, will define membership in their group for themselves. See S. 147 § 7(c)(2) and (4). 12/

All these reasons help to explain why courts consistently recognize that indigenous Hawaiians are entitled to the same treatment under federal law as the Nation's other indigenous people. See Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169 (Haw. 1982); Naliielua, 795 F. Supp. at 1012-13; Pai 'Ohana v. United States, 875 F. Supp. 680, 697 n.35 (D. Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996). They also explain why Congress has reached the same conclusion in dozens of enactments spanning several presidential administrations. That conclusion, and the steps S. 147 would legislate to effectuate Congress' decision, lie comfortably within the broad scope of Congress' power to regulate Indian affairs.

12/ Although Justice Breyer's concurring opinion in Rice questioned whether a state may define tribal membership as broadly as Hawaii defines "Hawaiian," Rice, 528 U.S. at 526 (Breyer, J., concurring), he also stated that a tribe defining its own membership would have more latitude because "a Native American tribe has broad authority to define its membership." Id. Further, S. 147 limits Native Hawaiian status to descendants of "indigenous, native people" who resided in Hawaii as of January 1, 1893, see S. 147 § 3(10)(A), bringing the definition into line with definitions established by federally recognized tribes that include as members those descended from tribal members as of a date approximately that distant in the past. See, e.g., Rice, 528 U.S. at 526 (Breyer, J., concurring) (citing Choctaw tribal definition that includes "persons on final rolls approved in 1906 and their lineal descendants" (citation omitted)); Encyclopedia of North American Indians – Cherokee, supra, ("Membership in the Cherokee Nation of Oklahoma requires proof of descent from an ancestor on the 1906 Dawes Commission roll. There is no minimum blood quantum requirement."). That is, in fact, the apparent intent of S. 147, which refers to the descendants of aboriginal Native Hawaiians who "resided in the islands . . . on or before January 1, 1893." S. 147 § 3(10)(A).

VI. Existing Federal Statutes that Benefit Native Hawaiians Give Effect to the Special Relationship with Native Hawaiians and Are Constitutional

In fulfillment of the United States' special obligation to indigenous Hawaiians, during the past 80 years Congress already has enacted numerous statutes that provide assistance to Native Hawaiians in areas such as education, health, housing and labor. Those statutes constitute an appropriate exercise of Congress' power to discharge the responsibility it has assumed for the well-being of the nation's indigenous people. As the Supreme Court has held, extending benefits to native groups in this way is not racial discrimination -- to the contrary, it would be discriminatory to deny to Hawaiians the same consideration the Constitution affords to every other indigenous American group.

Because federal legislation for the benefit of Native Hawaiians fulfills the United States' trust obligation to a group with which Congress has determined the United States has a special trust obligation, a court would review these laws under the standard set forth in Morton v. Mancari, supra. In Mancari, the Court upheld a preference for members of an Indian tribe because its purpose was "to further the Government's trust obligation toward the Indian tribes." 417 U.S. at 541-42. The Court held that such legislation should not be subject to the same level of scrutiny under the Fifth Amendment Due Process Clause as a racial classification because of "the unique legal status of Indian tribes under federal law" and Congress' "plenary" power to legislate on their behalf. Id. at 551. As the Court explained:

> 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 an uneducated, helpless and dependent people, needing protection against the selfishness of others . . . . 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 and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .

Id. at 552 (quoting Seber, 318 U.S. at 715). Because "[l]iterally every piece of legislation dealing with Indian tribes" provides "special treatment" to Indians, the Court noted that "[i]f these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id.

The Court thus held that the program at issue, an employment preference for Indians at the BIA, "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." Id. at 553. In such cases, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Id. at 555.

Because the deferential "tied rationally" standard in Mancari is a consequence of Congress' "plenary" power under the Indian Commerce Clause and other constitutional provisions to deal with "Indian tribes," id. at 551-52, courts apply the Mancari standard to legislation dealing with any "Indian tribe" as that term is broadly understood under the Indian Commerce Clause. See Alaska

Chapter, Assoc. Gen. Contractors of America, Inc. v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982) (holding Mancari standard applied where beneficiaries of statute included Alaska natives). As explained above, the Constitution vests Congress with virtually unreviewable power to recognize a special relationship with any of the indigenous people that inhabited the American frontier, regardless of when the frontier was encountered. That constitutional power extends to all non-"arbitrary" congressional recognition of distinctly Indian communities, Sandoval, 231 U.S. at 47, and is not limited by fluctuating criteria for formal recognition as a tribe. See supra, Section III.

In its enactments, Congress could not have been more clear that the government's special obligations to Native Hawaiians place legislation benefiting that group squarely within the reach of the Mancari standard. Specifically, Congress has expressly found that a "special relationship . . . exists between the United States and the Native Hawaiian people." See, e.g., 20 U.S.C. § 7902(13); id. § 7902(14) (same), and recently wrote into law that Hawaiians have a "unique status as [a] people . . . to whom the United States has established a trust relationship." HHHA, § 202(13)(B).

If, after these pronouncements, any doubt could have remained about the applicability of the Mancari standard to Native Hawaiians, Congress removed all doubt in its most recent enactments. In those recent statutes, Congress explicitly stated that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people . . . as to whom the United States has established a trust relationship." HHHA,

§ 202(13)(B). Further, perhaps mindful of Mancari's observation that the classification there was "political," not racial, Congress expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians." HHHA, § 202(13)(D); see 20 U.S.C. § 7512(12)(B) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship"). In addition, Congress expressly equated its relationship with native Hawaiians and its relationship with Indian tribes. 25 U.S.C. § 3010 ("This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations . . ."); 20 U.S.C. § 7512(12)(D) (the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives"). 13/ As these enactments show, for over eighty years Congress consistently has recognized that the United States has

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13/ This recognition is not new. It dates back to the early years of Hawaii's status as a territory. Thus, the HHCA in 1921 "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13); see Ahuna v. Dep't of Haw. Home Lands, 640 P.2d 1161, 1168 (Haw. 1982) (in the HHCA, "the federal government . . . undert[ook] a trust obligation benefiting the aboriginal people"); see also H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (creating Hawaiian home lands because "the natives of the islands who are our wards . . . and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty"). And the Admission Act conveyed federal ceded lands to Hawaii to hold "as a public trust" for, among other things, "the betterment of the conditions of native Hawaiians." Admission Act § 5(f); see Keaukaha—Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993) (same); 42 U.S.C. § 11701(16) (same).

the kind of relationship with Native Hawaiians that fits squarely within the Mancari doctrine.

Under Mancari, the standard for reviewing legislation that benefits an indigenous group with which the government has recognized a "trust obligation" is quite different than the standard for reviewing alleged race discrimination under the Constitution. Such legislation will be upheld if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Mancari, 471 U.S. at 555. Congress' enactments benefiting Native Hawaiians plainly meet that standard.

The federal statutes that extend benefits to Native Hawaiians address, among other things, the educational, health, housing, labor and other social, economic and cultural needs of that community. 14/ See 20 U.S.C. § 7902(14) (identifying areas of legislation). As Congress has found, Hawaiians as a group, like many Indians, continue to lag far behind the rest of the population in these areas. Certainly, there is no basis for disputing the Congressional findings supporting rationality of these measures. And this is precisely the kind of beneficial legislation that fulfills Congress' obligation to honor its "special relationship" with indigenous groups. See Mancari, 417 U.S. at 552 (the United States left Indians "an uneducated, helpless and dependent people, needing

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14/ See, e.g., Admission Act § 5(f), 73 Stat. 4; HHCA, 42 Stat. 108 ; HHHA, 114 Stat. 2872; 20 U.S.C. § 7901 et seq.; 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441; id. § 7118; 42 U.S.C.§ 254s; id. § 3057 et seq. See also 42 U.S.C. § 2991 et seq.; id. § 1996; 20 U.S.C. § 80q et seq.; 25 U.S.C. § 3001 et seq.; 16 U.S.C. § 470 et seq.; 25 U.S.C. § 2901 et seq.; 42 U.S.C. §3011.

protection against the selfishness of others" and assumed the duty "to do all that was required to perform the obligation" (internal quotation marks and citation omitted)); Pierce, 694 F.2d at 1167-68 (Mancari applies to legislation reaching a "broad[ ]" range of benefits). Accordingly, a court reviewing any of the numerous federal statutes that provide benefits to Native Hawaiians would easily find that they are constitutional because they are "tied rationally" to the special obligation Congress has recognized it has toward that group.

