



**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
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**WRITTEN TESTIMONY**

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Chairperson, Board of Trustees  
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United States Senate Committee on Indian Affairs  
Hearing on S. 147, The Native Hawaiian Government Reorganization Act  
Tuesday, March 1, 2005, 10:00a.m.  
Room 485, Russell Senate Office Building

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**Nā 'Ōiwi 'Ōlino**

E ō e nā 'Ōiwi 'Ōlino 'eā  
Nā pulapula a Hāloa 'eā  
Mai Hawai'i a Ni'ihau 'eā  
A puni ke ao mālamalama 'eā ē

Ku'ē au i ka hewa, ku'ē!  
Kū au i ka pono, kū!  
Ku'ē au i ka hewa, ku'ē!  
Kū au i ka pono, kū!

Answer, O Natives, those who seek knowledge  
The descendants of Hāloa  
From Hawai'i island in the east to Ni'ihau in the west  
And around this brilliant world

I resist injustice, resist!  
I stand for righteousness, stand!  
I resist injustice, resist!  
I stand for righteousness, stand!

**INTRODUCTION**

E nā alaka'i a me nā lālā o kēia Kōmike o nā Kuleana o ka 'Aha'ōlelo Nui o 'Amelika Hui  
Pū ia, aloha mai kākou. He loa ke ala i hele 'ia e mākou, nā 'Ōiwi 'ōlino o Hawai'i, a he ala i hehi

mua 'ia e nā ali 'i o mākou, e la'a, 'o ka Mō'ī Kalākaua, ke Kamali'iwahine Ka'iulani, a me ka Mō'īwahine hope o ke Aupuni Mō'ī Hawaii, 'o ia ko mākou ali 'i i aloha nui 'o Lili'uokalani. A he nui no ho 'i nā Hawai'i i kūnou mai ai i mua o 'oukou e nānā pono mai i ke kulana o ka 'ōiwi Hawai'i, kona nohona, kona olakino, ka ho'onaauao a pēlā wale aku.

Ua pono ka helena hou a mākou nei a loa'a ka pono o ka 'āina, ke kulaiwi pa'a mau o ka lāhui 'ōiwi o Hawai'i pae'āina, 'o ia wale nō ka Hawai'i. No laila, eia hou no ka 'ōiwi Hawai'i, he alo a he alo, me ka 'Aha'ōlelo Nui.

**TO THE LEADERS AND MEMBERS OF THIS COMMITTEE ON INDIAN AFFAIRS OF THE UNITED STATES CONGRESS, GREETINGS.**

My name is Haunani Apoliona and I am the Chairperson of the Board of Trustees for the Office of Hawaiian Affairs (OHA), a body corporate created by the Hawai'i State Constitution and statute. The mission of OHA is to protect and assist Native Hawaiian people and to protect our environmental and other resources, and by so doing work to perpetuate our threatened traditional culture. Perhaps most importantly, OHA is working to bring meaningful self-government to the Native Hawaiian people, who are the only indigenous group in the United States to whom Congress has not fully afforded that fundamental right.

Mr. Chairman, as you have stated, "self-determination enables tribes to more successfully develop programs that best serve their members, lessen dependency on the federal government, and ensure greater participation in the national economy." (*Indian Tribes as Sovereign Governments, Second Edition (2004), Foreword; page xii.*) Native Hawaiians seek this same opportunity, this same freedom, to develop programs that best serve our members, lesser dependence on government, and ensure greater participation in the economy.

I testify today in support of enactment of S. 147 and its companion legislation in the House of Representatives, H.R. 309.

**WE DESERVE TO BE TREATED WITH THE SAME RESPECT AS AMERICA'S OTHER INDIGENOUS GROUPS**

There are three indigenous populations within the United States: American Indians in the lower 48 states, Eskimos, Aleuts and other native groups in Alaska, and Native Hawaiians. The governing entities of American Indians and Alaska Natives have both been recognized by Congress. This recognition extends to indigenous people the ability to govern their own internal affairs in a manner appropriate to their cultures and traditions. Congress acted in 1934 by passing the Indian Reorganization Act, and in 1971 by passing the Alaska Native Claims Settlement Act. In this legislation, as Hawaiians, we seek only what long ago was granted this nation's other indigenous peoples. See Appendix C. Congress has held numerous hearings on analogous bills very similar to S. 147 to recognize a Native Hawaiian governing entity over the past several years. Indeed, this Committee issued voluminous reports in the 106<sup>th</sup>, 107<sup>th</sup> and 108<sup>th</sup> Congresses detailing the historical relations between the United States and Native Hawaiians and documenting the need for this legislation. A brief summary of this history is further set forth in Appendix A. During this same time period, the United States Departments of Interior and Justice, Governor Linda Lingle of

