

# CRS Report for Congress

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## **S. 147/H.R. 309: Process for Federal Recognition of a Native Hawaiian Governmental Entity**

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# S. 147/H.R. 309: Process for Federal Recognition of a Native Hawaiian Governmental Entity

## Summary

S. 147/H.R. 309, companion bills introduced in the 109<sup>th</sup> Congress, represent an effort to accord to Native Hawaiians a means of forming a governmental entity that could enter into government-to-government relations with the United States. This entity would be empowered to negotiate with the State of Hawaii and with the federal government regarding the transfer of land and the exercise of governmental power and jurisdiction. There was similar legislation in the 106<sup>th</sup>, 107<sup>th</sup>, and 108<sup>th</sup> Congresses; the House passed a Native Hawaiian recognition bill, H.R. 4904, in the 106<sup>th</sup> Congress. While the Senate did not pass H.R. 4904, the bill would have been enacted through a provision in the Consolidated Appropriations Act, 2001 (H.R. 4577, P.L. 106-554), until a Senate concurrent resolution removed the provision by correcting the enrollment of H.R. 4577 (S.Con.Res. 162).

This report describes the provisions of the reported version of S. 147; outlines some federal statutes and recent cases which might be relevant to the issue of federal recognition of a Native Hawaiian entity; and recounts some legal arguments that have been presented in the debate on this legislation. It includes a brief outline of the provisions of a substitute amendment expected to be offered in lieu of the reported version of S. 147, when Senate debate, which was interrupted by the filing of a cloture motion on July 29, resumes. The substitute amendment is the product of discussions that have included congressional, executive, and State of Hawaii officials. S. 147 has again been placed on the Senate Calendar. This report will be updated as warranted by legislative activity.

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# S. 147/H.R. 309: Process for Federal Recognition of a Native Hawaiian Governmental Entity

## Introduction

S. 147/H.R. 309 are similar to bills in earlier Congresses that would provide a process whereby a Native Hawaiian governmental entity could be organized and recognized by the federal government in much the same way Indian tribal governments are recognized by the federal government. Proponents believe that Native Hawaiians have lost their sovereignty by questionable actions of agents of the United States government and are entitled to the same kind of official recognition accorded to Indian tribes.<sup>1</sup> They also seek this legislation because there is no process by which a federal administrative agency can accord such recognition to a Native Hawaiian governmental entity and because they may see such recognition as a means of saving federal and state programs for Native Hawaiians, which have been jeopardized by a trend in recent court decisions. In the most recent of these, *Arakaki v. Lingle*,<sup>2</sup> decided September 1, 2005, a federal appellate court ruled that Hawaii taxpayers may contest the constitutionality of state funding of Native Hawaiian programs.

The legislation has a long history.<sup>3</sup> The House passed a Native Hawaiian recognition bill, H.R. 4904, in the 106<sup>th</sup> Congress. While the Senate did not pass H.R. 4904, the bill would have been enacted through a provision in the Consolidated

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<sup>1</sup> See “Joint Statement of Congressmen Neil Abercrombie and Ed Case Before the House Judiciary Subcommittee on the Constitution on H.R. 309/S. 147, the Native Hawaiian Government Reorganization Act of 2005,” 2-3 (July 19, 2005), which states that “[t]he essence of the Akaka bill is to confirm and further define the political relationship between our federal government and Native Hawaiians. This is nothing more than another manifestation of the bedrock of our federal policy toward indigenous people; the special government-to-government trust relationship between our government and federally recognized indigenous groups.” Senators Akaka and Inouye made a similar point: “this bill does not propose anything new nor does it afford special treatment to Native Hawaiians. Rather, this bill acknowledges our special relationship with Native Hawaiians and places them on an equal footing with the other aboriginal, indigenous people of the United States. It merely extends the Federal policy of self-governance and self-determination to Native Hawaiians.” “Joint Statement of Senators Daniel K. Akaka and Daniel K. Inouye Before the House Judiciary Subcommittee on the Constitution Regarding H.R. 309/S. 147, the Native Hawaiian Reorganization Act,” 3 (July 19, 2005).

<sup>2</sup> \_\_\_ F.3d \_\_\_, No. 04-15306 (9<sup>th</sup> Cir. 2005).

<sup>3</sup> See **Appendix I: Previous Legislation**, prepared by (name redacted), Specialist in American National Government, Domestic Social Policy Division, CRS.

Appropriations Act, 2001 (H.R. 4577, P.L. 106-554), until a Senate concurrent resolution removed the provision by correcting the enrollment of H.R. 4577 (S.Con.Res. 162). This report briefly surveys some of the components in the complex legal background of the legislative effort and issues raised.

## Background

Native Hawaiians are similar to American Indians and Alaska Natives in that, before the arrival of Europeans, their ancestors lived in territory that eventually became the United States. Their legal status, however, and the history of their dealings with the federal government differ from those of the other groups.<sup>4</sup> While Native Hawaiians have been included in various federal statutes authorizing programs for “Native Americans,”<sup>5</sup> and in others setting up separate programs for Native Hawaiians,<sup>6</sup> they are not covered by many statutes that require the Bureau of

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<sup>4</sup> Sources covering the historical background and the major legal developments relating to the Kingdom of Hawaii include L. Fuchs, *Hawaii Pono: an Ethnic and Political History* (1961); and Ralph S. Kuykendall, *The Hawaiian Kingdom* (1968); Ralph S. Kuykendall and Grove A. Day, *Hawaii: A History, from Polynesian Kingdom to American State* (1961). Other sources that treat the overthrow of the Kingdom, its annexation by the United States, and subsequent legislation, including the Organic Act, the Hawaiian Homes Commission Act, the statehood act, the Apology Bill, and the history of federal legislation providing special treatment for Native Hawaiians, are: *Felix S. Cohen’s Handbook of Federal Indian Law* 797-810 (1982 ed); Brian Duus, “Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize A Native Hawaiian Nation and Settle the Ceded Lands Dispute,” 4 *Asian-Pac. L. & Pol’y J.* 13 (2003); R.H.K. Lei Lindsey, “Akaka Bill: Legal Realities, and Politics as Usual,” 24 *U. Haw. L. Rev.* 693 (2002); Le’a Malia Kanehe, “The Akaka Bill: The Native Hawaiians’ Race or Federal Recognition,” 23 *Haw. L. Rev.* 857 (2001); Jon Van Dyke, “The Political Status for Native Hawaiian People,” 17 *Yale L & P. Pol. Rev.* 95 (1998); Stuart Minor Benjamin, “Equal Protection and the Special Relationship: the Case of Native Hawaiians,” 106 *Yale L. J.* 537 (1996).

For an annotated bibliography, see Nancy Carol Carter, “Native Hawaiians: History, Land and Research,” 21 *Legal Reference Services Quarterly* 1 (2002). Available at [[http://www.haworthpress.com/store/E-Text/View\\_EText.asp?a=3&fn=J113v21n01\\_01&i=1&s=J113&v=21](http://www.haworthpress.com/store/E-Text/View_EText.asp?a=3&fn=J113v21n01_01&i=1&s=J113&v=21)] (last visited August 19, 2005).

<sup>5</sup> For example, Hawaiian Natives are included as “Native Americans” in 25 U.S.C. § 3001 (Native American Graves Protection and Repatriation Act) and 42 U.S.C. § 2991 (Native American Programs Act of 1974).

<sup>6</sup> See, e.g., Hawaiian Homes Commission Act, 42 Stat. 108 (1920), which set aside 200,000 acres of land and established a program of loans and long-term leases for the benefit of Native Hawaiians; Department of Defense Appropriation Act for Fiscal year 1995, P.L. 103-335, 108 Stat. 2599, 2652, which provided preferential treatment to Hawaiian Native businesses in Navy contracts to restore Kaho’olawe Island; Native Hawaiian Education Act, 20 U.S.C. § 7512(13) *et seq.*, which establishes educational programs for Native Hawaiians; and, Hawaiian Homelands Homeownership Act of 2000, P.L. 106-569, §§ 511-514, 114 Stat. 2944, 2966-2967, 2990, which provides governmental loan guarantees to qualifying Native Hawaiian families.

Indian Affairs (BIA) of the Department of the Interior (DOI) to provide services to Indian tribal governments and Alaska Native corporations or villages.<sup>7</sup>

BIA provides services to Indians based on tribal affiliation. That tribes are governments having rights over their land and populace is a foundational element in the federal government's relationship with Indians. It derives from legal and philosophical theories prevalent among the early European colonial powers.<sup>8</sup> These theories, together with the fact that the colonists were outnumbered and had to reach accommodation with the tribes, gave rise to the practice of treating Indian tribes as governments and negotiating treaties with them with provisions addressing such items as land transfers, mutual obligations, and how criminal offenders would be dealt with. Indian treaty authority and other power to deal with the Indian tribes as governments reside with the federal government by virtue of authority embedded in the U.S. Constitution.

The Constitution conveys to Congress the "Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"<sup>9</sup> and to the President and the Senate, the power to make treaties, including treaties with Indian tribes.<sup>10</sup> Because of the history of U.S. relations with the Indian tribes and by virtue of the Indian powers contained in the U.S. Constitution, the governmental status of Indian tribes has long been recognized by the Supreme Court.<sup>11</sup> The Court has found this status to insulate federal programs providing special treatment for Indians from charges of racial discrimination. It has held that the status of Indian tribes is of a political nature and that Indian programs are not based on race. The leading case is *Morton v. Mancari*,<sup>12</sup> validating BIA's Indian preference hiring regulations as reasonably and directly related to a non-racial goal, aiding Indian tribal self-government, in fulfillment of the federal government's obligation to the Indian tribes.

Although the United States recognized the Kingdom of Hawaii and entered into treaties with it,<sup>13</sup> it was not the Kingdom of Hawaii which sought and succeeded in

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<sup>7</sup> See, e.g., Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., which provides Indian tribes and Alaska Native Regional Corporations with various grants and rights with respect to child custody proceedings and Indian child and family programs.

<sup>8</sup> See Cohen, "Original Indian Title," 32 *Minn. L. Rev.* 28 (1947); Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," 32 *Geo. L.J.* 1 (1942).

<sup>9</sup> U.S. Const., Art. I, sec. 8, cl. 3.6

<sup>10</sup> U.S. Const., Art. II, sec. 2, cl.2.

<sup>11</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing Indian tribes as "domestic dependent nations"); *Montana v. United States*, 450 U.S. 454 (1981) (describing the parameters of tribal civil jurisdiction); and *United States v. Lara*, 541 U.S. 193 (2004) (upholding the authority of Congress to delegate to Indian tribes criminal law jurisdiction over certain offenses committed by non-member Indians).

<sup>12</sup> 417 U.S. 535, 553 (1974).