The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity

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This memorandum addresses Congress' authority to enact S. 147, the proposed Native Hawaiian Government Reorganization Act of 2005 ("NHGRA"), which establishes a process for reconstituting and recognizing the Native Hawaiian governing entity. We conclude that Congress has the constitutional authority to enact the Native Hawaiian Government Reorganization Act of 2005.

Congress possesses plenary and exclusive power under the Constitution to enact special legislation to deal with Native Americans. This authority, inherent in the Constitution and explicit in the Indian Commerce Clause, art. I, § 8, cl. 3, and Treaty Clause, art. II, § 2, cl. 2, extends to dealings with Native Hawaiians, especially given the particular moral and legal obligations the United States assumed for its role in effecting a forcible end to the Kingdom of Hawaii in 1893.

Rice v. *Cayetano*, 528 U.S. 495 (2000), is not to the contrary. The Supreme Court there expressly declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id*. at 518. The conclusion that granting Native Hawaiians special voting rights in connection with the election of a state governmental official violates the Equal Protection Clause does not speak to whether Congress has the authority to reaffirm the status of Native Hawaiians as an indigenous, self-governing people and reestablish a government-to-government relationship:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating

> to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

United States v. *Antelope*, 430 U.S. 641, 645 (1977).

I. The Native Hawaiian Government Reorganization Act.

The stated purpose of the NHGRA is "to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship." NHGRA § 4(b). To that end, the NHGRA authorizes the Secretary of the Interior to establish a Commission that will prepare and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. *Id*. § 7(b). For the purpose of establishing the roll, the NHGRA defines the term "Native Hawaiian" as:

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

Id. § 3(8).

Through the preparation and maintenance of the roll of Native Hawaiians, the Commission will set up a Native Hawaiian Interim Governing Council called for by the NHGRA. *Id*. § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council; determine the Council's structure; and elect members of the Council from enrolled Native Hawaiians. *Id*. § 7(c)(2)(A).

The NHGRA provides that the Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity." *Id*. § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id*. § 7(c)(2)(B)(iii)(IV).

II. Congress' Authority to Enact the NHGRA.

Congressional authority to enact S. 147 encompasses two subordinate questions: First, would Congress have the power to adopt such legislation for members of a Native American tribe in the contiguous 48 states? Second, does such power extend to Native Hawaiians? The answer to both questions is yes, especially given the moral and legal obligations the United States acquired for overthrowing the then-sovereign Kingdom of Hawaii in 1893.

A. Congress' Broad Power to Deal with Indians Includes the Power to Restore Sovereignty to, and Reorganize the Government of, Indian Tribes.

There is little question that Congress has the power to recognize Indian tribes. As the Supreme Court explained recently, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.' " *United States* v. *Lara*, 541 U.S. 193, 200 (2004). *See also South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs"); *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (same); 20 U.S.C. § 4101(3) (finding that the Constitution "invests the Congress with plenary power over the field of Indian affairs"). The NHGRA expressly recites and invokes this constitutional authority. *See* NHGRA § 2(1) ("The Constitution vests Congress with the authority to address the conditions of the indigenous native people of the United States."); *id*. § 4(a)(3).

This broad congressional power derives from a number of constitutional provisions, including the Indian Commerce Clause, art. I, § 8, cl. 3, which grants Congress the power to "regulate Commerce * * * with the Indian Tribes," as well as the Treaty Clause, art. II, § 2, cl. 2. *See Lara*, 541 U.S. at 200-201; *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974). Other sources of constitutional authority include the Debt Clause, art. I, § 8, cl. 1, *see United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397 (1980); *see also Pope* v. *United States*, 323 U.S. 1, 9 (1944) ("The power of Congress to provide for the payment of debts, conferred by 8

of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary."); and the Property Clause, art. IV, § 3, cl. 2, *see Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87-88 (1918); *see also Alabama* v. *Texas*, 347 U.S. 272, 273 (1954) (per curiam) ("The power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation.") (internal quotation marks omitted). 1/

Congress' legislative authority with respect to Indians also rests in part "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely power that this Court has described as 'necessary concomitants of nationality.' " *Lara*, 124 S. Ct. at 1634 (citing, *inter alia*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). *See also Morton* v. *Mancari*, 417 U.S. at 551-552 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly *and implicitly* from the Constitution itself.") (emphasis added).

Plenary congressional authority to recognize Indian tribes extends to the restoration and reorganization of tribal sovereignty. In *Lara*, the Court held that Congress' broad authority with respect to Indians includes the power to enact

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1/ As discussed herein, *see infra* at 16-17, Congress in 1921 set aside some 200,000 acres of public land for the benefit of Native Hawaiians. The NHGRA is related to, and would help to realize the purpose of, that exercise of the Property Clause power by commencing a process that would result in the identification of the proper beneficiaries of Congress' set aside.

legislation designed to "relax restrictions" on "tribal sovereign authority." 124 S. Ct. at 196, 202. "From the Nation's beginning," the Court said, "Congress' need for such legislative power would have seemed obvious." *Id*. at 202. The Court explained that "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time," and "[s]uch major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty." *Id*. The Court noted that today congressional policy "seeks greater tribal autonomy within the framework of a 'government-to-government' relationship with federal agencies." *Id*. (quoting 59 Fed. Reg. 22,951 (1994)).

Of particular significance to the present analysis, the Court in *Lara* specifically recognized Congress' power to *restore* previously extinguished sovereign relations with Indian tribes. The Court observed that "Congress has restored previously extinguished tribal status -- by re-recognizing a Tribe whose tribal existence it previously had terminated." *Id*. (citing Congress' restoration of the Menominee tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress' power "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State." *Id*. Thus, when it comes to the sovereignty of Indian tribes or other "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831), the Constitution does not "prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions

that modify or adjust the tribes' status," and it is not for the federal judiciary to "second-guess the political branches' own determinations" in that regard. *Lara,* 124 S. Ct. at 205.

United States v. *John*, 437 U.S. 634 (1978), further supports Congressional authority to recognize reconstituted tribal governments and to re-establish sovereign relations with them. There, Congress' power to legislate with respect to the Choctaw Indians of Mississippi was challenged on grounds that "since 1830 the Choctaw residing in Mississippi have become fully assimilated into the political and social life of the State" and that "the Federal Government long ago abandoned its supervisory authority over these Indians." *Id*. at 652. It was thus urged that to "recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary." *Id*. The Court unanimously rejected the argument. "[W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaw than with the affairs of other Indian groups." *Id*. at 652-653. The "fact that federal supervision over them has not been continuous," according to the Court, does not "destroy[ ] the federal power to deal with them." *Id*. at 653.

Congress exercised this established authority to restore the government-to-government relationship with the Menominee Indian tribe of Wisconsin, s*ee Lara*, 541 U.S. at 203-204, and it can do the same here. Indeed, the NHGRA government reorganization process closely resembles that prescribed by the Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

In 1954, Congress adopted the Menominee Indian Termination Act, 25 U.S.C. §§ 891-902, which terminated the government-to-government relationship with the tribe, ended federal supervision over it, closed its membership roll, and provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 407-410 (1968). In 1973, Congress reversed course and adopted the Menominee Restoration Act, which repealed the Termination Act, restored the sovereign relationship with the tribe, reinstated the tribe's rights and privileges under federal law, and reopened its membership roll. 25 U.S.C. §§ 903a(b), 903b(c).

The Menominee Restoration Act established a process for reconstituting the Menominee tribal leadership and organic documents under the direction of the Secretary of the Interior. The Restoration Act directed the Secretary (a) to announce the date of a general council meeting of the tribe to nominate candidates for election to a newly-created, nine-member Menominee Restoration Committee; (b) to hold an election to elect the members of the Committee; and (c) to approve the Committee so elected if the Restoration Act's nomination and election requirements were met. *Id*. § 903b(a). Just so with S. 147. The NHGRA authorizes the Secretary of the Interior to establish a Commission that will prepare and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. NHGRA § 7(b). The NHGRA provides for the establishment of a Native Hawaiian Interim Governing

Council. *Id*. § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council; determine the Council's structure; and elect members of the Council from enrolled Native Hawaiians. *Id*. § 7(c)(2)(A).

The Menominee Restoration Act provided that, following the election of the Menominee Restoration Committee, and at the Committee's request, the Secretary was to conduct an election "for the purpose of determining the tribe's constitution and bylaws." *Id*. § 903c(a). After the adoption of such documents, the Committee was to hold an election "for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws." *Id*. § 903c(c). Likewise, the NHGRA provides that the Native Hawaiian Interim Governing Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity." *Id*. § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id*. § 7(c)(2)(B)(iii)(IV).

