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H.R. 2314, "NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009"

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

Thursday, June 11, 2009

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LEGISLATIVE HEARING ON H.R. 2314, "NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009."

Thursday, June 11, 2009
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:04 a.m. in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Hastings, Young, Kildee, Faleomavaega, Abercrombie, Napolitano, Bordallo, Wittman, Fleming, Coffman, and Lummis.

STATEMENT OF THE HONORABLE NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee on Natural Resources will come to order. We are meeting today to conduct a hearing on H.R. 2314, the Native Hawaiian Government Reorganization Act of 2009 introduced by our colleague from Hawaii, Congressman Neil Abercrombie. This is not the first time we have seen this legislation. It has been passed by the House over and over again, and it pains me that our efforts to establish a process to re-recognize the Native Hawaiian government have thus far been unsuccessful.

Native Hawaiians have a long history of a strong and vibrant government and culture. It is a dark chapter in United States history that despite several treaties with the Kingdom of Hawaii, the United States military actively participated in the overthrow of the Native Hawaiian government in 1893. Nevertheless, Native Hawaiians have endured, and they have kept their traditions, their cultural identify and community alive and well.

We have with us this morning several Native Hawaiians and other individuals from Hawaii who have come here to give testimony of great importance. I would also like to welcome our dear colleague from Hawaii, Mazie Hirono, along with a good friend, Mr. Abercrombie, who is a valued member of this Natural Resources Committee. Both have worked so hard for the rights and the recognition of Native Hawaiians. I just cannot say enough about both of these individual's leadership.

In closing, I can assure you that the Committee will continue to press forward with the re-establishment of a government-to-government relationship with the Native Hawaiians and reaffirm their indigenous sovereign rights. With that, I recognize the Ranking Minority Member, Mr. Hastings.

STATEMENT OF DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you very much, Mr. Chairman, and I want to thank you also for scheduling this hearing on H.R. 2314, which as you mentioned is sponsored by our good friend, Mr. Abercrombie. Mr. Chairman, if effort and persistence were all that were necessary to enact a bill, this bill would have become law the first year that Mr. Abercrombie sponsored it. Because of my high regard for him and the bipartisan approach that he took in pursuing enactment of this bill, it really is with a sense of regret that I find myself in opposition to this bill.

The House debated identical legislation in the 110th Congress in Committee and on the Floor subsequent to which the House did pass that bill. At that time, I was a member of the Rules Committee, and I managed the rule for the consideration of this bill for the Republicans. As in the last Congress, I am opposed to enacting this bill for the same reasons that I described on the Floor then.

No new circumstantial or legal evidence has come to light to change my opinion. If anything, the latest nine to nothing Supreme Court ruling on *Hawaii v. Office of Hawaiian Affairs* decided on March 31 of this year casts a larger shadow than before on the doubtful proposition that Congress constitutionally can and should extend a recognition to a governing entity for Native Hawaiians. It bears noting that the Bush Administration threatened to veto that bill.

Though President Obama is not bound by this, the previous administration's position largely rested on constitutional concerns raised by the Department of Justice, constitutional concerns with granting recognition to an entity that is effectively based on race.

Unfortunately, because no one from the Department of Justice and Interior and the White House are here today, we really have no idea how the President came to the conclusion that this bill does not cross a constitutional boundary separating recognition of an Indian tribe from recognition of race-based government prohibited under the 14th Amendment.

In 2006, the Department of Justice sent letters to the Senate expressing deep concern that this legislation, "divide people by their race," and that the Supreme Court and lower Federal Courts have been invalidating certain state laws providing race-based qualifications for certain state programs. It would have been helpful to have someone from the Justice Department present today to expand on these concerns.

I recognize this is a different administration, but it would have been helpful. Their absence only makes me wonder if the White House does not want the Justice Department's prior legal analysis to trump the President's political support for Native American recognition. Along these lines, the Bush Administration's Office of Management and Budget issued a strongly worded veto threat

saying the bill would, "grant broad powers to a racially defined group of Native Hawaiians to include all living descendants of the original Polynesian inhabitants of what is now modern-day Hawaii."

It went on to note that members of this class, "need not have geographic, political or culture connections to Hawaii, much less some discrete Native Hawaiian community." Finally, the U.S. Civil Rights Commission represented here today at the second panel objects to recognizing the Native American governing entity, so I will look forward to hearing testimony from them and from other witnesses, and with that, Mr. Chairman, I yield back my time.

The CHAIRMAN. The gentleman from Hawaii, Mr. Abercrombie.

STATEMENT OF NEIL ABERCROMBIE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mr. ABERCROMBIE. Yes. Thank you very much, Mr. Chairman. Mr. Chairman and Mr. Hastings, members of the Committee, I am grateful that the Committee is holding the hearing today on the Native Hawaiian Government Reorganization Act of 2009. By coincidence, it is especially fitting that the hearing is today as Hawaii is celebrating King Kamehameha Day. It is a public holiday honoring the king who united the Hawaiian Islands and began the monarchy that reigned over the Hawaiian Islands.

All over the State, there will be hula festivals, floral parades, many local festivities honoring the king. Thus, it seems right on this day that we begin the Congressional process that all Native Hawaiians be recognized as indigenous people of Hawaii. The irony here, Mr. Chairman, in the light of Mr. Hastings remarks is that this, in fact, unites everyone in Hawaii regardless of their racial extraction to the degree or extent that is at issue at all, and I believe it is not.

The purpose of the bill is to provide a process for the reorganization of the Native Hawaiian governing entity for the purposes of a Federally recognized government-to-government relationship, one that exists in numerous instances throughout the nation. On this day 114 years ago, the monarchy of the Kingdom of Hawaii was overthrown by agents of the United States government. This injustice created wounds and issues that have never been healed or resolved.

Fourteen years ago, the United States government took a step toward reconciling this part of the history by passing a resolution which acknowledged the overthrow of the Kingdom of Hawaii and offered an apology to Native Hawaiians. The Native Hawaiian Government Reorganization Act would take another step in the reconciliation process by providing Native Hawaiians with the same right of self-government and self-determination that are afforded to other indigenous people on the continent of North America.

