Calendar No. 101

109TH CONGRESS, *1st Session* | SENATE | REPORT 109–68

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

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

R E P O R T

[To accompany S. 147]

The Committee on Indian Affairs, to which was referred the bill (S. 147) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 147 is to provide a process for the reorganization of a Native Hawaiian government and, when that process has been completed in accordance with the Act, to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship.

BACKGROUND

S. 147 is the latest [1] in a series of Senate and House bills that would authorize a process leading to the reorganization and rec-

[1] Both S. 147 and a companion bill, H.R.309, were introduced on January 25, 2005.

ognition of a Native Hawaiian governing entity.[2] See H.R. 4904 and S. 2899, introduced in the 106th Congress; H.R. 617, S. 746 and S. 1783 in the 107th Congress; and H.R. 665, H.R. 4282 and S. 344 in the 108th Congress.[3] Between August 28 and September 1, 2000, the Committee held a 5–day joint hearing with the House Committee on Resources on S. 2899 and H.R. 4904, in Honolulu, Hawai'i, and received extensive oral and written statements of witnesses. See S. Hrg. 106–753 and the addendum printed in S. Hrg. 106–1105. Another hearing on S. 2899 was held in Washington D.C. on September 14, 2000. See S. Hrg. 106–795. Additionally, the Committee held a hearing on the current bill, S. 147, on March 1, 2005.[4]

The Senate bill from the 108th Congress, S. 344, was reported favorably by the Committee with an amendment in the nature of a substitute on June 27, 2003. The Committee report filed with this amendment, S. Rep. No. 108–85, sets forth a detailed cultural and political history of the native, aboriginal people living in what is now the State of Hawai'i, including their relations with the "outside" world: the pre-contact period and the initial encounter with Captain James Cook of the British Royal Navy in 1778; the consolidation of power under King Kamehameha in the early 19th Century, followed by several decades of increasing contact and influence of foreigners and foreign powers; relations with the United States, with which the Kingdom executed a series of treaties and conventions between 1826 and 1887; the overthrow of the Kingdom and Queen Lili'uokalani in 1893; the formation of the Republic of Hawai'i and its annexation by United States 5 years later; the establishment of the Territory of Hawai'i in 1900; and, finally, the admission of the State of Hawai'i into the Union in 1959. Reference should be made to the Committee's report accompanying S. 344, S. Rep. No. 108–85, for this detailed account of the history of the Native Hawaiian people and the islands. However, a few key points of this history are summarized below for purposes of context.

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[2] The bill would not itself create a Native Hawaiian governing entity-it would only authorize a process that would eventually lead to the organization and, eventually, Federal recognition of such an entity. Nor would the bill provide the entity with governmental powers or authority over lands or persons. Such powers and authority would be the subject of a future, three-way agreement that would have to be approved by the United States, the State of Hawaii and the Native Hawaiian governing entity.

[3] The Senate reports associated with these earlier versions of S. 147 are S. Rep. No. 106–424 (accompanying S. 2899), S. Rep. No. 107–66 (accompanying S. 746) and S. Rep. No. 108–85 (accompanying S. 344).

[4] The witnesses at the March 1 hearing were Representative Ed Case of Hawai'i; Congressman Eni Faleomavaega of American Samoa; Governor Linda Lingle of Hawai'i; Haunani Apoliona, Chair of the Board of Trustees, Office of Native Hawaiian Affairs; Tex Hall, President of the National Congress of American Indians; and Jade Danner, Director of Government Affairs and Community Consultation, Council for Native Hawaiian Advancement. The testimony of the witnesses was uniformly in support of the bill, and some witnesses indicated that recognition of a Native Hawaiian governing body enjoys widespread public support in Hawai'i in general and very strong—although not unanimous—support among Native Hawaiians in particular. The Committee did receive written statements and comments from numerous interested persons opposing the bill for a variety of reasons. For example, some oppose the bill on the ground that it will inappropriately bestow benefits on the members of the Native Hawaiian community that other citizens of Hawai'i will not be eligible to receive, or that the bill is contrary to the spirit of "aloha" in Hawai'i and will have a divisive effect on its citizens. Others contend that the bill, because of how it defines the term "Native Hawaiian," will benefit a large number of persons who have a highly attenuated Native Hawaiian blood quantum. The Committee notes that, with regard to the last contention, the bill does not establish the rules for membership in the Native entity; membership requirements will be determined in the future by the Native Hawaiian people themselves, through the reorganization process authorized in the bill.

The Great Mahele

By the middle of the 19th century, the islands' small non-native population had come to wield an influence far in excess of its size.[5] These influential westerners sought to limit the absolute power of the Hawaiian king over their legal rights and to implement property law so that they could accumulate and control land. As a result of foreign pressure, these goals were achieved.[6] In 1840, King Kamehameha III promulgated a new constitution, establishing a hereditary House of Nobles and an elected House of Commons. Soon afterward, the King authorized the Great Mahele ("division")—the beginning of the division of Hawai'i's communal lands which ultimately led to the transfer of substantial amounts of that land to western hands. In the 1848 Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the konohiki, or main chiefs; he reserved about 1 million acres for himself and his royal successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawai'i ("Government Lands"). All lands remained subject to the rights of native tenants. In 1850, after the division was accomplished, an act was passed permitting non-natives to purchase land in fee simple. The law implementing the Mahele contemplated that the maka'ainana, or commoners, would receive a substantial portion of the distributed lands because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.[7] Upon annexation in 1898, the remaining Government Lands and Crown Lands were ceded by the Republic of Hawai'i to the United States. These lands came to be known as the "Ceded Lands."

Hawaiian Homes Commission Act

By 1920, due to the dramatic decline in the numbers of Native Hawaiians in the decades leading up to and following the overthrow, there were many who were concluding that the native people of Hawai'i were a "dying race" and that if they were to be saved from extinction, they must have the means of regaining their connection to the land, the 'aina. In hearings on the matter, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised:

> One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty.[8]

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[5] See Felix S. Cohen, Handbook of Federal Indian Law, 799 (2d ed. 1982): "A small number of Westerners residing in Hawai'i, bolstered by Western warships which intervened at critical times, exerted enormous political influence."

