HOUSE COMMITTEE ON HAWAIIAN AFFAIRS
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Testimony of
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on
H.B. No. 2340, "Native Hawaiian Autonomy Act"

Introduction. H.B. No. 2340 would, if enacted, consolidate the Office of Hawaiian Affairs (OHA) and the Department of Hawaiian Home Lands (DHHL) into a new entity called the Native Hawaiian Trust Corporation. It would purport to end the trust responsibilities of the State of Hawai`i toward the Native Hawaiian people and thus bring "closure" on the claims of the Native Hawaiian people. [Page 4, line 21 (hereinafter cited as 4:21)] But it offers very little to the Native Hawaiian people in the way of lands or resources, and in some respects it reduces the limited self-governance the Native Hawaiian people have achieved through OHA. In its present form, the Bill can only be described as unfair, unjust, and mischievous (a) because it does not identify the lands and resources that would be transferred to the Native Hawaiians, (b) because the Native Hawaiian Trust Corporation it creates would have less self-governing powers that currently exist in OHA, and, most importantly, (c) because it refuses to respect the internationally- and federally-protected right of the Native Hawaiian people to make the fundamental decisions regarding their own self-determination and self-governance.

The "Findings" (Section 2): The Bill contains 15 paragraphs of "Findings" that

purport to tell the story of the Native Hawaiian people. Although these findings (a) recognize the economic and cultural losses experienced by the Native Hawaiian people [1:4-11], (b) mention the Apology Bill enacted by the U.S. Congress in 1993 [1:17], and (c) support "greater native Hawaiian autonomy" [3:18-19; see also 73:10-11], (1) they ignore the responsibilities of the federal and state governments for the loss of land, culture, and economic well-being, (2) they fail to recognize the detrimental effect that loss of sovereignty has had on the Native Hawaiian culture, self-esteem, health, and socio-economic status, and (3) they offer no significant new lands or resources or any real self-governance in exchange for bringing "closure" to the claims of native Hawaiians against the State and an ending of the "relationship of wardship or dependence." [3:6] These findings are also misleading (a) in referring to the "resolution of historic claims" [1:17-18], even though most claims remain unresolved, and (b) in referring to "the success of Hawaiian language immersion education" [1:18-2:1], even though the State's Department of Education has failed to devote adequate resources to this program to provide space for all the Native Hawaiian children who want to participate in it.

The Native Hawaiian Trust Corporation (Sections 3-4, 6-7): These Sections would create an entity called the "Native Hawaiian Trust Corporation," which would take over the assets and responsibilities of both the Office of Hawaiian Affairs (OHA) and the Department of Hawaiian Home Lands (DHHL), and both those organizations would then be eliminated. This new corporation would be governed by at least 13 trustees, who would be "of Hawaiian blood" [6:11], and would be elected by "Hawaiian residents of this State as provided by law." [6:12; see also 79:10] The term "Hawaiian blood" is defined by referring to persons

"descended by blood from any of the races inhabiting the Hawaiian Islands prior to 1778." [6:17-18; see also 18:14-16 and 73:19-21] This definition is different from the definitions used in most other statutes, which refer explicitly to the "aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." See, e.g., H.R.S. sec. 10-2. The Trustees of the Corporation would apparently be elected under an "at-large" system, with every Hawaiian voting for each Trustee on a statewide basis, although at least one Trustee must be "a resident of O`ahu, Maui, the county of Hawai`i, Kaua`i, Moloka`i, and a location other than the State of Hawai`i." [79:11-13] [The Bill contains an apparent inconsistency between (1) 6:11-12 which says that the Trustees would be elected "by Hawaiian residents of this State" and (2) 79:10-13 which says (a) that they would be elected "by Hawaiians eighteen or older, without regard to residence" and (b) that at least one Trustee must reside in "a location other than the State of Hawai`i."]