<sup>13</sup> See Apology Resolution, P.L. 103-150, 107 Stat. 1510 (1993). This Resolution provides (continued...)

obtaining annexation by the United States. That was achieved by an act of cession from the Republic of Hawaii, the government formed in 1893 after a revolutionary force, led by Americans, overthrew Queen Liliuokalani and expropriated governmental and crown lands without compensation.<sup>14</sup> In 1898, under a Joint Resolution, known as the Newlands Resolution, the United States accepted Hawaii's annexation and the lands ceded by the Republic of Hawaii, representing "all public, government, and crown lands."<sup>15</sup> In 1900, therefore, when the Territory of Hawaii was established under the Organic Act for the Territory of Hawaii,<sup>16</sup> there was no Native Hawaiian government actually in power.<sup>17</sup> No provision was made for a

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<sup>13</sup> (...continued)

a brief recital of the various events leading to the annexation of Hawaii as well as a chronology of federal legislation providing programs for Native Hawaiians. The Report by the Senate Select Committee on Indian Affairs, that accompanied the legislation includes copies of treaties with the Kingdom of Hawaii. S.Rept. 102-456, 102d Cong., 2d sess. 2 - 21 (1992).

<sup>14</sup> There is some dispute in interpreting the events surrounding the fall of the Kingdom of Hawaii. The Supreme Court, in *Rice v. Cayetano*, 528 U.S. 495, 500-506 (2000), set forth a history of Hawaii as understood by Congress in enacting the Hawaiian Homes Commission Act, in 1921, arguably the first federal law addressing the needs of Native Hawaiians. As related by the Court, Westerners, with the Americans ultimately dominating, sought economic and political influence in Hawaii throughout the 19<sup>th</sup> century, until in 1887, they forced the Queen to accept a western style constitution that included voting rights for non-Hawaiians. According to the Court, the 1893 revolution came:

in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called Committee of Safety, a group of professionals and business men, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for the restoration of the Hawaiian monarchy.... the Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated. *Id.*, at 504-505.

A brief summary of the history surrounding the overthrow and annexation, with copies of President Grover Cleveland's address in opposition to a treaty of annexation, is found in S.Rept. 102-456, 21 - 35 (1992).

<sup>15</sup> 30 Stat. 750 (1898).

<sup>16</sup> Act of Apr. 30, 1900, ch. 339, 31 Stat. 141.

<sup>17</sup> This statement is true if one confines the concept of "government" to a defined organizational entity by which political power over a particular territory is exercised. There is a counter argument to the effect that there are more meaningful ways to conceptualize governance in the context of indigenous peoples, including Indian tribes and Native Hawaiians. It takes the view that "[b]oth groups have maintained their identities through kinship and social ties, despite powerful assimilative pressures and the intense desire of non-Indians for their land. They have lost control of their historic territory and thus express their

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Native Hawaiian government or for compensation for the lands that had been seized from Queen Liliuokalani.<sup>18</sup> Thus, when the Territory of Hawaii was established, there was no formal federal acknowledgment by treaty or agreement of the existence of a Native Hawaiian government similar in status to an Indian tribe. To date, there has been no federal acknowledgment of the existence of a Native Hawaiian government and no federal administrative process for a Native Hawaiian entity to become federally recognized and, thereby, to enter into a government-to-government relationship with the United States. Such a procedure is available to Native American groups in the continental United States.<sup>19</sup>

## Federal Statutes Relating to Native Hawaiians

While it is true that since Hawaii's annexation, there has never been a formal designation by Congress or the BIA of federal recognition of a Native Hawaiian governmental entity, there have been various indices of the federal government's assumption of special responsibilities toward Native Hawaiians akin to those with respect to members of Indian tribes. A brief description of some of these statutes follows.

**Hawaiian Homes Commission Act, 1920.**<sup>20</sup> The Hawaiian Homes Commission Act (HHCA) set aside a portion of the public lands in Hawaii to be administered by a Hawaiian Homes Commission, originally a component of the territorial government, for the benefit of Native Hawaiians. Under the legislation, the Commission was empowered to grant long-term leases to Native Hawaiians and to provide other types of assistance to Native Hawaiians. That legislation defined "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."<sup>21</sup> With the 1959 Hawaii Statehood Act,<sup>22</sup> title to the Hawaiian Home Lands was transferred from the federal government to the state government, and the state government was given and

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<sup>17</sup> (...continued)

communal ties more through political lobbying than through fixed governmental institutions." Note, "International Law as an Interpretive Force in Federal Indian Law," 116 *Harv. L. Rev.* 1751, 1768-1769 (2003).

<sup>18</sup> A claim by the Queen for compensation from the United States for the crown lands was denied with the court holding that, although the lands were set aside to assure an income for the sovereign, they were not personal property and, thus, did not pass to heirs but to succeeding sovereigns. *Liliokalani v. United States*, 45 Ct. Cl. 418 (1910). In reaching the decision, the court relied partially on an 1864 decision of the Supreme Court of the Kingdom of Hawaii, *In the Matter of the Estate of His Majesty Kamehameha IV, Late Deceased*, 2 Haw. 715.

<sup>19</sup> 25 C.F.R., Part 83. See CRS Report RS21109, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes*, by (name redacted); and Alva C. Mather, "Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation," 151 *U. Pa. L. Rev.* 1827 (2003).

<sup>20</sup> Act of July 9, 1921, ch. 42, 42 Stat. 108.

<sup>21</sup> 42 Stat. 110.

<sup>22</sup> P.L. 86-3, 73 Stat. 4 (set out at 48 U.S.C. prec. § 491).



accepted the responsibility of administering the home lands in trust for Native Hawaiians. Under this legislation, although Hawaii may amend the HHCA, certain types of amendments must be approved by the federal government, including changes affecting the qualifications of lessees.<sup>23</sup>

The legislative history of HHCA is extensive both at the Territorial and congressional level for a period of years. Although there is some indication that one of the purposes of the legislation was to permit renewal of leases by large commercial producers,<sup>24</sup> the sponsors of the legislation were intent upon protecting land for Native Hawaiians that was in danger of being claimed under the homestead laws by non-Natives and aliens.<sup>25</sup> While it is not precedential authority for any federal court ruling, it might be noted that the Supreme Court of Hawaii, moreover, has ruled that the purpose of the HHCA was to rehabilitate Native Hawaiians and that “[N]ative Hawaiians are special objects of solicitude under the act.”<sup>26</sup> That court drew on language in the legislative history<sup>27</sup> of HHCA to conclude that there was “an intent to establish a trust relationship between the government and Hawaiian persons,”<sup>28</sup> analogous to the federal trusteeship with American Indians.

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<sup>23</sup> Virtually all amendments submitted to Congress have been approved. See, e.g., P.L. 99-557, 100 Stat. 3143 (1986); P.L. 102-398, 106 Stat. 1953 (1992); P.L. 105-21, 111 Stat. 235 (1997).

<sup>24</sup> See Mitsuo Uyehara, *The Hawaii Ceded Land Trusts: Their Use and Misuse* 16-17 (1977). See also, Theon Writhe, *The Disenchanted Isles: The Story of the Second Revolution in Hawaii* 32-33 (1972), claiming that:

What the sugar planters wanted most was the elimination of the section of the Organic Act that provided that upon expiration of a lease, valuable sugar land could be withdrawn from lease lands and opened to homesteaders if twenty-five applicants should request this. For ten years the planters had tried to get this provision out of the Organic Act and had been blocked by Congressmen who wanted to protect homesteading rights. Hidden within the Hawaiian Homes Act was a clause that said ‘necessary revenues for accomplishment of the purposes’ of the Act would be obtained by ‘authorizing the lease by sale at public auction of highly cultivated public lands of the Territory for a term not to exceed 15 years, and such lease ... shall not contain the withdrawal clause.’ Thus the lands of the sugar planters would remain safely under lease without exposure to homesteading rights of the Hawaiian people.

<sup>25</sup> 61 *Cong. Rec.* 3057 (June 27, 1921) (statement of Sen. New); S.Rept. 67-123, 67<sup>th</sup> Cong., 1<sup>st</sup> sess. 2 (1921): “This bill seeks to rehabilitate the Hawaiian race by placing Hawaiian families back on the land.” In H.Rept. 66-839, 66<sup>th</sup> Cong., 2d sess. (1920), the House Committee on the Territories identified two factors prompting the legislation: the population decline of Native Hawaiians and the ineffectiveness of previous systems of distributing lands to them.

<sup>26</sup> *In re Ainoa*, 60 Haw. 487, 488; 591 P.2d 507, 608 (Hawaii 1979).

<sup>27</sup> H.Rept. 66-839, at 4, statement of former Secretary of the Interior Franklin K. Lane: “‘One thing that impressed me...was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, and falling off rapidly in numbers....’” [Emphasis in original.]

<sup>28</sup> *Ahuna v. Department of Hawaiian Home Lands*, 640 P. 2d 1161, 1162 (Hawaii 1982).

**The Statehood Act.** At Hawaii statehood in 1959, the United States conveyed to the State of Hawaii, with certain exceptions, all public lands in Hawaii and, therefore, all the lands that had been ceded upon the annexation of Hawaii in 1898.<sup>29</sup> These lands were subject to the restriction that they and any proceeds from their sale or income were to be devoted to certain specified public purposes, including “the betterment of the conditions of [N]ative Hawaiians, as defined in the Hawaiian Homes Commission Act.”<sup>30</sup>

**The Apology Resolution.** On November 23, 1993, to acknowledge the 100<sup>th</sup> anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians on behalf of the United States for the “illegal” overthrow of the Kingdom of Hawaii, the United States passed legislation known as the Apology Resolution.<sup>31</sup> In it, the Congress “apologizes to Native Hawaiians on behalf of the people of the United States 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.”<sup>32</sup> It sets forth and characterizes certain events in the history of the Hawaiian monarchy and its overthrow, as well as the subsequent history of annexation, incorporation into the United States, and statehood for Hawaii. It also characterizes the attachment of Native Hawaiians to their land as integral to their well-being and also mentions the devastation wrought on them by 19<sup>th</sup> and 20<sup>th</sup> century social and economic changes. It voices support for the reconciliation efforts of the State of Hawaii and the United Church of Christ with respect to the Native Hawaiians.

**Other Federal Statutes.** Although Congress has not recognized a Native Hawaiian governmental entity analogous to a federally recognized Indian tribe, it has enacted an array of laws that provide special treatment for Native Hawaiians similar to and sometimes on an equal basis with that provided to members of federally recognized Indian tribes. A list of 160 federal laws specifically affecting Native Hawaiians has been assembled by Hawaii’s congressional delegation.<sup>33</sup> Many of these laws provide programs<sup>34</sup> which are considered by many to be essential to the well-being of Native Hawaiians.

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<sup>29</sup> P.L. 86-3, 73 Stat. 4, § 5(g).