[6] See e.g., Native Hawaiian Rights Handbook (Melody K. Mackenzie, ed., 1991), at 6. See, also, 1 Ralph S. Kuykendall, The Hawaiian Kingdom (1938), at 206–26, for a description of the expansion of foreign influence within the kingdom in the years leading up to the Mahele.

[7] Mackenzie, supra, 6–9. The maka'ainana failed to secure a great portion of the land for a number of reasons. Many did not know of or understand the new laws, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the chief, were unable to farm without the traditional common cultivation and irrigation of large areas, were killed in epidemics, or migrated to cities. Id., at 8.

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

Secretary Lane explicitly analogized the relationship between the United States and Native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for Native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[9]

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

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes. . . .
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> The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[10]

In 1920, Prince Jonah Kuhio Kalaniana'ole (Prince Kuhio), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."[11] Secretary Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[12]

The effort to "rehabilitate" the dying race of Native Hawaiians by returning them to the land led the Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside approximately 203,500 acres of the Ceded Lands for homesteading by Native Hawaiians.[13] Congress compared the Act to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands."[14]

In support of the Act, the House Committee on the Territories recognized that, prior to the Mahele, Hawaiians had a one-third in-

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[9] Hearings before the Committee on the Territories, House of Representatives, 66th Cong., 2d Sess., on Proposed Amendments to the Organic Act of the Territory of Hawaii, February 3, 4, 5, 7, and 10, 1920, at 129–30 (statement of Secretary Lane that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians, and citing a Solicitor's opinion stating that the setting aside of public lands within the Territory of Hawai'i would not be unconstitutional, relying in part on the congressionally authorized allotment to Indians as precedent for such an action); see, also, id. at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians) and at 167–70 (colloquy between Representative Curry, Chair of the Committee, and Representatives Dowell, and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

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

[11] 59 Cong. Rec. 7453 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).

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

[13] Hawaiian Homes Commission Act, § 203.

[14] H.Rep. No. 66–839, at 11 (1920).

terest in the lands of the Kingdom. The Committee reported that the Act was necessary to address the way Hawaiians had been short-changed in prior land distribution schemes.[15] Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest in the unregistered lands that reverted to the Crown before being taken by the Provisional Government and, subsequently, the Territorial Government:

> [T]hese lands, which we are now asking to be set aside for the rehabilitation of the Hawaiian race, in which a one-third interest of the common people had been recognized, but ignored in the division, and which reverted to the Crown, presumably in trust for the people, were taken over by the Republic of Hawai'i by an article of [its] constitution. . . .
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> By annexation these lands became a part of the public lands of the United States, and by the provisions of the organic act under the custody and control of the Territory of Hawai'i.
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> We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice. . . .[16]

The 1921 Act provides that the lessee must be a Native Hawaiian, who is entitled to a lease for a term of ninety-nine years, provided that the lessee occupy and use or cultivate the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the general allotment acts affecting Indians,[17] the leases were intended to encourage rural homesteading so that Native Hawaiians would leave the urban areas and return to rural subsistence or commercial farming and ranching. In 1923, the Congress amended the Act to permit one-half acre residence lots and to provide for home construction loans. Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots.[18]

During the remainder of the Territorial period and the first two decades following statehood, administration of the Hawaiian home lands program was inadequately funded, and the best lands were leased to non-Hawaiians in order to generate operating funds. There was little income remaining for the development of infrastructure or the settlement of Hawaiians on the home lands. The lack of resources-combined with questionable transfers and exchanges of Hawaiian home lands, and a decades-long waiting list of those eligible to reside on the home lands-rendered the home lands program an illusory promise for most Native Hawaiians.[19]

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[15] Id., at 6–7.
[16] 59 Cong. Rec. 7452–3 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).
[17] 25 U.S.C. 331–334, 339, 342, 348, 349, 354, 381 (1998).
[18] Office of State Planning, Office of the Governor, State of Hawai'i, Pt. I, Report on Federal Breaches of the Hawaiian Home Lands Trust, 4–6 (1992).
[19] Id., at 12–18.

The Hawai'i Admission Act

As a condition of statehood, the Hawai'i Admission Act[20] required the State of Hawai'i to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded by the United States to the new State. The 1959 Compact between the United States and the People of Hawai'i by which Hawai'i was admitted into the Union expressly provides that:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) . . . the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.[21]
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> The lands granted to the State of Hawai'i by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[22]

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[20] Pub. L. No. 86–3, 73 Stat. 4 (March 18, 1959) (the "Admission Act").
[21] Admission Act, § 4, 73 Stat. at 5.
[22] Id., § 5(f), 73 Stat. at 6 (emphasis added).

These explicit delegations of Federal authority to be assumed by the new State were not discretionary or permissive. The sections of the Admission Act quoted above contemplate a continuing Federal role, as do sections 204 and 223 of the Hawaiian Homes Commission Act, which provide that the consent of the Secretary of the Interior must be obtained for certain exchanges of trust lands and which reserved to Congress the right to amend that Act.[23] The Federal courts have noted that the United States retains the authority to bring an enforcement action against the State of Hawai'i for breach of the section 5(f) trust.[24]

The "Apology Resolution"

On November 23, 1993, the President signed into law a joint resolution of the Congress acknowledging the 100th anniversary of the 1893 overthrow of the government of the Kingdom of Hawai'i and extending an apology on behalf of the United States to Native Hawaiians for the roll played in that overthrow by agents and citizens of the United States.[25] In one of its recitals, the Apology Resolution also acknowledged that the Native Hawaiian people never directly relinquished their claims to inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum. The Apology Resolution further urged the President to support reconciliation efforts between the United States and the Native Hawaiian people.

Six years later, in response to the Apology Resolution, the Departments of Interior and Justice initiated a series of meetings in Native Hawaiian communities on each of the principal islands in the State of Hawai'i, culminating in two days of open dialogue. In each of these meetings, members of the Native Hawaiian community identified what they believed to be necessary elements for a process of reconciliation of the relationship between the United States and the Native Hawaiian people. A report issued by the two Departments in October 2000, entitled From Mauka to Makai: The River of Justice Must Flow Freely, made the following recommendation:

> Recommendation 1. It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103–150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative ac-

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

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

[25] See, Public Law 103–150 (the "Apology Resolution").