The Native Hawaiian Trust Corporation would be "a corporate entity" [6:6-7], and would "not be a sovereign governmental entity." [6:7; see also 81:15-16 which says "The corporation shall not be a sovereign entity of the State."] This phrasing is awkward and of uncertain meaning, the powers actually conveyed to the Trust Corporation are quite limited, and the State would in fact have substantial authority and responsibility to supervise and scrutinize the activities of the Corporation. Both the Attorney General and both houses of the Legislature (by two-thirds votes) would have to approve the by-laws adopted by the Corporation. [74:19-22] By contrast, OHA has always had the power to adopt its own by-laws. The Corporation would not have any real authority or autonomy over its lands and

resources because "[t]he State shall retain oversight responsibility over management of the available lands." [7:10-11; see also 4:17-10, 8:10-12, and 81:19-82:1] Every year, the Corporation will have to prepare a complete statement of its financial activities for the State. [82:2-7] The State's obligation to ensure proper funding to enable Native Hawaiian lands to be developed, which it has historically failed to meet, would be eliminated. [8:20-9:1]

The powers that the Native Hawaiian Trust Corporation would be given include some of the powers now held by OHA plus the powers to manage Kaho`olawe [76:1; 110:17-116:21] and to administer the Hawaiian-language immersion program at the K-12 level [75:17-19; 118:12-119:13] and "any other Hawaiian service programs" (although none are identified) [84:9-10]. The Corporation would receive the statewide expenditure per student for the students in the Hawaiian-language immersion program [Section 31, 118:17-119:4], and would be subject to supervision by the Department of Education for the first five years of the administration of this program [Section 32, 119:14-20]. The Corporation would "have no power to tax or ability to establish a judicial system." [81:17-18] It would also have no power to condemn land through eminent domain, but it could request the State to use its eminent domain powers on behalf of the Corporation; if the State agreed to assist, the Corporation would pay for the expenses of condemnation and the fair market price of the lands condemned. [83:2-21] The Corporation would have certain law-enforcement powers in Kaho`olawe [111:3-7], but apparently not over other lands that it would control.

The Trustees of the Corporation (who are referred to as "directors" in some parts of the Bill) would be "trustees of the assets of the corporation and shall be held to fiduciary standards." [80:7-9] These standards now apply to the OHA Trustees and the DHHL

Commissioners, but it is probably inappropriate to apply them to the elected legislators of an autonomous native organization, because these officials should be accountable to their constituents and not to a state or federal court.

H.B. No. 2340 would give some immunity to the Corporation's Trustees [81:1-10], but this immunity would not extend to situations involving allegations "of mismanagement of funds and resources by board members in breach of fiduciary duty" [81:11-14]. The Corporation itself apparently would not have any immunity from suit, nor any protection from having to pay punitive damages. Native nations in other parts of the United States have fought hard to protect their sovereign immunity, and such immunity is a crucial element of any true self-governing status.

Special Purpose Revenue Bonds (Sections 5 and 21): These Sections would add the Native Hawaiian Trust Corporation to the list of entities that the State could assist by issuing special purpose revenue bonds. [13:16] The process for implementing this program is spelled out at 84:19-110:16, which would add a new part to H.R.S. Chapter 39A on Special Purpose Revenue Bonds. These Bonds would be issued only pursuant to the close supervision of the State's Department of Budget and Finance and thus would reduce any autonomy that the Native Hawaiian Trust Corporation may have. OHA already has the power to issue revenue bonds under H.R.S. secs. 10-21 to 10-36, and can now do so without supervision by any other State department, so the changes included in H.B. 2340 would weaken rather than expand the autonomy of the Native Hawaiian people.

Control Over the Lands (Sections 9-14): The Bill would transfer power over the Hawaiian Home Lands to the Native Hawaiian Trust Corporation. After 25 years had passed,

the Corporation would be permitted--by a three-fourths vote of its trustees--to sell or otherwise transfer up to 50 percent of its land holdings (at a rate of no more than 10 percent per year). [25:17-26:3; 82:13-20] At one point the Bill says that after 25 years, the Corporation could lease its lands to non-Hawaiians "provided that it continues to provide for the housing needs of Hawaiians" [26:6-7], but at another point it says that leases to non-Hawaiians would be permitted after 10 years. [82:21- 83:1] After 10 years, all the acreage limits now governing DHHL leases, would be eliminated. [26:15-27:14] Most of the language in the Hawaiian Homes Commission Act, 1920, would be repealed. [29:12-72:4]

What Lands and Resources Would the Native Hawaiian Trust Corporation Receive?