Since Hawaii was annexed as a territory, the United States has treated Native Hawaiians in a manner similar to that of American Indians and Alaskan Natives. This bill would formalize that relationship and establish parity in Federal policies toward all of our indigenous people. This bill would also provide a structured process to address the longstanding issues resulting from the overthrow of the Kingdom of Hawaii.

This discussion has been avoided for far too long because no one has known how to address or deal with the emotions that arise when these issues are discussed. The bill provides a structured process to negotiate and resolve these issues with Federal and state governments and will alleviate a growing mistrust, misunderstanding, anger and frustration about these matters. Mr. Chairman, I hesitate and will not at this time give a lecture on land tenure issues in Hawaii that extend back to the kingdom.

I can assure you that I am well aware of them and that as a result of this history that I have so briefly outlined here, the bill is before us. We believe it will resolve all these issues and resolve it in such a way as to have the overwhelming support of virtually everybody in Hawaii. This measure is supported by Hawaii's Governor, Linda Lingle. I was going to say a Republican, but I hesitate to do that because we have never had this as a majority/minority or a party issue in Hawaii—never.

As Mr. Hastings acknowledged, it has never been addressed that way in the Congress, so I want to emphasize at this point that the Governor, Hawaii's Congressional Delegation, and the State Legislature are unanimously in support of the bill. The bill is also supported by a number of organizations in Hawaii and nationally is supported by organizations who have an interest in native issues and indigenous people issues. They have passed resolutions in support of enacting this bill which, of course, I will make available to the Committee.

At this point, recognizing that we have passed this bill in previous Congresses under control of both Democrats and Republicans, I ask support of this measure and to advance the reconciliation process for one of the nation's indigenous people.

I do want to thank you, Mr. Chairman and Mr. Hastings, for giving us the opportunity to recognize on our first panel Mazie Hirono, my colleague from Hawaii, and members of the Office of Hawaiian Affairs, which was constituted as a result of legislative activity in which I was involved in the Hawaii State Legislature. We thought it was going to be the definitive way of handling some of the issues at stake in the bill today.

The Chair is here, and members of the OHA board are here as well, as well as friends of Hawaii, and I am pleased to have this opportunity to greet them and to ask for your consideration today. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Neil. Madeleine, Eni, do either of you wish recognition? I am sorry. Anybody on the Republican side wish recognition? No?

Ms. BORDALLO. Mr. Chairman, I would like to make a few statements before we——

The CHAIRMAN. The gentlelady from Guam is recognized.

STATEMENT OF MADELEINE Z. BORDALLO, A DELEGATE IN CONGRESS FROM GUAM

Ms. BORDALLO. I stand in solidarity with our colleagues from Hawaii in supporting H.R. 2314 and am a close sponsor, and I also join you, Mr. Chairman, in extending a warm aloha and welcome to our colleague from the 2nd District, Ms. Hirono, and to all those that are here this morning for this important hearing. We know

today's hearing marks continued work on this legislation since the House first passed it by voice vote as H.R. 4904 in the 106th Congress.

Trustees and representatives of the Office of Hawaiian Affairs have visited my office to discuss this matter on more than one occasion. As a Member of Congress representing a non-self-governing territory that is home to an indigenous people, the Chamorros of Guam, I come to this discussion with an added appreciation for and a sensitivity to the inherent rights of the indigenous peoples.

Native Hawaiians continue to engage in traditional cultural practices spanning all aspects of daily life and industry including traditional agricultural methods, fishing and substance practices. It is important that Congress recognize, protect and respect these indigenous practices. The bill before us today, Mr. Chairman, would authorize a long over-due process of Federal reorganization for the Native Hawaiian government entity, and our acting favorably on it would be entirely consistent with the responsibilities and the principles that this Committee is called to uphold.

I, therefore, strongly support the efforts to bring just and due Federal recognition for the Native Hawaiians in recognizing the steadfast work of the Hawaiian delegation, especially my colleagues, Mr. Neil Abercrombie and Ms. Hirono, as well as Senators Akaka and Inouye for developing a good bill that outlines a process for appropriate Federal recognition for the Native Hawaiian people.

As we continue this discussion, it is important for all of us to remember and understand that the Kingdom of Hawaii was overthrown with the involvement of the United States Minister and the U.S. Military. Congress recognized this injustice through the passage of the Apology Resolution in 1993, and now it is time for us to act to address the consequences of that moment in history by advancing H.R. 2314 and again, Mr. Chairman, I thank you for the opportunity to make this statement.

This bill has my support, and I hope we can move it to the Floor quickly after this hearing today.

[The prepared statement of Ms. Bordallo follows:]

Statement of The Honorable Madeleine Z. Bordallo, a Delegate in Congress from Guam

Mr. Chairman: I have brief remarks to offer. I stand in solidarity with our colleagues from Hawaii in supporting, H.R. 2314, and am a cosponsor.

I also join you, Mr. Chairman, in extending a warm Aloha and welcome to our colleague from the 2nd District, Ms. Hirono, and to all those who are here this morning for this important hearing.

We know today's hearing marks continued work on this legislation since the House first passed it by voice vote as H.R. 4904 in the 106th Congress.

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I, therefore, strongly support the efforts to bring just and due federal recognition for Native Hawaiians and recognize the steadfast work of the Hawaiian Delegation, especially Mr. Abercrombie, and Ms. Hirono, as well as Senators Akaka and Inouye, for developing a good bill that outlines a process for appropriate federal recognition for the Native Hawaiian people.

As we continue this discussion, it is important for all of us to remember and understand that the Kingdom of Hawaii was overthrown with the involvement of the United States Minister and the U.S. military. Congress recognized this injustice through the passage of the Apology Resolution in 1993, and now it is time to for us to act to address the consequences of that moment in history by advancing H.R. 2314.

Again, this bill has my support, and I hope we can move it to the floor quickly after this hearing today.

The CHAIRMAN. The Gentleman from American Samoa, Eni Faleomavaega.

STATEMENT OF ENI F.H. FALEOMAVAEGA, A DELEGATE IN CONGRESS FROM AMERICAN SAMOA

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I would like to ask unanimous consent that my statement be made part of the record?

