No. 98-818

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD F. RICE
Petitioner

v.

BENJAMIN J. CAYETANO, GOVERNOR OF
THE STATE OF HAWAI'I
Respondent

BRIEF FOR THE HAWAI'I CONGRESSIONAL DELEGATION AS AMICUS CURIAE SUPPORTING RESPONDENT

Filed July 28, 1999

QUESTION PRESENTED

Whether the United States Congress has the constitutional authority to recognize that a special relationship exists between the United States and the indigenous people of the United States, and to enact laws to protect the rights, lands, and resources of those indigenous people, and whether in the exercise of that constitutional authority and with the agreement of a State, the Congress may delegate certain responsibilities to a State with an additional authorization for the State to assume a public trust for the betterment of the conditions of the native people of that State in a manner provided by the constitution and laws of the State.

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INTEREST OF AMICUS CURIAE [1]

As members of the United States Congress, we have an interest in a ruling by this Court which reaffirms the constitutional authority of the Congress to address the conditions of the native people of the United States and to assure that all of America's indigenous peoples are afforded comparable constitutional, statutory, and trust protections. The Petitioner in effect asks this Court to reverse Congress' long-standing political classification of the native people of Hawai'i as an indigenous people entitled to the same constitutional considerations as other indigenous groups within our republican scheme, and to divest Native Hawaiians of their status as Native Americans.

As members of the State of Hawai'i's congressional delegation, we have a particularized interest in the validation of the Federal laws which have been enacted to provide for the indigenous people of Hawai'i and the actions taken by the State of Hawai'i in furtherance of its Federally-delegated responsibilities.

Senator Daniel K. Inouye served in the Hawai'i Territorial Legislature from January, 1955 until July, 1959. In August, 1959, the Senator began his service in the United States House of Representatives, and since January, 1963, he has served in the United States Senate. Senator Inouye has been a member of the Senate Committee on Indian Affairs for twenty-one years, serving as the Committee's Chairman for eight years and Vice Chairman for the past five years. Senator Daniel K. Akaka is the first United

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, its counsel, and Alu Like, Inc. made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that the parties consented to the filing of this brief in letters filed with this Court.

States Senator of Native Hawaiian ancestry. He represented the State of Hawai'i in the United States House of Representatives from 1976 to 1990, and has served in the United States Senate and as a member of the Senate Committee on Indian Affairs since 1990.

Representative Patsy T. Mink served in the Hawai'i Territorial Legislature from 1956 to 1959 and in the Hawai'i State Senate from 1962 to 1964. Mrs. Mink has served in the United States House of Representatives from 1965 to 1977, and from 1990 to the present. Representative Neil Abercrombie served as a member of the Hawai'i State Legislature from 1974 to 1986, and has represented the State of Hawai'i in the United States House of Representatives since 1991.

STATEMENT OF THE CASE

For the past two hundred and ten years, the United States Congress, the Executive, and this Court have recognized certain legal rights and protections for America's indigenous peoples. The instant Petition asserts violations of the Fourteenth and Fifteenth Amendments to the United States Constitution, without addressing the long-settled constitutional and historical status of America's indigenous peoples, including the native people of Hawai'i and their lands.

Since the founding of the United States, Congress has exercised its constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. Congress has done this in recognition of the sovereignty possessed by the native people – a sovereignty which pre-existed the formation of the United States. The Congress' constitutional authority is also premised upon the indigenous people's status as the original inhabitants of this nation who occupied and exercised dominion and control over the lands to which the United States subsequently acquired legal title.

The United States recognizes a special political relationship with the indigenous people of the United States.

The indigenous people are Native Americans – American Indians, Alaska Natives and Native Hawaiians. In furtherance of this relationship, the Congress has enacted over 6,000 laws which give expression to the respective legal rights and responsibilities of the Federal government and the native people.

From time to time, with the consent of the affected States, the Congress has sought to more effectively address the conditions of the indigenous people by delegating Federal responsibilities to various States. In 1959, the State of Hawai'i assumed the Federally-delegated responsibility of administering 203,500 acres of land that had been set aside under Federal law for the benefit of the native people of Hawai'i. Haw. Const. art. XVI, § 7. In addition, the State agreed to the imposition of a public trust upon all of the lands ceded to the State upon admission. Hawai'i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 5 (1959). One of the five purposes for which the public trust is to be carried out is for the "betterment of the conditions of native Hawaiians." *Id.* The Federal authorization for this public trust clearly anticipated that the State's constitution and laws would provide for the manner in which the trust would be carried out. *Id.* §§ 4 & 5(f).

In 1978, the citizens of the State of Hawai'i exercised this Federally-delegated authority by amending the State constitution in furtherance of the special relationship with Native Hawaiians. The delegates to the 1978 constitutional convention recognized that Native Hawaiians had no other homeland, and thus that the protection of Native Hawaiian subsistence rights to harvest the ocean's resources, to fish the fresh streams, to hunt and gather, to exercise their rights to self-determination and self-governance, and the preservation of Native Hawaiian culture and the Native Hawaiian language could only be accomplished in the State of Hawai'i.