H.B. No. 2340 would transfer the lands now controlled by DHHL [Section 29, 117:12-19], the assets now controlled by OHA [Section 28, 116:22-117:11], the island of Kaho`olawe [117:11], certain historical sites such as Iolani Palace [Section 33, 119:21-120:11], "publicly owned Hawaiian fishponds and subsistence fishing areas" [Section 34, 120:17-18], "[c]ontrol over intestate succession of kuleana land" [120:19], and "[c]ontrol over all konohiki-type sea rights" [120:20] to the Native Hawaiian Trust Corporation. The transfer of Kaho`olawe to the Corporation would take place only subject to the Corporation's acceptance of all obligations respecting the island, including "clean-up of the island and its waters" [114:4:14, 122:8-11], a responsibility that is onerous and unfair. The proposed Bill also refers cryptically to "certain other ceded lands and the revenues therefrom" [73:4-5; see also 79:4-6 and 84:4-6 ("ceded lands otherwise authorized by the State for transfer to a native Hawaiian entity")] without any explanation. This language apparently refers to the lands and resources that would be transferred pursuant to the discussions now underway in the Act 329 meetings,

but the Executive-Branch and Legislative officials at these meetings have put no proposals whatsoever on the table, and not even the most optimistic participant at these meetings believes that any agreement will be forthcoming for at least another year. See Section 30, 117:20-118:8. In fact, the Executive and Legislative participants at these Act 329 meetings have not even provided insight into the guidelines and categories that they are considering for organizing the assets that would be transferred by the State to the Native Hawaiians in settlement of their claims. It is thus completely impossible to determine what is being offered to the Native Hawaiian people as a condition of settling their claim and bringing "closure" to their dispute with the State of Hawai`i.

The Bill also anticipates additional action by the Executive Branch and by the Legislature after the Native Hawaiian Trust Corporation comes into existence, because it requires approval by the Attorney General and a two-thirds vote of each house of the Legislature to acknowledge "that the corporation has complied with the requirements established" by the Bill [73:14-17; 74:14-22] before the land and resources would actually be transferred to the Corporation. These provisions are inconsistent with real self-governance by requiring the Corporation's Trustees to satisfy State officials rather than carry out the wishes of the Native Hawaiian people.

A Final Settlement of Claims Against the State? The Bill would repeal H.R.S. Chapter 673--the Native Hawaiian Trusts Judicial Relief Act [Section 37, 121:9-10], thus eliminating an important avenue that had been provided to Native Hawaiians to bring claims against the State of Hawai`i for mismanagement of the Hawaiian Home Lands and the public lands. The Bill would also repeal all of H.R.S. Chapter 10, which describes OHA's sources

of revenues, and thereby would repeal Act 304 (1990), which was the product of careful negotiation to resolve disputes over revenue sources. [Section 35, 120:21-22] With its language referring to "closure" [4:21] of claims against the State and to the "[r]esolution of 5(f) lands claims" [117:20], H.B. 2340 appears designed to constitute a final settlement of such claims. In the "Findings" section, the Bill refers to a "mutually agreeable settlement"[5:1], but it contains no mechanism to determine the views of the Native Hawaiian people regarding the proposals in the Bill.

The Constitutional and Legal Issues

Even If This Bill Were Enacted, the Native Hawaiian People Would Continue to Have the Right to Self-Determination, the Right to Create an Autonomous Sovereign Native Hawaiian Nation, and the Right to Their Fair Share of the Lands that Were Taken from the Kingdom of Hawai`i at the Time of the Illegal Overthrow and Subsequent Annexation by the United States. Because no real sovereign autonomy would be conveyed by the enactment of this Bill and because no mechanism whatsoever is included to measure the views of the Native Hawaiian people regarding the proposed settlements in the Bill, the enactment of this bill would not constitute an act of self-determination, and the Native Hawaiian people would continue to have a right to attain self-governance. See generally Jon M Van Dyke, Carmen Di Amore-Siah, and Gerald W. Berkley-Coats, Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai`i, 18 U. Haw. L. Rev. 623 (1996); Noelle M. Kahanu and Jon M. Van Dyke, Native Hawaiian Entitlement to Sovereignty: An Overview, 17 U. Haw. L. Rev. 427 (1995); S. James Anaya, The Native

Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs, 28 Ga. L. Rev. 309 (1994); Karen Blondin, A Case for Reparations for Native Hawaiians, 16 Haw. B.J. 13 (Winter 1981). As these articles explain, under international law and U.S. domestic law, native people have the right to control their own lands, resources, and affairs, and are entitled to form sovereign governments with real autonomy to achieve those goals. Although native people can choose among many different options regarding the extent of their autonomy and their relationship with their nonnative neighbors, these choices are theirs to make and cannot be imposed upon them. The wrongs imposed upon the Native Hawaiian people have been documented fully by the U.S. Congress in the 1993 Apology Bill, Public Law 103-150, where Congress urged a "reconciliation" with the Native Hawaiian people, and by Hawaii's Legislature in Act 359 (1993) establishing the Hawaiian Sovereignty Advisory Commission and in Act 200 (1994) where the Legislature transformed this body into the Hawaiian Sovereignty Elections Council and identified its goal as the facilitation of "a fair and impartial process to determine the will of the indigenous people to restore a nation of their own choosing." H. B. No. 2340 is inconsistent with that goal, because it would impose a solution upon the Native Hawaiians without determining their views.

The Blood Quantum Question. The Bill would give the Trustees of the Native Hawaiian Trust Corporation the power to "redefine the term 'Hawaiian' as used in this chapter to provide for a minimum quantum of Hawaiian blood, but in no case shall it exclude persons with at least one-half Hawaiian blood." [82:10-12] This power is given to the Trustees because "ultimately the question whether and to what extent persons of varying

quanta of Hawaiian blood should participate in rights, responsibilities, and benefits relating to Hawaiians should be determined by Hawaiians." [72:19-22] This part of the Bill recognizes that the Native Hawaiians themselves should determine how their lands and resources should be administered. The Bill would not require any changes in existing entitlement programs, but would allow the Trustees to consider such changes in the future. Because blood quantum is mentioned in the Hawaiian Homes Commission Act, 1920, and the 1959 Admission Act, future changes affecting rights recognized in those acts may require Congressional approval.

Amending the State Constitution. Sections 3, 4, 6, and 7 creating the Native Hawaiian Trust Corporation and eliminating OHA and the DHHL would require amending significant portions of Hawaii's Constitution, as does Section 5, which would allow the State to issue special purpose revenue bonds for the Native Hawaiian Trust Corporation. Article XVII, Section 3 of Hawaii's Constitution allows the Legislature to propose constitutional amendments by a two-thirds vote of each house or a majority vote taken by each house at each of two successive sessions. Following such a proposal, the voters of Hawai`i must approve an amendment by a majority of total vote cast at the next general election. These conditions would have to be complied with before most of the provisions in H.B. 2340 could take effect.

The Need for Action by the U.S. Congress. Section 8, which amends the Hawaiian Homes Commission Act, 1920, acknowledges that approval of the U.S. Congress is required before the lands now administered by the Department of Hawaiian Home Lands could be transferred to the Native Hawaiian Trust Corporation [17:3], as does Section 29, which would formally transfer the DHHL lands to the Corporation [117:18-19]. Formal

Congressional approval would also be required before the two paragraphs in Section 8 [17:1-22] could be added to the Hawaiian Homes Commission Act, 1920. Section 4 of the Hawai`i Admission Act, Pub.L.86-3, 73 Stat. 4 (1959), says that sections 201, 203, 204(a)(1) and (3), 204(b), 204.5, 205, 207-11, 213.5-17, 219.1, 220.5, 221, 223, 226, and 227 of the Hawaiian Home Lands Act, 1920, can be amended only "with the consent of the United States," although some uncertainty is introduced by the language in Section 4 that says that Congressional consent is not needed to amend provisions "relating to administration" and "relating to the powers and duties of officers other than those charged with the administration of said Act." The proposed Bill would amend Section 201 (in Section 9, 18:1-16), Section 204 (in Section 10, 17:19-22:12), Section 204.5 (in Section 11, 22:15-25:6), Section 205 (in Section 12, 25:9-26:7), Section 207 (in Section 13, 26:10-29:7), and Sections 208, 209, 210, 211, 221 (in Section 14, 29:8-11). The proposed Bill would repeal sections 202 (in Section 15, 29:12-31:21], Sections 212 and 213 (in Section 16, 31:22-41:15), Sections 214, 215, 216 and 217 (in Section 17, 41:16-56:8), Sections 219, 219.1, 220, 220.5, and 222 (in Section 18, 56:9-69:11), Sections 224, 225, 226, and 227 (in Section 19, 69:12-72:4). Approval by the U.S. Congress would be needed to amend sections 201, 204, 204.5, 205, 207-11, 221 and to repeal sections 214, 215, 216, 217, 219.1, 220.5, 226, and 227 of the Hawaiian Home Lands Act, 1920.