Hawai‘i, the National Congress of American Indians, and the Alaska Federation of Natives, as well as others, all have testified before this Committee in support of similar legislation. The Committee reported favorably on those previous bills. We hope that the Committee will do the same with S. 147.

#### **THE DISMANTLING OF THE ORIGINAL NATIVE HAWAIIAN GOVERNMENT**

For nearly a century before the forcible annexation of the Kingdom of Hawai‘i in 1898, the United States recognized the Native Hawaiian government as a sovereign entity, entering into four treaties and other agreements with the Kingdom over the course of most of the nineteenth century. Not unsurprisingly, however, when the United States forcibly took control of the Hawaiian Kingdom, it worked to dismantle our native government, leaving our ability to manage our own internal affairs severely compromised.

In an Apology Resolution adopted by Congress a decade ago, Congress explicitly acknowledged that the United States-backed overthrow of the Kingdom of Hawaii in 1893 and the United States' annexation of Hawai‘i in 1898 resulted in the “deprivation of the rights of Native Hawaiians to self-determination.” (See Apology Resolution, Pub. L. No.103-150, 107 Stat. 1510 (1993), see also Robert N. Clinton, *Arizona State Law Journal*, “There Is No Federal Supremacy Clause for Indian Tribes,” *Symposium on Cultural Sovereignty* Spring 2002, 34 Ariz. St. L.J. 113, 165.) The Departments of Justice and the Interior have acknowledged the same, and have called upon Congress to “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.” U.S. Depts. Of Justice and Interior, *From Mauka to Makai: The River of Justice Must Flow Freely* at 4 (Report on the Reconciliation Process Between the Federal Government and native Hawaiians, Oct. 23, 2000). S. 147 reflects the Departments' recommendation and Congress' commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i. S. 147 advances the process of healing for Native Hawaiians. See Appendix D.

The United States has a unique legal and political relationship with the indigenous people of Hawai‘i, and that relationship is forged in a history of treaties, the Admission Act of Hawai‘i, hundreds of federal statutes, Executive Orders, and court decisions. The United States has repeatedly acknowledged its trust responsibility to Native Hawaiians through the Executive, Legislative and Judicial Branches of government. See Appendix B. Congress clearly maintains the Constitutional authority to enact this legislation.

#### **S. 147 ESTABLISHES A PROCESS FOR NATIVE HAWAIIANS TO REORGANIZE AND REESTABLISH A NATIVE GOVERNMENT**

S. 147 establishes a collaborative process through which the United States, the State of Hawai‘i and a reorganized Native Hawaiian government will work together to define the scope and nature of each government's rights and responsibilities. Here's how the process will work:

First, the Secretary of the Interior will appoint a nine-member commission to prepare a roll of those adult members who chose to become members of the reorganized government. After this

roll is compiled and certified, the Commission will submit the roll to the Secretary for publication.

Second, Native Hawaiian members will have the authority to develop criteria for candidates to be elected to the Native Hawaiian Interim Governing Council, determine the structure of the Council, and elect members to the Council.

Third, once the Council is established, it will have authority to develop organic documents for the Native Hawaiian governing entity and to hold elections for the purpose of ratifying the proposed organic documents.

Fourth, the Secretary of the Interior shall review and, if appropriate, certify the Native Hawaiian organic documents.

Fifth, the legislation provides for a collaborative negotiation process through which the United States, the State of Hawai'i and the Native Hawaiian governing entity may address matters such as the transfer of lands, the exercise of governmental authority over such lands, the exercise of civil and criminal jurisdiction, and any residual responsibilities of the United States and Hawai'i. Significantly, S. 147 does not legislate any changes to the existing laws regarding these matters. Unless and until federal and state laws are amended to reflect the results of the collaborative, negotiated process, there will be no changes in the existing framework through which Native Hawaiian lands and resources are managed.

