PREPARED STATEMENT OF
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Before the
COMMITTEE ON INDIAN AFFAIRS
of the
UNITED STATES SENATE

on

S. 65, THE HAWAIIAN HOMEOWNERSHIP ACT OF 2011

April 13, 2012

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of the Committee, mahalo for the opportunity to testify on S. 65, the Hawaiian Homeownership Act of 2011. My testimony will focus on the special political and legal relationship between the United States and the Native Hawaiian community that has been acknowledged and reflected in federal actions and legislation relating to Native Hawaiians for over a century.

I currently direct the Native Hawaiian law program at the William S. Richardson School of Law, have written and litigated extensively on Native Hawaiian legal issues and, along with my colleagues Sherry Broder and the late Prof. Jon Van Dyke, have represented the Office of Hawaiian Affairs in several important cases, most recently in relation to the public or "ceded" lands trust. I want to clarify, though, that the views expressed here reflect my own judgment about the historical facts and legal issues. I also wish to acknowledge that much of the information shared here is well documented and well known to the Chair and other members of the Committee. Nevertheless, for a complete and accurate record, I believe it is important to restate this history and information.

The Relationship Between the United States and the Native Hawaiian Community

The special political and legal relationship between the United States and Native Hawaiians arises from several sources. These include: Federal and Congressional authority in dealing with the native peoples of the United States combined with the status of Native Hawaiians as the indigenous, aboriginal, native people of Hawai'i; the role of the United States in the overthrow of the Hawaiian Kingdom and the deprivation of the lands and sovereignty of the Native Hawaiian people; the course of Federal interaction and dealings with Native Hawaiians; and, the recent international recognition of the rights of Indigenous Peoples

I. Federal and Congressional authority in relation to native peoples and the status of Native Hawaiians as the indigenous, aboriginal, native people of Hawai'i

One source of the United States' power over Indian affairs derives from Congress' special authority under the Indian Commerce Clause, which allows Congress

to "regulate commerce with . . . the Indian Tribes."[1] While this power is broad and has been characterized as plenary, the acts of Congress and executive officials are subject to judicial review under constitutional and administrative law principles.[2]

The United States Supreme Court first analyzed the federal relationship with Native Americans in the "Marshall trilogy."[3] In sum, these decisions established that the United States dealt with Indian tribes as separate, distinct sovereign entities that had not surrendered their independence and right to self-government by associating with a stronger government and "taking its protection."[4] Rather, the federal government, as a result of treaties and other agreements negotiated with the tribes, became a trustee for the Indians, with a special role to oversee and protect many of the possessions of Indians from non-Indians. Indian tribes are not foreign nations, but are distinct political entities, akin to "domestic dependent nations," whose relation to the United States is like that "of a ward to his guardian."[5] In more recent decisions, the United States Supreme Court has recognized that Indian tribes are distinct, independent political communities that possess powers of self-government by reason of their original tribal sovereignty.[6] In general, the powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished."[7]

The Indian Commerce Clause's reference to Indian Tribes does not limit congressional authority to take action only on behalf of indigenous groups organized as tribes or native to the continental United States.[8] To the framers of the Constitution, an "Indian tribe" was simply a distinct group of indigenous people set apart by their common circumstances,[9] a definition that Native Hawaiians certainly satisfy.

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[1] U.S. CONST. art. 1, § 8. In addition, the Treaty Clause, U.S. CONST. art. II, § 2, Cl. 2, gives the President the authority, with the consent of the Senate, to make treaties with the Indian tribes. The U.S. Supreme Court has also held that the "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution. Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

[2] Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); U.S. v. Sioux Nation, 448 U.S. 371 (1980).

[3] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[4] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).

[5] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1-2 (1831).

[6] United States v. Wheeler, 435 U.S. 313, 323-24 (1978); United States v. Lara, 541 U.S. 193, 198 (2004).

[7] United States v. Wheeler, 435 U.S. at 328.

[8] *See* Montoya v. United States, 180 U.S. 261, 266 (1901) for the U.S. Supreme Court's discussion of the term "Indian tribe."

[9] Columbus applied the term "Indian" to the native people of the New World believing that he had found a route to India. The term has been understood ever since to refer to the native peoples who inhabited the New World before the arrival of Europeans. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-574 (1823) (referring to Indians as "original inhabitants" or "natives" who occupied the New World before discovery by "the great nations of Europe").