The CHAIRMAN. Without objection.

Mr. FALEOMAVAEGA. And I do want to again personally welcome our colleague, Ms. Hirono, from the great State of Hawaii for her presence and to hear from her as well as Ms. Haunani Apoliona, the Chairwoman of the Office of Hawaiian Affairs with us and members of the Board of OHA.

Mr. Chairman, I had a statement. It was about 100 pages that I was going to share with the members of the Committee this morning, but in the essence of time, I am going to be somewhat brief on the matter. I do want to thank our distinguished Ranking Member, Mr. Hastings, for his presence and realizing that we may not necessarily agree on the issues of the bill that is now before this Committee.

While it is true that there is no presence of the Administration to testify before the Committee, I am certain that in the coming weeks, in the near future that we will definitely receive an official position from the Administration rather than from the Department of the Interior or even from the White House. It is no secret, Mr. Chairman, that the Bush Administration for some eight years has always been against supporting this bill based on some of the Court cases that have come before the Supreme Court as it relates to the rights of Native Hawaiians.

It is interesting that we can legalize an issue and say that that is the correct way to move and to say that it was a legal decision that was made so, therefore, it is true. I think we only need to think of the fact that one of the Supreme Court decisions called *Plessy v. Ferguson* where the doctrine of equal but separate clause came into being.

For many, many years, our whole country was following that Supreme Court decision saying separate but equal, meaning that different races in our community throughout the country and the states were able to practice this "equal but separate" provision where blacks had to sit at the back of the bus; they had to eat in separate restaurants. The bottom line, Mr. Chairman, it was

racism at its best, and it was not until 1954 that another Supreme Court decision came about.

It was *Brown v. Board of Education*, and that decision overturned the entire doctrine but separate dividing the races or dividing the peoples in our great country to the extent now that we have the Civil Rights Act, the Voting Rights Act where African Americans finally after a hundred some years have come to realize their constitutional rights with the presumptive belief most of us to think that the Constitution is blind.

It doesn't give any preference to any certain class, race or people but that it should be equal under the law. I want just to note I suppose because I have cultural links the Native Hawaiian people, Mr. Chairman, I for one not only treasure this understanding, and I call them my Native Hawaiian cousins because they are related to me ethnically by heritage, by legacy and our history. I just wanted to note as a little matter of history, Mr. Chairman, some 2000 years B.C. Polynesians settled on these Hawaiian Islands.

Some came from Tahiti. Some came from Samoa. There were other Polynesian groups that came and settled on these islands. At the time of Captain Cook, there were some 300,000 Native Hawaiians living there. Interestingly enough, it wasn't until about 2,000 years later that finally, as my colleague, from Hawaii has stated earlier that this great warrior king by the name of Kamehameha for the first time united the Hawaiian Islands with the warriors, some 30,000 warriors.

Can you just picture now, Mr. Chairman, if you can just kind of picture, imagine what the Hawaiian Islands look like, and from the big Island of Hawaii, this warrior king with 30,000 warriors and some 900 war canoes started a task which took him almost 10 years to finally unite all of the Hawaiian Islands in one rule. From King Kamehameha, there was an organized duly recognized sovereign nation for some 100 years before the illegal and unlawful overthrow of Queen Liliuokalani's kingdom in the late 1890s.

I can go through that whole rendition of the history, Mr. Chairman, but I just wanted to share that this is not the question of race. I know that critics and my colleagues on the other side of the aisle have always said that they don't like this bill because it is race-based. It gives special preference for Native Hawaiians.

I think we need to understand with a clear perspective that Native Hawaiians are the only other indigenous native peoples under the administration of this great nation very similar, in fact exactly the same, as the American Indians as well as the Native Alaskans. I think all we are trying to do is to complete the circle to the extent that the Native Hawaiians ought to be given the same treatment as we give Native Alaskans and the American Indians, and I don't see what is so complicated by this.

This suggests well, this is racial preference. If it is, then why are we giving racial preferences in countless numbers of Congressional enactments and laws as well as Supreme Court decision recognizing the special relationship, the trust responsibility that Congress has under the Constitution. I wish my good friend from Michigan was here because the first thing he will do is hand out the Constitution to our colleagues reminding our colleagues about

the important and special relationship existing between the Congress and Native American tribes.

What we are trying to fulfill here, Mr. Chairman, with this legislation simply is going to try to complete the cycle of allowing Native Hawaiians the same privileges, same opportunities that have been given this right to establish a government within our national government just as we have done for the Navajo Nation or some 562 other Native American tribes that have been officially recognized by the Congress.

I wanted to share with my colleagues, Mr. Chairman, that I think at the time that our friends in Europe were trying to determine if the planet was round or was flat and for fear that they are going to fall over the edge of the planet they had to stay close to the mountains to make sure that they don't get off the edge, but I wanted to share with my colleagues this photo here.

Mr. Chairman, it is a picture of what my Hawaiian cousins built in the 1970s. It is a replica of the Polynesian voyaging double-hull canoe that was built for which the Native Hawaiian community and their leaders set sail from Hawaii to Tahiti to the Cook Islands, the Cook Islands to New Zealand to Tonga to Samoa, my own islands, back to Tahiti then to Hawaii, and it was my privilege to serve as a crew member of this Polynesian voyage in canoe, Mr. Chairman, for which took us about 27 days to sail from Tahiti to Hawaii.

The point I wanted to make here, Mr. Chairman, there are some 400,000 Native Hawaiians living right now, the largest indigenous inhabitants living under the sovereignty of our country are Native Hawaiians, and I think it would be a travesty in justice and fairness to our whole system if this bill is not passed. They are not asking, they are not begging for anything. They just want to be treated fairly as other indigenous native peoples.

I think this is what this bill is about, and I sincerely hope that in the course of our hearings in the coming weeks that my good friend from Washington might have a change of heart in understanding and appreciating what the Native Hawaiians have had to endure for the last 100 years, and again I commend and thank my good friend from Hawaii, Congressman Abercrombie.