The courts have approved the process set forth in the Menominee Restoration Act to restore sovereignty to the Menominee Indians. *See Lara*, 541 U.S. at 203 (citing the Restoration Act as an example where Congress "restored previously extinguished tribal rights"); *United States* v. *Long*, 324 F.3d 475, 483 (7th Cir.) (concluding that Congress had the power to "restor[e] to the Menominee the inherent sovereign power that it took from them in 1954"), *cert. denied*, 540 U.S.

822 (2003). The teachings of these cases would apply to validate the similar process set forth in NHGRA.

B. Congress' Power to Enact Special Legislation with Respect to Indians Extends to Native Hawaiians.

The inquiry, therefore, turns to whether Congress has the same authority to deal with Native Hawaiians as it does with other Native Americans in the contiguous 48 states. Congress has concluded that it has such authority. *See* NHGRA § 4(a)(3) (finding that 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"); 42 U.S.C. § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."). We conclude that courts will likely affirm these assertions of congressional authority. 2/

Under *United States* v. *Sandoval*, 231 U.S. 28 (1913), Congress has the authority to recognize and deal with native groups pursuant to its Indian affairs power, and courts have only a very limited role in reviewing the exercise of such congressional authority. In *Sandoval*, the Supreme Court rejected the argument that Congress lacked authority to treat the Pueblos of New Mexico as Indians and

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2/ *Rice* v. *Cayetano* did not decide the issue. On the contrary, the Supreme Court in *Rice* expressly declined to answer the questions whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518.

that the Pueblos were "beyond the range of congressional power under the Constitution." *Id.* at 49.

The Court first observed that "[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 duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." *Id.* at 45-46. The Court went on to say that, although "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe," nevertheless, "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." *Id.* at 46. Applying those principles, the Supreme Court concluded that Congress' "assertion of guardianship over [the Pueblos] cannot be said to be arbitrary, but must be regarded as both authorized and controlling." *Id.* at 47. And the Court so held even though the Pueblos differed (in the Court's view) in some respects from other Indians: They were not "nomadic in their inclinations"; they were "disposed to peace"; they "liv[ed] in separate and isolated communities"; their lands were "held in communal, fee-simple ownership under grants from the

King of Spain"; and they possibly had become citizens of the United States. *Id*. at 39.

Sandoval thus holds, first, that Congress, in exercising its constitutional authority to deal with Indian tribes, may determine whether a "community or body of people" is amenable to that authority, and, second, that unless Congress acts "arbitrarily," courts do not second-guess Congress' determination. 3/

It cannot be said that the NHGRA is an arbitrary exercise of Congress' power to recognize and deal with this Nation's native peoples. Congress has expressly found, in the NHGRA and other statutes, that Native Hawaiians are like other Native Americans. *See* NHGRA § 2(2) (finding that Native Hawaiians "are indigenous, native people of the United States"); *id*. § 2(20)(B) (Congress "has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf"); *id*. § 4(a)(1); Native American Languages Act, 25 U.S.C. § 2902(1) ("The term 'Native American' means an Indian, Native Hawaiian, or Native American Pacific Islander"); American Indian Religious

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3/ *See also Lara*, 541 U.S. at 205 (federal judiciary should not "second-guess the political branches' own determinations" with respect to "the metes and bounds of tribal autonomy"); *United States* v. *McGowan*, 302 U.S. 535, 538 (1938) ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out"); *Long*, 324 F.3d at 482 ("[W]hile we assume that Congress neither can nor would confer the status of a tribe onto a random group of people, we have no doubt about congressional power to recognize an ancient group of people for what they are."); c*f*. *Alaska* v. *Native Village of Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified is a question entirely for Congress.").

Freedom Act, 42 U.S.C. § 1996 (declaring it to be the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians"); 42 U.S.C. § 11701(1) (finding that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778").

Congress' authority to treat Native Hawaiians as American Indians is supported by the numerous statutes Congress has enacted doing just that. *See*, *e.g.*, Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; Hawaiian Homelands Homeownership Act, 25 U.S.C. §§ 4221-4243; Native Hawaiian Health Care Act, 42 U.S.C. 11701(19) (noting Congress' "enactment of federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities"); *see also* Statement of U.S. Representative Ed Case, Hearing Before the Senate Committee on Indian Affairs on S. 147, the Native Hawaiian Government Reorganization Act, at 2-3 (March 1, 2005) ("[O]ver 160 federal statutes have enacted programs to better the conditions of Native Hawaiians in areas such as Hawaiian homelands, health, education and economic development, all exercises of Congress' plenary authority under our U.S. Constitution to address the conditions of indigenous peoples.") (prepared text) (hereinafter, "Senate Indian

Affairs Committee Hearing on S. 147"); *cf*. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). No court has struck down any of these numerous legislative actions as unconstitutional.

That Congress has power to enact special legislation for Native Hawaiians is made clear by congressional action dealing with Native Alaskans, who -- like Native Hawaiians -- differ from American Indian tribes anthropologically, historically, and culturally. In 1971, Congress adopted the Alaska Native Claims Settlement Act ("ANSCA"), 43 U.S.C. §§ 1601-1629h, which is predicated on the view that Congressional power to deal with Native Alaskans is coterminous with its plenary authority relating to American Indian tribes. *See* 43 U.S.C. § 1601(a) (finding a need for settlement of all claims "by Natives and Native groups of Alaska"); *id*. § 1602(b) (defining "Native" as a U.S. citizen "who is a person of one-fourth degree of more Alaska Indian * * * Eskimo, or Aleut blood, or combination thereof."); *id*. § 1604(a) (directing the Secretary of the Interior to prepare a roll of all Alaskan Natives). The Supreme Court has never questioned the authority of Congress to enact such legislation. *See Alaska* v. *Native Village of Venetie*, *supra*; *Morton* v. *Ruiz*, 415 U.S. 199, 212 (1974) (quoting passage of Brief for Petitioner the Secretary of the Interior referring to "Indians in Alaska and Oklahoma"); *see also Pence* v. *Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (when the term "Indians" appears in federal statutes, that word "as applied in Alaska, includes Aleuts and Eskimos"). If Congress has authority to enact special legislation dealing with

Native Alaskans, it follows that Congress has the same authority with respect to Native Hawaiians.

Finally, the history of the Hawaiian people confirms that the story of the Hawaiian people, although unique in some respects, is in other ways very similar to the story of all Native Americans. By the time Captain Cook, the first white traveler to Hawaii, "made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion." *Rice*, 528 U.S. at 500. Hawaiian society, the Court noted, was one "with its own identity, its own cohesive forces, its own history." *Id.* As late as 1810, "the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I." *Id.* at 501. King Kamehameha had united the islands and "reasserted suzerainty over all lands." *Id.*

The Nineteenth Century is "a story of increasing involvement of westerners in the economic and political affairs of the Kingdom." *Id.* During this period, the United States established a government-to-government relationship with the Kingdom of Hawaii. Between 1826 and 1887, the two nations executed a number of treaties and conventions. *See id.* at 504.

In 1893, "a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the monarchy [of Queen Liliuokalani] with a

provisional government." *Id*. at 505. In 1894, the U.S.-created provisional government then established the Republic of Hawaii. *See id*. In 1898, President McKinley signed the Newlands Resolution, which annexed Hawaii as a U.S. territory. *See id*.; *Territory of Hawaii* v. *Mankichi*, 190 U.S. 197, 209-211 (1903) (discussing the annexation of Hawaii)*; Lara*, 541 U.S. at 203-204 (citing the annexation of Hawaii as an example of Congress' adjustment of the autonomous status of a dependent sovereign).

Under the instrument of annexation, the so-called Newlands Resolution, the Republic of Hawaii ceded all public lands to the United States, and the revenue from such lands was to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Rice*, 528 U.S. at 505. In 1921, concerned about the deteriorating conditions of the Native Hawaiian people, Congress passed the Hawaiian Homes Commission Act, "which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians." *Id*. at 507.

In 1959, Hawaii became the 50th State of the United States. *See id*. In connection with its admission to the Union, Hawaii agreed to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution, and the United States adopted legislation transferring title to some 1.4 million acres of public lands in Hawaii to the new State, which lands and the revenues they generated were by law to be held "as a public trust" for, among other purposes, "the betterment of the

conditions of Native Hawaiians." *Id*. (quoting Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 5, 6).