The amendments to the State constitution adopted by the citizens of Hawai'i to fulfill the special relationship with Native Hawaiians is consistent with the practice of

other States that have established special relationships with the native inhabitants of their areas. Fourteen States have extended recognition to Indian tribes that are not recognized by the Federal government, and thirty-two States have established commissions and offices to address matters of policy affecting the indigenous citizenry. *See* App. B.

The Petitioner's claims essentially challenge the Congress' constitutional authority to establish a special relationship with the native people of Hawai'i, to enact laws addressing their unique circumstances as indigenous people, and to delegate to the State of Hawai'i certain responsibilities for the protection of the lands set aside for native Hawaiians and for the betterment of their conditions.

SUMMARY OF THE ARGUMENT

This Court has frequently affirmed the Congress' authority to establish a political classification consisting of Native Americans. This Court has also recognized that this constitutionally-based authority is not constrained by the manner in which the native people are organized nor by their ethnological origins. *United States v. Kagama*, 118 U.S. 375 (1886); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *see also Pence v. Kleppe*, 529 F.2d 135, 138-39, n. 5 (9th Cir. 1976). The Congress has exercised its constitutional authority in furtherance of the special relationship it has established with the native people of Hawai'i through the enactment of 160 Federal laws which explicitly include Native Hawaiians in the class of Native Americans. *See* App. A.

This Court has also affirmed Congress' authority to delegate Federal responsibilities for administering relations with Native Americans to the States. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In the Hawai'i Admission Act, the United States delegated its principal responsibilities under the Hawaiian Homes Commission Act to the new State. As a

further condition of statehood, the United States imposed a public trust on lands ceded to the State for five purposes, one of which was the "betterment of the conditions of native Hawaiians." Hawai'i Admission Act, § 5(f), 73 Stat. at 6. The Admission Act makes clear that the United States anticipated that the State of Hawai'i's constitution and laws would provide for the manner in which the Hawaiian Homes Commission Act and the public trust would be administered. *Id.*

In the debates of the State's constitutional convention in 1978, the convention delegates repeatedly refer to these Federally-delegated responsibilities with which the State is charged as the authorization for the amendments they propose to the State's constitution. *See* App. D. Thereafter, Hawai'i's citizens voted to adopt the proposed amendments, including the amendment which established the Office of Hawaiian Affairs (OHA) and the election procedures for OHA's Board of Trustees. Since that time, neither the Congress nor the Executive of the United States has ever challenged the amendments, the establishment of the Office of Hawaiian Affairs or the manner in which the Trustees of OHA are elected. Rather, the Congress has enacted laws that expressly recognize the State's role in addressing the conditions of Native Hawaiians and that authorize the Office of Hawaiian Affairs to administer Federal programs. *See, e.g.*, Carl D. Perkins Vocational and Technical Education Act of 1998, 20 U.S.C. § 2301 *et seq.* (1998); Native American Programs Act Amendments of 1987, 42 U.S.C. § 2991 *et seq.* (1998).

The provisions of Hawai'i's Constitution – all consistent with Federal law and policy and all approved by the State's general electorate – are a lawful expression of Congress' delegation to the State of Hawai'i, with the State's consent, of Federal obligations to protect the rights of Native Hawaiians and their lands and resources. Although the United States has also retained the responsibility to address the conditions of the native people of Hawai'i, the State and Federal governments have concluded that their joint effort, reflected in the

Hawai'i Admission Act and the Hawai'i Constitution, can best serve the needs of this particular indigenous group.

INTRODUCTION

There is a history, a course of dealings and a body of law which clearly address the issues raised by the Petitioner in this case. It is a history that begins well before the first European set foot on American shores – it is a history of those who occupied and possessed the lands that were later to become the United States – the aboriginal, indigenous, native people of this land who were America's first inhabitants.

The indigenous people did not share similar customs or traditions. Their cultures were diverse. Some of them lived near the ocean and depended upon its bounty for their sustenance. Others made their homes amongst the rocky ledges of mountains and canyons. Some native people fished the rivers, while others gathered berries and roots from the woodlands, harvested rice in the lake areas, and hunted wildlife on the open plains. Their subsistence lifestyles caused some to follow nomadic ways, while others established communities that are well over a thousand years old.

Those who later came here called them "aborigines" or "Indians" or "natives" but the terms were synonymous. Over time, these terms have been used interchangeably to refer to those who occupied and possessed the lands of America prior to European contact.

Although the differences in their languages, their cultures, their belief systems, their customs and traditions, and their geographical origins may have kept them apart and prevented them from developing a shared identity as the native people of this land – with the arrival of western "discoverers" in the United States, their histories are sadly similar. Over time, they were dispossessed of their homelands, removed, relocated, and thousands, if not millions, succumbed to diseases for

which they had no immunities and fell victim to the efforts to exterminate them.