> tion, 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. . . .[26]

NEED FOR LEGISLATION

In 1978, in furtherance of the provisions of the Admission Act, the citizens of the State of Hawai'i amended the State constitution to provide for the establishment of a quasi-independent State agency, the Office of Hawaiian Affairs ("OHA"). The State constitution, as amended, provides that the OHA is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. In accordance with laws enacted by the State following the 1978 constitutional amendment, OHA administers programs and services using revenues derived from the Ceded Lands consistent with the conditions of § 5 of the Admission Act and Public Law 88–233.[27]

OHA's use of these revenues to provide programs and services for Native Hawaiians reflects the provision in section 5(f) of the Admission Act requiring that the ceded lands and the revenues derived therefrom be held by the State of Hawai'i as a public trust for five stated purposes—one of which, again, is "the betterment of the conditions of native Hawaiians." The Admission Act also provides that the new State assumes a trust responsibility for approximately 203,500 acres of land that had previously been set aside in 1921 for Native Hawaiians pursuant to the Hawaiian Homes Commission Act.[28]

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice* v. *Cayetano*,[29] holding unconstitutional the eligibility requirements for voting in elections of OHA trustees. The Court held that because OHA is an agency of the State of Hawai'i, funded in part by appropriations made by the State legislature, the election for the trustees of the OHA must be open to all citizens of the State of Hawai'i who are otherwise eligible to vote in statewide elections.[30] The State of Hawai'i had argued in *Cayetano* that the state law excluding non-Hawaiians from voting in OHA elections should be analyzed in accordance with the Court's rule enunciated in *Morton* v. *Mancari*,[31] wherein the Court upheld against an equal protection challenge the policy for Indian preference in hiring within the Bureau of Indian Affairs. The *Cayetano* Court rejected the State's *Mancari* argument, reasoning as follows:

> If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast,

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[26] From Mauka to Makai: The River of Justice Must Flow Freely, a report of the Departments of Interior and Justice, October 23, 2000, at 17.
[27] 77 Stat. 472 (December 23, 1963).
[28] 42 Stat. 108 (July 9, 1921), as amended (Hawaiian Homes Commission Act).
[29] 528 U.S. 495 (2000).
[30] The Court held that the provision of state law requiring those voting for the office of Trustee of the Office of Hawaiian Affairs to be Native Hawaiian violated the Fifteenth Amendment prohibition against abridging the right to vote on account of race.
[31] 417 U.S. 535 (1974).

> are the affair of the State of Hawaii, established by the State Constitution, responsible for the administration of state laws and obligations.[32]

Following the Supreme Court's decision in *Cayetano*, new civil actions were filed challenging the constitutionality of other aspects of OHA as well as Hawai'i's provision of programs and services to Native Hawaiians. In *Arakaki* v. *State of Hawaii*,[33] the Court of Appeals for the Ninth Circuit ruled that the State law requiring candidates for the OHA Board of Trustees to be Native Hawaiian was unconstitutional on grounds similar to those in *Cayetano*. Accordingly, all citizens of the State of Hawai'i may now vote for the candidates for the nine trustee positions and may themselves be candidates for these offices.

Other civil actions filed since the *Cayetano* decision have gone beyond the voting rights issues raised in that case and in *Arakaki* v. *Hawai'i*. These other cases target the provision of programs and services to Native Hawaiians by OHA, the Hawaiian Homes Commission and the Department of Hawaiian Home Lands on the grounds that providing benefits exclusively to Native Hawaiians is racially discriminatory under the Equal Protection clauses of the Fifth and Fourteenth Amendments.[34] If these challenges were to succeed, those elements of the United States' 1959 compact with the people of Hawai'i intended to benefit Native Hawaiians may be lost.[35]

S. 147 establishes a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States. And eventually thereafter, the programs and services now provided by OHA in furtherance of the provisions of the Admission Act would likely be provided instead by the Native Hawaiian governing body to its members—that is, to persons who have a political affiliation with a federally recognized Native Hawaiian governing entity with which the United States would have a formal, government-to-government relationship—so that equal protection challenges to those programs and services would be subject to the analysis of *Morton* v. *Mancari*.

Accordingly, apart from providing Native Hawaiians with a vehicle for reorganizing a governing entity through which they might, as have other native peoples in the United States, pursue the goals of self-determination and greater control over the future of their own resources and culture, another purpose of S. 147 is to assure that the long-standing Congressional policy of protecting and advancing the interests of Native Hawaiians—dating back at least to the 1921 Hawaiian Homes Commission Act—and the bargained-for conditions that were made part of the 1959 compact that led to the admission of the State of Hawai'i into the Union, are not ultimately frustrated as a result of these recent legal challenges.

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[32] Id., at 520.
[33] 314 F.3d 1091 (9th Cir. 2002).
[34] See, *Arakaki* v. *Cayetano, T1324 F.3d 1078, 1081 (9th Cir. 2003).*
[35] The Committee notes that both the *Cayetano* and the *Arakaki* decisions involved claims that the laws establishing OHA violated the 15th Amendment prohibition against abridging the right to vote on account of race, whereas the challenges to the delivery of services to Native Hawaiians involve 14th Amendment equal protection claims.

CONSTITUTIONAL SOURCES OF CONGRESSIONAL AUTHORITY

The report filed with S. 344 during the 108th Congress sets forth an extensive discussion of the constitutional sources of Congressional authority to legislate on matters relating to the native peoples of the United States, including the reorganization of a Native Hawaiian governing entity pursuant to that bill;[36] however, the Committee notes that in April of 2004, several months after the filing of that report, the United States Supreme Court issued its decision in *United States* v. *Lara*.[37] In *Lara*, the Court expressed the view that the Congress enjoys "'plenary' *grants* of power"[38] to legislate over matters relating to Indians and clarified its views of the sources of that power.[39]

The *Lara* decision is pertinent to S. 147 in that, in reaching the conclusion that Congress has the authority to modify, through legislation, the contours of inherent Indian tribal sovereignty, the Court compared, and justified, the particular modifications in sovereignty involved in that case with some examples of "adjustments to the autonomous status of *other such dependent entities*," including the Territory of Hawaii, the Northern Mariana Islands, the Philippines and Puerto Rico.[40] The *Lara* Court acknowledged that Congress' plenary power over Indian affairs—again, the sources of which, according to the Court, stem not only from the Indian Commerce Clause but also the Treaty Clause and the "necessary concomitants of nationality"[41]—includes the power to recognize, terminate and restore the tribal status of Indian tribes.[42]

In short, the plenary grants of power described by the Court in *Lara* should be more than broad enough to reach the business of S. 147—to provide to the descendants of an aboriginal people with whom the United States executed several formal treaties a mechanism with which to organize a native government, and to assure that a long-standing Federal policy of protecting the interests of Native Hawaiians—a policy reflected in the United States' 1959 compact with the people of the State of Hawai'i—will continue into the future.