In short, the story of the Native Hawaiian people is the story of an indigenous people having a distinct culture, religion, and government. Contact with the West brought decimation of the native population through foreign diseases; a period of government-to-government treaty making with the United States; the involvement of the U.S. Government in overthrowing the Native Hawaiian government; the establishment of the public trust relationship between the U.S. Government and Native Hawaiians; and, finally, political union with the United States. Given the parallels between the history of Native Hawaiians and other Native Americans, Congress has ample basis to conclude that it has the coterminous power to deal with the Native Hawaiian community as it has to deal with American Indian tribes. *Cf*. *Long*, 324 F.3d at 482 ("This case does not involve a people unknown to history before Congress intervened. * * * [W]e have no doubt about congressional power to recognize an ancient group of people for what they are."). 4/

4/ In *Montoya* v. *United States*, 180 U.S. 261, 266 (1901), the Supreme Court stated that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular through sometimes ill-defined territory." In so stating, the Court in *Montoya* did not intend to, and did not, circumscribe Congress' authority to recognize Indian tribes. In any event, the community of Native Hawaiian people fit within the *Montoya* definition of a tribe: Native Hawaiians were, and are, of a "same or similar" race, had a unitary governmental system prior to is overthrow, and have inhabited the Hawaiian Islands.

Finally, Congress has found that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past; have never abandoned their claim to be a sovereign people; and have maintained a distinct cultural and social identity. *See* NHGRA § 2(13) ("[T]he Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum."); *id.* § 2(15) ("Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions"); *id.* § 2(22)(A) ("Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands"); *id.* § 2(22)(B); *see also* U.S. Department of Justice & U.S. Department of the Interior, *From Mauka to Makai: The River of Justice Must Flow Freely*, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians at 4 (Oct. 23, 2000) (finding that "the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions").

In 1993, a century after the Kingdom of Hawaii was replaced with the active involvement of the U.S. Minister and the American military, "Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people." *Rice*, 528 U.S. at 505. *See* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In the Apology Resolution,

Congress both "acknowledge[d] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and issued a formal apology to Native Hawaiians "for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination." *Id*. §§ 1, 3, 107 Stat. 1513.

C. The Responsibility of the U.S. Government for Contributing to the Overthrow of the Hawaiian Kingdom Reinforces Congress' Moral and Legal Authority to Enact the NHGRA.

Congress' moral and legal authority to establish a process for the reorganization of the Native Hawaiian governing entity also derives from the role played by the United States -- in particular the U.S. Minister to Hawaii, John Stevens, aided by American military forces -- in bringing a forcible end to the Kingdom of Hawaii in 1893.

As Congress recounted in the Apology Resolution, the U.S. Minister to the sovereign and independent Kingdom of Hawaii in January 1893 "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii." 107 Stat. 1510. In pursuit of that objective, U.S. Minister Stevens "and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaii nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government." *Id*. *See also* S. Rep. No.

108-85, 108th Cong., 2d Sess. 11 (2003) (on the orders of the U.S. Minister, "American soldiers marched through Honolulu, to a building known as Ali'iolani Hale, located near both the government building and the palace"); *Rice*, 528 U.S. at 504-505. The next day, the Queen issued a statement indicating that she would yield her authority "to the superior force of the United States of America whose Minister Plenipotentary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu." 107 Stat. 1511. The United States, quite simply, effected regime change in Hawaii because "without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms." *Id*. In December 18, 1893, President Cleveland described the Queen's overthrow "as an 'act of war,' committed with the participation of a diplomatic representative of the United States and without the authority of Congress." *Id*.

Given the role of United States agents in the overthrow of the Kingdom of Hawaii, Congress could conclude that its "unique obligation toward the Indians," *Morton* v. *Mancari*, 417 U.S. at 555, extends to Native Hawaiians. Congress' power to enact special legislation dealing with native people of America is derived from the Constitution, "both explicitly *and implicitly*." *Id*. at 551 (emphasis added). *See Lara*, 541 U.S. at 201 (to the extent that, through the late 19th Century, Indian affairs were a feature of American military and foreign policy, "Congress' legislative authority would rest in part * * * upon the Constitution's adoption of

preconstitutional powers necessarily inherent in any Federal Government"). The Supreme Court has explained that the United States has a special obligation toward the Indians -- a native people who were overcome by force -- and that this obligation carries with it the authority to legislate with the welfare of Indians in mind. As the Court said in *Board of County Commissioners of Creek County* v. *Seber*, 318 U.S. 705 (1943):

> From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. 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 an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. 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 * * *.

Id. at 715 (citation omitted).

In the case of Native Hawaiians, the maneuverings of the U.S. Minister and the expression of U.S. military force contributed to the overthrow of the Kingdom of Hawaii and the deposition of her Queen. The events of 1893 cannot be undone; but their import extends to this day, imbuing congress with a special obligation and the inherent authority to restore some semblance of the self-determination then stripped from Native Hawaiians. In the words of Justice Jackson,

> The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335, 355 (1945) (concurring opinion).

IV. As an Exercise of Congress' Indian Affairs Powers, the NHGRA Is Not an Impermissible Classification Violative of Equal Protection.

The principal objection to the NHGRA -- that it classifies U.S. citizens on the basis of race, in violation of the constitutional guarantee of equal protection, *cf*. *Rice* v. *Cayetano*, *supra* 5/ -- misses the mark. Because the NHGRA is an exercise of Congress' Indian affairs powers, this legislation is "political rather than racial in nature." *Morton* v. *Mancari*, 417 U.S. at 553 n.24. As the Court explained,

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

5/ *Rice* does not support this objection. There, the Court held that the Fifteenth Amendment to the Constitution -- which states that the right of U.S. citizens to vote shall not be denied or abridged by the United States or by any state on account of race or color -- did not allow the State of Hawaii to limit to Native Hawaiians eligibility to vote in elections to elect trustees for the Office of Hawaiian Affairs, a state governmental agency. *See Rice*, 528 U.S. at 523-524. *Rice* is inapposite because the reorganized Native Hawaiian governing entity will be neither a United States nor a Hawaiian governmental entity, but rather the governing entity of a sovereign native people.

> is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of Indians . . . ." *Morton* v. *Mancari*, *supra*, at 553 n.24.

United States v. *Antelope*, 430 U.S. at 645-646 (footnote omitted); s*ee also* *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.") (quoting *Morton* v. *Mancari*, 417 U.S. at 551-552).

In *Morton* v. *Mancari*, the Supreme Court rejected the claim that an Act of Congress according an employment preference for qualified Indians in the Bureau of Indian Affairs violated the Due Process Clause and federal anti-discrimination provisions. In rejecting that claim, the Court explained that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment," 417 U.S. at 554 (citing cases involving, *inter alia*, the grant of tax immunity and tribal court jurisdiction), and the Court laid down the following rule with respect to Congress' special treatment of Indians: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id*. Clearly, the NHGRA can be "rationally tied" to Congress discharge of its duty with respect to the native people of Hawaii.

In any event, Native Hawaiians have been denied some of the self-governance authority long established for other indigenous populations in the United States. As Governor Lingle testified to Congress,

> The United States is inhabited by three indigenous peoples -- American Indians, Native Alaskans and Native Hawaiians. * * * Congress has given two of these three populations full self-governance rights. * * * To withhold recognition of the Native Hawaiian people therefore amounts to discrimination since it would continue to treat the nation's three groups of indigenous people differently. * * * [T]oday there is no one governmental entity able to speak for or represent Native Hawaiians. The [NHGRA] would finally allow the process to begin that would bring equal treatment to the Native Hawaiian people.

Testimony of Linda Lingle, Governor of the State of Hawaii, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) (prepared text). *See also* Statement of Sen. Byron Dorgan, Vice Chairman, Senate Indian Affairs Committee Hearing on S. 147, at 1 (March 1, 2005) ("[T]hrough this bill, the Native Hawaiian people simply seek a status under Federal law that is equal to that of America's other Native peoples -- American Indians and Alaska Natives.") (prepared text); Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) ("In this legislation, as Hawaiians, we seek only what long ago was granted this nation's other indigenous peoples.") (prepared text).

* * *

The Supreme Court has confirmed that Congress has broad, plenary constitutional authority to recognize indigenous governments and to help restore

and restructure indigenous governments overtly terminated or effectively decimated in earlier eras. *See Lara*, 541 U.S. at 203 (affirming that the Constitution authorizes Congress "to enact legislation * * * recogniz[ing] * * * the existence of individual tribes" and "restor[ing] previously extinguished tribal status"). That authority extends to the Native Hawaiian people and permits Congress to adopt the NHGRA, which would recognize the Native Hawaiian governing entity and initiate a process for its restoration.