In the early days of America's history, the native people's inherent sovereignty informed the course of the newcomers' dealings with them. Spanish law of the 1500 and 1600's presaged how the United States would recognize their aboriginal title to land, and treaties became the instruments of fostering peaceful relations. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942).

As America's boundaries expanded, new territories came under the protection of the United States. Eventually, as new States entered the Union, there were other aboriginal, indigenous, native people who became recognized as the "aborigines" or "Indians" or "natives" of contemporary times – these included the Eskimos, and the Aleuts, and the other native people of Alaska, and later, the indigenous, native people of Hawai'i.

For nearly a century, Federal law has recognized these three groups – American Indians, Alaska Natives, and Native Hawaiians – as comprising the class of people known as Native Americans. Well before there was a history of discrimination in this country which the Fourteenth and Fifteenth Amendments were designed to address, this Court had recognized the unique status of America's native peoples under the Constitution and laws of the United States.

The Petitioner urges this Court to adopt a new and most novel distinction that vests in the native people of this land the power to determine, solely by the manner in which they organize themselves, the scope of the constitutional authority exercised by the Congress and the President of the United States. Under the Petitioner's theory, if the native people have not organized themselves as "tribes," then the Executive and Legislative branches of our government do not have the Constitutional authority to establish policies and enact laws which are designed to address their conditions. Implicit in the Petitioner's new construction of the Constitution is the

proposition that the Congress cannot delegate to the States any authority to address the special circumstances of Native Americans who are not tribally-organized, and the States cannot undertake actions relating to the native people on their own initiative.

Reduced to their essence, the Petitioner's claims depend upon a finding by this Court that the provisions of the Constitution which have given rise to a two hundred and ten year history of Federal legislative enactments, numerous expressions of Federal policy, and a one hundred and sixty-seven-year-old body of this Court's jurisprudence relating to the native people of the United States should either be set aside for purposes of this action, or re-interpreted in such a manner as to render them inapposite and inapplicable to this case. To effectively address the Petitioner's charge to this Court, there is clearly much work to be undone.

ARGUMENT

I. THE UNITED STATES CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO ADDRESS THE CONDITIONS OF THE INDIGENOUS, NATIVE PEOPLE OF THE UNITED STATES.

This Court has so often addressed the scope of Congress' constitutional authority to address the conditions of the native people that it is now well-established.[2]

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[2] "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *Kagama*, 118 U.S. at 384.

Although the authority has been characterized as "plenary," *Morton v. Mancari*, 427 U.S. 535 (1974), its exercise is subject to judicial review. *Weeks*, 430 U.S. 73; *United States v. Sioux Nation*, 448 U.S. 371 (1980).[3] It has been held to encompass not only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired. *United States v. Sandoval*, 231 U.S. 28 (1913).

The ensuing course of dealings with the indigenous people has varied from group to group, and thus, the only general principles that apply to relations with the first inhabitants of this nation is that they were dispossessed of their lands, often but not always relocated to other lands set aside for their benefit, and that their subsistence rights to hunt, fish, and gather have been recognized under treaties and laws, but not always protected nor preserved.[4]

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[3] The rulings of this Court make clear that neither the conferring of citizenship upon the native people, the allotment of their lands, the lifting of restrictions on alienation of native land, the dissolution of a tribe, the emancipation of individual native people, the fact that a group of natives may be only a remnant of a tribe, the lack of continuous Federal supervision over the Indians, nor the separation of individual Indians from their tribes would divest the Congress of its constitutional authority to address the conditions of the native people. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *United States v. Celestine*, 215 U.S. 278 (1909); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911); *United States v. Nice*, 241 U.S. 591 (1916); *Chippewa Indians v. United States*, 307 U.S. 1 (1939); *Weeks*, 430 U.S. 73; *United States v. John*, 437 U.S. 634 (1978).

[4] The courts have recognized and reaffirmed the subsistence rights to hunt, fish and gather of American Indians, Alaska Natives and Native Hawaiians. *Confederated Tribes of Warm Springs Res. v. United States*, 177 Ct. Cl. 184 (1966); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *United States v.*

Some commentators have suggested that no other group of people in America has been singled out so frequently for special treatment, unique legislation, and distinct expressions of Federal policy. Although the relationship between the United States and its native people is not a history that can be said to have followed a fixed course, it is undeniably a history that reveals the special status of the indigenous people of this land. Our laws recognize that the native people do not trace their lineage to common ancestors, and from time to time, our laws have in fact discouraged the indigenous people from organizing themselves as "tribes." But this much we think is true – that for the most part, at any particular time in our history, our laws have attempted to treat the native people, regardless of their genealogical origins and their political organization, in a consistent manner.