<sup>30</sup> P.L. 86-3, 73 Stat. 4, § 5(f).

<sup>31</sup> P.L. 103-150, 107 Stat. 1510 (1993).

<sup>32</sup> P.L. 103-150, Section 1, 107 Stat. 1510, 1513.

<sup>33</sup> Brief for the Hawai’i Congressional Delegation as Amicus Curiae, at A-1, *Rice v. Cayetano*. 528 U.S. 495 (No. 98-518). This list may also be found in Table of Federal Acts Affecting Native Hawaiians, appended to Testimony of Hawaii Attorney General Mark J. Bennett before the House Judiciary Subcommittee on the Constitution, Tuesday, July 19, 2005 [<http://judiciary.house.gov/media/pdfs/bennett071905.pdf>] (last visited September 2, 2005).

<sup>34</sup> See **Appendix II**, Federal Native Hawaiian Programs, prepared by (name redacted), Specialist in American National Government, Domestic Social Policy Division, CRS.

## Recent Cases

In *Kahawaiolla v. Norton*,<sup>35</sup> the exclusion of Native Hawaiian groups from the BIA's administrative process for recognizing government-to-government relations with Indian tribes was upheld against a charge of racial discrimination. *Norton* is among a group of cases that involve questions of whether Native Hawaiian is a race-based classification or whether it may be viewed as a political classification and, therefore, benefit from the line of the case law upholding federal Indian statutes. None of the cases, however, has reached the question of whether or not Congress may establish a government-to-government relationship with Native Hawaiians, similar to that which the courts have recognized with respect to Indian tribes and Alaska Native entities. Furthermore, the outcome of some of these cases has served as impetus for legislation such as S. 147/H.R. 309 that would provide a process for recognition of a Native Hawaiian governing entity.<sup>36</sup>

***Kahawaiolaa v. Norton.*** This case involves a facial challenge to the DOI tribal acknowledgment or recognition regulations.<sup>37</sup> These regulations are available to groups of Indians or Alaska Natives in the continental United States<sup>38</sup> not yet accorded federal recognition by the DOI. These regulations afford such groups a means of establishing their existence as an Indian tribe and, thus, entitled to “the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.... and to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States.”<sup>39</sup> In the litigation, Native Hawaiians and Native Hawaiian organizations sought to have the regulations declared unconstitutional and DOI restrained from enforcing them on Equal Protection grounds.<sup>40</sup>

The main contention was that DOI was engaging in racial discrimination in violation of the Fifth Amendment by denying Native Hawaiians access to the federal

<sup>35</sup> 386 F. 3d 1271 (9<sup>th</sup> Cir. 2004), *cert. denied*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2001 (2005).

<sup>36</sup> Some supporters of S. 147/H.R. 309 view congressional legislation providing for recognition of a Native Hawaiian governing entity as the best way of safeguarding the various federal programs, with their annual funding of more than \$69 million per year, in view of the success of recent legal challenges. See, e.g., DePledge Derrick, “Akaka Bill Gaining Higher Profile,” Honolulu *Advertiser* (August 10, 2005); 2005 WLNR 12535778.

<sup>37</sup> 25 C.F.R., Part 83.

<sup>38</sup> “Continental United States” is defined to mean “the contiguous 48 states and Alaska.” 25 C.F.R. § 83.1.

<sup>39</sup> 25 C.F.R. § 83.2. Such recognition carries with it “important rights and protections to Indian tribes, including limited sovereign immunity, powers of self-government, the right to control the lands held in trust for them by the federal government, and the right to apply for a number of federal services.” *Kahawaiolaa v. Norton*, 386 F. 3d 1271, 1272.

<sup>40</sup> They also challenged the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq., according to which Indian tribes may organize as governments and adopt constitutions, and the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450 et seq., which also excludes Native Hawaiians.

acknowledgment process. At the trial court level, a federal district court had held that determining which groups of Native Americans to recognize was a political question committed to the Legislative and Executive Branches and, thus, not susceptible to judicial scrutiny.<sup>41</sup> It found that since Congress had not dealt with Native Hawaiian groups as governments, DOI regulations were implementation of congressional policy. The trial court also found that the regulations did not violate Equal Protection because they satisfied the rational basis test articulated in *Morton v. Mancari*,<sup>42</sup> and were legitimate exercises of the congressional power in Indian affairs.

The appellate court viewed the issue differently. It did not focus on whether the decision to extend federal recognition to one group and not to another was a political question. Instead, it looked to the precise claim of the Native Hawaiians and determined that the constitutionality of DOI's decision to exclude Native Hawaiians from participating in the federal acknowledgment process is subject to judicial review under the Federal Administrative Procedure Act.<sup>43</sup> It further determined that the deferential rational basis standard of *Morton v. Mancari* applied since the regulations dealt with recognition of political entities. Excluding Native Hawaiians was found to meet the rational basis test because the acknowledgment regulations were viewed as being grounded in the Indian Reorganization Act, which has a provision excluding Hawaii.<sup>44</sup> The court noted that Congress had similarly excluded Native Hawaiians from coverage under the Indian Self-Determination and Education Assistance Act.<sup>45</sup> The court also seemed to imply that congressional differentiation between Indian tribes and Native Hawaiians dates back to the 19<sup>th</sup> century when treaties were entered into with the Kingdom of Hawaii in 1875 and 1887 despite the existence of an 1871 law forbidding treaties with Indian tribes.<sup>46</sup> It concluded that "Congress has evidenced an intent to treat Hawaiian [N]atives differently from other indigenous groups"<sup>47</sup> and has done so because "the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States until the governance over internal affairs was entirely assumed by the United States, is fundamentally different from that of indigenous groups and federally recognized Indian tribes in the continental United States."<sup>48</sup> Finally, the appellate court looked at the different sets of entitlements Congress has established for Native Hawaiians and for Indians and determined that it is rational for Congress to establish two sets of programs for the two different groups and, given that fact, equally rational for DOI to exclude Native Hawaiians

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<sup>41</sup> *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002). The court cited *Baker v. Carr*, 369 U.S. 186, 215-217 (1969), which had included in its recital of issues that involve the political question doctrine determinations of tribal status.

<sup>42</sup> 417 U.S. 535, 553 (1974).

<sup>43</sup> 5 U.S.C. § 551 et seq.

<sup>44</sup> 25 U.S.C. § 473.

<sup>45</sup> 25 U.S.C. § 450 et seq.

<sup>46</sup> 25 U.S.C. § 71.

<sup>47</sup> 386 F. 3d 1271, 1281.

<sup>48</sup> *Id.*, at 1282.

from recognition as an Indian tribe.<sup>49</sup> Although the court upheld the DOI decision to exclude Native Hawaiians from the acknowledgment regulations, it expressed dissatisfaction with its decision to do so:

Although we conclude that the Department of Interior’s exclusion of Hawaiians passes constitutional muster, we recognize that, in many ways, the result is less than satisfactory. We would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether [N]ative Hawaiians, or some [N]ative Hawaiian groups, could be acknowledged on a government-to-government basis. It would have been equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance.<sup>50</sup>

***Rice v. Cayetano.*** In *Rice v. Cayetano*,<sup>51</sup> the Supreme Court struck down, as violating the Fifteenth Amendment prohibition against racial discrimination in voting, a provision of Hawaii’s Constitution essentially limiting to Native Hawaiians the right to vote in elections for the trustees of the Office of Hawaiian Affairs (OHA), a state agency charged with operating programs for Native Hawaiians. OHA program responsibilities are funded by a set portion of the state’s public lands revenues, i.e., representing part of the lands ceded to the United States by the Republic of Hawaii.<sup>52</sup> The case did not involve the legitimacy of state programs benefitting Native Hawaiians, nor did it involve the question of whether a purely private Native Hawaiian organization could limit its franchise. The issue was the legality of closing the voting rolls in an election for a state office to everyone other than persons of Native Hawaiian lineage. The Court concluded that limiting voting to persons whose ancestors were in Hawaii at a specific time was essentially using “[a]ncestry as a proxy for race.” 528 U.S. 495, 514. With respect to the argument advanced by the State of Hawaii that limiting the voting to Native Hawaiians could be sustained under the same rationale that has been applied to members of Indian tribes in cases such as *Morton v. Mancari*, the Court stated:

If Hawaii’s restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State — and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 — has determined that [N]ative Hawaiians have a status like that of Indians in organized tribes, and that it may, and has delegated to the State a broad authority to

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<sup>49</sup> “Granting federal recognition to [N]ative Hawaiians as an Indian tribe or tribes would serve to blur the categorical distinction between the two groups, frustrate at least to some degree Congress’ intent to treat the two groups differently, and allow [N]ative Hawaiians to obtain greater benefits than the members of all American Indian tribes.” *Id.*, at 1283.

<sup>50</sup> *Id.*, at 1283.

<sup>51</sup> 528 U.S. 495 (2000).

<sup>52</sup> These lands have passed through the various governing authorities of Hawaii, including the Hawaiian monarchy; the provisional government of 1894; the United States, pursuant to the 1898 Newlands Resolution of annexation, 30 Stat. 750; and the government of the Territory of Hawaii pursuant to the Hawaiian Organic Act of 1900, 31 Stat. 159. The Hawaiian Home Lands are not administered by the Office of Hawaiian Affairs.

preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat [N]ative Hawaiians as it does Indian tribes....The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or [N]ative Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.<sup>53</sup>

The dissent, which would have upheld Hawaii's election law, endorsed the view that congressional Indian affairs power extends to all the indigenous peoples of the United States and that a trust relationship has been established with Native Hawaiians by virtue of their state of dependency at annexation and has been manifested in the protective legislation enacted by Congress since 1920:

The descendants of Native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created specialized 'guardian-ward' relationship with the Government of the United States. It follows that legislation targeting the [N]ative Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States; that 'special treatment ... be tied rationally to the fulfillment of Congress' unique obligation' toward the native peoples.<sup>54</sup>

***Doe v. Kamehameha Schools.*** A third recent decision, *Doe v. Kamehameha Schools*,<sup>55</sup> involved the admissions policy of the Kamehameha Schools (Kamehameha), which are privately funded and operated, serving 16,000 Native Hawaiian students. Kamehameha has functioned since 1886 under a trust established in the will of Princess Bernice Pauahi Bishop, a descendant of the dynasty that ruled Hawaii in the 19<sup>th</sup> century. Its admission policy essentially excludes persons not able to trace their lineage to aboriginal inhabitants of the Hawaiian Islands, i.e., those in Hawaii before Captain James Cook, the first Westerner, who landed in 1778. The court found the policy to violate 42 U.S.C. § 1981, a federal civil rights statute that prohibits racial discrimination in the offering and making of private contracts. The court found that there was no requirement in the trust instrument that enrollment be limited to Native Hawaiians. Kamehameha had conceded that the admissions policy was based on race. The Court ruled that, rather than the strict scrutiny standard applicable to race-based classifications in Fourteenth Amendment Equal Protection cases,<sup>56</sup> it would apply a test based on Title VII of the Civil Rights Act of 1964.<sup>57</sup>

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<sup>53</sup> 528 U.S. 495, 518-519.