Native Hawaiians are undoubtedly the indigenous, native, aboriginal people of Hawai‘i and modern Native Hawaiians are linked not only by ancestry, but also by culture, language, history and land to the original inhabitants of Hawai‘i.[10] Indeed, in 2011, the State of Hawai‘i took the extraordinary action of officially recognizing the "indigenous, aboriginal, maoli" status of Native Hawaiians.[11]

As discussed below, Congress has often legislated on behalf of Native Hawaiians, implicitly, and often explicitly, recognizing them as the native people of Hawai‘i, and oftentimes including them in legislation for other native people of the United States. Native Hawaiians, as the modern day descendants of the indigenous, aboriginal, native people of Hawai‘i, fall within congressional authority under the Indian Commerce Clause.

II. The U.S. Role in the 1893 Overthrow of the Hawaiian Kingdom and the deprivation of the lands and sovereignty of the Native Hawaiian people

Throughout the nineteenth century, the United States recognized the independence of the Kingdom of Hawai‘i and extended full and complete diplomatic recognition to the Hawaiian government. In 1842, U.S. President John Tyler recognized the sovereignty of Hawai‘i and declared it the official policy of the United States to support Hawaiian independence.[12] The United States entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1849, 1875, and 1884.[13] In 1893, the United States Minister assigned to the Kingdom of Hawai‘i, John L. Stevens, conspired with a small group of non-Hawaiian residents of the Kingdom, including citizens of the United States, to overthrow the indigenous and lawful government of Hawai‘i.

In January 1893, Queen Lili‘uokalani, constrained by a constitution that had been forced upon her brother in 1887, sought to promulgate a new constitution returning authority to the throne and the Native people.[14] Using this as a pretext, a small group of men representing Western commercial interests formed a Committee of Safety to

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[10] *See generally*, Derek H. Kauanoe & Breann Swann Nu‘uhiwa, *We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent*, ASIAN-PAC. L. & POL'Y J. (forthcoming Spring 2012). *See, also,* DAVIANNA PŌMAIKA‘I MCGREGOR, NĀ KUA‘ĀINA 1-48 (2007) [hereinafter "NĀ KUA‘ĀINA"]; JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 11-18 (2008) [hereinafter "VAN DYKE, CROWN LANDS"]; FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § § 4.07 [4] [a] (Nell Newton ed. 2005) [hereinafter "COHEN'S HANDBOOK"].

[11] Act of July 6, 2011, No. 195, §§ 1 & 2. Maoli means "[n]ative, indigenous, genuine, true, real." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 222 (1971).

[12] Sen. Ex. Docs., 52nd Cong 2d. Sess., No. 77, 35-37 (1842).

[13] In 1826, the first formal agreement between the United States and the Hawaiian Kingdom was negotiated although it was never ratified by the U.S. Senate. CHARLES I. BEVANS, 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 861 (1971); *id*. at 864, 9 Stat. 977; *id*. at 874, 19 Stat. 625; *id*. at 878, 25 Stat. 1399.

[14] TOM COFFMAN, NATION WITHIN 119-120 (2003).

overthrow the Hawaiian government.[15] They received the aid of Minister Stevens, who caused U.S. military forces to land in Honolulu on January 16, 1893.[16] On the afternoon of January 17th, the Committee of Safety proclaimed the Hawaiian monarchy abolished and the establishment of a provisional government.[17] Minister Stevens quickly extended diplomatic recognition to the provisional government, even before the Queen yielded. The Queen, seeking to avoid bloodshed, relinquished her authority to the United States under protest, fully expecting that the United States would repudiate Stevens' actions.[18]

On February 1, Stevens proclaimed Hawai'i a protectorate of the United States and the American flag was raised in Honolulu.[19] The provisional government immediately sought annexation to the United States. After an investigation, however, newly inaugurated President Grover Cleveland called for restoration of the monarchy. In a message to Congress on December 18, 1893, President Cleveland admitted that the government of a peaceful and friendly people was illegally overthrown. "A substantial wrong has thus been done," concluded the President, "which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair."[20] Realizing that annexation would not be immediately forthcoming, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawai'i.[21]

In 1897, U.S. President William McKinley took office on a platform advocating "control" of Hawai'i. The new administration negotiated an annexation treaty ratified by the Republic's Senate.[22] Native Hawaiians and other citizens of Hawai'i presented

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[15] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, Pub. L. No. 103-150, 107 Stat. 1510 (1993), para. 5 [hereinafter "Apology Resolution"].

[16] *Id*., para 6.

[17] *Id*., para. 7.