The Petitioner asserts that the scope of constitutional authority vested in the Congress is constrained by the manner in which the native people organize themselves. If they are not organized as tribes, then the Congress lacks the authority to enact laws and the President is without authority to establish policies affecting the native people of the United States. However, the original language proposed for inclusion in the Constitution made no reference to "tribes" but instead proposed that the Congress be vested with the authority "[t]o regulate affairs with the Indians as well within as without the limits of the United States." 2 *The Records of the Federal Convention of 1787*, 321 (Max Farrand ed., Yale Univ. Press 1966). A further refinement suggested that the language read,

Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *Six Nations v. United States*, 173 Ct. Cl. 899 (1965); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Sac & Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir. 1978); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982); *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992).

"and with Indians, within the Limits of any State, not 'subject to the laws thereof.' " *Id.* at 367.

The exchanges of correspondence between James Monroe and James Madison concerning the construction of what was to become Article I, Section 8, Clause 3 of the Constitution make no reference to Indian tribes, but they do discuss Indians.[5] Nor is the term "Indian tribe" found in any dictionaries of the late eighteenth century, although the terms "aborigines" and "tribe" are defined.[6]

Whether the reference was to "aborigines" or to "Indians," the Framers of the Constitution did not import a meaning to those terms as a limitation upon the authority of the Congress, but as descriptions of the native people who occupied and possessed the lands that were later to become the United States – whether those lands

[5] In his letter to James Monroe of November 27, 1784, James Madison observes, "[t]he foederal articles give Congs. the exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority, of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws. In the case of Indians of this description the only restraint on Congress is imposed by the Legislative authority of the State." 2 *The Founders' Constitution* 529 (Philip B. Kurland & Ralph Lerner ed., 1987) (Letter from Madison to Monroe of 11/27/1784); *see also supra* (Letter from Monroe to Madison of 11/15/1784).

[6] The term "aborigines" is defined as "the earliest inhabitants of a country, those of whom no original is to be traced," and the term "tribe" is defined as "a distinct body of the people as divided by family or fortune, or any other characteristic." *A Dictionary of the English Language* (Samuel Johnson ed. 1755) The annotations accompanying the term "Indian" in the 1901 Oxford dictionary indicate the use of the term as far back as 1553. *Oxford English Dictionary* (James A.H. Murray ed. 1901).

lay within the boundaries of the original thirteen colonies, or subsequently-acquired territories. This more logical construction is consistent with more than two hundred Federal statutes which establish that the aboriginal inhabitants of America are a class of people known as "Native Americans" and that this class includes three groups – American Indians, Alaska Natives, and Native Hawaiians.

The native people of Alaska were not organized as tribes, nor did they have treaties with the United States. Nonetheless, in 1934, in enacting the Indian Reorganization Act, the Congress established that "[f]or purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."[7] Two years later, the Congress amended the Act to provide a right to organize under the Act for "groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district. . . . " 25 U.S.C. § 473a (1998).

In his effort to exclude the native people of Hawai'i from the class of Native Americans, the Petitioner notes that Native Hawaiians have not organized themselves as tribes and further asserts that the Congress has drawn a distinction between the native people of the continental United States and the native people of Hawai'i on the basis of race.[8] But the Petitioner's assertion ignores the

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[7] Indian Reorganization Act, 25 U.S.C. § 479 (1998); Opinion of the Interior Solicitor, 49 I.D. 592 (1923) (concluding that "[t]he relations existing between (the Alaska Natives) and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States. . . . ")

[8] "The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act, 1920, § 201, 42 Stat. 108 (1921). When capitalized, the term "Native Hawaiian" is commonly used in Federal statutes to refer to "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

fact that for many years, blood quantum was also commonly employed in Federal statutes with reference to American Indians and Alaska Natives,[9] and the Federal courts have similarly noted the practice of the Congress to classify native people on the basis of blood quantum.[10] The matter was addressed by this Court in 1974, in *Morton*.[11]

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[9] Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984, 988 (codified at 25 U.S.C.A. §§ 479 & 480) (1934) (defining "Indian" as tribal members, descendants of tribal members residing within reservation boundaries on June 1, 1934 and other persons of one-half or more Indian blood and limiting eligibility for certain loans to persons of at least one-quarter degree of Indian blood); Act of June 30, 1919, ch. 4, § 1, 41 Stat. 9 (codified at 25 U.S.C. § 163) (1919) (authorizing the Secretary of the Interior to prepare a final membership roll for any tribe, specifying age and blood quantum).

[10] "It is plain the Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race'. Indians can only be defined by their race." *Simmons, Jr. v. Chief Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966). *See also, United States v. First Nat'l Bank of Detroit, Minn.*, 234 U.S. 245 (1914); *United States v. Ferguson*, 247 U.S. 175 (1918).

[11] "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination,

"The Congress has exercised its constitutional authority through the enactment of 160 Federal laws that either provide for the specific needs or conditions of Native Hawaiians or include Native Hawaiians in the class of Native Americans to be affected by those laws. *See* App. A.