SUMMARY OF PROVISIONS OF SUBSTITUTE AMENDMENT TO S. 147

The following is a broad summary of the principal provisions of the substitute amendment to S. 147:

Section 2 sets forth 23 Congressional findings, many of which focus on the history of Native Hawaiians and the United States policy as it relates to Native Hawaiians, including the enactment

[36] See, S. Rep. No. 108–85, at 22–36.
[37] 541 U.S. 193 (2004).
[38] Id., at 202; emphasis added.
[39] The Court noted that the power of Congress in Indian affairs derives not only from the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2 (*Lara*, at 200–1), but rests also "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that [the U.S. Supreme] Court has described as 'necessary concomitants of nationality.'" Id. at 201.
[40] Id., at 203–4; emphasis added.
[41] Id., at 201–2.
[42] Id. See, also, the Court's observations in *U.S.* v. *John*, 437 U.S. 634 (1978): "[I]n view of the elaborate history, recounted above, of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." Id., at 652–3.

of over 160 public laws to address the conditions of Native Hawaiians.

Section 5 establishes the United States Office of Native Hawaiian Relations within the Office of the Secretary of the U.S. Department of the Interior. The Office is to be the principal entity through which the United States will carry on the reconciliation process with Native Hawaiians and will effectuate and coordinate the relationship of the United States and the Native Hawaiian governing entity once it has been formed. The Office would also serve as lead agency for the work of a Native Hawaiian Interagency Coordinating Group that is to be established in section 6 of S. 147.

Section 6 establishes an interagency coordinating group of Federal officials whose principal responsibility would be to coordinate Federal programs and policies affecting Native Hawaiians and to assure that each Federal agency conducting such programs or services develops a Native Hawaiian consultation policy.

Section 7 provides a process for the reorganization of the Native Hawaiian government and for the reaffirmation by the United States of the special political and legal relationship between the United States and the Native Hawaiian government for purposes of carrying on a government-to-government relationship. This section also provides for establishment of a nine-member Commission, composed of Native Hawaiians who meet the definition of "Native Hawaiian" set forth in section 3(10), for the purposes of preparing and maintaining a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity, and certifying that the adult members of the Native Hawaiian community proposed for inclusion on the roll meet the definition of "Native Hawaiian" in section 3(10).

The nine-member Commission is to submit the roll to the Secretary of Interior within two years from the date on which the Commission is fully composed, and to certify to the Secretary that each of the adult members of the Native Hawaiian community proposed for inclusion on the roll meet the definition of Native Hawaiian set forth in section 3(10) of the substitute amendment. Upon the Commission's certification, the Secretary is to publish the roll in the Federal Register.

Section 7 also authorizes the Secretary to establish a mechanism for appeal for any person whose name is excluded from the roll and who asserts that he or she meets the definition of Native Hawaiian in section 3(10) and is 18 years of age or older. The Secretary is to publish the roll regardless of whether appeals are pending, and update the roll and the publication of the roll on the final disposition of any appeal, as well as update the roll to include any Native Hawaiian who has attained the age of 18 and who has been certified by the Commission as meeting the definition of Native Hawaiian in section 3(10) after the initial publication of the roll or after any subsequent publications of the roll.

Following the publication of the roll, the adult members of the Native Hawaiian community listed on the roll elect an Interim Governing Council that is authorized to conduct referenda on the proposed elements of the organic governing documents of the Native Hawaiian governing entity, the proposed criteria for citizenship of the Native Hawaiian governing entity, the proposed powers

and authorities to be exercised by the Native Hawaiian governing entity, as well as the proposed privileges and immunities of the Native Hawaiian governing entity, the proposed civil rights and protection of civil rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities of the Native Hawaiian governing entity, and other issues determined appropriate by the Council.

Based on the referendum, the Council is authorized to develop proposed organic governing documents for the Native Hawaiian governing entity, to distribute them to all adult members of the Native Hawaiian community listed on the roll, and conduct an election for the purpose of ratifying the proposed organic governing documents. Upon the ratification of the organic governing documents, the governing documents are to be submitted to the Secretary of the Interior by the Council for certification that they are consistent with Federal law and the special relationship between the United States and the indigenous, native people of the United States. The Secretary is required to certify that the governing documents provide for the protection of the civil rights of the citizens of the Native Hawaiian government and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian government. If the Secretary determines that the governing documents do not meet the requirements of section 7, they are to be resubmitted to the Council with a justification for any findings of noncompliance. In such event, the Council must amend the organic governing documents to meet all applicable requirements of section 7 and then resubmit them to the Secretary.

Once the Secretary has made these certifications, and the officers of the Native Hawaiian governing entity are elected, the bill would reaffirm the political and legal relationship between the United States and the Native Hawaiian governing entity and extend Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.

Following the extension of Federal recognition of the Native Hawaiian governing entity, section 8 of the substitute amendment authorizes the United States and the State of Hawai'i to enter into negotiations with the Native Hawaiian governing entity to address the following matters: the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources; the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use; the exercise of civil and criminal jurisdiction; the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawai'i; and any residual responsibilities of the United States and the State of Hawai'i.

Section 8 also provides that, upon agreement on any matter or matters negotiated with the United States, the State of Hawai'i, and the Native Hawaiian governing entity, the parties are authorized to submit recommendations for proposed amendments to Federal law that will enable the implementation of agreements reached by the three governments to the Committee on Indian Affairs of the Senate and the Committee on Energy and Natural Resources of the Senate, and the Committee on Resources of the House of Representatives, and recommendations for proposed

amendments to State law that will enable the implementation of the agreements reached by the three governments to the Governor and the legislature of the State of Hawai'i.