[18] LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 387 (12th ed. 1976); Apology Resolution, para. 9.

[19] Apology Resolution, para. 11.

[20] President's Message to Congress Relating to the Hawaiian Islands (December 18, 1893). House Executive Documents No. 47, 2nd Session, 53rd Congress, 1893-94, vol. 27, "Hawaiian Islands," iii-xvi.

[21] Apology Resolution, para. 20. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC (1894-1898), at 33-34 (1961). Russ notes:

> Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that . . . [the Republic's] constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic. Hence, even those Kanaka (Hawaiians) who could fulfill the requirements generally refused to register, to vote, and to take part in the Government when it was established.

Id. at 36.

[22] Resolution of the Senate of Hawaii Ratifying the Treaty of Annexation of 1897; WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-94), 198 (1959).

petitions to the U.S. Senate—over 21,000 signatures—protesting annexation and calling for the restoration of the Hawaiian monarchy.[23] The 1897 annexation treaty failed.[24]

But the next year, pro-annexation forces introduced a joint resolution of annexation. The annexation of Hawai‘i by joint resolution was hotly debated in the U.S. Senate, with many arguing that the United States could acquire territory only under the treaty-making power of the U.S. Constitution, requiring ratification by two-thirds of the Senate.[25] Nevertheless, with the advent of the Spanish-American War, the islands became strategically significant.[26] Ultimately, the U.S. acquired Hawai‘i through a joint resolution, with a simple majority in each house.

The Joint Resolution of Annexation[27] made no provision for a vote by Native Hawaiians or other citizens. Under the resolution, the United States received approximately 1.8 million acres of public, Government, and Crown lands.[28] In the mid-19th century conversion of lands to fee simple ownership known as the Māhele, Kamehameha III had set apart "forever to the chiefs and people," more than 1.5 million acres of Government Lands.[29] At the same time, Kamehameha III had reserved the Crown Lands as his own personal lands and as a source of income and support for the crown.[30] Thus, although "the fee simple ownership system instituted by the Māhele and

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[23] In 1897, a Hawaiian delegation carried two sets of petitions – one gathered by the Hui Aloha ‘Āina and the other by the Hui Kālai‘āina – with almost 38,000 signatures against annexation, to Congress. Senator George Hoar, who met with the delegation, read the text of the Hui Aloha ‘Āina petitions, which had garnered over 21,000 signatures, into the Congressional Record during the Senate debate on annexation. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 157-59 (2004).

[24] Silva notes that the Hawaiian delegation was originally told that there were 58 votes in the Senate for the treaty, only two votes shy of the 60 needed for passage. By the time the delegation left Washington, there were only 46 votes on the pro-annexation side. *Id*.

[25] Annexationists pointed to the acquisition of Texas in 1845 by joint resolution as precedent, but Texas had been brought into the Union under Congress' power to admit new states. Further, the joint resolution utilized in the Texas case was approved by a plebiscite held in Texas. No plebiscite was proposed for Hawai‘i. One Senator offered an amendment to the measure providing for such a vote by all adult males, but it was defeated. Finally, on June 15, 1898, by a vote of 209 to 91, the House approved the resolution. On July 6, 1898, the resolution passed the Senate by 42 to 21, with 26 abstentions. Congressional Record, 55 Cong., 2nd Sess 6149 (June 20, 1898); *id*. at 6310 (June 30, 1898); *id*. at 6709-10 (July 6, 1898); *id*. at 6018 (June 5, 1898); *id*. at 6712 (July 6, 1898).

[26] See, e.g., *id*. at 5982 (June 15, 1898); Appendix at 669-70 (June 13, 1898).

[27] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States of July 7, 1898, 30 Stat. 750 [hereinafter "Joint Resolution"].

[28] *Id*. Apology Resolution, para. 25.

[29] See 2 REVISED LAWS OF HAWAII, 1925, at 2152-2176 (listing of lands and act confirming division of lands); *see also* An Act Relating to the Crown, Government, and Fort Lands, June 7, 1848 *reprinted in* VAN DYKE, CROWN LANDS, at Appendix 2.