The cultures, languages, traditions, religious belief systems, and the governance structures adopted by the native people of this land are not the same. The indigenous people have no common race or ethnicity. Not all native people have treaties with the United States. Felix S. Cohen, *Handbook of Federal Indian Law*, p. 405 (1942 ed.). Their organization into tribal units is not the hallmark of their status as Native Americans, nor does their recognition by the United States depend upon the continuous existence of a governing entity. *Chippewa Indians*, 307 U.S. 1. Rather, Native Americans have a unique relationship with the United States because they were the original inhabitants of this nation, and they were independent and self-governing at the time of contact. Under the Constitution and consistent, continuous Congressional practice, the classification of Native Americans is neither tribal nor racial, but political.

II. THE UNITED STATES CONGRESS HAS ESTABLISHED THAT AMERICAN INDIANS, ALASKA NATIVES AND NATIVE HAWAIIANS ARE THE INDIGENOUS, NATIVE PEOPLE OF THE UNITED STATES.

Clearly, the Constitution vests the Congress with the power and authority to manage relations with American Indians. For more than a century, Congress has also exercised that authority to address the conditions of Alaska Natives and Native Hawaiians. Following this Court's

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an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

guidance that our government's relations with the native people are primarily political relationships which are subject to changing circumstances, the Federal courts have generally deferred to the Legislative and Executive branches of the government in fashioning and adapting the terms of those relationships.

Over time, the circumstances of the native people have changed dramatically, in no small part because of radical shifts in Federal policies which have ranged from war, removal, relocation, and termination to recognition, reorganization, restoration, and finally, self-determination and self-governance.

The first native people with whom our national government entered into relations were American Indians. The peaceful course of dealings with them was shaped by treaties, Executive Orders and acts of Congress. Although the native people of Alaska are recognized as ethnologically diverse from American Indians, and although they had no treaties with the United States and were not organized as tribes, as a function of Federal law, they are shareholders in Native regional and village corporations that hold title to Native lands and resources. Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(h) (1998).

Today, in the expression of their self-determination and self-governance, American Indians and Alaska Natives are playing a critical role in the development of Federal law and policy, and are assuming increasingly greater responsibilities for the administration of Federal programs and services. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (1998).

In 1993, the United States Congress and the President of the United States enacted a Joint Resolution acknowledging the one-hundredth anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i, extending an apology to the Native Hawaiian people on behalf of the United States for the overthrow of the Kingdom of Hawai'i. Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510. That resolution declared that,

> The Congress – (1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people; (2) recognizes and commends efforts of reconciliation initiated by the State of Hawai'i . . . [and] (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.

Id.

In the exercise of their right to self-determination and self-governance, Native Hawaiians are engaged in the active consideration of the manner in which they will give expression to their inherent sovereignty. As with the Indian tribes with whom the United States terminated relations and later restored to Federally-recognized status, *see* App. C, the Congress has expressly recognized that the inherent sovereignty of the native people, be they Indian or Native Hawaiian, does not depend for its existence on Federal action.

Such is the nature of the special, political relationships that the United States has carried on with the indigenous, native people of America for the last two hundred years. Each of these relationships has been defined at times with surgical precision, but also with all-encompassing legislative enactments designed to address matters of health, education, housing, employment and training, the preservation of native cultures and languages, the protection of native religions and sacred sites, and the repatriation of Native American human remains.

The more comprehensive enactments of recent times reflect a contemporary reality that is shared by Native Americans, regardless of where they reside or whether

they are American Indian, Alaska Native, or Native Hawaiian. The statistics on America's indigenous people illustrate why such measures have been enacted: the highest rates of mortality associated with various diseases and health conditions in the American population; the greatest need for housing in the United States, including the highest rates of homelessness, substandard dwellings and overcrowding; substantially below-average performance on measures of educational achievement; and rates of unemployment that in many native communities average well above fifty percent and range as high as ninety-five percent.

The native people of the United States are the only Americans who have experienced the disinterment of the human remains of their relatives and families by the thousands, as well as the desecration of graves and sacred sites in similar numbers – a phenomenon which necessitated the enactment of a Federal law, the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (1998). Native Hawaiians have been included in the scope of these comprehensive legislative enactments not only because they are indigenous people with whom the United States has recognized a special relationship, but also because the challenges they face in health status, education, housing, poverty and the appalling disposition of their human remains appear to be the lingering vestiges of a history that is sadly common to all the native people of the United States.

The Congress has enacted over 200 Federal laws addressing the shared conditions of Native Americans. More than 6,000 Federal laws have been enacted specifically for American Indians, 245 for Alaska Natives, and 160 for Native Hawaiians.[12]

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[12] The number of Federal laws enacted for the benefit of Native Americans, and those for Alaska Natives, includes only those laws which have been enacted since 1973.

If the constitutional authority of the Congress to address the conditions of the indigenous people of the United States has been exercised more expansively as new States have joined the Union, it is because the native people were not "Indians" in the ethnological sense, but they are "aborigines" in the political sense. The Congress, the President of the United States, and the State and Federal courts have all recognized this classification of Native Americans as one which arises out of Federal law and policy, and which is fundamentally political in nature.