Finally, section 8 provides (1) that nothing in the Act serves as a settlement of any claim against the United States, and (2) requires that claims against the United States arising under Federal law that are in existence on the date of enactment and asserted by the Native Hawaiian governing entity on behalf of Native Hawaiians relating to the legal and political relationship between the United States and the Native Hawaiian people must be brought within 20 years after the date on which Federal recognition is extended to the governing entity.

Section 9 of the bill provides that the Act does not authorize the Native Hawaiian governing entity to conduct gaming under the Indian Gaming Regulatory Act and does not authorize eligibility to participate in Bureau of Indian Affairs programs and services for any person not otherwise eligible for such programs or services.

AMENDMENT IN THE NATURE OF A SUBSTITUTE

At the business meeting held on March 9, 2005, the Committee approved an amendment in the nature of a substitute. The amendments in the substitute (1) clarify the definition of "Native Hawaiian" in section 4 by stating that the definition does not affect the definition of that term under any other Federal or State law; (2) add three new defined terms, "Indian program or service," "Indian tribe,"[43] and "Native Hawaiian program or service" to section 4; (3) revise subsection (b) to section 9 to provide that Act does not make any person eligible for Indian programs and services if such person is not otherwise eligible for the program or service under applicable Federal law; and (4) add a new subsection (c) to section 9 stating that the Native Hawaiian governing entity and its citizens shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws.

The purpose of the amendment to subsection 9 is to clarify an important point of Congressional intent: persons who become eligible for citizenship in the newly reorganized Native Hawaiian entity would not, by virtue of that citizenship alone, become eligible to receive "Indian programs and services" but would be eligible to receive "Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws" relating to Native Hawaiian programs and services.[44] If a person is a member of a Federally recognized Indian tribe and is also a citizen of the Native Hawaiian entity, his or her eligibility to receive Indian programs and services from, for example, Indian Health Service would not be increased, diminished or otherwise affected by such citizenship.[45]

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[43] The term "Indian tribe" has the same meaning given to that term in section 4 of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b.

[44] In other words, the "other applicable law" would determine whether the Native Hawaiian citizen in question is eligible for a particular program or service.

[45] The Committee would further point out that this section is not intended to limit or in any way affect Federal or State programs for Native Hawaiians that are currently coordinated with, or provided by, Federal agencies that also provide services to Indians and Alaska Natives. This section should not be interpreted to preclude agencies whose purpose it is to provide services to Native Hawaiians from entering into and carrying out otherwise lawful cooperative agreements or memoranda of understanding with Federal agencies that provide services to American Indians or Alaska Natives, so long as Federal funding appropriated for "Indian programs and

Continued

The amendment to section 9 reflects the facts that (1) there already exists an array of separate and distinct Federal and State programs and services specifically intended for Native Hawaiians and (2) current Federal programs and services for Indians and Alaska Natives are underfunded and incapable of absorbing a large population of new recipients.

SECTION-BY-SECTION ANALYSIS OF SUBSTITUTE AMENDMENT

Section 1. Short title

Section 1 provides that this Act may be cited as the "Native Hawaiian Government Reorganization Act of 2005".

Section 2. Findings

This section sets forth the Congress' findings. Findings (1) through (3) recite Congress' constitutional authority to address the condition of native people of the United States, and its political and legal responsibility to promote the welfare of native people, including Native Hawaiians. Finding (4) recites that under the treaty making power of the United States, Congress confirmed treaties with the Kingdom of Hawai'i, and from 1826 until 1893, the United States recognized the sovereignty of the Kingdom and accorded it full diplomatic recognition, and entered into a series of treaties and conventions in 1826, 1842. 1849, 1875, and 1887. Findings (5) through (7) reflect Congress' determination of the need and efforts to address conditions of Native Hawaiians through the Hawaiian Homes Commission Act of 1920. Finding (8) documents Congress' establishment of the ceded lands trust as a condition of statehood for the State of Hawai'i. Findings (9) through (11) reflect the importance of the Hawaiian Home Lands and Ceded Lands to Native Hawaiians as a foundation for the Native Hawaiian community for the survival and economic self-sufficiency of the Native Hawaiian people and their maintenance of other distinctively native areas in Hawai'i. Findings (12) through (14) address and describe the effect of the 1993 Apology Resolution. Findings (15) through (18) address the status of the Native Hawaiian community as a "distinct native community," their expressions of rights to self-determination and self-governance, their traditional and cultural practices and desires to preserve, develop and transmit to future generations their lands, practices and political and cultural identity to future generations. Finding (19) recites that this Act provides a process within the framework of Federal law for Native Hawaiians to exercise their inherent rights as a distinct indigenous, native community and reorganize a Native Governing entity. Finding (20) recites that Congress has declared that the United States has a special responsibility for the welfare of its native peoples, including Native Hawaiians, has identified Native Hawaiians as a distinct group of native people within the scope of its authority under the Constitution, has enacted laws on their behalf, and has delegated to the State of Hawai'i some of the Unites States' responsibilities relating to Native Hawaiians and their lands. Finding (21) states that the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people through the provi-

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services" is not used to provide programs and services to Native Hawaiian citizens who are not otherwise—that is, independently—eligible to receive those Indian programs or services.

sions of the Admission Act. Finding (22) states that the United States has continually recognized and reaffirmed that Native Hawaiians have a cultural, historic and land-based link to the original indigenous people of the Hawaiian Islands and 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 an indigenous people 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. Finally, finding (23) documents that the Governor and Legislature of the State of Hawai'i have expressed their strong support for the recognition of the Native Hawaiian governing entity.

Section 3. Definitions

This section sets forth definitions of terms used in the bill. Defined terms are Aboriginal, Indigenous, Native People; Adult Member; Apology Resolution; Commission; Council; Indian Program or Service; Indian Tribe; Indigenous, Native People; Interagency Coordinating Group; Native Hawaiian; Native Hawaiian Governing Entity; Native Hawaiian program or service; Office; and Secretary.