Table of Federal Acts Affecting Native Hawaiians

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 21, 1910	Pub. L. No. 61-266, 36 Stat. 703, 718 (1910)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indian and Native Hawaiians.
Act of Mar. 4, 1911	Pub. L. No. 62-525, 36 Stat. 1363, 1395 (1911)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 24, 1912	Pub. L. No. 63-302, 37 Stat. 417, 436 (1912)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 23, 1913	Pub. L. No. 63-3, 38 Stat. 4, 26 (1913)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 1, 1914	Pub. L. No. 63-161, 38 Stat. 609, 625 (1914)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 3, 1915	Pub. L. No. 63-263, 38 Stat. 822, 838 (1915)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1916	Pub. L. No. 64-132, 39 Stat. 262, 279 (1916)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 12, 1917	Pub. L. No. 65-21, 40 Stat. 105, 122 (1917)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 19, 1919	Pub. L. No. 66-21, 41 Stat. 163, 181 (1919)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1918	Pub. L. No. 65-181, 40 Stat. 634, 651 (1918)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 5, 1920	Pub. L. No. 66-246, 41 Stat. 874, 891 (1920)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Mar. 4, 1921	Pub. L. No. 66-388, 41 Stat. 1367, 1383 (1921)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 9, 1921	Pub. L. No. 66-34, 42 Stat. 108 (1921)	Creates a homesteading program for Native Hawaiians.
Act of June 12, 1922	Pub. L. No. 67-240, 42 Stat. 635, 643 (1922)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 3, 1923	Pub. L. No. 67-403, 42 Stat. 1221 (1923)	Amends Hawaiian Homes Commission Act by increasing dollar limits for residential loans and other provisions.
Act of Feb. 13, 1923	Pub. L. No. 67-409, 42 Stat. 1227, 1235 (1923)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 7, 1924	Pub. L. No. 68-214, 43 Stat. 521, 528 (1924)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 3, 1925	Pub. L. No. 68-586, 43 Stat. 1198, 1206 (1925)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 22, 1926	Pub. L. No. 69-141, 44 Stat. 305, 315 (1926)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 11, 1927	Pub. L. No. 69-600, 44 Stat. 1069, 1079 (1927)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 7, 1928	Pub. L. No. 70-105, 45 Stat. 246 (1928)	Amends the Hawaiian Homes Commission Act by requiring an annual area disposal limit and increases the dollar amount within the Hawaiian Home Loan fund.
Act of May 16, 1928	Pub. L. No. 70-400, 45 Stat. 573, 583 (1928)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians, including excavation and preservation of archaeologic remains.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Feb. 20, 1929	Pub. L. No. 70-778, 45 Stat. 1230, 1241 (1929)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 19, 1930	Pub. L. No. 71-158, 46 Stat. 229, 241 (1930)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 26, 1935	Pub. L. No. 74-223, 49 Stat. 504 (1935)	Requires three of five Hawaiian Homes Commission members to be at least one-quarter Native Hawaiian.
Act of July 10, 1937	Pub. L. No. 75-200, 50 Stat. 497, 503 (1937)	Amends Hawaiian Homes Commission Act by establishing age minimum for lessee and adding more lands under the Act.
Act of June 20, 1938	Pub. L. No. 75-680, § 3, 52 Stat. 784, 784-85 (1938)	Authorizes leasing land within the Hawai#i National Park to Native Hawaiians and recognizes limited Native Hawaiian fishing rights in the area.
Act of Nov. 26, 1941	Pub. L. No. 77-325, § 3, 55 Stat. 782, 782 (1941)	Amends Hawaiian Homes Commission Act by creating a Home Development fund and allowing investing of loan fund.
Act of May 31, 1944	Pub. L. No. 78-320, 58 Stat. 260, 264 (1944)	Amends Hawaiian Homes Commission Act by returning lands under the Commission's jurisdiction to the Territory of Hawai#i .
Act of June 14, 1948	Pub. L. No. 80-638, 62 Stat. 390 (1948)	Amends Hawaiian Homes Commission Act by authorizing churches, hospitals, schools, theaters, and the Federal government to use the land.
Act of July 9, 1952	Pub. L. No. 82-481, 66 Stat. 511, 514 (1952)	Amends Hawaiian Homes Commission Act by adding lands to the Commission's jurisdiction.
Act of July 9, 1952	Pub. L. No. 82-482, 66 Stat. 514 (1952)	Amends Hawaiian Homes Commission Act by increasing dollar amounts in the Hawaiian Homes Land Fund and the Hawaiian Homes Development Fund.
Act of June 18, 1954	Pub. L. No. 83-417, 68 Stat. 263 (1954)	Amends Hawaiian Homes Commission Act by authorizing leases for irrigated pastoral lands.
Hawai#i Admission Act, Act of Mar. 18, 1959	Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959)	Admits Hawai#i as a State and establishes a public trust for the betterment of the conditions of Native Hawaiians, as defined by the Hawaiian Homes Commission Act.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Dec. 23, 1963	Pub. L. No. 88-233, 77 Stat. 472 (1963)	Protects the corpus of the public lands trust, whose intended beneficiaries are Native Hawaiians, by revising procedures under the Hawai#i Statehood Act.
Act of July 11, 1972	Pub. L. No. 92-346, 86 Stat. 457 (1972)	Designates Honokohau as a National Historical Landmark and authorizes preservation of the site, giving employment preference to and providing training for Native Hawaiians.
Native American Programs Act of 1974	Pub. L. No. 93-644, § 801, 88 Stat. 2291, 2324 (1975)	Promotes Native Hawaiian, American Indian, and Alaska Native economic and social self-sufficiency through financial assistance to agencies serving Native Hawaiians.
Departments of Labor and Health, Education, and Welfare Appropriation Act, 1976	Pub. L. No. 94-206, 90 Stat. 3 (1975)	Appropriates funds for Native American programs (includes Native Hawaiians).
Act of Oct. 17, 1976	Pub. L. No. 94-518, § 401-405, 90 Stat. 2447, 2447, 2449 (1976)	Preserves Kalaupapa Settlement and authorizes a preference for former patients and Native Hawaiians to manage the site.
Act of Aug. 5, 1977	Pub. L. No. 95-93, sec. 303, § 701(a), 91 Stat. 627, 650 (1977)	Amends the Comprehensive Employment Training Act of 1973 to include employment training programs for Native Hawaiians.
Joint Resolution, American Indian Religious Freedom	Pub. L. No. 95-341, 92 Stat. 469 (1978)	Recognizes the rights American Indians, Eskimos, Aleuts, and Native Hawaiians to practice their traditional religions.
Act of Nov. 20, 1979	Pub. L. No. 96-123, 93 Stat. 923 (1979)	Appropriates funds for Native Hawaiian health and human services programs as allowed under authorizing legislation, including assistance to research institutions with Indian, Alaska Native, Native Hawaiian, Hispanic, and Black students.
Education Amendments of 1980	Pub. L. No. 96-374, § 1331, 94 Stat. 1367, 1499 (1980)	Creates Advisory Council on Native Hawaiian Education to study the effectiveness of State and Federal education programs for Native Hawaiians.
Act of Dec. 22, 1980	Pub. L. No. 96-565, §§ 101-110, 94 Stat. 3321, 3321-23 (1980)	Establishes Kalaupapa National Historic Park which shall be administered by Hansen's Disease patients and Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Urgent Supplemental Appropriations Act, 1982	Pub. L. No. 97-216, 96 Stat. 180 (1982)	Appropriates funds for nursing research grants and encourages that priority be given to Native Hawaiians, other Native Americans, native American Pacific islanders, and Hispanics.
Supplemental Appropriations Act, 1982	Pub. L. No. 97-257, 96 Stat. 818 (1982)	Appropriates funds to promote economic and social self-sufficiency of Native Americans, including Native Hawaiians; also appropriates funds for Native Hawaiian education and health programs as allowed under authorizing legislation.
Act of July 30, 1983	Pub. L. No. 98-63, 97 Stat. 301 (1983)	Appropriates funds to address the unique health needs of Native Americans, including Native Hawaiians; also urges the National Cancer Institute to give greater attention to the Native Hawaiian population.
Native Hawaiian Study Commission Act	Pub. L. No. 96-565, §§ 301-307, 94 Stat. 3321, 3324-27 (1980)	Establishes Native Hawaiian Study Commission to study the culture, needs, and concerns of Native Hawaiians.
Department of Health and Human Services Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds to the Administration for Native Americans which promotes social and economic self-sufficiency for Native Americans, including Native Hawaiians; also appropriates funds to combat alcoholism among Native Hawaiians and declares Native Hawaiian cancer research a priority.
Department of Labor Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for vocational training and other labor services for Native Hawaiians and other Native Americans.
Department of Education Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 21, 1982	Pub. L. No. 97-377, 96 Stat. 1830 (1982)	Appropriates funds to address alcohol abuse among Native Hawaiians.
Act of Aug. 22, 1984	Pub. L. No. 98-396, 99 Stat. 1369 (1984)	Appropriates funds for a Native Hawaiian health study and report.
Act of Oct. 12, 1984	Pub. L. No. 98-473, 99 Stat. 1837 (1984)	Appropriates funds for historic preservation of marine resources, including the Hawaiian voyaging canoe Hokule#a.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriation Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian programs to promote economic and social self-sufficiency; also appropriates funds for parent-child centers and for Native Hawaiian cancer research.
Department of Education Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 19, 1985	Pub. L. No. 99-190, 99 Stat. 1185 (1985)	Appropriates funds for education assistance to health profession students who will serve geographical concentrations of Native Hawaiians and Indian reservations.
American Indian, Alaska Native and Native Hawaiian Culture and Art Development Act	Pub. L. No. 99-498, §§ 1501-1503, 1521-1522, 100 Stat. 1268, 1600, 1610-11 (1986)	Authorizes grants to support a program for Native Hawaiian culture and arts development.
Anti-Drug Abuse Act of 1986	Pub. L. No. 99-570, § 4134, 100 Stat. 3207, 3207-134 (1986)	Authorizes the Health and Human Services Secretary to contract with organizations that provide drug abuse prevention, education, treatment, and rehabilitation services to Native Hawaiians.
Act of July 11, 1987	Pub. L. No. 100-71, 101 Stat. 391 (1987)	Appropriates funds for the Native Hawaiian Culture and Arts Development Program.
Native American Programs Act Amendments of 1987	Pub. L. No. 100-175, sec. 506, § 803A, 101 Stat. 926, 926-75 (1987)	Establishes Native Hawaiian Revolving loan fund for Native Hawaiian organizations and Native Hawaiians to promote economic development.
Department of Health and Human Services Appropriations Act, 1988	Pub. L. No. 100-202, 101 Stat. 1329-263 (1987)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Jacob K. Javits Gifted and Talented Students Education Act of 1988	Pub. L. No. 100-297, sec. 1001, §§ 4101-4108, 102 Stat. 130, 237 (1988)	Authorizes grants or contracts with institutions (including Indian tribes and Native Hawaiian organizations) to carry out programs or projects designed to meet the educational needs of gifted and talented students.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Drug-Free Schools and Communities Act of 1986	Pub. L. No. 100-297, sec. 1001, §§ 5112, 5134, 102 Stat. 130, 253, 261 (1988)	Authorizes education grants, cooperative agreements, or contracts with organizations that primarily serve and represent Native Hawaiians; also appropriates funds for drug abuse education and prevention programs for Native Hawaiians.
Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988	Pub. L. No. 100-297, §§ 4001-4009, 102 Stat. 130, 358 (1988)	Recognizes the Federal government's legal responsibility to enforce Hawai#i 's trust responsibilities to Native Hawaiians and creates new education programs targeting a model curriculum, family based education centers, gifted and talented, and special education programs.
Veterans' Benefits and Services Act of 1988	Pub. L. No. 100-322, § 413, 102 Stat. 487, 487 (1988)	Adds Native Hawaiians to the Advisory Committee on Native American Veterans which evaluates programs for Native American veterans.
Indian Housing Act of 1988	Pub. L. No. 100-358, sec. 2, § 204, 102 Stat. 676, 679 (1988)	Requires assessment of the housing and mortgage needs of Native Hawaiians.