III. THE UNITED STATES CONGRESS HAS DELEGATED AUTHORITY TO THE STATES TO ADDRESS THE CONDITIONS OF THE INDIGENOUS, NATIVE PEOPLE OF THE UNITED STATES.

The manner in which the authority of the States and the Federal government would be exercised in relation to the indigenous, native people of the United States has proven to be a challenging issue from the earliest days of our history as a nation.[13]

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[13] On January 22, 1788, James Madison observed, "The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Foederal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain." 2 *The Founders' Constitution* at 530.

In 1790, the Congress crafted the first Act to regulate trade and intercourse with the Indians, rendering invalid any sale of Indian lands to any person or State in the absence of an authorization by the United States. Indian Non-Intercourse Act, 25 U.S.C. § 177 (1998).

Later, upon their entry into the Union, several States disavowed the exercise of jurisdiction over the native people and their lands. In 1889, the Enabling Act through which the States of Washington, Montana, North Dakota, and South Dakota secured admission into the Union required that the constitutional conventions of the new States enact provisions by which the people would disclaim title to lands owned by Indians or Indian tribes and would acknowledge that such lands were to remain "under the absolute jurisdiction and control" of the Congress until the United States title was extinguished. The disclaimers were to be made "by ordinances irrevocable without the consent of the United States and the people of the States."[14] Similar disclaimers are found in the enabling or admission Acts of the States of Utah, Oklahoma, Arizona, and New Mexico. Act of July 16, 1894, ch. 138, 28 Stat. 107 (1894) (Utah); Act of June 16, 1906, ch.

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[14] Act of Feb. 22, 1889, § 4, 25 Stat. 676 (1889) (providing that, "[t]he constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, . . . " and "[t]hat the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . ")

3335, 34 Stat. 267 (1906) (Oklahoma); Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910) (Arizona and New Mexico).

However, Federal authority over indigenous affairs has also been delegated to several States. 25 U.S.C. §§ 232 & 233 (1998) (New York); Act of June 8, 1940, ch. 276, 54 Stat. 249 (1940) (Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (1946) (North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948) (Iowa). In 1953, the Congress enacted the first jurisdictional statute of general application to Indian lands, vesting certain States with authority to exercise jurisdiction over criminal offenses and civil causes of actions committed or arising on Indian reservations within those States. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953). That delegation of authority has been sustained by this Court as an appropriate exercise of the Congress' constitutional authority. *Yakima Indian Nation*, 439 U.S. 463.

Public Law 83-280 was enacted during a period when Federal policy endorsed the termination of reservations, the assimilation of native people into the dominant society, and the divestiture of Federal responsibilities relating to Native Americans. This Federal policy was well-established in its implementation at the time the State of Hawai'i was admitted into the Union, and may well explain the absence of the customary disclaimer of state jurisdiction over the native peoples. Instead, the United States delegated its responsibilities under the Hawaiian Homes Commission Act to the State of Hawai'i, and charged the new State with a public trust and affirmative responsibilities to assure "the betterment of the conditions of native Hawaiians." Hawai'i Admission Act, §§ 4 & 5(f), 73 Stat. 4.

Thirty-two other States have established special commissions or offices to address the conditions of the native people. *See* App. B. Fourteen States carry on formal relations with the indigenous people, even though for the most part, there is no explicit delegation of Federal authority to do so. These States have extended State recognition to forty-nine tribes, even though those tribes

are not recognized by the Federal government. *See* App. B. Nonetheless, these "state-recognized" tribes are eligible for certain Federal programs and services. *See, e.g.*, Native American Programs Act, 42 U.S.C. § 2991 *et seq.* (1998); Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.* (1998); National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1998).

IV. THE UNITED STATES CONGRESS HAS DELEGATED AUTHORITY TO THE STATE OF HAWAI'I TO ADDRESS THE CONDITIONS OF THE INDIGENOUS, NATIVE PEOPLE OF HAWAI'I.

> At first contact with Europeans, the Hawaiian Islands supported the largest and most densely settled population of any Polynesian island group. There are various estimates of early population, before the ravages of foreign disease took their toll, but a figure of 200,000 Hawaiians is usually regarded as conservative . . . The contact-period society of Hawai'i stands out as one of the most sophisticated, complex, and developed of the many hundreds of indigenous societies and cultures dispersed throughout the Pacific.

Patrick Vinton Kirch, *Feathered Gods and Fishhooks*, pp. 2 & 7 (1985).

A. The Hawaiian Homes Commission Act

Although the present litigation arises out of actions taken by the citizens of Hawai'i pursuant to Federally-delegated authority in the Hawai'i Admission Act, nearly 40 years earlier the United States had set-aside lands in Hawai'i for the benefit of Hawai'i's native people. The administration of this Federal law, the Hawaiian Homes Commission Act, was one impetus for the amendments proposed to the State's constitution in 1978 affecting Native Hawaiians.

