RSC Republican Study Committee
Rep. Jeb Hensarling (R-TX), Chairman
Russ Vought, Executive Director
132 Cannon House Office Building
Washington, DC 20515
www.house.gov/hensarling/rsc
ph (202) 226-9717 / fax (202) 226-1633

Legislative Bulletin……..……October 24, 2007

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H.R. 505— Native Hawaiian Government Reorganization Act of 2007

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(*Abercrombie, D-HI*)

Order of Business: The bill is scheduled to be considered on Wednesday, October 24, 2007, subject to a structured or closed rule. Information with regard to any amendments made in order will be provided in a separate document.

Summary: H.R. 505 would recognize and authorize the creation of a sovereign Native Hawaiian governing entity, i.e. an Indian tribe. In order to do that, the bill would establish a process for organizing the Native Hawaiian people into an entity that knows who its members are, possesses authority over its members, adopts governing documents, etc. Such a tribe would likely have as many as 400,000 members nationwide, including more than 20 percent of Hawaii's residents, and potential authority over Native Hawaiians in all of the fifty states. If each Native Hawaiian eligible under this legislation were to apply to become a member of the new governing entity, it would be one of the nation's largest Indian tribe.

For more details on what the bill would do, see the "Detailed Summary" and "Conservative Concerns" sections below.

Background: There are more than 150 current statutes that confer federal benefits to the Native Hawaiian people. However, in 2000, the Supreme Court put many of these benefits in jeopardy with its decision in *Rice v. Cayetano*. Specifically, the Court held that the State of Hawaii's limitation on voting for certain state agency posts to only "Native Hawaiians" ran afoul of the Fifteenth Amendment because it used ancestry as a proxy for race. The State argued that excluding non-Native Hawaiians from voting was permitted given the deference that is normally associated with government dealings with Indian tribes and that Native Hawaiians ought to be considered as a political classification rather than a racial one. While the Court avoided the question of whether Native Hawaiians (as a dispersed group) could indeed be treated as an Indian tribe, it concluded that the State's Office of Hawaiian Affairs was certainly *not* a tribe but rather an arm of the state government.

However, whether or not Native Hawaiians constitute an Indian tribe is crucial for their federal benefits to withstand Constitutional scrutiny if challenged in court. In 1974, the Court upheld (*Morton v. Mancari)* an employment preference at the Bureau of Indian Affairs for Native Americans because it was done specifically on the basis of the federal government's "constitutionally-grounded special relationship" with Indian tribes—and not with Indians generally. The Indian Commerce Clause (Article I, Section 8, Clause 3) provides Congress with the power to "regulate Commerce with foreign nations, and among the several states, and *with the Indian tribes*." The Court stated that "the preference is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized tribes….*the preference is political rather than racial in nature.*" Otherwise, all government programs that extend benefits according to racial classifications must be "strictly scrutinized" and are presumptively invalid as violations of the Fourteenth Amendment's Equal Protection Clause.

Rice was decided by a vote of 7-2. Justice Kennedy wrote the majority opinion, and Justices Breyer and Souter wrote a separate concurring opinion, which stated that while Native Hawaiians theoretically are analogous to an Indian tribe, the record showed that "the analogies they…offer are too distant to save a race-based" classification. Although not directly on point, the Court's decision in *Rice* and the comments above by Breyer and Souter have led many to conclude that the current configuration of the justices would likely strike down most federal benefits flowing to Native Hawaiians as a racial set-aside, if given a chance. As a result, the Hawaiian Congressional delegation has championed H.R. 505 to provide a process for the United States to recognize Native Hawaiians as a governing entity or tribe that is political in nature.

Historical Record: Polynesians were the first to inhabit the Hawaiian Islands, and they lived in relative isolation until Captain James Cook of Britain arrived in 1778. His was the first of many expeditions that led to increasing western involvement in the political and cultural affairs of Hawaii. At the time of Cook's arrival, Hawaii was ruled by different kings often at war with each other. In 1810, Kamehameha I succeeded in unifying the four kingdoms into one nation that was subsequently recognized as a sovereign nation by foreign countries. It was at this time that Hawaii went through a significant westernization with the establishment of a constitutional monarchy, the adoption of laws protecting religious liberty, and the transformation of the feudal land structure to confer freehold title (even while the King retained many lands for himself). In addition, the right of land ownership was extended to foreigners.