[30] *Id*. *See* Estate of Kamehameha IV, 2 Haw. 715, 722-723 (1864). In 1865, the Crown lands were made inalienable. Act Rendering the Crown Lands Inalienable, January 5, 1865, *reprinted in* VAN DYKE, CROWN LANDS, Appendix 5.

the laws that followed drastically changed Hawaiian land tenure, the Government Lands and the Crown Lands were held for the benefit of all the Hawaiian people."[31] For Native Hawaiians, the Government and Crown lands "marked a continuation of the trust concept" that the sovereign held the lands "on behalf of the gods and for the benefit of all."[32]

At the time of annexation, the United States implicitly recognized the unique nature of the Government and Crown Lands. Although the Joint Resolution of Annexation ceded "the absolute fee and ownership of all public, Government, or Crown lands"[33] to the United States, federal public land laws were not applied to Hawai'i. Instead, Congress was to enact "special laws for [the] management and disposition"[34] of ceded lands. Moreover, the revenues from the ceded lands, with certain exceptions, were to be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[35]

In 1900, Congress enacted an Organic Act[36] for the new territory that established a territorial government and confirmed the cession of lands to the United States. The Organic Act gave the territory the "possession, use, and control"[37] of the lands, but stipulated that proceeds from the lands were to be utilized for purposes "consistent with the Joint Resolution of Annexation."[38] Consequently, while the Republic had ceded the Crown and Government Lands to the United States, both the Joint Resolution of Annexation and the Organic Act recognized that these lands were impressed with a special trust.[39]

As a result of these actions by the United States—its participation in the overthrow and its annexation of Hawai'i—the United States was instrumental in

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[31] NATIVE HAWAIIAN RIGHTS HANDBOOK 26 (Melody Kapilialoha MacKenzie ed. 1991) [hereinafter "HANDBOOK"].

[32] *Id*. *See, e.g.,* NĀ KUA'ĀINA 31-39 (2007); VAN DYKE, CROWN LANDS, at 8-10, 54-58, 212-215.

[33] Joint Resolution.

[34] *Id*.

[35] *Id.* In an 1899 opinion, the U.S. Attorney General interpreted the Joint Resolution as creating a "special trust" for the benefit of Hawai'i's inhabitants. 22 Op. Att'y. Gen. 574 (1899).

[36] Act of April 30, 1900, An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900) [hereinafter "Organic Act"].

[37] *Id*. § 91. Section 95 of the 1894 Constitution of the Republic had declared the Crown Lands to be the property of the Hawaiian government and free of any trust. *Reprinted* in Liliuokalani v. U.S., 45 Ct. Cl. 418, 428 (1910). Similarly, section 99 of the Organic Act declared that the Crown Lands were "free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof." Organic Act, § 99.

[38] *Id.* § 73(e).

[39] *See* Cheryl Miyahara, Note, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101, 115-118 (1981) [hereinafter "Miyahara, *Ceded Lands*"] for discussion of the unique nature of Hawai'i's lands and concluding that "the federal government had become in effect trustee of the lands ceded by Hawaii, holding absolute but 'naked' title for the benefit of the people of Hawaii."

depriving Native Hawaiians of both their sovereignty and their national lands.[40]

III. The course of Federal interaction and dealings with Native Hawaiians

A. The Territorial Period and the Hawaiian Homes Commission Act

During the territorial period, the condition of Native Hawaiians continued to deteriorate, following a downward spiral that began on first contact with Europeans. In 1920 territorial representatives sought assistance from Congress. Noting that Native Hawaiians had been "frozen out of their lands and driven into the cities," and that "Hawaiian people are dying," the representatives recommended allotting land to Native Hawaiians so that they could reestablish their traditional way of life.[41] The Secretary of the Interior echoed that recommendation, informing Congress that Native Hawaiians are "our wards . . . for whom in a sense we are trustees," that they "are falling off rapidly in numbers" and that "many of them are in poverty."[42]

In 1921, those recommendations led Congress to enact the Hawaiian Homes Commission Act (HHCA),[43] setting aside about 203,000 acres of ceded lands for a homesteading program to provide residences, farms, and pastoral lots for Native Hawaiians of fifty percent or more Hawaiian ancestry.[44] Congress found constitutional precedent for the HHCA in previous enactments granting Indians and others special privileges in using public lands.[45]

But passage of the HHCA was a compromise with large business interests. Prior to annexation, the Republic had established a general homesteading program on Government and Crown lands.[46] In 1910, Congress amended the Organic Act, directing the Territory to open these lands for general homesteading in a given area when twenty-five or more qualified homesteaders applied for land.[47] Since sugar plantation leases on about 26,000 acres of prime lands were due to expire during the 1920s and 1930s, Hawai'i's large plantation owners feared that homesteading would impact their successful plantations.[48]

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[40] Apology Resolution, at paras. 26, 29.

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

[42] *Id*.