<sup>54</sup> 528 U.S. 495, 534 (quoting *Morton v. Mancari*, 417 U.S., at 555) (Stevens, J., dissenting).

<sup>55</sup> 416 F. 3d 1025 (9<sup>th</sup> Cir. 2005).

<sup>56</sup> “[R]acial classifications ... must serve a compelling governmental interest, and must be narrowly tailored to further that interest.” *Adarand Constructors, Inc. v. Peña*, 525 U.S. 200, 227 (1995).

<sup>57</sup> 42 U.S.C. §§ 2000(e) et seq. The standard is derived from *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Under that test, Kamehameha's admissions policy could only survive if it could be demonstrated to advance a legitimate nondiscriminatory purpose.

Kamehameha offered at least three possible arguments, each of which was rejected by the court. The first, justification as an affirmative action plan, was rejected because, unlike affirmative action plans that had been upheld by the Supreme Court, Kamehameha's admission policy ignored the rights of other races.<sup>58</sup> The second, inferring congressional intent as to how to interpret § 1981 from scattered statutes, was rejected on relevance grounds as well as for lack of precedent. The third, whether a special relationship exists with Native Hawaiians to preclude the racial classification, was not analyzed because Kamehameha had conceded that the preference was based on race. In a dissent, Judge Graber, stated that she would have upheld the admission policy. Essentially, she would infer congressional intent to permit the Native Hawaiian preference to continue at the Kamehameha Schools by harmonizing 42 U.S.C. § 1981, as amended in 1991, with another statute enacted that same year. According to her reasoning, Congress, in amending § 1981, and in the same year creating a demonstration program for Native Hawaiian education operated by Kamehameha,<sup>59</sup> could not have intended § 1981 to preclude Kamehameha's preferential treatment of Native Hawaiians.<sup>60</sup>

***Arakaki v. Lingle.*** On September 1, 2005, the U.S. Court of Appeals for the Ninth Circuit, in *Arakaki v. Lingle*,<sup>61</sup> ruled that Hawaii taxpayers have standing to challenge the constitutionality of using state funds to provide services to Native Hawaiians under various state programs administered by Hawaii's Department of Hawaiian Home Lands, the Hawaiian Home Commission, and the Office of Hawaiian Affairs. In the same opinion, the court upheld the dismissal of claims against the United States and found that none of the laws cited by the plaintiffs, including the HHCA and the Statehood Act, has established the United States as a current trustee.

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<sup>58</sup> The criteria under which affirmative action programs have been upheld, as set forth in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), are: (1) having a purpose of redressing a practice that had resulted in racial imbalance; (2) not being unnecessarily unfair to those not in the favored race; and (3) being designed as a temporary measure — to redress the imbalance not to perpetuate a balance.

<sup>59</sup> 20 U.S.C. § 4904(a)(1991) (repealed in 1994).

<sup>60</sup> “I disagree that the mere fact that the Kamehameha Schools grants an exclusive preference to Native Hawaiian applicants is dispositive of this case. Indeed, the inescapable conclusion from the statutory context is that in 1991 Congress intended that a preference for Native Hawaiians, in Hawaii, by a Native Hawaiian organization, located on the Hawaiian monarchy's ancestral lands, be upheld because it furthers the urgent need for better education of Native Hawaiians, which Congress had identified explicitly in 1988.” 416 F.3d 1025, 1043 (Graber, dissenting).

<sup>61</sup> \_\_\_ F.3d \_\_\_, No. 04-15306 (9<sup>th</sup> Cir. 2005). The district court had dismissed the entire suit. *Arakaki v. Lingle*, 305 F. Supp. 2d 1161 (D. Haw. 2004).

## S. 147/H.R. 309, 109<sup>th</sup> Congress

Two bills in the 109<sup>th</sup> Congress, S. 147 and H.R. 309, address the issue of recognition of a Native Hawaiian governing entity. These are similar in purpose to bills introduced in three earlier Congresses.<sup>62</sup> Hearings and committee reports in connection with these measures provide an extensive record of the factors prompting this legislation. An abbreviated history of its background, from the period before Captain Cook's arrival, through the period of "increasing contact and influence of foreigners and foreign powers" and treaties with the United States, up to and including the HHCA, the Admission Act, and the Apology Resolution, is found in the report accompanying S. 147; a fuller treatment may be found in S. Rep. 108-85, which accompanied S. 344 in the 108<sup>th</sup> Congress.

In reporting out S. 147, the Senate Indian Affairs Committee linked the legislation to the reconciliation process encouraged by the Apology Resolution and the 2000 report issued by the Departments of Justice and the Interior, which included in its recommendations the following statement:

It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.<sup>63</sup>

The goal of the legislation is to provide "a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-

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<sup>62</sup> Bills in earlier Congresses include H.R. 665, H.R. 4282, and S. 344 in the 108<sup>th</sup> Congress; H.R. 617, S. 746, and S. 1783 in the 107<sup>th</sup> Congress; and, H.R. 4904 (passed by the House on September 26, 2000) and S. 2899 in the 106<sup>th</sup> Congress. While the Senate did not pass H.R. 4904, the bill would have been enacted through a provision in the Consolidated Appropriations Act, 2001 (H.R. 4577, P.L. 106-554), until a Senate concurrent resolution removed the provision by correcting the enrollment of H.R. 4577 (S.Con.Res. 162).

<sup>63</sup> S.Rept. 109-68, 7-8 (109<sup>th</sup> Cong., 1st sess. 2005), quoting, Department of Justice and 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" (October 2, 2000). Available at [<http://purl.access.gpo.gov/GPO/LPS14622>]. (Hereafter cited as From Mauka to Makai.)



determination and self-governance.”<sup>64</sup> Furthermore, “when that process has been completed, [the goal is] to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship.”<sup>65</sup>

## **S. 147: Major Provisions As Reported by the Senate Committee on Indian Affairs**

As introduced, the Senate and House versions were similar. The Senate bill was reported with amendments. Subsequently, discussions among staff of the legislative and executive branches and the State of Hawaii have resulted in a substitute amendment, which is expected to be introduced when Senate debate resumes. A brief summary of the provisions of the substitute amendment follows, *infra* p. 29. The following summarizes the bill as reported by the Senate Committee on Indian Affairs.

**Findings.** The legislation is prefaced by findings to the effect that the Constitution vests Congress with power to address “the conditions of the indigenous native people of the United States,” and that Native Hawaiians “are indigenous, native people of the United States.”<sup>66</sup> It continues with findings as to the United States’ “special political and legal responsibility to promote the welfare of native people of the United States, including Native Hawaiians”; the existence of confirmed treaties between the United States and the Kingdom of Hawaii, between 1826 and 1893, which recognized the sovereignty of that Kingdom; and the enactment of the HHCA.<sup>67</sup> There are findings that the HHCA set aside 203,500 acres “to address the conditions of Native Hawaiians ... to assist “the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii,” and that there are approximately 6,800 Native Hawaiian families residing on the Hawaiian Home Lands and 18,000 eligible Native Hawaiians on a waiting list for leases.<sup>68</sup> There are also findings with respect to trust lands ceded by the United States to the State of Hawaii by compact at admission for five purposes, one of which is “betterment of the conditions of Native Hawaiians”; that the revenues of these lands are part of a public trust, the assets of which have never been completely inventoried or segregated; and, that Native Hawaiians have sought access to these ceded lands to settle and maintain communities throughout the State.<sup>69</sup> In the legislation, there is also a finding that “the Hawaiian Home Lands and other ceded lands provide an important foundation for the ability of the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and

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<sup>64</sup> S. 147, § 2 (19).

<sup>65</sup> S. Rept. 109-68, at 1.

<sup>66</sup> S. 147, § 2(1) and (2), 109<sup>th</sup> Cong., 1<sup>st</sup> sess.

<sup>67</sup> *Id.*, §§ 2 (3), (4), and (5).

<sup>68</sup> *Id.*, §§ 2 (6) and (7).

<sup>69</sup> *Id.*, §§ 2 (8) and (9).

traditions, and for the survival and economic self-sufficiency of the Native Hawaiian people,”<sup>70</sup>

Three subsections of the findings relate to the Apology Resolution, noting that it: (1) “acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and...that the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum,” and (2) expresses a commitment of Congress and the President, among other things, “to acknowledge the ramification of the overthrow of the Kingdom of Hawaii.”<sup>71</sup> Further findings include one that “Native Hawaiians continue to maintain other distinctly native areas in Hawaii”;<sup>72</sup> “to maintain their separate identity as a distinctive native community through cultural, social, and political institutions, and to give expression to their rights as a native people to self-determination, self-governance, and economic self-sufficiency.”<sup>73</sup>

There are also findings to the effect that Congress “has declared that the United States has a special responsibility for the welfare of the native peoples of the United States, including Native Hawaiians”; that it “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”: and that it “has delegated broad authority to the State of Hawaii to administer some of the United States’ responsibilities as they relate to the Native Hawaiian people and their lands.”<sup>74</sup> There are specific findings that “the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people” through the Admission Act and that “the United States has continually recognized and reaffirmed that “Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands; ... [that] Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands; ... [that] the United States extends services to Native Hawaiians because of their unique status as the indigenous, native people of a once-sovereign nation with whom the United States has a political and legal relationship; and ... [that] the special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States.”<sup>75</sup>

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<sup>70</sup> Id., § 2 (10).

<sup>71</sup> Id. §§ 2 (12), (13), and (14).

<sup>72</sup> Id., § 2 (11).

<sup>73</sup> Id., § 2, (15).

<sup>74</sup> Id., § 2 (22) (B).

<sup>75</sup> Id., § 2 (22) (D). There is also a finding that the State of Hawaii supports the legislation, on the basis of two unanimous resolutions passed by the state legislature in 2000 and 2001 and in testimony before the Senate Committee on Indian Affairs by the Governor of Hawaii

**United States Office for Native Hawaiian Relations.** The legislation would establish, within DOI, a United States Office for Native Hawaiian Relations to continue the reconciliation process with Native Hawaiian people and, upon the recognition of the Native Hawaiian governing entity, to administer and coordinate relations with that entity.

**Native Hawaiian Interagency Coordinating Group.** There would also be a Native Hawaiian Interagency Coordinating Group, comprised of officials from each federal agency administering Native Hawaiian programs or involved in actions significantly impacting Native Hawaiian resources, rights, or lands, with the Department of the Interior as the lead agency. Among its functions would be coordinating federal programs affecting Native Hawaiians and ensuring that each federal agency develops a consultation policy with respect to Native Hawaiian people and with the Native Hawaiian governing entity to be established.