National Science Foundation University Infrastructure Act of 1988	Pub. L. No. 100-418, § 6402, 102 Stat. 1107, 1543 (1988)	Reserves percentage of appropriation for institutions of higher learning that serve Native Americans (including Native Hawaiians) and specific ethnic groups.
Department of Health and Human Services Appropriations Act, 1989	Pub. L. No. 100-436, 102 Stat. 1688 (1988)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Native Hawaiian Health Care Act of 1988	Pub. L. No. 100-579, 102 Stat. 2916 (1988); Pub. L. No. 100-690, § 2301-2312, 102 Stat. 4181, 4223 (1988)	Authorizes programs to improve the health status of Native Hawaiians; authorizes grants or contracts with Papa Ola Lokahi to develop comprehensive heath care master plan to improve Native Hawaiian health.
Health Professions Reauthorization Act of 1988	Pub. L. No. 100-607, sec. 604, § 751, 102 Stat. 3048, 3126 (1988)	Provides health professionals with incentives to staff health centers serving Native Hawaiians, Indians, and rural areas.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Nursing Shortage Reduction and Education Extension Act of 1988	Pub. L. No. 100-607, sec. 714-715, § 836(h), 102 Stat. 3048, 3161 (1988)	Authorizes grants to nursing schools, loan repayment incentives to encourage work with Native Hawaiians, Indians, or in rural areas, and scholarship grants to nursing schools whose students serve two years at an Indian Heath Service facility or a Native Hawaiian health center.
Handicapped Programs Technical Amendments Act of 1988	Pub. L. No. 100-630, sec. 102, § 616, 102 Stat. 3289, 3296 (1988)	Amends the Education of the Handicapped Act which provides handicapped Native Hawaiian (and other native Pacific basin) children with a free appropriate public education.
Business Opportunity Development Reform Act of 1988 Small Business	Pub. L. No. 100-656, sec. 207, § 8(a), 102 Stat. 3853, 3861 (1988)	Amends the Small Business Act by including economically-disadvantaged Native Hawaiian organizations as socially and economically disadvantaged small business concerns.
Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988	Pub. L. No. 100-690, sec. 2022, § 1912A, 102 Stat. 4181, 4194 (1988)	Amends the Public Health Service Act by establishing the formula to fund comprehensive substance abuse and treatment programs for Native Hawaiians.
Indian Health Care Amendments of 1988	Pub. L. No. 100-713, sec. 106, § 338J, 102 Stat. 4784, 4787 (1988)	Amends the Public Health Service Act by creating a Native Hawaiian Health Professions Scholarship program.
Department of Health and Human Services Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1166 (1989)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Department of Education Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1179 (1989)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
National Museum of the American Indian Act	Pub. L. No. 101-185, 103 Stat. 1336 (1989)	Establishes the National Museum of the American Indian which will study Native Americans, collect, preserve, and exhibit Native American objects, provide a Native American research and study program, and authorizes the return of Smithsonian-held Native American human remains and funerary objects; Native Americans includes Native Hawaiians.
Department of Housing and Urban Development Reform Act of 1989	Pub. L. No. 101-235, §§ 601-605, 103 Stat. 1987, 2052 (1989)	Establishes commission to study and propose solutions to Indian, Alaska Native, and Native Hawaiian housing problems.
Veterans' Benefits Amendments of 1989	Pub. L. No. 101-237, sec. 312, § 3102, 103 Stat. 2062 (1989)	Authorizes the study of Native Hawaiian veterans' and other Native American veterans' participation in Veterans Affairs' home loan guaranty program.
Dire Emergency Supplemental Appropriation for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and Other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990	Pub. L. No. 101-302, 104 Stat. 213, 239 (1990)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian housing and provides grant money to Indian and Hawaiian Native youth for the Drug-Free Schools and Communities Act.
Native American Languages Act	Pub. L. No. 101-477, §§ 101-104, 104 Stat. 1152, 1154 (1990)	Adopts the policy to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages; Native Americans include Native Hawaiians.
Department of Health and Human Services Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Education Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Disadvantaged Minority Health Improvement Act of 1990	Pub. L. No. 101-527, sec. 4, § 782, 104 Stat. 2311, 2321 (1990)	Authorizes grants to health profession schools to assist programs of excellence for Native Hawaiians, other Native Americans, and specified ethnic groups.
Native American Graves Protection and Repatriation Act	Pub. L. No. 101-601, 104 Stat. 3048 (1990)	Provides for the protection of Native American graves and repatriation of funerary objects, human remains, and objects of cultural patrimony; Native Americans include Native Hawaiians.
Cranston-Gonzalez National Affordable Housing Act	Pub. L. No. 101-625, sec. 917, § 109, 104 Stat. 4079, 4398 (1990)	Authorizes appropriations for the Neighborhood Reinvestment Corporation which serves rural communities, Native Americans, Native Hawaiians, and other communities in need.
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 401, § 338J(a), 104 Stat. 4662, 4668 (1990)	Amends the Public Health Service Act by providing scholarship assistance to Native Hawaiian students.
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 501-502, §§ 1507, 1510, 104 Stat. 4662, 4668 (1990)	Amends the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act by allowing interest and earnings to be used to carry out the Institute's responsibilities.
National Dropout Prevention Act of 1991	Pub. L. No. 102-103, sec. 311, § 103(b), 105 Stat. 497, 505 (1991)	Amends the Carl D. Perkins Vocational and Applied Technology Education Act by providing stipends to Native Hawaiian vocational students.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992	Pub. L. No. 102-139, 105 Stat. 736 (1991)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing.
Department of Health and Human Services Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Education Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.
Department of Defense Appropriations Act 1992	Pub. L. No. 102-172, 105 Stat. 1150 (1991)	Amends the National Defense Authorization Act so that a disadvantaged small business concern includes a small business concern owned and controlled by socially and economically disadvantaged individuals, an Indian tribe, a Native Hawaiian organization, or an organization employing the severely disabled.
Act of Dec. 11, 1991	Pub. L. No. 102-218, sec. 1, § 317, 105 Stat. 1671 (1991)	Amends title 38 (Veterans' Benefits) to designate the Chief Minority Affairs Officer as an adviser on the effect of policies, regulations, and programs on Native Hawaiians, other Native Americans, women, and minority groups.
ADAMHA Reorganization Act (Alcohol, Drug Abuse, and Mental Health Administration)	Pub. L. No. 102-321, sec. 203, § 1953, 106 Stat. 323, 409 (1992)	Amends the Public Health Services Act by requiring the State of Hawai#i to contract with organizations which plan, conduct, and administer comprehensive substance abuse and treatment programs for Native Hawaiians.
Higher Education Amendments of 1992	Pub. L. No. 102-325, sec. 305, §§ 357(b)(7), 1406, 106 Stat. 448, 479, 818 (1992)	Amends the Higher Education Amendments of 1965 by authorizing Federal repayment of loan for nurses working in a Native Hawaiian Health Center (also in Indian Health Service); gives preference to Teacher Corps applicants intending to teach on Indian reservations or in Alaska Native villages or in areas with high concentrations of Native Hawaiians; also, authorizes biennial education survey on Native Hawaiians, other Native Americans, and other groups including the disabled, disadvantaged, and minority students.
Higher Education Facilities Act of 1992	Pub. L. No. 102-325, sec. 422, § 428J(a), 106 Stat. 448, 541 (1992)	Amends the Higher Education Act of 1965 by authorizing grants and fellowships to promote higher education of Indians, Alaska Natives, and Native Hawaiians, along with specified ethnic groups.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Job Training Reform Amendments of 1992	Pub. L. No. 102-367, sec. 401, § 401, 106 Stat. 1021, 1074 (1992)	Authorizes employment and recruitment preference for Native Hawaiians, Indians, and Alaska Natives for a new office that will administer Native American programs; also creates a Native American Employment and Training Council with membership of Indians, Alaska Natives, and Native Hawaiians that will solicit views on issues program operation and administration.
Older Americans Act Amendment of 1992	Pub. L. No. 102-375, sec. 201, § 201(c)(3), 106 Stat. 1195, 1203 (1992)	Amends the Older Americans Act Amendment of 1965 by creating an advocate for older Indians, Alaskan Natives, and Native Hawaiians to promote enhanced delivery of services and grants, and authorizes appropriations for these activities.
Native American Programs Act Amendments of 1992	Pub. L. No. 102-375, sec. 811, 822, §§ 803A, 811A, 106 Stat. 1195, 1295, 1296 (1992)	Amends Native American Programs Act by requiring the filing of annual report on the social and economic conditions of American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives, and authorizes appropriations for the Native American programs.
Department of the Interior and Related Agencies Appropriations Act, 1993	Pub. L. No. 102-381, 106 Stat. 1374 (1993)	Authorizes appropriations for the Alaska Native Culture and Arts Development Act which also provides funds for Native Hawaiians.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993	Pub. L. No. 102-389, 106 Stat. 1571 (1992)	Provides for appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing in carrying out functions under the Department of Housing and Urban Development Reform Act of 1989.
Department of Health and Human Services Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Specifies funding guidelines for the Native Hawaiian Health Care Act of 1988.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Education Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.
Department of Defense Appropriations Act, 1993	Pub. L. No. 102-396, 106 Stat. 1876 (1993)	Amends the Native Hawaiian Health Care Act of 1988 by establishing health goals for Native Hawaiians and scholarships for Native Hawaiian health students.
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai#i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 102-398, 106 Stat. 1953 (1992)	Agrees to the adoption of amendments enacted by the State of Hawai#i to the Hawaiian Homes Commission Act of 1920.
Veterans' Medical Programs Amendments of 1992	Pub. L. No. 102-405, § 123, 106 Stat. 1972, 1982 (1992)	Requires development of a plan to treat veterans' post-traumatic stress disorder, especially the needs of Native Hawaiians, other Native Americans, women, and ethnic minorities.
Health Professions Education Extension Amendments of 1992	Pub. L. No. 102-408, sec. 102, § 739, 106 Stat. 1992, 2055 (1992)	Amends the Public Health Services Act by authorizing grants to health professions schools to support programs of excellence in health professions education for Native Hawaiians, other Native Americans, and minority individuals.
Nurse Education and Practice Improvement Amendments of 1992.	Pub. L. No. 102-408, sec. 102, § 846, 106 Stat. 1992, 2031 (1992)	Amends the Public Health Service Act by authorizing the repayment of school loans for nurses who work two years in an Indian Health Service health center, in a Native Hawaiian health center, in a public hospital, in a migrant health center, in a community health center, in a rural health clinic, or in a public or nonprofit private health facility.
Veterans' Home Loan Program Amendments of 1992	Pub. L. No. 102-547, sec. 8, §§ 3761-3764, 106 Stat. 3633, 3639 (1992)	Amends Title 38 by providing direct housing loans to Native American veterans (including Native Hawaiians) and includes the Department of Hawaiian Homelands in the definition of "tribal organization."