With regard to the definition of the term "Native Hawaiian," it is the intent of the Committee that the definition shall be applicable for the purpose of establishing the roll authorized under section 7(c)(1) and until such time as the Native Hawaiian governing entity is recognized by the United States. Thereafter, however, the definition of "Native Hawaiian" for the purposes of citizenship in the Native Hawaiian governing entity shall be as provided for in the organic governing documents of the Native Hawaiian governing entity pursuant to section 7(c)(2), and upon certification of those documents by the Secretary of the Interior pursuant to section 7(c)(4), the definition of Native Hawaiian in the organic governing documents of the Native Hawaiian governing entity shall be the definition of Native Hawaiian for purposes of this Federal law. The Committee notes that the definition of Native Hawaiian either in this Act or as eventually used in those organic governing documents is not intended to alter or affect the meaning of that term wherever it is used in other laws. The substitute amendment clarifies that the term Native Hawaiian as used in the Act does not affect the definition of that term under any other Federal or State law.

Section 4. United States Policy and Purpose

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a special political and legal relationship and cites to some of the laws that reflect that relationship. It states the constitutional authority to enact legislation addressing the conditions of Native Hawaiians, and also affirms that Native Hawaiians have the right to self-determination and to reorganize a Native Hawaiian governing entity. Section 4 also states that the purpose of the Act is to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing en-

tity for purposes of continuing a government-to-government relationship.

Section 5. United States Office for Native Hawaiian Relations

This section establishes the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of Interior. This Office is charged with: (1) continuing the process of reconciliation with the Native Hawaiian people in furtherance of the Apology Resolution; (2) upon reaffirmation and Federal recognition of the Native Hawaiian governing entity, effectuating and coordinating the special political and legal relationship between the Native Hawaiian people through the Secretary and with other Federal agencies; (3) fully integrating the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people and the Native Hawaiian governing entity prior to taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; (4) consulting with the Interagency Coordinating Group, other Federal agencies, and with the State of Hawai'i on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and (5) preparing and submitting to the Senate Committee on Indian Affairs, the Senate Committee on Energy and Natural Resources, and the House Committee on Resources an annual report detailing the activities of the Interagency Coordinating Group that are undertaken with respect to the continuing process of reconciliation and to effect meaningful consultation with the Native Hawaiian governing entity, and providing recommendations for any necessary changes to existing Federal statutes or regulations promulgated under the authority of Federal law.

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

Section 6. Native Hawaiian Interagency Coordinating Group

This section establishes the Native Hawaiian Interagency Coordinating Group composed of officials from each Federal agency administering Native Hawaiian programs, to be designated by the President, and a representative from the U.S. Office of Native Hawaiian Relations. The Department of Interior is to serve as the lead agency of the Interagency Coordinating Group. The primary responsibility of the Coordinating Group is to coordinate Federal policies or acts that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Coordinating Group is also charged with assuring that each Federal agency develops a Native Hawaiian consultation policy and participates in the development of the report to Congress authorized in section 5.

Section 7. Process for the Reorganization of the Native Hawaiian Governing Entity and the Reaffirmation of the Political and Legal Relationship Between the United States and the Native Hawaiian Governing Entity

This section sets forth the process for the reorganization of the Native Hawaiian governing entity and reaffirms the political and legal relationship between the United States and the Native Hawaiian governing entity.

Subsection (a) provides that the United States recognizes that the Native Hawaiian people have the right to reorganize the Native Hawaiian governing entity for their common welfare and to adopt appropriate organic governing documents.

Subsection (b)(1) authorizes the establishment of a nine-member Commission, to be appointed by the Secretary of the Interior, for the purposes of preparing and maintaining a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and for certifying to the Secretary that those proposed for inclusion on the roll meet the definition of "Native Hawaiian" as set forth in section 3(10). The Secretary is to appoint members of the Commission within 180 days of the enactment of this Act who meet the definition of "Native Hawaiian" as set forth in section 3(10) and have expertise in the determination of Native Hawaiian ancestry and lineal descent. The section provides that members of the Commission shall be reimbursed for travel expenses, including per diem in lieu of subsistence, while away from their homes or regular places of business in the performance of services for the Commission.

The section also provides authority for the Commission to appoint and terminate an executive director and such other additional personnel, without regard to the civil service laws or regulations, as are necessary to enable the Commission to perform the duties of the Commission. The Commission is authorized to fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 of the United States Codes relating to the classification of positions and General Schedule pay rates, however the rate of pay for the executive director and other personnel are not to exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5 of the U.S. Code.

The section also provides authorization for employees of the Federal government to be detailed to the Commission without reimbursement, provided that the detail of the employee shall be without interruption or loss of civil service status or privilege. The Commission is also authorized to procure temporary and intermittent services in accordance with section 3109(b) of title 5 of the U.S. Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of title 5.

The Secretary is required to dissolve the Commission following the reaffirmation of the political and legal relationship between the Native Hawaiian governing entity and the United States and the extension of Federal recognition by the United States to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people as provided in section 7(c)(6).

Subsection (c) establishes the process for the reorganization of the Native Hawaiian governing entity.

Subsection (c)(1) sets forth the process for the formation of the roll, which is to include the names of all adult members of the Native Hawaiian community who are certified to be Native Hawaiian pursuant to section 3(10) and choose to participate in the reorganization of the Native Hawaiian governing entity. Each adult member seeking enrollment shall submit documentation to the Commission in the form established by the Commission sufficient to document that the individual meets the definition of Native Hawaiian set forth in section 3(10). In determining the eligibility of individuals to be listed on the roll, the Commission may consult with Native Hawaiian organizations, agencies of the State of Hawai'i, to include the Department of Hawaiian Home Lands, Office of Hawaiian Affairs, and the State Department of Health, and other entities with expertise and experience in the determination of Native Hawaiian ancestry and lineal descent. The Commission is to submit the roll to the Secretary of the Interior within two years from the date on which the Commission is fully composed and shall certify that each person proposed for inclusion on the roll meets the definition of Native Hawaiian set forth in section 3(10). Upon certification, the Secretary is to publish the roll in the Federal Register. The Secretary is authorized to establish a process whereby any person 18 years or older in age who claims to have been excluded from the roll can appeal that exclusion. The Secretary is to publish the roll regardless of whether appeals are pending and is to update the roll and the publication of the roll to reflect the final disposition of appeals and to include any Native Hawaiian who attains the age of 18 and is certified by the Commission as meeting the definition of Native Hawaiian in section 3(10) after the initial publication of the roll or any subsequent publications updating the original roll. If the Secretary fails to publish the roll within 90 days of the date on which the certified roll is submitted by the Commission, the Commission is to publish the roll notwithstanding any order or directive to the contrary issued by the Secretary of any other official of the Department of the Interior. Adult members of the Native Hawaiian community whose names are listed in the published roll, as updated, shall be eligible to participate in the reorganization of the Native Hawaiian governing entity.