Section 8 also assigns a new role for the U.S. Secretary of the Interior to approve any land transfers that Native Hawaiian Trust Corporation might engage in. [17:13.]

Conclusion. H.B. 2340 as presently written is deeply flawed. It purports to constitute a final solution to the claims of the Native Hawaiian people against the State of Hawai`i, but

it includes no mechanism to determine whether the Native Hawaiian people favor this solution. It adopts one of the many possible models for self-government and would impose it upon Native Hawaiians without giving them an opportunity to consider and debate the merits of the other approaches that could be chosen. It appears to be written with little understanding of the struggles that have taken place during the past two decades to remedy the wrongs inflicted on the Native Hawaiian people, to increase the assets controlled by the Native Hawaiian people, and to promote a self-determination process. Even the definition of "Native Hawaiian" in the Bill is unrelated to the definition in existing statutes and makes no reference to the status of Native Hawaiians as "aboriginal people."

Because the Bill contains no details on the lands and resources that would be conveyed to the Native Hawaiian Trust Corporation as part of this final solution, it is impossible to evaluate whether the settlement package would constitute a fair resolution of the extensive claims that the Native Hawaiians have against the State of Hawai`i.

The repeal of H.R.S. Chapter 10 (including the amendments introduced through Act 304 (1990)) and Chapter 673 constitute significant changes in the contractual relationship between the State of Hawai`i and the Native Hawaiian people and would be viewed as a violation of the Contract Clause of the U.S. Constitution unless the land and resources conveyed to the Native Hawaiian people are deemed by them as a comparable substitute for the rights and assets that are taken from them.

Transferring the assets of OHA and DHHL to a new Native Hawaiian political entity, perhaps also eventually with the assets of the private ali`i trusts, is an idea that has been viewed as desirable by many Hawaiians, although the question of timing is always a difficult

one. Combining DHHL with OHA was actively discussed as a desirable goal, for instance, at the 1978 Con Con when OHA was created.

But H.B. No. 2340 does not promote an acceptable self-determination process leading to self-government. The powers allocated to the Native Hawaiian Trust Corporation are exceedingly modest, excluding the powers to tax and to establish a judiciary, for instance. The Corporation would run the Hawaiian-language immersion programs, but what about other schools? Could the Corporation start a college or university? Law enforcement is not mentioned, except on Kaho`olawe, where it would exist. Would state laws apply on lands controlled by the Corporation? What about the power to zone the lands, to establish welfare and service programs, to administer health-care facilities, to charter corporations, to build roads, and so on? Would the laws regarding gambling that apply in Indian Country in the rest of the United States also apply on the lands controlled by the Corporation? This Bill only begins to examine the possibilities on this subject. And while it would give a limited immunity to the Trustees, it would not protect the Corporation itself from suit or from punitive-damage awards.

The failure of H.B. No. 2340 to provide any mechanism to include the Native Hawaiian people in the important decisions that lie ahead makes this Bill unacceptable as a vehicle for resolving the disputes between the Native Hawaiians and the State. The consistent decisions made 20 years ago at the 1978 Con Con and in subsequent legislative sessions have been clearly designed to promote self-determination and self-government for the Native Hawaiian people. H.B. No. 2340 appears to be based on the opposite premise, that something far short of that goal would be acceptable and appropriate, and that the Legislature

can impose a solution on the Native Hawaiian people.

Some event needs to occur--something like a constitutional convention--where delegates elected by the Native Hawaiian people consider their options and make choices that would then be voted on by all persons of Hawaiian ancestry. Only after such a sequence of events occurs, and only after the Native Hawaiians establish a self-governing body to govern their lands and resources, will they have exercised their inalienable right of self-determination.