In addition to westerners, Hawaii experienced an influx of Asian foreigners, and the proportion of pre-1778 inhabitants gradually decreased—especially as the economics and growth of sugar relied heavily on more labor. By 1890, native Hawaiians constituted less than half of the population. Of the 89,990 people living in Hawaii, only 40,622 were either Hawaiian or Half-Hawaiian—49,368 were Chinese, Portuguese, Japanese, American, British, and other nationalities. Hawaii had become a melting pot of races and ethnicities. Furthermore, Hawaii's government (both its cabinet and legislature) reflected the multi-racial composition of its subjects—the Kingdom of Hawaii was not a strictly native Hawaiian government as some have contended.

Queen Liliuokalani attempted to increase the crown's power in January of 1893 after years of gradual reform, and a number of westerners responded by forming a Committee of Public Safety,

seizing control of the government, and replacing the monarchy with a provisional government. This coup was largely bloodless (one policeman was shot in the shoulder), and according to *United States and the Hawaiian Kingdom: A Political History,* while the U.S. Marines were ordered on shore by U.S. Minister John Stevens without explicit permission from President Benjamin Harrison, they were *not* "used to assist in the overthrow of the Queen or in the establishment of the provisional government" but rather present to protect American life and property. When President Harrison learned of the events, he sanctioned Stevens' involvement because he viewed it as crucial "to our interests in the Pacific Ocean" in the face of British and Japanese involvement on the islands.

However, President Grover Cleveland, who took office two months later, denounced the U.S. role and called for a restoration of the Hawaiian monarchy. The provisional government refused, called a constitutional convention, and formed the Republic of Hawaii. The new Republic took control of all crown and government lands and sought annexation to the United States. Cleveland refused to submit such a treaty to the Senate, but his successor, President William McKinley supported annexation and signed the Annexation Act into law in 1898. The Republic of Hawaii ceded title to all of its public lands to the United States.

In 1920, Congress passed the Hawaiian Homes Commission Act to set aside roughly 200,000 acres of land and provide long-term leases to "native Hawaiians." Native Hawaiians were defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Island previous to 1778." In 1959, Hawaii was admitted as the fiftieth state of the Union and granted title to all public lands within its boundaries (almost 1.2 million additional acres). The Admissions Act authorized the land and income derived from it to be used for a number of purposes, *including but not limited to*, "the betterment of the conditions of native Hawaiians as defined by the Hawaiian Homes Commission Act."

In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer a portion of the funds generated by the 1.2 million acres of ceded lands for the betterment of "native Hawaiians" and "Hawaiians." The OHA was overseen by a board of trustees that was composed and elected by Hawaiians. It was these restrictions that the Supreme Court found to be unconstitutional in *Rice v. Cayetano*. In 1993, the United States officially apologized for its involvement in the events of 1893, for its "invasion" and "active support" of an insurrection that led to the overthrow of the Kingdom of Hawaii. The apology resolution also pledged to support reconciliation efforts between the U.S. and the Native Hawaiian people.

Detailed Summary of H.R. 505:

- **Definitions:** Defines a Native Hawaiian as an "individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendent of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893…or an individual who is 1 of the indigenous native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act…or a direct lineal descendent of that individual." However, H.R. 505 only defines "aboriginal, indigenous, and native people" as the original inhabitants who exercised sovereignty or their descendents.

Some conservatives may be conserved that the bill does not effectively define these terms, and that as a result, only one drop of indigenous blood is required, not a quantum as normal. Nor does the bill include a residency requirement.

- **Policy and Purpose:** Reaffirms that is the policy of the United States that Native Hawaiians be treated as a "unique and distinct, indigenous, native people with whom the United States has a special political and legal relationship." The bill states that Congress has the authority under the Indian Commerce Clause to enact legislation regarding Native Hawaiians and cites past legislation where it has exercised that right. It also states that Native Hawaiians have an inherent right to autonomy in their affairs, an inherent right of self-determination and self-government, the right to reorganize a Native Hawaiian governing entity, and the right to become economically self-sufficient. Finally, the bill asserts that the purpose of this legislation is to "provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship."