In 1826 it was estimated that there were 142,650 full-blooded Hawaiians in the Hawaiian islands. By 1919 their numbers had been reduced to 22,600. Historically, the Hawaiian's subsistence lifestyles required that they live near the ocean to fish and near fresh water streams to irrigate their staple food crop (taro) within their respective ahupua'a.[15] Beginning in the early 1800's, more and more land was being made available to foreigners and was eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Hawaiians were forced off the lands that they had traditionally occupied. As a result, they moved into the urban areas, often lived in severely-overcrowded tenements and rapidly contracted diseases for which they had no immunities.

Interior Department Secretary, Franklin K. Lane, observed in testimony before the House Committee on Territories, "[o]ne thing that impressed me there 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." H.R. Rep. No. 66-839, at 4 (1920). By 1920, there were many others who were also 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 'āina.[16]

The effort to "rehabilitate" this dying race by returning them to the land led Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside 203,500 acres of public lands (former Crown and

[15] The ahupua'a is a traditional division of land which is triangular in nature, and encompasses lands from the mountain top to the sea. *Territory v. Bishop Trust Co., Ltd.*, 41 Haw. 358, 361 (Haw. 1956).

[16] 'Aina means land. Pukui, Mary K., and Elbert, Samuel H., *Hawaiian Dictionary*, Honolulu (Univ. of Hawai'i Press, 1986).

Government lands acquired by the United States upon Annexation) for homesteading by native Hawaiians. Hawaiian Homes Commission Act, 1920, § 203, 42 Stat. at 109. Congress analogizes the Act to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands." H.R. Rep. No. 66-839, at 11 (1920).[17]

The 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, 25 U.S.C. §§ 331-334, 339, 342, 348, 349, 354, 381 (1998), 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 February, 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. Office of State Planning, Office of the Governor, Pt. I, 1 *Report on Federal Breaches of the Hawaiian Home Lands Trust*, 4-6 (1992).

For the next forty years, during the Territorial period (1921-1959) and the first two decades of statehood (1959-1978), inadequate funding forced the Department of Hawaiian Home Lands to lease its best lands 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

[17] "Your committee's opinion is further substantiated by the brief of the attorney general of Hawai'i . . . and the written opinion of the solicitor of the Department of Interior. . . . " H.R. Rep. No. 66-839, at 11.

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 a tragically illusory promise for most native Hawaiians. *Id.* at 12.

B. Hawai'i Admission Act

As a condition of statehood, the Hawai'i Admission Act required the new State to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded to the 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 the 'available lands', as defined by said Act, ***shall be used only in carrying out the provisions of said Act.***

Hawai'i Admission Act, § 4, 73 Stat. at 5 (emphasis added).

> 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 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. ***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.***

Id. § 5(f), 73 Stat. at 6 (emphasis added).

These were explicit delegations of Federal authority to be assumed by the new State. They were not discretionary. The language is not permissive. The United States did not absolve itself from any further responsibility in the administration or amendment of the Hawaiian Homes Commission Act. Nor did the United States divest itself of any ongoing role in overseeing the use of ceded lands or the income or proceeds therefrom. Rather, as the Federal and State courts have repeatedly held, 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. *Han, et al. v. United States*, 45 F.3d 333 (9th Cir. 1995); *Pele Defense Fund*, 837 P.2d 1247.

Under the Petitioner's theory, there are no circumstances under which the State of Hawai'i could assume the responsibilities of the Hawaiian Homes Commission Act or fulfill one of the section 5(f) purposes – "the betterment of the conditions of native Hawaiians" – without violating the guarantees of the Fourteenth Amendment to the United States Constitution. But the Congress expressly found that the 1950 Hawai'i State Constitution is "republican in form and in conformity with the Constitution of the United States . . . and is hereby accepted, ratified and confirmed." Hawai'i Admission Act, § 1, 73 Stat. 4.

By 1959, the constitutional authority of the Congress to provide for the conditions of the indigenous people of the United States was well established. The inclusion of sections 4 and 5(f) in the Admission Act is constitutional and is consistent with the body of Federal law and policy which had recognized Native Hawaiians as indigenous, native people of the United States for nearly fifty years. *See* App. A.

C. The Hawai'i Constitutional Convention of 1978

The convening of a constitutional convention is a significant event in most states, and it was not different in Hawai'i. While the claims in this case compel a focus on the establishment of the Office of Hawaiian Affairs, the delegates to the 1978 Constitutional Convention addressed a range of issues related to the native people of Hawai'i. The citizens of Hawai'i subsequently adopted amendments to the State's constitution that reflected a broad-based concern that the conditions of the native people of Hawai'i would require a carefully-considered and comprehensive approach.[18] In addition, the fifty-seven years of