**Process for Preparing a Membership Roll and Extending Federal Recognition to a Native Hawaiian Governing Entity.** Under the bill, a Commission, consisting of nine Native Hawaiians with expertise in determining Native Hawaiian genealogy, would be appointed by the Secretary of the Interior (SOI), to prepare a roll and establish standards for documenting eligibility for inclusion on the roll. The Commission's term expires upon federal recognition of the Native Hawaiian governing entity. The roll would be limited to eligible adult Native Hawaiians who choose to participate in the process. Native Hawaiians, at least 18 years old, who apply for enrollment and are certified under a process specified in the bill, would be eligible for inclusion on the roll. "Native Hawaiian" is defined in terms of being: (1) any individual who is one of the "aboriginal, indigenous, native people" who resided in Hawaii on or before January 1, 1893, and exercised sovereignty in the Hawaiian archipelago, and the lineal descendants of such an individual, and (2) any individual who is one of the indigenous native people of Hawaii who was eligible in 1921 for programs authorized by the HHCA and any direct lineal descendant of that individual. The Commission may consult with Native Hawaiian organizations, Hawaiian state agencies, and other entities in the field of Native Hawaiian ancestry and lineal descent. The roll is to be submitted to SOI for certification within two years of the Commission's formation. The Secretary is authorized to establish a procedure for appealing exclusions with respect to the roll. The roll is to be published in the *Federal Register*, when certified; if the Secretary fails to act within 90 days after a roll is submitted, the Commission is to publish the roll, which shall thereby permit those listed to participate in setting up the Native Hawaiian governing entity.

Under the bill, adult members of the Native Hawaiian community listed on the roll as published are authorized to develop criteria for candidates to serve on the Native Hawaiian Interim Governing Council, determine the structure of that Council, and elect members to the Council from the roll as published. The Council is to represent those on the roll. It may enter into contracts for funding from a state or federal agency; it may conduct a referendum among members listed to determine

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<sup>75</sup> (...continued)

on February 25, 2003, and March 1, 2005. *Id.*, § 2(23).

what is to be included in the governing documents of the Native Hawaiian governing entity. Such a document may include proposals for: citizenship criteria; governmental powers, privileges, and immunities; and, civil rights of citizens and others affected by the Native Hawaiian governing entity. The Council may also hold elections to ratify the proposed organic governing documents and, when such documents are certified by SOI, to elect officers of the Native Hawaiian governing entity. The legislation specifies that once the documents are certified and the elections held, the Native Hawaiian governing entity becomes the federally recognized representative governing body of the Native Hawaiian people, and the political and legal relationship between the United States and the Native Hawaiian governing entity would be reaffirmed.

**Negotiation Authority: Land Transfers and Jurisdiction.** The legislation authorizes the Native Hawaiian governing entity and the federal government to enter into negotiations with the State of Hawaii with respect to land transfers, exercise of government authority over any lands transferred; the exercise of civil and criminal jurisdiction, delegation of governmental powers to the Native Hawaiian governing entity by the federal government and the State of Hawaii; and “any residual responsibilities of the United States and the State of Hawaii.” It authorizes the parties to submit any required amendments to existing law required following these negotiations. Proposed amendments to federal law are to be submitted to the Senate Indian Affairs and Energy and Natural Resources Committees and the House Committee on Resources. Proposed amendments to state laws are to be submitted to the Governor and the legislature of the State of Hawaii.

**Claims.** The legislation specifies that it is not to be interpreted as settling any claim against the United States and specifies a 20-year statute of limitations for any claim in existence upon passage of the bill that is asserted by the Native Hawaiian governing entity on behalf of the Native Hawaiian people relating to the legal and political relationship between the United States and the Native Hawaiian people.<sup>76</sup>

**Indian Gaming Regulatory Act.** A provision specifies that nothing in the legislation is to be construed as authorizing the Native Hawaiian governing entity to conduct gaming under the Indian Gaming Regulatory Act. 25 U.S.C. § 2701 *et seq.*

**Indian Programs and Services.** A provision in the bill specifies that because Native Hawaiians and the Native Hawaiian governing entity are eligible for services to Native Hawaiians under existing law, nothing in the legislation provides authorization for eligibility “to participate in any Indian program or service to any individual or entity not otherwise eligible for the program or service under applicable federal law.”

## Issues

What follows is a brief summary of some of the major legal issues that have been raised with respect to the legislation. After S. 147 was reported, as noted

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<sup>76</sup> See p. 29 *infra*, for treatment of claims, causes of action, and sovereign immunity in the substitute amendment.

previously, discussions among Executive and Legislative Branch staff and representatives of the Governor of Hawaii have produced language that is to be included in a substitute amendment to be offered in lieu of the reported version when Senate debate resumes.<sup>77</sup>

**Does the Legislation Establish a Racial Classification?** The Supreme Court held, in *Rice v. Cayetano*, that the State of Hawaii's election law that limited to Native Hawaiians the right to cast ballots in elections for officials who administered state programs for Native Hawaiians offended the Fifteenth Amendment's prohibition on racial discrimination in voting. This ruling has opened the way for cases, such as *Arakaki v. Lingle*, which include the issue of whether or not "Native Hawaiian" is a racial classification and, therefore, subject to a strict scrutiny standard of judicial review. If it can be established that Native Hawaiian is a political classification, similar to that of Indian tribal member, the standard of review would be a rational basis test and would be framed in terms of whether special treatment for Native Hawaiians is rationally related to trust or guardianship obligations that the United States assumes with respect to its indigenous peoples.

Testimony at a July 19, 2005, hearing of the Subcommittee on the Constitution of the House Committee on the Judiciary raised a variety of issues with respect to H.R. 309.<sup>78</sup> According to one view, the legislation "focuses on race to the exclusion of all potentially relevant factors [and] would force the federal government itself to impose and enforce a racial test before any sovereign Native Hawaiian entity even exists .... S. 147's racial test is, therefore, offensive to the Constitution."<sup>79</sup>

Proponents of the measure do not view the legislation as race-based. They align Native Hawaiians with Indians and, thereby, subject to the provisions in the U.S. Constitution giving power to Congress in Indian affairs, including the power to establish a political relationship. The Attorney General of Hawaii, for example, argues that the word "Indian" was not meant to have a narrow meaning, but to include all indigenous peoples.<sup>80</sup> He cites Supreme Court cases sustaining

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<sup>77</sup> See *infra*, pp. 28-30.

<sup>78</sup> [<http://judiciary.house.gov/oversight.aspx?ID=185>]. (Last visited August 19, 2005).

<sup>79</sup> One contention is that the legislation is race-based because its definition of "Native Hawaiian" is based on lineal descent. Senate Republican Policy Committee, "Why Congress Must Reject Race-Based Government for Native Hawaiians," 3 (June 22, 2005). [[http://rpc.senate.gov/\\_files/Jun2205NatHawSD.pdf](http://rpc.senate.gov/_files/Jun2205NatHawSD.pdf)] (Last visited August 23, 2005). See also "Statement of Bruce Fein on the Constitutionality of Creating a Race-Based Native Hawaiian Government (H.R. 309) Before the House Judiciary Subcommittee on the Constitution," (July 19, 2005). [<http://judiciary.house.gov/media/pdfs/fein071905.pdf>] (last visited August 23, 2005). (Hereafter cited as Bruce Fein's Testimony.) Mr. Fein challenges the validity of many of the specific findings in H.R. 309 and speculates that passage of this bill could harm the harmonious racial diversity that has existed in Hawaii and inspire other racial and ethnic groups in the United States to raise similar claims. He mentions MEChA (Movimiento Estudiantil Chicano de Aztlan), a Mexican American organization seeking to reclaim Aztlan land from 9 western states.

<sup>80</sup> See, e.g., "Position Statement of the Attorney General of the State of Hawaii: H.R. 309/S. (continued...)"

congressional authority over Alaska Natives, non-tribal Indians, and the Pueblos of New Mexico indicating that if Congress determines to formalize a special relationship with an Hawaiian Native governmental entity, the legislation will be upheld as a valid exercise of Indian affairs power. He argues that Native Hawaiians meet the standard that the Supreme Court used, in *Montoya v. United States*,<sup>81</sup> to determine what constitutes a tribe: they descend from common ancestors; they inhabit a particular territory; and they lived in a self-governing community prior to the arrival of the Europeans.<sup>82</sup>

At a March 1, 2005, Senate Committee on Indian Affairs hearing on S. 147, Hawaii's Governor, Linda Lingle, directly confronted the charge that the legislation is race-based both by invoking the history of U.S. treaty-making with the Hawaiian Kingdom and the history of the questionable events culminating in annexation as evidence of a political and not a racial relationship with the Native Hawaiian people; she also claimed that without S. 147/H.R. 309, the treatment of Native Hawaiians is race-based discrimination when contrasted with treatment of Indians and Alaska Natives, with respect to self-determination. She stated:

The United States is inhabited by three indigenous peoples — American Indians, Native Alaskans and Native Hawaiians.

While these three indigenous groups differ in culture, history, and anthropological origin, all share three fundamental attributes: (1) they were here long before any European explorer ever set foot on the North American continent or the Hawaiian archipelago; (2) they lived according to their own governmental structures on their homelands long before the federal government of the United States was imposed upon them; and (3) the United States historically acknowledged their existence as distinct nations.

Congress has given two of these three populations full self-governance rights. The Native Hawaiian Government Reorganization Act allows Native Hawaiians to receive parity with the nation's other indigenous peoples. 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.<sup>83</sup>

In the *Rice v. Cayetano* litigation, moreover, the United States, in its amicus brief, took the position that Congress has already designated Native Hawaiians as a group subject to federal protection under the Indian affairs powers and, thus, insulated from an equal protection challenge:

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<sup>80</sup> (...continued)

147 (the 'Akaka Bill') Is Constitutional," Testimony of Hawaii Attorney General Mark J. Bennett before the House Judiciary Subcommittee on the Constitution, Tuesday, July 19, 2005," 7. [<http://judiciary.house.gov/media/pdfs/bennett071905.pdf>] (last visited August 23, 2005). (Hereafter cited as Position Statement of Attorney General of Hawaii.)

<sup>81</sup> 180 U.S. 261 (1901).

<sup>82</sup> Position Statement of Attorney General of Hawaii, *supra*, n. 80.

<sup>83</sup> "Testimony on Senate Bill 147, the Native Hawaiian Government Reorganization Act of 2005," at 1-2. [<http://indian.senate.gov/2005hrsgs/030105hrng/lingle.pdf>].

Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility. Congress' determination that Native Hawaiians constitute a distinct indigenous group for whom it may enact special legislation is entirely rational. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who have exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty or its sovereign lands.