[43] Hawaiian Homes Commission Act, 42 Stat. 108 (formerly codified as amended at 48 U.S.C. §§ 691-718 (1958)) (omitted from codification in 1959) (set out in full as amended at 1 HAW. REV. STAT. 261) [hereinafter "HHCA"].

[44] *Id*. § 208.

[45] H.R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920).

[46] The Land Act of 1895, CIVIL LAWS OF 1897, § 169; *see* ROBERT H. HOROWITZ ET AL., PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS 5-15 (Legislative Reference Bureau Report No. 5, 1969) (detailed analysis of the Act); VAN DYKE, CROWN LANDS, at 188-99 (discussing the 1895 Land Act).

[47] Act of May 27, 1910, ch. 258, § 5, 36 Stat. 444, amending the Organic Act.

[48] TOM DINNELL ET AL., THE HAWAIIAN HOMES PROGRAM: 1920-1963, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1, at 6 (1964) [hereinafter "HOMES PROGRAM"].

As discussed above, during the same period, Hawaiian leaders became alarmed by the rapidly deteriorating conditions of the Hawaiian people.[49] Dispossessed from their traditional lands and seeking work, Hawaiians became members of the "floating population crowding into the congested tenement districts of the larger towns and cities" under conditions that many believed would "inevitably result in the extermination of the race."[50] As one report on the HHCA program put it, "[e]conomically depressed, internally disorganized and politically threatened, it was evident that the remnant of Hawaiians required assistance to stem their precipitous decline."[51]

These forces converged to promote passage of the HHCA. The homesteading approach to rehabilitation was "further reinforced . . . by the suggestion that dispossessed Hawaiians would be returning to the soil, going back to the cultivation of at least a portion of their ancestral lands . . . ."[52] Although originally opposed, ultimately the sugar growers supported the HHCA because it carefully restricted the lands for homesteading,[53] excluding cultivated sugar cane lands.[54] Changes to the Organic Act, enacted as part of the trade-off to gain support of the HHCA, eliminated the threat of losing fertile sugar producing lands.[55] Most homestead lands set aside for the HHCA lacked water and were of marginal agricultural value.[56] Moreover, Hawaiian leaders had originally proposed that all Native Hawaiians should be eligible for homesteading, but sugar interests maneuvered to have the blood quantum set at fifty percent, limiting the number of Hawaiians that could seek land.[57]

The HHCA was not the only acknowledgement of the special political and legal relationship between the United States and Native Hawaiians. In 1938, Congress again exercised its authority by granting Native Hawaiians exclusive fishing rights to portions of the Hawai'i National Park.[58]

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[49] *See generally* Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1 (1990) [hereinafter "McGregor"].

[50] S. CON. RES. 2, 10th Leg. of the Territory of Hawaii, 1919 HAW. SENATE JOURNAL 25-26.

[51] HOMES PROGRAM, at 2-3. For instance, the general crime rate for people of Hawaiian ancestry, as well as the rate of juvenile delinquency, was significantly higher than that of other groups. *Id*.

[52] *Id*. at 7.

[53] *See* McGregor, at 14-27.

[54] HHCA, § 203, 42 Stat. at 109-10 (1921). Also excluded were lands under a homestead lease, right of purchase lease, or certificate of occupation. *Id*.

[55] HANDBOOK, at 44-48.

[56] *See* ALLEN A. SPITZ, LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1B, at 19-26 (1964).

[57] H.R. REP. NO. 839, 66th Cong., 2nd Sess. (1920). See KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008) for background on the blood quantum restrictions of the HHCA. See generally M.M. Vause, The Hawaiian Homes Commission Act, History and Analysis (June 1962) (unpublished M.A. thesis, University of Hawai'i) (on file with Hamilton Library, University of Hawai'i) for discussion of factors leading to passage of the HHCA including the blood quantum limitations.

[58] Act of June 20, 1938, ch. 530, § 3(a), 52 Stat. 784.

B. Statehood and the Admission Act

In 1959, Hawai'i was admitted as a state of the union.[59] The Hawai'i Admission Act recognized the special status of Hawai'i's public lands and reflected the intent to return those lands to the new state. This approach differed significantly from the legal treatment of lands in other states, where the states received only a small portion of public lands. In contrast, the federal government transferred to Hawai'i title to most of the ceded lands held at the time of statehood.[60] The Hawai'i Admission Act also contains provisions specifically recognizing a trust for Native Hawaiians.