Subsection (c)(2) addresses the organization of the Native Hawaiian Interim Governing Council.

Subsection (c)(2)(A) provides that the adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary may develop eligibility criteria for election to serve on the Native Hawaiian Interim Governing Council, may determine the structure of the Council, and may elect the members of the Council from those listed on the final roll.

Subsection (c)(2)(B) provides that the Council may represent individuals on the published roll in the implementation of the Act and shall have no powers other than those specifically conferred upon it under the authority of this Act. Generally, the Council's authorities are limited to activities relating to the development of proposed organic documents, the conduct of a referendum on the documents, and submission of the documents to the Secretary for certification that they meet the requirements of the Act. The Council may enter

into a contract with, or obtain a grant from, any Federal or State agency for the purpose of carrying out its authorized activities and may also conduct a referendum among the adult members of the Native Hawaiian community whose names are listed on the published roll for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity, including but not limited to the proposed criteria for citizenship of the Native Hawaiian governing entity, the proposed powers, authorities, privileges, and immunities of the Native Hawaiian governing entity, the proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of its governmental powers and authorities, and other issues determined by the Council to be appropriate. Based on the referendum, the Council may develop proposed organic governing documents for the Native Hawaiian governing entity, may distribute to all adult members of the Native Hawaiian community listed on the published roll a copy of the proposed organic governing documents and a brief impartial description of their contents. The Council may also hold elections for the purpose of ratifying the proposed organic governing documents and, upon certification of those documents by the Secretary in accordance with section 7(c)(4), may hold elections of the officers of the Native Hawaiian governing entity.

Subsection (c)(3) provides that following the organization of the Native Hawaiian governing entity and the adoption of organic governing documents, the Council shall submit the ratified organic governing documents to the Secretary.

Subsection (c)(4)(A) provides that within the context of the future negotiations to be conducted under the authority of section 8(b)(1), and the subsequent actions of Congress and the State of Hawai'i to adopt implementing legislation, but not later than 90 days after the date on which the Council submits the organic governing documents to the Secretary, the Secretary shall certify that the organic governing documents:

- establish criteria for citizenship in the Native Hawaiian governing entity;
- were adopted by a majority vote of the adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary;
- provide authority for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;
- provide for the exercise of governmental authorities by the Native Hawaiian governing entity, including any authorities delegated to the entity by the United States and the State of Hawaii pursuant to any agreements executed pursuant to negotiations authorized in section 8(b)(1) and any legislation necessary to implement such agreements;
- prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity;
- provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons af-

fected by the governmental authority of the Native Hawaiian governing entity; and

- are consistent with applicable Federal law and the special political and legal relationship between the United States and the indigenous native people of the United States, provided however that the provisions of Public Law 103–454, 25 U.S.C. 479a, shall not apply.

It is the Committee's intent that for purposes of determining whether the criteria for citizenship in the Native Hawaiian governing entity are consistent with applicable Federal law, the definition of "Native Hawaiian" set forth in section 3 of the Act or any other Federal law shall not be a constraint on the right of the Native Hawaiian governing entity to determine its own citizenship or membership.

Subsection (c)(4)(B) provides that if the Secretary determines that any provision of the organic governing documents is not consistent with applicable Federal law, the Secretary shall resubmit the organic governing documents to the Council along with a justification for each of the Secretary's findings as to why the provisions are not consistent with such law. The Council is authorized to amend the organic governing documents in order to ensure their compliance with applicable Federal law and to resubmit the organic governing documents to the Secretary for certification.

Subsection (c)(4)(C) provides that the certification of the organic government documents shall be deemed to have been made if the Secretary has not acted within 90 days of the date that the Council has submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.

Subsection (c)(5) provides that on completion of the certifications made by the Secretary, the Council may hold elections of the officers of the Native Hawaiian governing entity.

Subsection (c)(6) provides that upon the certifications of the organic governing documents of the Native Hawaiian governing entity and the election of the officers of the Native Hawaiian governing entity, the political and legal relationship between the United States and the Native Hawaiian governing entity is reaffirmed and United States extends Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.

Section 8. Reaffirmation of Delegation of Federal Authority; Negotiations; Claims

Section 8(a) reaffirms the United States' delegation of authority to the State of Hawai'i in the Admission Act to address the conditions of the indigenous, native people of Hawai'i.

Section 8(b) provides that, upon the Federal recognition and reaffirmation of the Native Hawaiian governing entity, the United States and the State of Hawai'i are authorized to enter into negotiations with the Native Hawaiian governing entity that are designed to lead to an agreement or agreements addressing matters such as 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 authorities to the Native Hawaiian governing entity,[46] and the scope of any residual responsibilities of the United States and the State of Hawai'i. When the three governments reach agreement on one or more matters, they are authorized to submit recommendations for legislation that may be necessary to implement the agreement or agreements that they have reached to the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate, the Committee on Resources of the House of Representatives, and the Governor and Legislature of the State of Hawai'i.

Section 8(c) provides that nothing in this Act shall be construed as a settlement of any claim against the United States, and provides further that any claim against the United States arising under Federal law which is in existence on the date of enactment of this Act, that is asserted by the Native Hawaiian governing entity on behalf of the Native Hawaiian people, and which relates to the legal and political relationship between the United States and the Native Hawaiian people, must be filed in the court of jurisdiction over such claims within 20 years of the date on which Federal recognition is extended to the Native Hawaiian governing entity pursuant to section 7(c)(6). The period of time established for the filing of claims on behalf of the Native Hawaiian people in section 8(c) applies only to the Native Hawaiian governing entity.