- **Native Hawaiian Relations Office and Interagency Group:** Establishes a Native Hawaiian Relations office within the Department of Interior to continue the process of reconciliation with the Native Hawaiian people, to coordinate the political and legal relationship between the tribe and all agencies of the U.S. federal government, etc. H.R. 505 also creates a new interagency coordinating group, since most programs administered to Native Hawaiians are outside of the jurisdiction of the Department of Interior. However, the bill declares that nothing in this section will be applicable to the Department of Defense (DOD) or any agency (or component) within the DOD.

- **Reorganization Process:** Recognizes formally a Native Hawaiian governing entity with the right to "reorganize the single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents." To that end, the bill authorizes a nine-member commission to prepare and maintain a roll of the adult members (18 years and older) to participate in the "reorganization" of the Native Hawaiian community. The commission's travel expenses would be paid for by the federal government, and the commission's executive director could be hired and fired without regard to civil service laws.

  The commission would establish documentation for each Native Hawaiian to submit in order to be added to the rolls and would work with Native Hawaiian organizations to help determine ancestry. Once completed, the commission would be required to submit the roll to the Department of Interior, publish it in the Federal Register, and certify that each members meets the bill's definition of a Native Hawaiian.

  The members of the Native Hawaiian community listed on the published roll would then develop criteria for candidates to be elected to serve on the Native Hawaiian Governing Council, determine the structure of the Council, and elect officers. The Council could receive federal or state funding to help carry out the activities associated with the

establishment of the governing entity. The Council would be required to develop governing documents for the entity for distribution to and ratification by the Native Hawaiian community. Once ratified, the Secretary of the Interior would have 90 days to certify the documents, or they would be automatically deemed accepted. An election would then be held for officers in the new Native Hawaiian government, and upon that "the special political and legal relationship between the United States and the Native Hawaiian governing entity is hereby reaffirmed and the United States extends Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people."

- **Formal Negotiations:** Allows for negotiations between the "three governments," the U.S., the State of Hawaii, and the new Native Hawaiian governing entity on the following matters:

    1) the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources;
    2) the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use;
    3) the exercise of civil and criminal jurisdiction;
    4) the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawaii;
    5) any residual responsibilities of the United States and the State of Hawaii; and
    6) grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii.

  The bill asserts the following governmental authority: "Any governmental authority or power to be exercised by the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall be exercised by the Native Hawaiian governing entity only as agreed to in negotiations pursuant to…this Act and beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable."

- **Disclaimers:** Includes a number of disclaimers to ensure that the legislation does not create a cause of action against the United States or any other entity or person, or alter existing law (including existing case law), regarding obligations to Native Hawaiians. In addition, the legislation declares that nothing in the Act is meant to "create or allow to be maintained in any court any potential breach-of-trust actions, land claims, resource-protection or resource-management claims, or similar types of claims brought by or on behalf of Native Hawaiians or the Native Hawaiian governing entity for equitable, monetary, or Administrative Procedure Act-based relief against the United States or the State of Hawaii, whether or not such claims specifically assert an alleged breach of trust, call for an accounting, seek declaratory relief, or seek the recovery of or compensation for lands once held by Native Hawaiians." The State of Hawaii would retain its sovereign immunity as well.

- **Indian Gaming:** Prohibits the Native Hawaiian government from conducting gaming activities under the authority of any federal law, including the Indian Gaming Regulatory Act. H.R. 505 states that this restriction would apply to gaming activities by the Native Hawaiian governing entity whether they would be located on land within the state of Hawaii or within any other state or territory of the U.S. However, it is conceivable that the Native Hawaiian government could negotiate with the State of Hawaii to receive the authority needed to conduct gaming activities.

- **Land in Trust:** Provides that no land may be taken into trust by the Secretary on behalf of individuals or groups claiming to be Native Hawaiian or on behalf of the Native Hawaiian government.

- **Civil and Criminal Jurisdiction:** Asserts that the "status quo" of federal and state jurisdiction will apply, and that nothing in the Act alters the civil or criminal jurisdiction of the U.S. However, the bill sets up a negotiation process with the newly created Native Hawaiian government that would re-draw the various jurisdictional lines with respect to Native Hawaiians across the nation.