Section 5(f) of the Admission Act commands the State to hold ceded lands:

> [A]s a public trust for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[61]

Moreover, the lands, as well as any proceeds and income from the lands or their disposition, must be managed or disposed of for one or more of the trust purposes, as provided by state law.[62]

Most relevant to S.65, the Hawaiian Homeownership Act, section 4 of the Admission Act requires, *as a compact with the United States*, that the Hawaiian Homes Commission Act be adopted in the State Constitution.[63] Indeed, the Hawai'i Supreme Court has analogized the trust duties the State acquired under Section 4 with those owed by the federal government to other Native Americans.[64] Section 4 also allows the State to

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[59] Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6 [hereinafter "Admission Act"].

[60] Miyahara, *Ceded Lands*, at 102. Certain lands—those that had been set aside pursuant to an act of congress, executive order, presidential proclamation, or gubernatorial proclamation—remained the property of the United States. Admission Act, § 5(c). These "retained" lands could be transferred to the new state within five years of Hawai'i's admission if the United States no longer needed them. *Id*. § 5(e). Congress subsequently passed an act allowing the transfer of these lands to the state at any time they are declared unnecessary to federal needs. Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

[61] Admission Act, § 5(f) (emphasis added).

[62] Section 5(f) states: "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."

[63] Admission Act, § 4, provides, in part: "As a compact with the United States relating to the management and disposition of Hawaiian home lands, the Hawaiian Homes Commission Act, . . . shall be adopted as a provision of the Constitution of said State . . . ."

[64] In *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1160, 1168-1169, the Hawai'i Supreme Court stated:

increase benefits to HHCA beneficiaries but the United States must approve any changes in the qualifications for beneficiaries.[65] Moreover, under the HHCA itself, Congress maintains the authority to alter, amend, or repeal the HHCA.[66] Consequently, although the State gained principal responsibility for administration of the HHCA in 1959, the federal government also retains significant authority.

C. The 1993 Apology Resolution

In November of 1993, the U.S. Congress passed, and President Clinton signed into law, Public Law 103-150, a joint resolution apologizing to the Native Hawaiian people for U.S. participation in the overthrow of the Hawaiian Kingdom.[67] This Apology Resolution was enacted as a public law and signed by the President and is a statute of the United States, similar to any other law enacted by Congress.[68]

The Apology Resolution acknowledges the "special relationship" that exists between the United States and the Native Hawaiian people. Congress confirmed in the Apology Resolution that Native Hawaiians are an "indigenous people," a key characterization that establishes that a "political" relationship exists between the Native Hawaiian people and the United States government.[69] In the Resolution, Congress found

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> In our opinion, the extent or nature of the trust obligations of the [State] toward beneficiaries . . . may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives. In *Pence v. Kleppe,* 529 F.2d 135 (9th Cir. 1976), the circuit court recognized that the word "Indian" is commonly used in the United States to mean "the aborigines of America." *Id.* at 138-39 n.5; *see also* 42 C.J.S. *Indians* § 1 (1944). Congress recently passed a religious freedom act which specifically included native Hawaiians among other American Indians. *See* American Indian Religious Freedom Act, . . . Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.

[65] Section 4 further states: "[A]ny 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." *Id*.

[66] HHCA, § 223, provides: "The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title."

[67] Apology Resolution.

[68] *See, e.g., Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution as any other legislation enacted by Congress).

[69] The Apology Resolution states:

> Whereas *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. . . .

Apology Resolution, at paras. 25, 29. After documenting in detail the wrongs done to the Hawaiian people at the time of the illegal overthrow—including "the deprivation of the rights of

that the Hawaiian people had "never directly relinquished their claims to their inherent sovereignty as a people," and listed among the wrongs perpetrated, "the deprivation of the rights of Native Hawaiians to self-determination."[70] The right to self-determination is the most basic of human rights under federal and international law, and efforts to facilitate the exercise of this right are mandated by fundamental human rights principles.