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Housing and Community Development Act of 1992	Pub. L. No. 102-550, sec. 128, § 605, 106 Stat. 3672 (1992)	Authorizes appropriations for National Commission on American Indians, Alaska Natives, and Native Hawaiian housing.
Hawai#i Tropical Forest Recovery Act.	Pub. L. No. 102-574, § 4, 106 Stat. 4593, 4597 (1992)	Establishes the Hawai#i Tropical Forest Recovery Task Force which will make recommendations for rejuvenating Hawaii's tropical forests, including the traditional practices, uses, and needs of Native Hawaiians in tropical forests.
National Historic Preservation Act Amendments of 1992	Pub. L. No. 102-575, sec. 4002, 4006, §§ 2, 101, 106 Stat. 4600, 4753 (1992)	Amends the National Historic Preservation Act to protect Native Hawaiian, Indian, and Alaska Native religious and cultural sites, including authorizing direct grants to Indian tribes and Native Hawaiian organizations to preserve, stabilize, restore, or rehabilitate religious properties.
Veterans Health Care Act of 1992	Pub. L. No. 102-585, sec. 602, § 340B, 106 Stat. 4943, 4967 (1992)	Authorizes Native Hawaiian Health centers to purchase pharmaceuticals at the Federal government-negotiated price.
Department of Health and Human Services Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
100th Anniversary of the Overthrow of the Hawaiian Kingdom	Pub. L. No. 103-150, 107 Stat. 1510 (1993)	Acknowledges and apologizes for the United States' role in the overthrow of the Kingdom of Hawai#i .
Goals 2000: Educate America Act	Pub. L. No. 103-227, sec. 2-3, 108 Stat. 125, 129 (1994)	Establishes National Education Goals for schools and students from diverse backgrounds, including Indians, Alaska Natives, and Native Hawaiians, the disabled, and limited English-speakers.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
School-to-Work Opportunities Act of 1994	Pub. L. No. 103-239, sec. 3-4, 108 Stat. 568, 572 (1994)	Establishes school-to-work activities to improve the knowledge and skills of youths from various backgrounds and circumstances, including disadvantaged students, students with diverse racial, ethnic, or cultural backgrounds, American Indians, Alaska Natives, Native Hawaiians, students with disabilities, students with limited-English proficiency, migrant children, school dropouts, and academically talented students.
Alaska Native Culture and Arts Development Act	Pub. L. No. 103-239, sec. 721, § 1521, 108 Stat. 568, 572 (1994)	Amends the Higher Education Act of 1986 by authorizing grants to organizations that primarily serve and represent Native Hawaiians or Alaska Natives to support Native culture and art programs.
Department of Health and Human Services Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian health.
Department of Education Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian education.
Department of Defense Appropriations Act, 1995	Pub. L. No. 103-335, 108 Stat. 2599 (1994)	Authorizes preference to Native Hawaiian contractors restoring Kaho#olawe's environment.
Safe and Drug-Free Schools and Communities Act of 1994	Pub. L. No. 103-382, sec. 101, §§ 4004, 4011, 4118, 108 Stat. 3518, 3674, 3674, 3685 (1994)	Authorizes grants for Native Hawaiian-serving institutions to plan, conduct, and administer violence and drug prevention programs.
Native Hawaiian Education Act	Pub. L. No. 103-382, sec. 101, § 9201-9212, 108 Stat. 3518, 3794 (1994)	Recognizes that Native Hawaiians are indigenous people and authorizes, among other things, grants to assist Native Hawaiians in achieving national education goals.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Jacob K. Javits Gifted and Talented Students Education Act of 1994	Pub. L. No. 103-382, sec. 101, § 10201, 108 Stat. 3518, 3820 (1994)	Authorizes grants and/or contracts to Native Hawaiian organizations and Indian tribes to assist in carrying out programs or projects for gifted/talented students.
Improving America's Schools Act of 1994	Pub. L. No. 103-382, sec. 101, § 13102, 108 Stat. 3518, 3878 (1994)	Provides support, training, assistance to grant recipients to improve the quality of education for immigrants, migrants, the poor, American Indians, Alaska Natives, and Native Hawaiians.
Bilingual Education Act	Pub. L. No. 103-382, sec. 101, §§ 7101, 7104, 7136, 108 Stat. 3518, 3716, 3718, 3732 (1994)	Authorizes grants to implement new comprehensive bilingual education programs for Native American and Native Hawaiian languages.
Improving America's Schools Act of 1994 (Part E)	Pub. L. No. 103-382, sec. 101, § 7501, 108 Stat. 3518, 3745 (1994)	Authorizes subgrants from State and local governments to implement a bilingual education program for the ancestral languages of American Indians, Alaska Natives, and Native Hawaiians.
Native American Veterans' Memorial Establishment Act of 1994	Pub. L. No. 103-384, § 2, 108 Stat. 4067, 4067 (1994)	Establishes memorial to recognize contributions of Native American Veterans (American Indians, Native Alaskans, and Native Hawaiians).
Veterans' Benefits Improvements Act of 1994	Pub. L. No. 103-446, sec. 510, § 544, 108 stat. 4645, 4669 (1994)	Authorizes creation of a Center for Minority Veterans and Advisory Committee on Minority Veterans to be more responsive to the needs of Native Hawaiian, American Indian, Alaska Native, and ethnic minority veterans.
Hawaiian Home Lands Recovery Act	Pub. L. No. 104-42, §§ 201-06, 109 Stat. 353, 357 (1995)	Settles Department of Hawaiian Home Lands claims against the Federal government for the value of the lost use of lands by Native Hawaiians.
The Balanced Budget Down payment Act	Pub. L. No. 104-99, § 115, 110 Stat. 26, 29 (1996)	Authorizes appropriations to cover termination of Native Hawaiian and Alaska Native Cultural Arts
National Defense Authorization Act for FY 1996	Pub. L. No. 104-106, § 524, 110 Stat. 186 (1996)	Authorizes upgrading the Distinguished Service Cross to the Medal of Honor for World War II Native American Pacific Islander veterans (including Native Hawaiians).