#### **S. 147 IS NECESSARY FOR NATIVE HAWAIIAN SELF-SUFFICIENCY, ECONOMIC SECURITY, HEALTH AND WELFARE, AND CULTURAL PRESERVATION.**

S. 147 provides the Native Hawaiian people with the tools we need to reorganize so that our governing entity will be in a position to more efficiently and effectively provide for us. Administration of existing federal appropriations by a single governing entity will result in more efficient and effective use of those funds. This, in turn, will promote meaningful economic development that will create desperately needed new employment opportunities for Native Hawaiians.

S. 147 will also provide a framework to nurture and protect the unique culture of Native Hawaiians. It is well documented that Native governments throughout the United States are best positioned to ensure the continuation of native cultures through the development of educational and language programs, culturally-sensitive social services, and religious practices. In Hawaii, where this native culture is the primary attraction in a tourist industry that fuels the State's economy, preservation of Native Hawaiian culture is an economic imperative.

#### **THE IMPACT OF S. 147 ON THE BUREAU OF INDIAN AFFAIRS' BUDGET**

We, as Native Hawaiians, have not asked for, and S. 147 does not provide, the Native Hawaiian governing entity with access to the federal funding set aside for American Indian tribes. In fact, S. 147 is specifically structured so that it does not provide authority for that to occur. First, Section 7 of the bill makes clear that the Native Hawaiian governing entity shall not be considered an "Indian tribe" as that term is defined in Title 25 of the United States Code. Hence, S. 147 does

not provide for the Native Hawaiian governing entity to participate in Bureau of Indian Affairs programs and appropriated funding available only for "Indian tribes."

Second, Section 9 of the bill quite specifically states that "[n]othing contained in this Act provides authorization for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs for any person not otherwise eligible for the programs and services."

We think Section 7 and 9 of the bill make clear that enactment of S. 147 will not have an impact on the Bureau's budget or on money generally appropriated for Indian tribes. The House Committee on Resources came to the same conclusion on a virtually identical bill introduced in the last Congress, stating:

This legislation will continue to reflect the separate funding authorities that Native Hawaiians have enjoyed since 1910; since this date, Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Thus appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives.

H.R. Rep. No. 108-742, at 3 (2004). We reiterate and we stand by our commitment not to adversely impact our American Indian `ohana with this legislation.

#### **FEDERAL APPROPRIATIONS CURRENTLY PROVIDED TO NATIVE HAWAIIANS**

As discussed above, the Native Hawaiian governing entity need not raid the appropriated federal funds provided to American Indians through the Bureau of Indian Affairs' budget because Native Hawaiians already receive funding of their own through various non-BIA programs. For example, we receive funding from the Department of Housing and Urban Development for Native Hawaiian housing, we receive funding from the Department of Health and Welfare for health care clinics, and we receive funding from the Department of Education for educational programs.

Native Hawaiians already receive federal funding of our own through various non-BIA programs for such matters as Native Hawaiian health, education, housing, economic development, historic preservation, culture, and elder and vocational services. Federal recognition will not make Native Hawaiians eligible for the federal programs and services established for our Indian and Alaska Native `ohana. Through federal recognition, we are not members of tribes of the lower 48 states, nor members of corporations, tribes or villages of Alaska. We are Native Hawaiians.

It is important to emphasize this existing funding because in these times of difficult budget deficits we well understand Congress' concerns about any expansion of the federal budget. Because our programs already are funded, enactment of S. 147 will have no significant impact on the federal budget.

This has been confirmed by the Congressional Budget Office, which studied an earlier (nearly identical) version of S. 147 in the 108<sup>th</sup> Congress estimated that "implementing H.R. 4282

would cost “nearly \$1 million annually in fiscal years 2005–2007 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.” H.R. Rep. No.108-742, at 8 (2004).

Clearly implementing the provisions of S. 147 would have a minimal impact on the federal budget.

#### **DEFINING “NATIVE HAWAIIAN”**

S. 147 defines the term “Native Hawaiian” as:

(A) an individual who is one of the indigenous, native people of Hawai‘i and who is a direct lineal descendant of the aboriginal, indigenous, native people who-- (i) resided in the islands that now comprise the State of Hawai‘i on or before January 1, 1893; and (ii) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawai‘i; or

(B) an individual who is one of the indigenous, native people of Hawai‘i and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.