In the Apology Resolution, Congress also acknowledged that the Republic of Hawai'i ceded 1.8 million acres of Crown, Government and Public Lands of the Kingdom of Hawai'i without the consent of or compensation to the Native Hawaiian people or their sovereign government;[71] that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty over their national lands to the United States;[72] and that the overthrow was illegal.[73]

Congress expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people, and urged the President of the United States to support reconciliation efforts between the United States and the Native Hawaiian people.[74]

The Apology Resolution's commitment to reconciliation, however, may have been undermined by the United States Supreme Court's 2009 decision in *Hawaii v. Office of Hawaiian Affairs*.[75] In that case, the Court determined that the Apology Resolution's findings had no "operative effect,"[76] and that its substantive provisions were merely conciliatory or precatory.[77] I believe, however, that it is important to point out that nowhere in its opinion does the Court question the veracity of the Apology Resolution's findings. Instead, the Court determined that those findings did not change substantive law since the Apology Resolution lacks an overt indication "that Congress intended to amend or repeal . . . rights and obligations" that the State acquired under the Admission Act.[78]

D. Other Federal Actions

1. The U.S. Department of Interior and U.S. Department of Justice *Mauka to Makai* Report

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Native Hawaiians to self-determination"—the Apology Resolution urges the President of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people." *Id.* at § 1: Acknowledgment and Apology, (5).

[70] Apology Resolution, at para. 29, and § 1: Acknowledgment and Apology, (3).

[71] Apology Resolution, at para. 26.

[72] Apology Resolution, at para. 29.

[73] Apology Resolution, § 1: Acknowledgment and Apology, (1).

[74] Apology Resolution, § 1: Acknowledgment and Apology, (4)-(5).

[75] Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

[76] *Id*. at 175.

[77] *Id*. at 173.

[78] *Id.* at 175-6.

In October 1999, the U.S. Department of the Interior and the Department of Justice announced that their representatives would be conducting meetings in Hawai‘i to further reconciliation efforts as called for in the Apology Resolution. Their purpose was to investigate progress on the reconciliation called for in the Apology Resolution and to solicit input from the Hawaiian community so that their concerns could be included in a forthcoming report to Congress. In late 1999, the Justice and Interior representatives consulted the Native Hawaiian community on Kaua‘i, Maui, Moloka‘i, Lana‘i, and in Hilo and Kona on Hawai‘i Island. On O‘ahu alone, more than 300 people attended the meetings. Hundreds testified, and 265 submitted written statements. These statements touched on topics ranging from sovereignty to community and economic development, and from health and education to housing.

In August 2000, the Departments jointly issued a detailed report, entitled *From Mauka to Makai: The River of Justice Must Flow Freely*,[79] on the reconciliation process based on the community input, thus recommitting the United States to a reconciliation process. The *Mauka to Makai* report encouraged acts of reconciliation to heal the wounds of Native Hawaiians. According to the report:

> Reconciliation is an evolving and continuing process to address the political status and rights of the Native Hawaiian people, based on dialogue among the Federal and State Governments, Native Hawaiians, and Hawai‘i’s Congressional delegation, and further action by the United States Congress. This document contains recommendations with respect to the continuation of the reconciliation process and should be read as merely the next step, as the United States and Native Hawaiians move forward in further dialogue.[80]

In acknowledging the 1993 Apology Resolution and formally recommitting to reconciliation, the Departments cast their recommendations in terms of justice and moral responsibility. The report’s first and most significant recommendation related to federal recognition. The report stated, “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.”[81] The four other recommendations were: establish an office in Interior to address Native Hawaiian issues; assign a representative from the Department of Justice Office of Tribal Justice to maintain dialogue with Native Hawaiians on pertinent issues; create a Native Hawaiian Advisory Commission to consult with agencies under Interior that manage land in Hawai‘i; and continue to address past wrongs to promote the welfare of Native Hawaiians.[82]

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[79] Department of Interior and Department of Justice, *Mauka to Makai: The River of Justice Must Flow Freely* (October 23, 2000).

[80] *Id*. at ii.

[81] *Id.* at 3-4.

[82] *Id*. at 4.

2. The Office of Native Hawaiian Relations

At least one of the *Mauka to Makai* recommendations has been implemented. In a 2004 appropriation bill, Congress established the Office of Native Hawaiian Relations. The Office, housed in the Office of the Secretary of the Interior, is charged with "continu[ing] the process of reconciliation with the Native Hawaiian people.[83] The purpose of the Office is to effectuate and implement the "special legal relationship" between the Native Hawaiian people and the United States; continue the process of reconciliation with the Native Hawaiian people; and fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.[84] The Office of Native Hawaiian Relations also carries out the Secretary's responsibilities as set forth in the Hawaiian Home Lands Recovery Act.[85]