Petitioner seeks to derive from the Indian Commerce Clause's reference to 'Tribes' a requirement that Congress may only take action on behalf of indigenous groups with present-day tribal governments. To the framers of the constitution, however, an Indian tribe was simply a distinct group of indigenous people set apart by their common circumstances, a definition that Native Hawaiians satisfied in 1778 and satisfy today. Moreover, Congress has concluded that it has a trust obligation to Native Hawaiians precisely because it bears responsibility for the destruction of their government and their loss of sovereignty over their land. The Constitution is not so self-defeating as to make the very reasons that Congress has concluded that it has a trust responsibility serve as an obstacle to the fulfillment of that responsibility. Nor is the existence of a tribal government necessary to make legislation on behalf of indigenous people non-racial. 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.<sup>84</sup>

One of the factors at the base of the charge that the legislation is race-based is the use of lineal descent in defining the class of persons eligible for inclusion in the membership of the Native Hawaiian entity. Proponents of the legislation, however, note that the use of lineage and blood quantum is customary in federal Indian law. Not only do many tribes require a degree of Indian blood for membership,<sup>85</sup> but the federal government has also used this as a determinant of whether or not a person is to be considered Indian for a specified purpose. As early as 1846, the Supreme Court, having to determine what "Indian" meant in a federal criminal statute, concluded that it required both identification by a tribe and blood quantum.<sup>86</sup> There are myriad federal statutes over the course of United States history drawing distinctions based on blood quantum or lineal descent. For example, the Indian Reorganization Act, on which the regulations at issue in *Morton v. Mancari* were based, defines "Indian" to include:

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<sup>84</sup> Brief of United States as Amicus Curiae, at 9-10, *Rice v. Cayetano*. The Court in *Rice* did not decide the question of whether Congress could designate a Native Hawaiian entity without offending the Equal Protection Clause. See text accompanying n. 53, supra.

<sup>85</sup> For examples of such tribal membership criteria, see *Rice v. Cayetano*, 528 U.S. 495, 526-527 (Breyer, J. concurring in the result). Justice Breyer cites various tribal constitutions that limit membership to descendants on tribal rolls of a certain date, some with blood-quantum stipulations.

<sup>86</sup> *United States v. Rogers*, 45 U.S. How. 567 (1846). The case involved a person of no Indian ancestry who had been adopted into the tribe.

“all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... all other persons of one-half or more Indian blood.”<sup>87</sup>

The practice of using blood quantum can be found in some early treaties and statutes such as those which differentiated among tribal members according to blood quantum, with Indians of “mixed blood” gaining access to the management of their affairs earlier than those with a greater degree of Indian blood.<sup>88</sup> The Alaska Native Claims Settlement Act of 1971,<sup>89</sup> which grants Alaska Natives rights in land and funds transferred to Alaska Native village and regional corporations, defines “Alaska Native” as “a person of one-fourth degree or more Alaska Indian” or one “who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is ... regarded as Native by any village or group.”<sup>90</sup>

**Is This Legislation Within the Power of Congress to Remedy Past Discrimination?** Even if found to be based on a racial classification, a congressionally enacted mechanism to confer tribal status or attributes upon Native Hawaiians may be constitutionally justified if adequately supported by evidence of a “compelling” remedial purpose. The courts’ affirmative action jurisprudence may point the way. In *Adarand Constructors, Inc., v. Peña*,<sup>91</sup> the Court applied “strict scrutiny” to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by “socially and economically disadvantaged individuals,” defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, it determined that all “racial classifications” by government at any level must be justified by a “compelling governmental interest” and “narrowly tailored” to that end. But the majority opinion, by Justice O’Connor, sought to “dispel the notion” that “strict scrutiny is ‘strict in theory, but fatal in fact,’” by acknowledging a role for Congress as architect of remedies for past discrimination identified by the legislative process.<sup>92</sup> “The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response

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<sup>87</sup> 25 U.S.C. § 479. “Indian” is defined to include Eskimos and other aboriginal peoples of Alaska.

<sup>88</sup> A Treaty of September 30, 1854, Art. 2, (7<sup>th</sup>), 10 Stat. 1109, a Treaty with the Chippewa of Lake Superior and of the Mississippi, included a clause which allotted 80 acres of land to each mixed-blood head of family, which could be issued in fee patent. A subsequent treaty includes a provision for allotting up to 160 acres to each male or female Chippewa, not to be alienated except with the approval of the SOI. Treaty of March 19, 1867, with the Chippewa of the Mississippi, 16 Stat. 719.

<sup>89</sup> P.L. 92-203, 85 Stat. 588, codified as amended at 43 U.S.C. §§ 1601-1628.

<sup>90</sup> 43 U.S.C. § 1602(b).

<sup>91</sup> 515 U.S. 200 (1995).

<sup>92</sup> 515 U.S. 200, 231.237, , 151, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J. concurring in the judgment).



to it.”<sup>93</sup> Indeed, a majority of Justices — all but Justices Scalia and Thomas — appeared to accept some forms of racial preferences by Congress in at least some circumstances.

Absent additional High Court guidance, lower federal courts have been left to determine the scope of remedial power remaining in congressional hands, and of the conditions required for its exercise. On remand from *Adarand*, the Tenth Circuit found that the range of admissible evidence to support racial line-drawing by Congress was both direct and circumstantial, including post-enactment evidence and legislative history, demonstrating public and private discrimination in the construction industry.<sup>94</sup> Congressional hearings over nearly a two-decade period depicted the social and economic obstacles faced by small and disadvantaged entrepreneurs, mainly minorities, in business formation and in competition for government contracts. Moreover, “disparity studies” conducted in most of the nation’s major cities compared minority-owned business utilization with availability and “raise[d] an inference that the various discriminatory factors the government cites have created that disparity.”<sup>95</sup> This record satisfied the Tenth Circuit panel that Congress had a “strong basis in evidence” for concluding that passive federal complicity with private discrimination in the construction industry contributed to discriminatory barriers in federal contracting, a situation the government had a “compelling” interest in remedying.

Similarly, the Eighth Circuit’s consolidated ruling in *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation* and *Gross Seed Co. v. Nebraska Department of Roads*<sup>96</sup> concluded from the record of committee hearings and other documentary evidence before Congress that the government had a compelling interest for the programs in question. Petitioners argued that Congress and transportation officials had no “hard evidence” of intentional discrimination in the contracting industry.<sup>97</sup> The Eighth Circuit nonetheless agreed with the Tenth Circuit panel that “Congress has spent decades compiling evidence of race discrimination in federal highway contracting,” and petitioners failed to meet the burden of showing that no remedial action was necessary.<sup>98</sup>

Both the Apology Resolution and S. 147/H.R. 309 are based on congressional findings of wrongs done by the United States and its agents to the Native Hawaiian populace. The Apology Resolution, *inter alia*, attributes the overthrow of the

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<sup>93</sup> 515 U.S. 200, 231.

<sup>94</sup> *Adarand Constructors, Inc. v. Slater*, 228 F. 3d 1147(10<sup>th</sup> Cir. 2000).

<sup>95</sup> *Id.*, at 1173.

<sup>96</sup> 345 F. 3d 964 (8<sup>th</sup> Cir. 2003), *denied*, 541 U.S. 1041 (2004).

<sup>97</sup> They relied on a Justice Department summary of over 50 documents and 30 congressional hearings on minority-owned businesses prepared in response to the *Adarand* decision. See Appendix — The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 60 *Fed. Reg.* 26050 (May 25, 1996). The Eighth Circuit did not find this documentation compelling. 345 F. 3d 964, at 969-970.

<sup>98</sup> 345 F. 3d 964, 970.

“indigenous and lawful Government of Hawaii,” to a conspiracy that included the U.S. minister, John L. Stevens, and “a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States,” with the support of “armed naval forces of the United States.”<sup>99</sup> It further acknowledges that “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, either through their monarchy or through a plebiscite or referendum,” and that “the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people.”<sup>100</sup>

It could be argued that the extensive congressional findings in the Apology Resolution, in S. 147/H.R. 309, in the legislative record accompanying the over 160 federal laws that address the Native Hawaiian situation, and in the extensive findings with respect to the historical record and present condition of Native Hawaiians in a report<sup>101</sup> issued in 2000 by DOI and the Department of Justice may satisfy the requirement that race-based legislation be remedial in nature and substantiated by an extensive record showing its necessity. On the other hand, one commentator concludes that federal programs for Native Hawaiians would be subject to strict scrutiny and many of them would not survive if a political relationship is not established.<sup>102</sup>

**Does Congress have authority under the U.S. Constitution’s Indian Clauses to Enact Legislation That Recognizes a Native Hawaiian Governmental Entity?** The Supreme Court has upheld a broad exercise of federal power in Indian affairs and referred to the power of Congress in this area as “plenary.”<sup>103</sup> Tribal organizations are not the only form of governmental entities that Congress has recognized under the Indian power. Other organizational alignments are also referenced in various federal statutes. The Indian Claims Commission Act,<sup>104</sup> for example, applied to “any Indian *tribe, band, or other identifiable group of American Indians* [emphasis added] residing within the territorial limits of the United States or Alaska.” The law permitting Alaska Natives to organize and adopt constitutions and governmental authority applies to “*groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district.*”<sup>105</sup> The Supreme Court has deferred to Congress in this matter, according wide latitude to statutory designation of Indian tribal entities. In *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. Candelaria*, 271

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<sup>99</sup> 107 Stat. 1510.

<sup>100</sup> *Id.*

<sup>101</sup> From Mauka to Makai.

<sup>102</sup> Stuart Minor Benjamin, *Equal Protection and the Special Relationship: the Case of Native Hawaiians*, 106 *Yale L. J.* 537, 559 (1996).

<sup>103</sup> *Delaware Tribal Business Comm v. Weeks*, 430 U.S. 73, 83-84 (1977).

<sup>104</sup> 60 Stat. 1049, 1050 (1946).

<sup>105</sup> 25 U.S.C. § 473a.