I associate myself with all that he has said about the need for this legislation to again pass this Committee, pass by the House, and hopefully we will get it to the White House and have President Obama sign off on it. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you, Eni. Mazie, we welcome you to the Committee, and again thank you so much for your leadership on this issue. You may proceed as you desire.

STATEMENT OF MAZIE K. HIRONO, U.S. CONGRESSWOMAN, HAWAII 2ND DISTRICT

Ms. HIRONO. Thank you, Mr. Chairman and Ranking Member Hastings and all of the members of the Committee. Aloha. Thank you for this opportunity to testify on H.R. 2314. I particularly appreciate the comments made by my colleagues, Abercrombie of course, Bordallo and Faleomavaega as well as your comments, Mr. Chairman, because I feel as though I can just rest on your com-

ments. However, I am here, so I am going to proceed with my testimony.

I begin, of course, by wishing all of you a Happy Kamehameha Day. In Hawaii today is a holiday. We celebrated Kamehameha Day here in Washington, D.C., on Sunday where more than 400 people came to drop leis around the Kamehameha statue in Emancipation Hall. King Kamehameha I was the king who united the Hawaiian Kingdom and established the Kingdom of Hawaii in 1810, and it is for his people, the Native Hawaiians, that H.R. 2314 seeks to end years of injustice and provide a path to self-determination.

The kingdom of Hawaii was overthrown in 1893. Hawaii's last monarch queen, Liliuokalani, was deposed by an armed group of businessmen and sugar planters who were American by birth or heritage, but they were aided and abetted by U.S. Troops. The Queen agreed to relinquish her throne under protest to avoid bloodshed. She believed the United States with which Hawaii had diplomatic relations, not to mention treaties, would restore her to the throne.

As we now know, despite the objections of President Grover Cleveland, the injustice of the overthrow of an independent nation was allowed to stand, and the Republic of Hawaii was established. In 1898, the United States annexed Hawaii. Prior to annexation, a petition drive organized by Native Hawaiians secured thousands of signatures, almost two-thirds of the Native Hawaiian population, opposing annexation.

These historical documents are now a part of our national archives. Native Hawaiian culture was under siege. The Republic of Hawaii prohibited the use of the Hawaiian language in schools. Everyday use of the Hawaiian language diminished greatly, and it was in danger of dying out. Hawaiians were pressured to assimilate and much of their vibrant culture was lost. Hawaii became a state in 1959. Beginning in the late 1960s and early 1970s, the Native Hawaiian Cultural Rediscovery began in music, hula, language and other aspects of the culture.

People of all ethnicities in Hawaii respect and honor the Native Hawaiian culture. We are not threatened by the idea of self-determination by Native Hawaiians. In 1978, Hawaii convened a constitutional convention that was designed in part to right some of the wrongs done to Native Hawaiians by proposing changes to our state constitution. The constitutional convention created the Office of Hawaiian Affairs, or OHA, so that Native Hawaiians would have some ability to manage their own affairs on behalf of Native Hawaiians.

The people of Hawaii ratified the creation of OHA in our state constitution and voted to allow the trustees of OHA to be elected solely by Native Hawaiians. The provisions relating to the election of OHA trustees was challenged in *Rice v. Cayetano* all the way to the U.S. Supreme Court, which heard the case in 1999. I attended the hearing at the Supreme Court while I was serving as Hawaii's lieutenant Governor, and the Court ruled that the State of Hawaii could not limit the right to vote in a state election to Native Hawaiians.

This decision does not stand for the proposition that Native Hawaiians are non-indigenous people. I also attended the more recent hearing involving OHA and again that hearing before our United States Supreme Court raised other issues. The issue was not whether Native Hawaiians are indigenous people. I was in the Hawaii State Legislature when we approved creation of Hawaiian language emergent schools recognizing that language is an integral part of a culture and people.

Public Hawaiian language preschools, called Pūnana Leo, were started in 1984. We now have Hawaiian language elementary, middle and high schools in Hawaii, and a new generation of fluent Hawaiian language speakers are helping to keep this beautiful and culturally important language alive. Other native peoples are looking to Hawaii as a model as a means of preserving and perpetuating their native languages. I believe how we treat our native indigenous people reflects our values and who we are as a country.

Clearly, there is much in the history of our interactions with the native peoples of what is now the United States that makes us less than proud, but one of the great attributes of America has always been our ability to look objectively at our history, to learn from it, and when possible to make amends. H.R. 2314 is supported by the great majority of Hawaii's residents, by its Republican Governor, by our State Legislature and by dozens of organizations.

In 2007, the U.S. House of Representatives passed H.R. 505, an earlier version of this bill by a vote of 261 to 153. This was the second time that the House had recognized the need for Native Hawaiian self-determination. The State of Hawaii motto, which was also the motto of the Kingdom of Hawaii is Ua mau ke ea o ka aina I ka pono, which translates to the life of the land is perpetuated in righteousness.

Native Hawaiians, like American Indians and Alaska Natives, have an inherent sovereignty based on their status as indigenous native people. I urge your support of H.R. 2314. Mahalo nui loa, aloha, and I would be happy to respond to any questions you may have.

The CHAIRMAN. Thank you, Mazie. Ranking member? Members on my left or right?

[The prepared statement of Ms. Hirono follows:]

Statement of The Honorable Mazie K. Hirono, a Representative in Congress from the State of Hawaii

Mr. Chairman, Ranking Member Hastings, and members of the Committee:

Thank you for this opportunity to testify today on H.R. 2314, the Native Hawaiian Government Reorganization Act, which provides a measure of justice for the indigenous, native people of the Hawaiian islands.

I would like to begin by wishing all of you a happy Kamehameha Day. Today is a state holiday in Hawaii, where we celebrate King Kamehameha I, who united all of the Hawaiian islands and established the Kingdom of Hawaii in 1810. It is for his people, the Native Hawaiians, that H.R. 2314 seeks to end years of injustice and provide a path to self-determination.