[18] The State's constitutional amendments: (1) recognize the traditional and customary rights Hawaiians exercise for subsistence, cultural, and religious purposes, Haw. Const. art. XII, § 7; (2) direct the State to establish a Hawaiian education program consisting of language, culture, and history in the public schools, *id.* art. X, § 4; (3) provide for the protection of natural resources, particularly the fresh water and ocean resources which are so vital to the native peoples' way of life, *id.* art. XI; (4) reaffirm the public lands trust and establish the Office of Hawaiian Affairs, *id.* art. XII, §§ 4, 5 and 6; (5) reaffirm the trust provisions of the Hawai'i Admission Act, *id.* art. XVI, § 8; (6) establish the Hawaiian language as one of the two official languages of the State, *id.* art. XV, § 4; (7) adopt the former King Kamehameha I's Law of the Splintered Paddle as the symbol of the State's concern for public safety, *id.* art. IX, § 10; and (8) provide for a State motto: "Ua mau ke ea o ka ʻāina i ka pono" or "[t]he life of the land is perpetuated in righteousness," *id.* art. XVI, § 5.

experience with the Hawaiian Homes Commission Act program informed the debates in Hawai'i's 1978 Constitutional convention.[19] *See also* App. D.

The Federal policy supporting the rights of native people to self-determination and self-governance had been in place for ten years, and it is clear that the delegates to the convention were looking not only at the past experience under the Hawaiian Homes Commission Act but toward a future when the native people of Hawai'i might be afforded the opportunity to express their right to self-determination and self-governance. Thus, in the Report of the Committee of

[19] One of the delegates to the convention presented the following information on the home lands program: "Today over 113,000 acres of DHHL [Department of Hawaiian Home Lands] lands are leased to the public through leases, revocable permits or licenses. Another 16,000 acres are under governor executive orders, this all coming prior to 1972. Another 22,000 acres are utilized by federal, state and county agencies without document, and another 40,000 acres are classified as conservation. In all, 85 percent of DHHL lands (170,000 acres) are utilized by the general public; 12 percent have actually been utilized by the intended beneficiaries, or 400 acres per annum have been transferred to native Hawaiians since 1920." Debates in Committee of the Whole, 1978 Proceedings of the Constitutional Convention for the State of Hawai'i, 411 (Sept. 2, 1978).

the Whole on the proposed amendments establishing the Office of Hawaiian Affairs, it was stated,

> "The Committee recognizes the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition . . . The Committee intends this section to be broad enough to include within its scope the administration and management of the native Hawaiian lands trust created by the Hawaiian Homes Commission Act of 1920 . . . The consolidation of the two trusts [Hawaiian home lands and section 5(f) trusts] under the control and management of a single board would facilitate the attainment of the objective of the two trusts: to provide for the betterment of the conditions of native Hawaiians . . . Your Committee concluded that these Sections 5 and 6, taken together, are of utmost importance for they provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people."[20]

The objectives to be achieved through the establishment of the Office of Hawaiian Affairs are remarkably similar to the goals that were the focus of this Court's consideration in *Morton*.[21]

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[20] Proceedings of the Constitutional Convention of Hawai'i of 1978, Journal and Documents, Standing Comm. Rep. No. 59, Vol. I, p. 643.

[21] "The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life . . . The overriding purpose of that particular Act [Indian Reorganization Act of 1934] was to establish machinery whereby Indian tribes would be able to assume a great degree of self-government, both politically and economically . . . The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve . . . [Section 12] was intended to integrate the Indians into the government service connected with the administration of his affairs." 417 U.S. 535.

In keeping with the manner in which the other native people of the United States exercise their right to self-determination and self-governance, the citizens of Hawaii voted to adopt the constitutional amendment establishing the Office of Hawaiian Affairs and also approved the means by which OHA Trustees would be elected. No eligible voting citizen of Hawaii was excluded from exercising this franchise.

Since 1968, the United States has recognized and supported the native peoples' right to self-determination and self-governance. The legislative history of the 1978 Hawai'i State Constitutional Convention makes clear that in establishing the Office of Hawaiian Affairs, the citizens of Hawai'i sought to provide Native Hawaiians with the means to exercise their rights to self-determination and self-governance, consistent with Federal law and policy. As forecast by the delegates to the constitutional convention, *see* App. D, at the appropriate time this exercise in self-governance would be wedded with the exercise of responsibility for administering the lands set aside for native Hawaiians, and the expression of sovereignty which had been lost with the overthrow of the Hawaiian kingdom could once again be made manifest.

CONCLUSION

The Congress has the constitutional authority to establish a political classification of Native Americans consisting of American Indians, Alaska Natives, and Native Hawaiians and to enact laws affecting Native Americans. The Congress has recognized a special relationship with the native people

of Hawai'i and has enacted 160 Federal laws addressing the conditions of Native Hawaiians based upon their status as indigenous people of the United States. The Congress also has the constitutional authority to delegate Federal responsibilities to the State of Hawai'i to provide for the betterment of the conditions of Native Hawaiians and to protect lands set aside under Federal law for their benefit. The establishment of the Office of Hawaiian Affairs and the election of OHA Trustees approved by the citizens of Hawai'i to carry out the responsibilities with which the State of Hawai'i was charged in the 1959 Admission Act is an appropriate exercise of its Federally-delegated authority.

Dated, July 28, 1999

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APPENDIX A

Table of Federal Acts Affecting Native Hawaiians