The definition provided in S. 147 is generally consistent with the definitions used in the myriad of federal statutes concerning Native Hawaiians, including, for example, the Native Hawaiian Health Care Act, the Native Hawaiian Education Act, the Hawaiian Homelands Homeownership Act, the Native American Graves Protection and Repatriation Act, the National Historic Lighthouse Preservation Act, and the Older Americans Act Amendments of 1987. The definition is also consistent with the lineal descendancy membership requirements of many, many Indian tribes, which key membership to lineal descendancy from an established historical membership roll. *See, e.g.* the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon; the Coquille Indian Tribe of Oregon; the Wyandotte Nation of Kansas; the Chickasaw Nation of Oklahoma; the Choctaw Nation of Oklahoma; and the Cheyenne River Sioux Tribe of South Dakota. Indeed, this Committee has itself acknowledged that the Constitution does not “impose[] any minimum blood quantum requirement for tribal membership, and suggestions to the contrary have no legal or historical basis.” S. Rep. 108-85, at 32 (2003).

There may be concerns about the implications of how “Native Hawaiian” is defined. As a practical matter, the definition of “Native Hawaiian”, as defined in S. 147, will not make members of the Native Hawaiian entity eligible to participate in Bureau of Indian Affairs funding. Therefore, we do not believe that the manner in which we identify our membership will have any significant budgetary impact.

We urge Congress not to set policy that splits us apart and separates us from our family members as was done in the past. We are Native Hawaiian, we know who we are, trust us to decide what is best for us.

Let me reemphasize that one of the most fundamental principles of meaningful self-government is the ability to determine who is a member of the Native group. We respectfully suggest that the Native Hawaiian people be able to determine who is or is not Native Hawaiian.

#### **TRUST RESPONSIBILITIES IMPOSED ON HAWAII UPON ITS ADMISSION TO THE UNION**

Hawai'i is the only State required by federal legislation to administer a portion of the federal trust obligation to its native people. The historical context of this obligation is grounded in the Hawai'i Admission Act, Pub. L. No. 86-3 (1959). As a condition of its admission to statehood in 1959, Congress required the State of Hawai'i to assume most of the federal government's trust responsibilities concerning the administration of lands and resources under the Hawaiian Homes Commission Act. The Admission Act provides:

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act . . . shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States.

Pub. L 86-3, § 4. The United States Solicitor General explained that “[t]his Section “transferred authority to the State to administer HHCA lands.” Brief of the United States at 4, *Rice v. Cayetano*, 528 U.S. 495 (2000). The Hawaii Admission Act further requires state administration and management of an additional 1.2 million acres of trust land for one of five purposes -- one of which is for “the betterment of the conditions of native Hawaiians.” Pub. L. 86-3, § 5(f).

Under the Hawaii Admission Act, the Department of the Interior retains certain trust duties relating to the administration of Native Hawaiian land and resources. In particular, the United States retained the power to enforce the trust by filing actions against the State if it failed to perform the trust responsibilities set forth in the Admissions Act. Pub. L. 86-3, § 5(f). The Secretary of the Interior also retained approval authority for exchanges of Hawaiian Home Lands. Finally, Hawai'i may amend or repeal the Hawaiian Homes Commission Act only with the consent of the United States. In other words, but for the retained oversight role of the United States, the State administers all of the trust responsibilities encompassed within the Hawaiian Homes Commission Act.

#### **RESTORING NATIVE HAWAIIAN SELF-GOVERNING STATUS**

Hawai'i gained admission to the Union squarely in the middle of a two-decade period in which the United States actively was engaged in terminating its government-to-government relationship with tribal governments. This termination policy was officially adopted by Congress in 1953, and in the following year alone Congress terminated its government-to-government relationship with at least 66 tribes. F. Cohen's Handbook of Federal Indian Law, at 171, 173-74 (1982 ed.).

In some instances Congress terminated the federal relationship with a particular tribe while concurrently transferring certain trust responsibilities for that tribe to the state in which the tribe was located. For example, the federal trust responsibility for the management of tribal lands was transferred to the State of Texas when the Alabama Coushatta Tribe was terminated in 1954 and