The Kingdom of Hawaii was overthrown in 1893. Hawaii's last monarch, Queen Liliuokalani, was deposed by an armed group of businessmen and sugar planters, who were American by birth or heritage, with the support of U.S. troops. The Queen agreed to relinquish her throne, under protest, to avoid bloodshed. She believed the United States, with which Hawaii had diplomatic relations, would restore her to the throne. It is important to note that the sovereign nation of Hawaii had treaties with other nations, including the United States, including: Great Britain, France, Germany, Italy, Japan, and Russia. As we now know, despite the objections of U.S.

President Grover Cleveland, the injustice of the overthrow of an independent nation was allowed to stand, and the Republic of Hawaii was established.

In 1898, the United States annexed Hawaii. Prior to annexation, a petition drive organized by Native Hawaiians secured signatures of almost two-thirds of the Native Hawaiian population opposing annexation. The total was 29,000 signatures out of an estimated Native Hawaiian population of 40,000. These historical documents are now a part of our National Archives.

Native Hawaiian culture was under siege. The Republic of Hawaii prohibited the use of the Hawaiian language in schools. Everyday use of the Hawaiian language diminished greatly, and it was in danger of dying out. Hula dancing, which had been suppressed by the missionaries and then restored by King Kalaukaua, who preceded Queen Liluokalani, survived but did not flourish. Hawaiians were pressured to assimilate and much of their vibrant culture was lost.

In 1903, Prince Jonah Kuhio Kalanianaole was elected to serve as Hawaii's delegate to Congress. One of his most notable achievements was the passage of the Hawaiian Homes Commission Act of 1920, which set aside some 200,000 acres of land for Native Hawaiians. The reason for the legislation was the landless status of so many Native Hawaiians, who were displaced by newcomers to the islands and became the most disadvantaged population in their native land. Congress passed the Hawaiian Homes Commission Act, which is still in force, in recognition of its trust responsibility toward Native Hawaiians.

Hawaii became a state in 1959. Beginning in the late 1960s and early 1970s, a Native Hawaiian cultural rediscovery began in music, hula, language, and other aspects of the culture. This cultural renaissance was inspired by hula masters or kumu hula, who helped bring back ancient and traditional hula; musicians and vocalists, who brought back traditional music and sang in the Hawaiian language; and political leaders, who sought to protect Hawaii's sacred places and natural beauty.

This flourishing of Hawaiian culture was not met with fear in Hawaii, but with joy and celebration and an increased connection with each other. People of all ethnicities in Hawaii respect and honor the Native Hawaiian culture. We are not threatened by the idea of self-determination by Native Hawaiians.

In 1978, Hawaii convened a constitutional convention that was designed, in part, to right some of the wrongs done to Native Hawaiians by proposing changes to the state constitution. The constitutional convention created the Office of Hawaiian Affairs or OHA so that Native Hawaiians would have some ability to manage their own affairs on behalf of Native Hawaiians. The people of Hawaii ratified the creation of OHA in the state constitution and voted to allow the trustees of OHA to be elected solely by Native Hawaiians.

The provision relating to the election of OHA trustees was challenged in *Rice v. Cayetano* all the way to the U.S. Supreme Court, which heard the case in 1999. I attended the hearing at the Supreme Court while I was serving as Hawaii's Lieutenant Governor. The Court ruled that the State of Hawaii could not limit the right to vote in a state election to Native Hawaiians. This decision does not stand for the proposition that Native Hawaiians are non-indigenous people.

The 1978 Constitutional Convention, or ConCon as it is known in Hawaii, also laid the ground work for the return of some federal lands to Native Hawaiians, including the island of Kahoolawe, which is currently held in trust for a future Native Hawaiian governing entity. The ConCon also designated the Hawaiian language along with English as the official state languages of Hawaii for the first time since the overthrow in 1893.

I was in the Hawaii State Legislature when we approved creation of Hawaiian language immersion schools, recognizing that language is an integral part of a culture and people. The Hawaiian language was in danger of disappearing. Public Hawaiian language preschools, called Punana Leo, were started in 1984. We now have Hawaiian language elementary, middle, and high schools in Hawaii, and a new generation of fluent Hawaiian language speakers are helping to keep this beautiful and culturally important language alive. Other native peoples are looking to the Hawaii model as a means of preserving and perpetuating their native languages.

I believe how we treat our native indigenous people reflects our values and who we are as a country. Clearly, there is much in the history of our interactions with the native people of what is now the United States that makes us less than proud. But one of the great attributes of America has always been the ability to look objectively at our history, learn from it, and when possible, to make amends.

H.R. 2314 is supported by the great majority of Hawaii's residents, by its Republican governor, by our State Legislature, and by dozens of organizations. In 2007, the U.S. House of Representatives passed H.R. 505, an earlier version of the bill, by a vote of 261 to 153. This was the second time the House had recognized the need for Native Hawaiian self-determination.

The State of Hawaii motto, which was also the motto of the Kingdom of Hawaii, is "Ua mau ke ea o ka aina i ka pono," which translates to "the life of the land is perpetuated in righteousness." Native Hawaiians, like American Indians and Alaska Natives, have an inherent sovereignty based on their status as indigenous, native people. I urge your support of H.R. 2314.

Mahalo nui loa (thank you very much).

Mr. FALEOMAVAEGA. Mr. Chairman, I want to associate myself with the most eloquent statement presented by Ms. Hirono before our Committee, and I want to say absolutely I join her and commend her and support everything that she has said concerning this bill. Thank you, Mazie. I appreciate it.

Ms. HIRONO. Mahalo.

Mr. FALEOMAVAEGA. Mahalo.

The CHAIRMAN. The gentleman from Hawaii.

Mr. ABERCROMBIE. Yes. Thank you, Mr. Chairman. Representative, I don't know if you have had an opportunity to look at the testimony of Ms. Heriot, who is a Commissioner of the United States Commission of Civil Rights. Have you had the opportunity?

Ms. HIRONO. I did briefly read her testimony, yes.

Mr. ABERCROMBIE. Yes. Without going in any great length at it at this time, among other things that are cited in there is the Admissions Act of 1959 when Hawaii became a state. The contention here in this testimony, one of the contentions is that this bill that you and I are supporting now is racially based. Could you elaborate on that in terms of why we think this is not the case?