It is the Committee's intent that the reference to "lands, natural resources and other assets" which are the subject of negotiations contemplated in subsection (b) shall include, but not be limited to, lands set aside under the Hawaiian Homes Commission Act and lands ceded by the Republic of Hawai'i to the United States in 1898 and later ceded to the State pursuant to § 5 of the Admission Act and Pub. L. 88–233, 77 Stat. 472 (December 23, 1963).

Section 9. Applicability of Certain Federal Laws

This section provides that nothing in this Act is to be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act. Section 9 also provides that the Act does not provide an 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 law, and that the Native Hawaiian governing entity and its citizens shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable law.

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[46] Under current law—including the Admission Act, the Hawai'i Constitution and the state laws enacted pursuant to the Hawai'i Constitution—responsibility for the administration of the Hawaiian home lands and the Ceded Lands for specified purposes has been delegated to the State of Hawai'i. Accordingly, to the extent that the Native Hawaiian governing entity would exercise jurisdiction or authority over any portion of these lands, the agreement must of necessity delegate such jurisdiction and authority to the entity—and any delegation of that sort in the agreement would require enactment of legislation by the United States Congress for the delegation to be effective. The Committee would note that the reference in section 8(b) to "delegation of governmental powers and authorities" is not intended to imply that the Native Hawaiian governing entity would not otherwise have any inherent powers.

Section 10. Severability

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

Section 11. Authorization of Appropriations

This section authorizes the appropriation of such sums as are necessary to carry out this Act.

LEGISLATIVE HISTORY

S. 147 was introduced on January 25, 2005, by Senator Akaka for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Smith of Oregon became a cosponsor on February 16, 2005, Senator Cantwell of Washington on February 18, 2005, and Senator Murkowski of Alaska on March 8, 2005.[47] A hearing on S. 147 was held before the Committee on March 1, 2005, and on March 9, 2005, the bill, with an amendment in the nature of a substitute, was ordered by the Committee to be favorably reported to the full Senate.

A House companion measure to S. 147, H.R. 309, was introduced on January 25, 2005, by Representative Abercrombie, for himself and Representatives Case, Grijalva, Young, Moran, Bordallo and Faleomavaega, and referred to the Committee on Resources. On February 1, 2005, Representative Rahall joined as a cosponsor.

In the 108th Congress, S. 344, a bill similar in purpose to S. 147, was introduced on February 11, 2003, by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Reid of Nevada became a cosponsor on February 27, 2003, Senator Stevens of Alaska on March 17, 2003, Senator Hatch of Utah on November 12, 2003, Senator Smith of Oregon on December 9, 2003, Senator Campbell of Colorado on April 21, 2004, and Senator Carper of Delaware on June 24, 2004. A hearing on S. 344 was held before the Committee on Indian Affairs on February 25, 2003. S. 344 was ordered favorably reported to the full Senate by the Committee on Indian Affairs on May 14, 2003.

A House companion measure to S. 344, H.R. 665, was introduced on February 11, 2003, by Representative Abercrombie, for himself and Representative Case, and thereafter referred to the Committee on Resources.

In the 107th Congress, S. 746, a bill similar in purpose to S. 147, was introduced on April 6, 2001, by Senator Akaka, for himself and Senator Inouye, and thereafter referred to the Committee on Indian Affairs. On July 24, 2001, S. 746 was ordered favorably reported to the full Senate. The Committee report accompanying the bill was S. Rep. No. 107–66.

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

[47] Additional Senators joined as cosponsors after the business meeting on March 9, 2005, when the bill was ordered reported with the substitute amendment: Senator Coleman of Minnesota on March 10, 2005, Senator Dorgan of North Dakota on April 4, 2005, Senator Stevens of Alaska on April 5, 2005, and Senator Graham of South Carolina on May 11, 2005.

H.R. 617 was ordered favorably reported to the full House of Representatives on May 16, 2001. S. 746 and H.R. 617 were not acted upon prior to the sine die adjournment of the 107th session of the Congress.

In the 106th Congress, S. 2899, a bill similar in purpose to S. 344, was introduced by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives and thereafter referred to the Committee on Resources. The Committee and the Committee on Resources held five consecutive days of joint hearings on S. 2899 and H.R. 4904 in Hawai'i from Monday, August 28, through Friday, September 1, 2000. The Committee held an additional hearing on S. 2899 in Washington D.C. on September 13, 2000. S. 2899 was ordered favorably reported to the full Senate by the Committee on September 13, 2000. The Committee report accompanying the bill was Senate Report 106–424. H.R. 4904 was ordered favorably reported by the House Resources Committee and passed the House on September 26, 2000. H.R. 4904 failed to pass the Senate before the sine die adjournment of the 106th session of the Congress.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On March 9, 2005, in an open business meeting, the Committee considered an amendment in the nature of a substitute to S. 147, and ordered the bill, as amended, to be favorably reported to the Senate.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of the Congressional Budget Office on S. 147 is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 25, 2005.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 147, the Native Hawaiian Government Reorganization Act of 2005.

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

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

S. 147—Native Hawaiian Government Reorganization Act of 2005

S. 147 would establish a process for establishing and recognizing a Native Hawaiian governing entity. CBO estimates that implementing S. 147 would cost nearly $1 million annually in fiscal years 2006–2008 and less than $500,000 in each subsequent year,

assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues.

The bill would establish the United States Office or Native Hawaiian Relations within the Department of Interior (DOI), which would be responsible for developing and overseeing the federal relationship with the Native Hawaiian governing entity. Based on information from DOI, CBO expects that this office would require up to three full-time personnel. S. 147 also would establish the Native Hawaiian Interagency Coordinating Group, consisting of officials from affected agencies. Finally, the bill would create a nine-member commission responsible for creating and certifying a roll of adult Native Hawaiians. Based upon information from DOI, CBO expects that this commission would need three years and three full-time staff members to complete its work.

S. 147 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government to represent native Hawaiians. The transfer of any land or other assets to this new government, including land now controlled by the State of Hawai'i, would be the subject of future negotiations.

The CBO staff contacts for this estimate are Mike Waters (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has not received any executive communications on S. 147 or the substitute amendment to it.

REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate require each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 147 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the provisions of S. 147 do not effect any change in existing law.

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