- **Indian Programs and Services:** States that nothing in the Act provides an authorization for eligibility to participate in any Indian program or service to an individual who is not eligible under current federal law. This provision is designed to address concerns that H.R. 505 would take funding away from existing Indian tribes because there would be no rationale for maintaining separate funding streams and an additional 400,000 Native Hawaiian beneficiaries could heighten the competition for already scarce federal resources. However, H.R. 505 does not preclude a future Congress from taking any such action.

- **Severability if Unconstitutional:** Provides that if any section or provision of this Act is held invalid by the Supreme Court that the remaining sections or provisions shall continue in full force and effect.

- **Funding**: Authorizes "such sums as necessary" to carry out Act.

Conservative Concerns: Specifically, the following are *some* concerns that many conservatives have expressed with H.R. 505:

- **Unconstitutional:** Congress lacks the power to invent Indian tribes, and the Supreme Court has held that Congress' power with regard to indigenous peoples is not unlimited. In *U.S. v. Sandoval*, the Court stated that: "It is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes." In other words, the Court held that the Congress cannot create an Indian tribe where one does not exist, but can rather, only *recognize* groups who have long operated as a tribe with a preexisting political structure and who live separately and distinctly from other communities (both geographically and culturally).

- **Racial Group, Not a Tribe:** Native Hawaiians do not appear to meet either the Bureau of Indian Affairs' seven current mandatory requirements or the Court's own definition for recognition as an Indian tribe. Currently, the Bureau requires that an indigenous group:

  (1) exist already as an Indian tribe since 1900 as documented by state and local officials and anthropologists;
  (2) exist as a community (including 50% of the group residing geographically together);
  (3) exert political influence over its members "from historical times to the present;"
  (4) possess governing documents and membership criteria;
  (5) possess evidence that current membership descends from a historical tribe and
  (6) does not belong to any other acknowledged tribe; and
  (7) not be barred from recognition by federal legislation.

  Native Hawaiians would run into further barriers even under the Supreme Court's own definition of a tribe in *Montoya v United States*: "By a 'tribe' we understand a body of Indians of the same or a similar race, *united in a community under one leadership or government*, and *inhabiting a particular though sometimes ill-defined territory"* (emphasis added). Former Attorney General Ed Meese and Todd Gaziano provide similar analysis, noting that tribal recognition does not hinge solely on race:

  > Real Indian tribes were not and not organized along "racial" lines. There are 562 tribes that the Bureau of Indian Affairs recognizes, and no one thinks that each represent a separate and distinct race. At the time of the framing, many tribes allowed Europeans and Americans to join and other members to leave. In short, they were not and are not "racially exclusive." If sharing one drop of aboriginal Hawaiian blood makes a tribe, then Chicanos, Latinos, African Americans, Mexicans, indeed any ethnicity could become a tribe if Congress so decrees.

- **Racial Balkanization:** H.R. 505 could lead to a racial balkanization in Hawaii and elsewhere, providing for different codes of law to apply to people of different races who live and function as part of one currently homogenous community. Tribal Indians are typically located on reservations and immune from state laws, but this would not be the case should Native Hawaiians be granted the status of "tribe". In general, tribes do not pay state taxes nor do they abide by state regulations. With this in mind, consider for example, two small businesses in Hawaii competing against one another. One is owned by a Native Hawaiian, and the other is owned by someone who is not. The former would be exempt from state taxes, state business regulations, and zoning and environmental laws, and the latter would not.

- **Lack of Referendum:** Nothing in H.R. 505 provides current Hawaiians with any choice in the matter of whether or not there is a new governmental entity—which would no doubt affect them—created in their community. In addition, last year the Grassroots Institute conducted a poll which asked the following question:

> The Akaka bill, now pending in Congress, would allow Native Hawaiians to create their own government not subject to all the same laws, regulations, and taxes that apply to other citizens of Hawaii. Do you want Congress to approve the Akaka bill?

Only 29 percent of respondents said yes—58 percent said no. In addition, 50 percent of those surveyed supported the idea of a referendum before the provisions of H.R. 505 became law. No such referendum is provided for in H.R. 505.