Ms. HIRONO. There is an entire line of other cases all the way to the U.S. Supreme Court that talks about the special relationship that the United States has with indigenous people, the Native Americans and the Alaska Natives, so the Native Hawaiians are an indigenous people. There is a whole line of cases as I mention, and there is yes, a line of cases relating to equal protection under the 14th Amendment. This is not an equal protection issue. I think this is where the crux of the difference is, that this is not a race-based legislation.

It is based on the acknowledgement that Native Hawaiians are an indigenous people. and it those line of cases that apply, not the line of cases that relate to equal protection.

Mr. ABERCROMBIE. Is it not one of the elements of the Admissions Act, which is cited in this testimony, "One of the five purposes was for the betterment of the conditions of Native Hawaiians as defined in the Hawaiian Homes Commission Act 1920, as amended."

Ms. HIRONO. That is correct.

Mr. ABERCROMBIE. And were we not both in the legislature when we developed what we hoped was going to be the definitive way of handling this situation when we put the Office of Hawaiian Affairs together?

Ms. HIRONO. Well, I was not in the legislature until 1980. Clearly, I supported the 1978 constitutional convention, which proposed the creation of OHA, which was ratified by the majority of the people of Hawaii, and yes, we have attempted when I was in the legislature for 14 years to implement the provisions of the creation of OHA.

Mr. ABERCROMBIE. The land that is referred to there, again in this testimony talks about ceded land. Would you elaborate for a moment as to what the phrase ceded land means in the context of Hawaiian history?

Ms. HIRONO. Well, I know that there is a legal definition regarding ceded land, but it represents lands that were held by the Federal government when Hawaii became a republic or annexed. These lands when Hawaii became a state were then given over to the State for five purposes, one of which was to assist the Native Hawaiians, and so the State Constitution also requires that certain amounts of revenues from ceded lands should go to Native Hawaiians, and that is an issue that is still being debated and addressed in Hawaii.

Mr. ABERCROMBIE. Is it not the case then that the lands, the ceded lands, are held in trust by the State?

Ms. HIRONO. Yes.

Mr. ABERCROMBIE. They do not belong to the State?

Ms. HIRONO. No. It is held in trust, and, of course, one of the trust purposes is for the benefit of Native Hawaiians.

Mr. ABERCROMBIE. Just one further point. With regard to elections that have been held so far, is it not the case that when the original bill was put forward, the constitutional amendment was put forward to establish the Office of Hawaiian Affairs, and Native Hawaiians were doing the voting that people who were not Native Hawaiians were elected to be trustees in the Office of Hawaiian Affairs?

Ms. HIRONO. Are you talking about after the *Rice v. Cayetano* hearing?

Mr. ABERCROMBIE. No, no. Before.

Ms. HIRONO. As far as I know, before *Rice v. Cayetano* it was only Native Hawaiians who could vote in that election.

Mr. ABERCROMBIE. When people voted, anybody who was running was in support of the purposes as indicated in the Admissions Act, were they not? Was that ever seriously disputed by anybody that you can recall?

Ms. HIRONO. I don't think so.

Mr. ABERCROMBIE. OK. Is it fair to say then that in Hawaii the bill is regarded and the intention of the bill is regarded to deal with the historical realities and political realities and has never been considered to be racially based except by those who try to indicate that that is what they think?

Ms. HIRONO. That is correct. Those of us who have addressed this issue, who have thought about it, who have read the various opinions, we have never viewed this as a race-based issue. It truly is recognizing Native Hawaiians as the peoples that were there long before Captain Cook so-called discovered the Sandwich Islands.

Mr. ABERCROMBIE. How do you answer the question then or the proposal or the proposition that H.R. 2314 is unconstitutional?

Ms. HIRONO. They are wrong. As I said, there are appropriate lines of cases that apply to the special relationship that the United States has native peoples. It is those line of cases that we should be looking at.

Mr. ABERCROMBIE. The testimony that I referred to says as follows: "By retroactively creating a tribe of individuals who are already full citizens of both the United States and the State of Hawaii and who do not have a long and continuous history of separate self-governance. H.R. 2314 would be breaking new ground." Do you have a comment on that statement?

Ms. HIRONO. I cannot disagree more strongly with that statement because there was a Kingdom of Hawaii recognized by the United States. We had a number of treaties. The Kingdom of Hawaii, a sovereign nation, had a number of treaties, not just with the United States but with France, Great Britain, other countries. They were recognized throughout the world as a sovereign nation.

Just because they were not constituted as tribes does not take away from the fact that Native Hawaiians are an indigenous peoples who should be treated the same way as treat Alaska Natives and American Indians.

Mr. ABERCROMBIE. So is it unfair to derive from this statement that Native Hawaiians are being punished because they didn't fit a definition or a category of a Constitution that was derived when they were, in fact, a separate kingdom at the time?

Ms. HIRONO. I would say that any kind of an argument that says that, that Native Hawaiians are not an indigenous people, is in my view very wrong.

Mr. ABERCROMBIE. Thank you. Thank you, Mr. Chairman.

Ms. HIRONO. Thank you.

Mr. KILDEE. Chairman, may I?

The CHAIRMAN. Mr. Kildee is recognized.

Mr. KILDEE. Just briefly, and thank you very much. I am cosponsor of this bill and feel very strongly about it. I am Co-Chair of the Native American Caucus. I have dealt with Native Americans for many, many years. America is a land of diversity within unity, and that is our strength, our diversity within unit. The sovereign continental Native Americans have not been less in their patriotism, in their unit, in their service to our country.

We can determine that in our wars, a number of the continental Native Americans, and the fact that there is a little Pacific Ocean separating Hawaii from the continental United States should not lessen the same rights of having a sovereignty within the United States. I feel very strongly on this that Native Americans, including Native Hawaiians, have proven their loyalty through many wars, through many diversities of this country.

I am happy that in my State of Michigan, I have about 12 tribes of sovereign Native Americans, all of whom have regularly demonstrated their Americanism and kept their own traditions also. I just can't understand why we can't apply that same principal of equity and justice to the Native Hawaiians, and I support you in this.

The CHAIRMAN. Does the gentleman yield?

Mr. KILDEE. I yield, yes.