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Child Care and Development Block Grant Amendment of 1996	Pub. L. No. 104-193, sec. 614, § 658P, 110 Stat. 2105, 2287 (1996)	Amends the Child Care and Development Block Grant Act of 1990 by authorizing Native Hawaiian organizations to apply for grants or enter into contracts with the Health and Human Services Secretary to improve child care, increase the availability of early childhood development, and increase before and after school care services.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997	Pub. L. No. 104-204, sec. 213, § 282, 110 Stat. 2874, 2904 (1996)	Authorizes the Housing Secretary to waive anti-discrimination provisions of the Cranston-Gonzalez National Affordable Housing Act for lands set aside under the Hawaiian Homes Commission Act, 1920.
Department of Health and Human Services Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988 and Older Americans Act of 1965.
Department of Education Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
National Museum of the American Indian Act Amendments of 1996	Pub. L. No. 104-278, sec. 4, § 11A, 110 Stat. 3355, 3356 (1996)	Amends National Museum of the American Indian Act by authorizing repatriation of Indian and Native Hawaiian sacred or funerary objects and cultural patrimony objects.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai#i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 105-21, 111 Stat. 235 (1997)	Agrees to the adoption of amendments enacted by the State of Hawai#i to the Hawaiian Homes Commission Act of 1920.
Department of Transportation and Related Agencies Appropriations Act, 1998	Pub. L. No. 105-66, 111 Stat. 1425 (1997)	Waives repayment of airport funds that were diverted for the betterment of American Indians, Alaska Natives, and Native Hawaiians.
Department of Health and Human Services Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for the Native Hawaiian Health Care Act and Older Americans Act of 1965.
Department of Education Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Museum and Library Services Technical and Conforming Amendments of 1997	Pub. L. No. 105-128, sec. 6, § 262, 111 Stat. 2548, 2549 (1997)	Amends Museum and Library Services Act by authorizing Hawaiian organizations eligible to receive grants (along with American Indian tribes) to electronically link libraries with education, social, or information services.
Workforce Investment Act of 1998	Pub. L. No. 105-220, § 166, 112 Stat. 936, 1021 (1998)	Authorizes grants to Indian Tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations, and Native Hawaiian organizations for employment and training activities.
Rehabilitation Act Amendments of 1998	Pub. L. No. 105-220, sec. 404, § 101 112 Stat. 936, 1163 (1998)	Amends the Rehabilitation Act of 1973 by requiring State agencies to consult with Indian Tribes, tribal organizations, and Native Hawaiian organizations before adopting any policies for vocational rehabilitation services.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Higher Education Amendments of 1998	Pub. L. No. 105-244, sec. 303, § 1001, 112 Stat. 1581, 1638 (1998)	Amends the Higher Education Act of 1965 by authorizing grants to improve education institutions' ability to serve Alaska Natives and Native Hawaiians.
Act of October 14, 1998	Pub. L. No. 105-256, sec. 12, § 10(b)(1), 112 Stat. 1896, 1899 (1998)	Amends the Native Hawaiian Health Care Improvement Act by requiring recipients of the Native Hawaiian Health Scholarship Program to work in the Native Hawaiian Health Care System.
Department of Health and Human Services Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations to carry out the Native Hawaiian Heath Care Act of 1988 and the Older Americans Act.
Department of Education Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Head Start Amendments of 1998	Pub. L. No. 105-285, sec. 117, § 650, 112 Stat. 2702, 2727 (1998)	Amends the Head Start Act by requiring the Secretary of Health and Human Services to prepare and submit a report concerning the condition, location, and ownership of facilities used, or available to be used, by Native Hawaiian Head Start agencies.
Assets for Independence Act	Pub. L. No. 105-285, §§ 401-416, 112 Stat. 2702, 2759 (1998)	Authorizes Native Hawaiian organizations (and State, local, and tribal governments) to conduct demonstration projects to evaluate the effects of savings, microenterprise, and home ownership on families and the community
Carl D. Perkins Vocational and Technical Education Act of 1998	Pub. L. No. 105-332, sec. 1, § 116, 112 Stat. 3076, 3095 (1998)	Authorizes grants to plan, conduct, and administer vocational programs for Native Hawaiians and other Native Americans.
Native American Programs Act Amendments of 1997	Pub. L. No. 105-361, sec. 3, § 803A, 112 Stat. 3278, 3278 (1998)	Amends the Native Hawaiian Revolving Loan fund to include a loan guarantee.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
National Park Service Concessions Management Improvement Act of 1998	Pub. L. No. 105-391, § 416, 112 Stat. 3497, 3516 (1998)	Promotes the sale of authentic American Indian, Alaska Native, and Native Hawaiian handicrafts and makes those revenues exempt from franchise fees.
Health Professions Education Partnerships Act of 1998	Pub. L. No. 105-392, sec. 101, § 736, 112 Stat. 3524, 3525 (1998)	Authorizes grants to assist schools with health professions education programs for Native Hawaiians, American Indians, Alaska Natives, and under-represented minorities.
Hawaiian Homelands Homeownership Act of 2000	Pub. L. No. 106-568, Sec. 201, 25 U.S.C. 4101 et seq.	Authorizes grants for affordable housing activities on Hawaiian Home Lands and loan guarantees for such housing
No Child Left Behind Act of 2001	Pub.L. No. 107-110, Sec. 701, 4117, 5521, 7201, 20 U.S.C. 7511	Authorizes grants for preservation and maintenacne of Native Hawaiian language