- **Independence and Secession:** The State of Hawaii's Office of Hawaiian Affairs continues to post a document which fuels speculation that H.R. 505 may lead to secession and further independence efforts:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S.344 creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people may exercise their right to self-determination by selecting another form of government *including free association or total independence*. (emphasis added)

In the process of clarifying statements he made earlier to an NPR reporter, the Senate companion's sponsor, Daniel Akaka, admitted that this bill could lead to independence:

> I've spoken to those in Hawaii who want to have the—Hawaii to be independent and I've told them, hey, you can use the governing entity to discuss it. And this is what I meant. They can bring these to the governing entity and the governing entity will make a decision as to what happens to, uh, to independence or returning to the monarchy.

However, as Senator Jon Kyl noted previously, these statements seem to leave the matter unsettled:

> It is understandable that [Governor Linda Lingle's] response would deny any effort to facilitate independence or secession, but given the vocal pro-independence movement in Hawaii, it would be foolhardy to ignore the possibility that the State of Hawaii somehow intends to leave this question ambiguous with citizens who might see the Office of Hawaiian Affairs and conclude otherwise.

Note: Not all conservatives are opposed to H.R. 505. Some believe the Native Hawaiian people are sufficiently analogous to an Indian tribe to warrant a formal recognition as one. In addition, they construe the Hawaiian Homes Commission Act, the Hawaii Admissions Act, and the roughly 150 federal statutes that confer benefits to Native Hawaiians as an implicit recognition of their tribe-like status already in current law.

Committee Action: H.R. 505 was introduced on January 17, 2007, and referred to the House Committee on Natural Resources where a mark-up was held on May 2, 2007. The Committee reported the bill to the full House by voice vote.

Administration Position: The Administration is strongly opposed to H.R. 505:

> The Administration strongly opposes passage of H.R. 505. As the U.S. Civil Rights Commission recently noted, this legislation "would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege." The President has eschewed such divisive legislation as a matter of policy, noting that "we must . . . honor the great American tradition of the melting pot, which has made us one nation out of many peoples." This bill would reverse this great American tradition and divide the governing institutions of this country by race. If H.R. 505 were presented to the President, his senior advisors would recommend that he veto the bill.
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> H.R. 505 would grant broad governmental powers to a racially-defined group of "Native Hawaiians" to include *all* living descendents of the original, Polynesian inhabitants of what is now modern-day Hawaii. Members of this class need not have any geographic, political, or cultural connection to Hawaii, much less to some discrete Native Hawaiian community. Proponents of the bill seek to analogize Native Hawaiians to members of existing Indian tribes. As one Federal court recently explained, however, "the history of the indigenous Hawaiians…is fundamentally different from that of indigenous groups and federally-recognized Indian Tribes in the continental United States."
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> Closely related to those policy concerns, H.R. 505 raises significant constitutional concerns that arise anytime legislation seeks to separate American citizens into race-related classifications rather than according to their own merits and essential qualities. In the particular context of Native Hawaiians, the Supreme Court has invalidated state legislation containing similar race-based qualifications for participation in Native Hawaiian governing entities and programs.
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> Given the substantial historical and cultural differences between Native Hawaiians as a group and members of federally recognized Indian tribes, the Administration believes that tribal recognition is inappropriate and unwise for Native Hawaiians and would raise serious constitutional concerns. The Administration strongly opposes any bill that would formally divide sovereign United States power along suspect lines of race and ethnicity.

Cost to Taxpayers: According to the CBO, the cost of implementing H.R. 505 would be approximately $1 million per year from 2008-2010 and less than $500,000 in each subsequent year, assuming the appropriation of the necessary funds.

Does the Bill Expand the Size and Scope of the Federal Government? Yes, H.R. 505 would establish the United States Office for Native Hawaiian Relations within the Department of the Interior (DOI), as well as federally recognize a new Native Hawaiian governing entity, and authorize funding to carry out the bill's provisions.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, H.R. 505 would require that the state of Hawaii comply with the recognition of the Native Hawaiian governing entity. In addition, any transfer of land now controlled by the state of Hawaii would be the subject of future negotiations.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: According to House Report 110-389, "H.R. 505 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI."

Constitutional Authority: House Report 110-389 cites Article I, Section 8 (the congressional power regulate Commerce with foreign nations, and among the several states, and *with the Indian tribes*) of the Constitution of the United States as constitutional authority to enact this bill. Some conservatives may find questionable this citation of constitutional authority.

RSC Staff Contact: Russ Vought; 202-226-8581; russ.vought@mail.house.gov;
Sarah Makin; 202-226-0718; sarah.makin@mail.house.gov