Mr. FALEOMAVAEGA. I just wanted to follow up Congressman Abercrombie's line of thinking about the Supreme Court case that seems to raise the issue of race-based. The fact that there is a white man living in Hawaii who claims that his rights as a voter was discriminated because he was not allowed to vote as other Native Hawaiians as required by State law and the State Constitu-

tion, I would like to ask the gentlelady wasn't Hawaii a U.S. Territory from 1900? For the first 20 years, it was represented by a territorial delegate. His name was Prince Kuhio for some 20 years. Is that true?

Ms. HIRONO. That is correct.

Mr. FALEOMAVAEGA. And wasn't one of the conditions in the Admissions Act before Hawaii could become a state that the Congress just simply sloughed off all its constitutional responsibilities to the Native Hawaiians by giving this right of authority to the State government to administer the needs of Native Hawaiians?

Ms. HIRONO. Congress retains some jurisdiction because of the creation of the Hawaiian Homes Commissions Act, so Congress has always acknowledged its special relationship with native peoples, including Native Hawaiians.

Mr. FALEOMAVAEGA. But the only reason why the State took part in this whole relationship with the Native Hawaiians because Congress just simply said State of Hawaii, you take responsibility for what you can do to help the Native Hawaiians.

Ms. HIRONO. Yes.

Mr. FALEOMAVAEGA. So there was a recognition of a distinct group of Native Hawaiians as you had described earlier.

Ms. HIRONO. Definitely.

Mr. FALEOMAVAEGA. So this is not a new issue as if it was made up a couple of years ago before the Supreme Court decision to that effect.

Ms. HIRONO. I think the Rice decision is very much misinterpreted by those who claim that it is on that basis that anything relating to Native Hawaiians is race-based. That decision was based on the fact that OHA was basically a state-created entity. There is a whole line of cases that relate to state actions, and it is because of that circumstance that led to the Supreme Court making its decision the way it did.

I would like to add the Supreme Court decisions must be very carefully read because to take a decision and to extrapolate from that to areas that did not even come before the Court is really misreading the Court's decision.

Mr. FALEOMAVAEGA. And basically Justice Kennedy, who wrote the majority opinion, specifically used the 15th Amendment as the basis where on the race-based issue——

Ms. HIRONO. And it was not a 14th Amendment.

Mr. FALEOMAVAEGA. But totally ignored the basis of how the Native Hawaiians had to be treated according to what the Congress had wanted the State of Hawaii to fulfill. I just wanted to note that for the record, Mr. Chairman. I thank the gentleman from Michigan for yielding.

The CHAIRMAN. And the gentlelady from Guam.

Ms. BORDALLO. Thank you, Mr. Chairman, and I thank my colleague for giving very, very excellent testimony this morning. I mentioned in my opening statements about the passage of an apology resolution in 1993, and to me, Mr. Chairman, and members here, we recognized that this was an injustice, so I feel because of that we should now try to address the consequences of what had happened.

Because of this resolution, I think we should continue to move forward and try to rectify what had happened then, and so I strongly go on record again to reiterate my support of H.R. 2314. Thank you.

The CHAIRMAN. The gentlelady from California was here first. Ms. Napolitano, do you have questions?

Ms. NAPOLITANO. Yes, I have one, Mr. Chairman. Very interesting to hear your testimony, Mr. Hirono. I never really discussed Hawaii's interest, but I am glad to hear that this is on the table. One of the things that comes to mind, in the essence of territories, there are benefits that those territories receive. Now, in Hawaii's instance, what kind of resources or extending services would be established to benefit the Native Hawaiians if this bill passes?

Ms. HIRONO. This bill sets up a process whereby the United States can recognize a constituted Native Hawaiian governing entity. It creates a process. The passage of this bill would be the beginning of that process, but there is kinds of other issues that would relate to the kinds of things you are talking about would require the Department of the Interior, the State of Hawaii to enter into negotiations on those kinds of specifics that I believe you are asking.

It is not as though by creating this, by passing this bill that all of a sudden there is going to be all of these changes that are made without any involvement by anyone else.

Ms. NAPOLITANO. Well, that brings the next question. Have these agencies not been providing the proper assistance to a qualified state, Hawaii?

Ms. HIRONO. The Congress has passed over 150 laws that relate to Native Hawaiians, and so in that sense, there have been established any number of programs that support Native Hawaiians, but what has been missing is an acknowledgement of a Native Hawaiian governing entity, a government-to-government relationship that the Alaska Natives and the American Indian Tribes have with the United States.

Ms. NAPOLITANO. And specifically that is? Specifically, what does that allow them to be in that recognition?

Ms. HIRONO. Alaska natives and American Indians have a nation-to-nation relationship.

Ms. NAPOLITANO. OK.

Ms. HIRONO. I am not familiar with all of the specifics of the kind of legislation that applies to these entities, but the thing that we should remember is the United States has a special relationship with native peoples, and Native Hawaiians are native peoples. They are the only remaining native peoples of this country that has not attained this kind of recognition and relationship with the U.S. Government, and that is what this bill seeking to foster.

Ms. NAPOLITANO. Thank you, Mr. Chair. That answers the question.

The CHAIRMAN. Gentlelady from Wyoming, Ms. Lummis.

Ms. LUMMIS. Thank you, Mr. Chairman, and it is such a pleasure to see you here this morning, Representative Hirono. I do have some questions for you. I have read in press reports that most Hawaiians oppose this legislation. Do you believe that is a correct

statements, and do you have information to the contrary or that would support that?

Ms. HIRONO. That is not an accurate reflection of the support that this legislation of the Native Hawaiians have in Hawaii. The poll that you are referring to was a push poll, and the way the question was asked I would say most people would say that they would not support it, so that is not an accurate poll in my opinion.

Ms. LUMMIS. OK.

Ms. HIRONO. It is not a fair poll.

Ms. LUMMIS. OK.

Ms. HIRONO. The legislature of the State of Hawaii, which represents all of the people of Hawaii has time and again passed resolutions in support of this legislation. The Governor of the State of Hawaii supports it. There are numbers of organizations all across the country who support this bill, including the American Bar Association.