U.S. 432 (1926), the Court approved application of specific federal Indian laws to the Pueblo Indians of New Mexico, overturning an earlier decision that had found them not to be Indians. *Sandoval* upheld extension of the Indian liquor laws to the Pueblo lands and the Congressional power to include the Pueblos within federally protected Indians; Candelaria overturned *United States v. Joseph*, 94 U.S. 614 (1877), which had found Pueblos not to be Indians, and ruled that the Pueblos fell within the definition of an “Indian tribe” within the meaning of the laws regarding the alienation of Indian property. The rationale for this ruling includes, among other things, a holding that the Pueblos were “*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.*” [Emphasis added.] That language comes from *Montoya v. United States*, 180 U.S. 261, 266 (1901), and has subsequently been employed as a core element in the concept of what is an Indian tribe.<sup>106</sup>

The Supreme Court has not yet been faced with the direct question as to whether Congress may equate Native Hawaiians with Indian tribes. In *Rice v. Cayetano*, within the context of a state election, the Court ruled that a classification based on tracing ancestry to the pre-1778 inhabitants of the Hawaiian Islands is invidious racial discrimination. Whether Congress may do what Hawaii could not, however, was not settled by *Rice v. Cayetano*, as the Court noted.<sup>107</sup> In that case, moreover, the Court seemed to tie Congressional power over Indians to retained tribal sovereignty, rather than to their position as aboriginal inhabitants of territory that became the United States.<sup>108</sup> Restoring powers of self-government to a Native Hawaiian entity, moreover, may be considered analogous to restoration of powers to an Indian tribe. Congressional authority to restore power to an Indian tribe was sustained by the Supreme Court recently in a case involving a federal statute that restored to Indian tribes certain criminal law jurisdiction over non-member Indians. In that case, *United States v. Lara*,<sup>109</sup> the Court decided that Congress has the power “to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.”<sup>110</sup>

**Interpretation of Hawaii’s History.** The legislation has prompted challenges to the interpretation of its findings and those of the Apology Resolution that the United States, through its agents, collaborated in an illegal ouster of the

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<sup>106</sup> See, e.g., *Mashpee Tribe v. New Seabury Corp.*, 592 F. 2d 575 (1<sup>st</sup> Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

<sup>107</sup> 528 U.S. 495, 518-519. See *supra*, n. 51.

<sup>108</sup> “The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi-sovereign authority, even after cession of their lands to the United States.” 528 U.S. 495, 518.

<sup>109</sup> 541 U.S. 193 (2004). See CRS Report RL32361, *Tribal Sovereignty Over Nonmember Indians: United States v. Billy Jo Lara*, by (name redacted).

<sup>110</sup> 541 U.S. 193, 196.

Hawaiian monarchy and wrested sovereignty from the Native Hawaiian people.<sup>111</sup> A succinct exposition of the view of Hawaii's history that appears to be in accord with that taken in the Apology Resolution is as follows:

When Captain James Cook sailed into Hawaii, anywhere from 200,000 to 1 million people lived in a highly organized social system based on communal land tenure — all land was held in trust by the king and the concept of fee simple did not exist. While the Hawaiians were governed by four separate chiefdoms, they had a uniform culture, language, and religion. In 1810, King Kamehameha unified the islands under the Kingdom of Hawaii with U.S. and European assistance. Western traders saw riches of fur, sandalwood, and whales, and King Kamehameha allowed wide access to these resources in exchange for western support of his monarchy. The United States, as well as most of the world, recognized the Kingdom of Hawaii as an independent sovereign by 1826.

From 1810 to 1893, Hawaii gravitated further into the hands of the West. Hawaiians introduced fee simple land ownership to satisfy western interests. The “Great Mahele,” or “Great Division,” ended the islands’ communal land arrangement by apportioning one-third of the land to the crown, one-third to the government, and one-third to [N]ative Hawaiians. In actuality, [N]ative Hawaiians, although promised ownership in land they had cultivated, received less than one percent of the allotted land. And those who did receive land did not understand the nature of their title — in fact, many [N]ative Hawaiians sold their land without comprehending the legal ramifications.

Further, the population of the islands changed dramatically. The burgeoning western-owned sugar and pineapple plantations hungered for

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<sup>111</sup> Subsection 2(13) of S. 147 reads, “the Apology Resolution acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum.”

Included in the Apology Resolution is a statement issued, in 1893, by the Queen of the Hawaiian Kingdom that she was abdicating under protest and looked to the United States to reinstate her. Also included are excerpts from a message to Congress from President Cleveland characterizing U. S. actions as “an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress,” and calling upon Congress to restore the Hawaiian monarchy to right a “substantial wrong ... done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.” 107 Stat. 1510, 1511

Hawaiian history as related in the Apology Resolution and the Senate Report accompanying it (S.Rept. 102-456, 21-35) has been contested recently by former Senators Slade Gorton and Hank Brown, in an article in the August 16, 2005, *Wall Street Journal*, A-16. They contend that “the Apology Resolution distorted historical truths,” that the United States was not involved in the overthrow of Queen Liliuokalani in 1893, that there was no resistance to the insurgents, and that “the queen authored her own ouster by planning a coup against the Hawaiian Constitution to recapture monarchical powers that had been lost in a strong democratic current.” In their view, under the Kingdom, sovereignty was shared by native and non-native citizens. They claim that there was a 2-1 margin in the Native Hawaiian vote for statehood in 1959, and that this refutes the statement in the Apology Resolution that Native Hawaiians never relinquished sovereignty to the United States.

laborers, creating an infusion of labor from Asia, Germany, and Spain. By the mid-nineteenth century, native Hawaiians were poor, plagued by new diseases brought by foreigners, and landless. By 1900, [N]ative Hawaiians constituted only half of the islands' population....

The year 1893 marked the end of the Hawaiian Kingdom. The monarch of Hawaii, Queen Lili'uokalani, sought to re-establish [N]ative control. She had secretly written a new constitution for Hawaii to replace an earlier one, written by western business interests in 1887 and forced upon a previous king. The constitution that the Queen sought to replace guaranteed white landowners substantial control in Hawaiian government. Lili'uokalani's constitution, in contrast, would have eliminated western influence by granting voting rights exclusively to [N]ative Hawaiians. Further, her constitution would eliminate the many cabinet positions filled by Americans. Those with commercial interests in Hawaii panicked, and within days, the United States, through its military troops, retaliated with force.

Queen Lili'uokalani, with a military force assembled near her palace, relinquished power to the United States. Immediately, a U.S.- controlled provisional government sprang to life and sought annexation. President Cleveland, however, demanded the restoration of the monarchy and declared the overthrow of Queen Lili'uokalani an "act of war." By 1898, however, President McKinley answered the call of Manifest Destiny and annexed Hawaii. Suddenly, 1.8 million acres became part of the United States without the payment of any compensation.<sup>112</sup>

Other commentators have challenged this interpretation, and it has been argued that "the Monarchy was overthrown without the collusion of the United States or its agents; the Native Hawaiian people enjoyed no more inherent sovereignty under the kingdom than did non-Native Hawaiians; in any event, sovereignty at the time of the overthrow rested with Queen Liliuokalani, not the people; the public lands of Hawaii belonged no more to Native Hawaiians than to non-Native Hawaiians; and, there was never a legal or moral obligation of the United States or the Provisional Government after the overthrow to obtain the consent of Native Hawaiians to receive control over the crown lands."<sup>113</sup>

The interaction of Hawaii's history with that of the United States is a matter of complex and multiple interacting forces and individuals about which political scientists, historians, and contemporaneous observers have disagreed. Indeed, in setting forth the historical background of HHCA, the Supreme Court opinion in *Rice* recognized this fact and chose to outline the history as understood by the legislators who enacted the underlying laws, rather than to attempt to set forth its own version of the events. It stated:

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<sup>112</sup> John Heffner, Note, "Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide," 37 *Tex. Int'l L. J.* 591, 594-596 (2002) (footnotes omitted).

<sup>113</sup> Bruce Fein's Testimony, at 9. Fein also asserts that Native Hawaiians are not a separate community; they are spread all over the United States; and, that there never was a government of Native Hawaiians both because the Kingdom had only one sovereign, not a sovereign people, and because its subjects were Native and non-Native alike.

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources.<sup>114</sup>

**Jurisdictional Issues.** Indian tribes have inherent powers of self government<sup>115</sup> and limited civil and criminal jurisdiction over their members and their land by virtue of inherent tribal sovereignty and federal statute.<sup>116</sup> Since they are neither federal nor state governmental entities, in their relationship to their members, they are not subject to the restraints placed on government by the federal Constitution.<sup>117</sup> For this reason, Congress enacted the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., applying many of the safeguards of the federal Bill of Rights to Indian tribal governments.

S. 147/H.R. 309 does not establish any civil or criminal jurisdiction or any specific limits on the jurisdiction of the Native Hawaiian governmental entity that may emerge from the process established in the legislation. The legislation does not specify that the governmental entity shall be subject to the Indian Civil Rights Act, for example. It does, however, require as a condition of DOI certification of its governing documents, that they provide protection for the civil rights of those under the jurisdiction of the Native Hawaiian governing entity. The legislation addresses the issue of gambling, however, by precluding gaming under the Indian Gaming Regulatory Act.<sup>118</sup> Other jurisdictional matters appear to be unsettled and left to be determined pursuant to section 8 of the legislation. That section authorizes negotiations by the United States, the Native Hawaiian governing entity, and the State of Hawaii, with respect to “the transfer of lands, natural resources and other assets to the Native Hawaiian governing entity, the protection of existing rights related to such lands or resources, and the exercise of governmental authority over such lands, natural resources and other assets, including the exercise of civil and criminal jurisdiction by the Native Hawaiian governing entity, the delegation of governmental power and

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<sup>114</sup> 528 U.S. 495, 499-500.

<sup>115</sup> See “The Powers of Indian Tribes,” a memorandum, dated October 25, 1934, from the Solicitor of the Interior and approved by the Assistant Secretary, 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs: 1917-1974*, 445.

<sup>116</sup> See CRS Report RL32361, *Tribal Sovereignty Over Nonmember Indians: United States v. Billy Jo Lara*, by (name redacted); and *Felix S. Cohen's Handbook of Federal Indian Law*, 281 - 385 (1982 ed.).

<sup>117</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896).

<sup>118</sup> Of course, if subsequent negotiations result in agreement with respect to gaming, it would be up to Congress as to whether or not to approve such gaming.

authorities to the Native Hawaiian governing entity, and the scope of residual responsibilities of the United States and the State of Hawaii.”<sup>119</sup>

**Potential Cost.** The bill authorizes several million dollars in appropriated funds to be expended to carry out the federal responsibilities in recognizing a Native Hawaiian entity.<sup>120</sup> Critics state that the legislation raises the possibility of costly claims litigation against the United States and eventual incorporation of Native Hawaiians into BIA and Indian Health Services programs without any increase in funding, thereby diluting the benefits to existing Indian organizations.<sup>121</sup> Proponents, however, respond by pointing to the fact that the bill, as reported, precludes Native Hawaiian inclusion in Indian programs and contains nothing explicit that authorizes claims against the United States by Native Hawaiians. A provision in the bill merely sets a limitation period of 20 years for claims, meaning that only a claim otherwise cognizable by the courts could be brought.