3. Modern Legislation

Congress has also included Native Hawaiians in laws enacted to benefit other native peoples in the United States, such as the National Historic Preservation Act, which provides protection to properties with religious and cultural importance to Native American Indian tribes and Native Hawaiians; the Native American Graves Protection and Repatriation Act, which protects Native American Indian, Alaska Native, and Native Hawaiian ancestral remains and sacred objects; the American Indian Religious Freedom Act, which expresses U.S. policy to protect native religions; and the Native American Languages Act, supporting the preservation of native languages.[86] In addition, Congress has enacted specific laws relating solely to Native Hawaiians pursuant to its authority under the Indian Commerce Clause. These include the Native Hawaiian Education Act, which establishes programs to facilitate the education of Native Hawaiians and the Native Hawaiian Health Care Improvement Act, which seeks to improve the health status of Native Hawaiians.[87] Indeed, the findings in both the Native Hawaiian Education Act and the Native Hawaiian Health Care Improvement Act often refer to the "trust relationship" between the United States and the Native Hawaiian people.

Thus, as set out above, the entire course of dealings between the United States and the Native Hawaiian community—over an extended period—demonstrates that the United States has interacted with Native Hawaiians based on the special political and legal relationship and responsibility it holds toward its native peoples.

IV. The U.N. Declaration on the Rights of Indigenous Peoples

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[83] Consolidated Appropriations Act of 2004, Pub. L No. 108-199, 118 Stat. 3, div. H, sec. 148 (2004).

[84] *Id*.

[85] Pub. L No. 104-42, sec. 206 (1995).

[86] NHPA, 42 U.S.C. § 470 et seq.; NAGPRA, 25 U.S.C. 3001 et seq; AIRFA, 42 U.S.C. § 1996; NALA, 25 U.S.C. § 2904, et seq.; AIRFA, 25 U.S.C. § 2904.

[87] NHEA, 20 U.S.C. § 7511, et seq.; NHHCIA, 42 U.S.C. § 11701, et seq.

On September 13, 2007, after years of debate and consideration, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples,[88] extending the right of self-determination to Indigenous Peoples. The United States did not vote to approve the Declaration, but in December 2010, President Barack Obama announced that after extensive review and input from indigenous leaders, the United States would support the Declaration.

Among other things, the Declaration states that Indigenous Peoples have the right of self-determination and self-governance, and the right to maintain their unique culture and institutions.

> Article 3
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[89]
>
> Article 4
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> Article 5
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The Declaration also recognizes a wide range of basic human rights and fundamental freedoms of Indigenous Peoples. Among these are an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, and the right to maintain and develop political, religious, cultural and educational institutions along with the protection of cultural and intellectual property.[90] Although the Declaration is non-binding, it is nevertheless a strong statement of agreement among the nation states and evidence of international customary law.[91]

V. Conclusion

Congress has identified Native Hawaiians as a distinct indigenous group within

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[88] United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, *available at* http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx. Only four nation states—the United States, Canada, New Zealand, and Australia—voted against the Declaration, while eleven others abstained. Since then, all four of the major nation states have changed their positions and now support the Declaration.

[89] *Id.*

[90] *See*, e.g. Articles 9, 10, 12, and 20 of the Declaration.

[91] U.N. declarations and resolutions illuminate the position of the international community on any given subject matter, and are frequently invoked as evidence of customary international law. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (7th ed. 2008).

the scope of its Indian affairs power, and–beginning with the Hawaiian Homes Commission Act in 1921 and continuing until today–has enacted dozens of statutes on behalf of Native Hawaiians pursuant to its recognized special legal and political relationship with Native Hawaiians. Congress' determination that Native Hawaiians are a distinct indigenous group for whom it may enact special legislation is rational and logical. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and as recognized in the Apology Resolution, Native Hawaiians have never relinquished their claims to sovereignty or over their national lands.

Moreover, Congress has concluded that it has a special obligation to Native Hawaiians precisely because the United States bears responsibility for the destruction of the Native Hawaiian government and their loss of national lands. Congress has repeatedly stated that it 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 with whom the United States has established a special political and legal relationship.

The entire course of dealings between the Federal government and the Native Hawaiian people has evidenced an acknowledgment of this special political and legal relationship from both the Congressional and Executive branches. This course of dealing extends from as early as 1921 with the passage of the Hawaiian Homes Commission Act up until the present day with the implementation of the Native Hawaiian Education and Native Hawaiian Health Care Improvement Acts as well as the establishment of the Office of Native Hawaiian Relations within the Department of Interior.

Finally, the U.N. Declaration on the Rights of Indigenous Peoples provides support for the continued recognition and development of the special political and legal relationship between the United States and the Native Hawaiian community.

Again, mahalo nunui for the opportunity to present this testimony!