## Legislative Action

**Senate Report and Cloture Motion.** On May 16, 2005, S. 147 was reported favorably by the Senate Committee on Indian Affairs<sup>122</sup> with an amendment in the nature of a substitute. Debate began in the Senate, with introductory remarks heard on June 21 and July 14, 2005. A cloture motion was filed and the legislation withdrawn from the Senate Calendar. A substitute amendment is expected when debate resumes.<sup>123</sup>

**Discussions on Language.** For much of July and August, there were negotiations involving the Chairman and Ranking Member of the Senate Committee on Indian Affairs, Senators Akaka and Inouye, Hawaii’s Attorney General, the White House, the Department of Justice, the Office of Management and Budget, and the Department of Defense “on specific language to resolve all of the Administration’s policy concerns.”<sup>124</sup> According to a press release issued by Senator Akaka, the new language will require that any claims against the United States be resolved in the negotiations process set forth in the bill and will make “it clear that civil and criminal jurisdiction currently held by the State and Federal governments will remain with the State and Federal governments until otherwise negotiated with the Native Hawaiian

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<sup>119</sup> S.Rept. 109-68, 20-21.

<sup>120</sup> The Congressional Budget Office estimate is “nearly \$1 million annually in fiscal years 2006-2008 and less than \$500,000 in each subsequent year, assuming availability of appropriated funds.” S.Rept. 109-68, pp. 23-24.

<sup>121</sup> Republican Policy Committee, “Why Congress Must Reject Race-Based Government for Native Hawaiians,” at 13. [[http://rpc.senate.gov/\\_files/Jun2205NatHawSD.pdf](http://rpc.senate.gov/_files/Jun2205NatHawSD.pdf)] (last visited August 23, 2005).

<sup>122</sup> S.Rept. 109-68.

<sup>123</sup> Discussed *infra*, at 29.

<sup>124</sup> Letter from Linda Lingle, Governor, State of Hawaii, to the United States Senate 1 (August 23, 2005). The letter identified the policy concerns as including potential claims, impact on military readiness, criminal jurisdiction, and gambling. *Id.*, at 2.

governing entity,” and that the Department of Defense will be exempted from the consultation requirements although it will continue to consult pursuant to other laws and to litigation agreements.<sup>125</sup>

**Expected Substitute Amendment.** When S. 147 comes to the Senate floor, it is expected that a substitute amendment will be offered in lieu of the reported version of the bill, and that it will incorporate provisions that have been agreed upon in the July and August discussions. This is expected to include provisions that will: (1) limit federal recognition to a single Native Hawaiian governing entity; (2) permit claims against the United States and Hawaii to be included in the negotiation process; (3) specify that civil and criminal jurisdiction may be negotiated but will remain as is until implementing legislation is enacted by Congress and Hawaii; (4) prohibit gaming by the Native Hawaiian governmental entity, under IGRA or pursuant to inherent authority, in Hawaii or elsewhere within the United States or its territories; (5) preclude BIA from taking land into trust for the benefit of the Native Hawaiian governing entity pursuant to the administrative process established under 25 C.F.R., Part 151; (6) preclude the applicability of the Indian Non-Intercourse Act, 25 U.S.C. § 177,<sup>126</sup> to lands in the State of Hawaii transferred either before or after the enactment of this legislation; (7) deny eligibility for Indian programs and services to the Native Hawaiian governing entity and its members; and (8) specify that the Native Hawaiian governmental entity and its members are eligible for Native Hawaiian programs and services to the extent and manner provided by other applicable law. The substitute amendment is also expected to include disclaimers stating that the legislation does not create any cause of action against the United States or any person; alter existing law regarding the obligations of the United States or the State of Hawaii with respect to Native Hawaiians or any Native Hawaiian entity; or create obligations not already existing under federal law. Also to be included is a section on sovereign immunity specifying retention of federal and State sovereign immunity with respect to various potential actions and rendering certain types of claims against the United States non-justiciable.<sup>127</sup>

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<sup>125</sup> [<http://akaka.senate.gov/~akaka/releases/05/09/2005916736.html>].

<sup>126</sup> This law prohibits transfers of Indian land without the consent of the United States; it has been used by Indian tribes to contest “ancient land claims.”

<sup>127</sup> Amendment to provide a complete substitute to S. 147, 109<sup>th</sup> Cong., 1<sup>st</sup> sess. Available at [<http://akaka.senate.gov/assets/s%20147%20substitute%209-2.pdf>]. [last visited September 21, 2005]. Another provision would permit non-Native Hawaiians to be appointed to the Commission that must certify that members on the roll meet the established qualifications. There is also a modification of the language in § 2 (22)(D), which in the Substitute Amendment finds that the “special relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States,” rather than what appears in the reported version of S. 147: “special *trust* relationship ....”



## APPENDIX I: Legislation

Native Hawaiian recognition bills have been considered in the 106<sup>th</sup>-108<sup>th</sup> Congresses, and at least one of the bills has been reported in each Congress (see **Table 1** below).<sup>128</sup> All the bills provided for a recognition process very similar to that in S. 147 and H.R. 309, but differed in various other provisions, including the determination of land transfers to, and the jurisdictional powers of, a Native Hawaiian political entity. The nature of the federal government's relationship to Native Hawaiians was an issue long before the 106<sup>th</sup> Congress, however, in both the Department of the Interior<sup>129</sup> and the halls of Congress.

Congress came closest to enacting a Native Hawaiian recognition bill in the 106<sup>th</sup> Congress, when the House passed H.R. 4904. While the Senate did not pass H.R. 4904, the bill would have been enacted through a provision in the Consolidated Appropriations Act, 2001 (H.R. 4577, P.L. 106-554), until a Senate concurrent resolution removed the provision by correcting the enrollment of H.R. 4577 (S.Con.Res. 162).

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<sup>128</sup> **Appendix I** prepared by (name redacted), Specialist in American National Government, Domestic Social Policy Division, CRS.

<sup>129</sup> For instance, in 1993, the outgoing Bush Administration's Interior Solicitor's opinion on U.S. responsibility for Native Hawaiians, which saw very little federal responsibility, was withdrawn by the new Clinton administration's Interior Solicitor (Statement of Solicitor John D. Leshy, Nov. 15, 1993, M-36978 (Supp.)).

**Table 1. Native Hawaiian Recognition Bills in Congress**

<b>Congress</b>	<b>Bill number</b>	<b>Latest (or Final) Congressional actions</b>
109 <sup>th</sup>	S. 147	Ordered reported by Senate Indian Affairs Committee (S.Rept. 109-68), May 16, 2005. Motion to proceed to consideration of measure withdrawn in Senate, July 29, 2005.
	H.R. 309	Referred to House Resources Committee, January 25, 2005.
108 <sup>th</sup>	S. 344	Reported by Senate Indian Affairs Committee (S.Rept. 108-85), June 27, 2003.
	H.R. 665	Referred to House Resources Committee, February 11, 2003.
	H.R. 4282	Reported by House Resources Committee (H.Rept. 108-742), October 6, 2004.
107 <sup>th</sup>	S. 81	Referred to Senate Indian Affairs Committee, January 22, 2001.
	S. 746	Reported by Senate Indian Affairs Committee (S.Rept. 107-66), September 21, 2001.
	S. 1783	Referred to Senate Indian Affairs Committee, December 21, 2001.
	H.R. 617	Reported by the Committee on Resources (H.Rept. 107-140), July 16, 2001.
106 <sup>th</sup>	S. 2899	Reported by Senate Indian Affairs Committee (S.Rept. 106-424), September 27, 2000.
	H.R. 4904	Reported by House Resources Committee (H.Rept. 106-897), September 26, 2000. Passed by the House by voice vote, September 26, 2000.
	H.R. 4577 (P.L. 106-554)	H.R. 4577 (which incorporated by reference H.R. 5666, §123 of which enacted H.R. 4904 as passed by the House) passed by House and Senate, December 15, 2000. S.Con.Res. 162 (which corrected the enrollment of H.R. 4577, as already passed, by incorporating H.R. 5666 <i>except</i> §123) passed by Senate and House, December 15, 2000.

## APPENDIX II: Federal Native Hawaiian Programs

Congress has enacted a number of programs for Native Hawaiians, in addition to the Hawaiian Home Lands program.<sup>130</sup> One concern among proponents of Native Hawaiian recognition is that many or all of these federal programs for Native Hawaiians may be endangered if a Native Hawaiian political entity is not created.<sup>131</sup> Federal Native Hawaiian programs either are solely for Native Hawaiian communities or organizations or explicitly include Native Hawaiian communities or organizations among the eligible applicants. Some of these programs benefit Indians as well. The programs provide a not insignificant amount of federal dollars for Native Hawaiians. A 2003 report of the Council for Native Hawaiian Advancement estimated that in FY2002 over \$70 million flowed into Hawaii because of such Native Hawaiian programs.<sup>132</sup> Among the major federal Native Hawaiian programs listed in the *Catalog of Federal Domestic Assistance (CFDA)*<sup>133</sup> are the following.

- Native Hawaiian Education Act (P.L. 107-110, Title VII, Part B); F2004 obligations were \$33.3 million, according to the CFDA.
- Higher Education Act, Title III, Institutional Aid for Alaska Native and Native Hawaiian serving institutions.
- Native Hawaiian Health Care Improvement Act (P.L. 102-396); F2004 obligations were \$10.5 million, according to the CFDA.
- Native Hawaiian Housing Block Grants (P.L. 106-569, Hawaiian Homelands Homeownership Act, §513); F2004 obligations were \$9.6 million, according to the CFDA.
- Loan Guarantees for Native Hawaiian Housing (P.L. 106-569, Hawaiian Homelands Homeownership Act, §514); F2004 loan guarantees were \$39.7 million, according to the CFDA.
- Native American Programs Act of 1974 (P.L. 93-644, as amended); shared program with Indians and Native American Pacific Islanders; total program FY2004 obligations were \$35 million, according to the CFDA.
- Native American Employment and Training (P.L. 105-220, §166); shared program with Indians; total program FY2004 obligations were \$55 million, according to the CFDA.

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<sup>130</sup> **Appendix II** prepared by (name redacted), Specialist in American National Government, Domestic Social Policy Division, CRS.

<sup>131</sup> “Robert Klein, former Hawaii state Supreme Court associate justice, who represents the Office of Hawaiian Affairs in lobbying for the Akaka Bill, says the measure will prevent hundreds of federal programs that benefit native Hawaiians from being struck down as being unconstitutional.” Richard Borreca, “Proposed Akaka Bill Changes Get Federal OK, Lingle Says,” *Honolulu Star-Bulletin*, Aug. 25, 2005 [http://starbulletin.com/2005/08/24/news/story5.html], accessed Aug. 25, 2005.

<sup>132</sup> Council for Native Hawaiian Advancement, *Economic Impact of Native Hawaiian Federal Recognition*, CNHA Policy Brief (Honolulu: The Council, May 2003), pp. 2-3, [http://www.hawaiiancouncil.org/docs/EconomicImpact111604.pdf] accessed Sept. 2, 2005.

<sup>133</sup> CFDA is available online at [http://12.46.245.173/cfda/cfda.html].

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