Ms. LUMMIS. OK. Now, I understand there may be as many as 400,000 people that are eligible to be part of the governmental entity that would come out of this bill. How would they relate to the Hawaiian government that was set up when Hawaii became a state and the United States government and other entities that are already existing such as city and county government?

Ms. HIRONO. This bill establishes a process whereby the Native Hawaiians will be enrolled as part of the group that will participate, and discussions about what a government entity should look like, but as I mentioned, the Native Hawaiians cannot on their own by themselves without any input or any kind of negotiation with the State of Hawaii as well as with the U.S. Congress, in fact, and the U.S. Department of the Interior as to the specific governing documents.

This is a bill that creates a process whereby all of those kinds of elements of what a governing structure should look like can proceed, but what that all will be in finality remains for all of the kind of input and agreement from other entities.

Ms. LUMMIS. And is that also true such as whether or not Native Hawaiians would still be required to pay state income and excise taxes? Those issues seem to be unaddressed in this bill, so is that up in the air?

Ms. HIRONO. All of those kinds of issues, anything that would allow Native Hawaiians to not pay state taxes would have to be agreed to by the State of Hawaii. I do not envision that the State of Hawaii would agree to such a thing.

Ms. LUMMIS. What about public land use?

Ms. HIRONO. All of those kinds of specific kinds of questions that you are asking me has to do with what the negotiations will result in, and as I said, this entity, this group cannot just come up with whatever they want. There are parameters that would govern. They are still members of the United States. They are still citizens of the United States with all the rights and privileges of citizens of the United States.

Ms. LUMMIS. Yet this proposed status differs significantly from Native American status under Indian law, correct?

Ms. HIRONO. Native Hawaiians were not constituted as tribes as most of us I think understand tribes, but they were a separate na-

tion. They were a kingdom. We had treaties. The Kingdom of Hawaii had treaties with the United States. They were acknowledges as a nation. As I said, because they were not constituted as tribes does not mean that they are not an indigenous peoples. They are.

Ms. LUMMIS. Yes, indeed. My questions arise from the sovereignty issues that continue to be shaped and litigated with regard to Indian law and the relationship of sovereign nations within the auspices of Indian law to the United States and to state governments, local governments, county governments, so my questions I pose to try to avoid some of the unanswered questions that continue to sort of plague inadequately fleshing out some of these issues with regard to the relationship between Indian law and non-Indian law, so thank you very much.

Mr. ABERCROMBIE. Would you yield for a moment?

Ms. LUMMIS. Indeed.

Mr. ABERCROMBIE. Yes. I think a lot of these questions, they are good questions, and they should be answered, and I think you can get a practical, everyday governing answer from Mr. Kane when he testifies. He is the Chairman of the Department of Hawaiian Homelands, and virtually everything that you just asked in everyday practice is being dealt with by Mr. Kane, and I have every confidence that he will be able to not just answer them but provide a perspective as to practically how this works.

Of course, Mr. Young is here and has more than three decade's experience of how the practical realities of dealing with questions like sovereignty are handled. They are good questions. They need to be answered, and they are being answered every day in everyday governance in Hawaii and Alaska today.

Ms. LUMMIS. Thank you, Mr. Chairman. Thank you, Mr. Abercrombie, and my time is up, and I yield back.

The CHAIRMAN. Gentleman from Alaska.

Mr. YOUNG. Thank you, Mr. Chairman. Thank you fine lady for our testimony and my buddy over here from Hawaii. I am in strong support of this legislation because we have lived through this in Alaska. I came out of this Committee, the Alaska Native Land Claims Act where we created 12 regional corporations, and we recognize them as an entity that can contribute ad to claim land. It is worked beautifully.

We have had a lot of problems to begin with because there is sort of the hostility to the aspect that well, they are no different than we are. They are different. They are natives. There is Hawaiian Natives, and there is Alaska Natives, and since 1971 now, the most strongest group of individuals in the State are the regional corporations. It helps the State. It is extremely important the recognition that would be created by this legislation.

The one thing we have to recognize in this act there isn't a native land claims act itself in Alaska. The entity once being created could supersede the State without the agreement of the State, and this is why the Governor supports it, and why the legislature supports it. This is going to be a cooperative effort to make sure that yes, they are recognized, and yes, they will have some different recognition and capabilities than they do now, but they will have bet-

ter opportunity to improve the State of Hawaii, and that is why you have the support for this legislation in Hawaii.

I am quite proud of what happened in Alaska. We have some still difference of opinion in some areas. There are those well, I am a native. I was born there. Yes, they are Caucasian. They are not original natives, and that is crucially important because there is a difference. The first aboriginals in Alaska were Alaskan natives, and they claimed 44 million acres of land. It was public land and rightfully so.

I actually proposed when I was in the State Legislature at that time 100 million acres of land because we have found out that the natives take better care of the lands than the Federal governments do, and so we only got 44 million acres of land, which is bigger than Hawaii, I believe.

[Laughter.]

Mr. YOUNG. Again, I want to compliment Neil for what he has been able to do in this effort. I have sponsored these bills over the years, and I want to compliment you on your testimony, and I hope my colleagues understand the importance this is to the native people of Hawaii and how we have worked together. Our tribes now in Alaska are working with Alaskan tribes together trying to give advise where the mistakes were made and trying to avoid those mistakes and go forth with this good piece of legislation. With that, Mr. Chairman, I yield.

Mr. ABERCROMBIE. Would you yield a moment?

Mr. YOUNG. Yes, gladly.

Mr. ABERCROMBIE. With regard to that, it is an excellent point about the 44 million acres. What we are dealing with here in practical terms is 1.8 million acres in ceded land, the former crown lands over which the State of Hawaii now has trust responsibility, and about 200,000 acres of Hawaiian homelands, which Mr. Kane directly administers on behalf of the people of the State today.

The reason that you get these questions now, in all honesty, Doc, and everybody else, is that when the 1.8 million acres were seen as essentially worthless, which is the reason that these particular lands because you could have said at the time that the entire state was crown lands because it was a kingdom, and it was operated in a feudal manner so that the chiefs and chiefesses had fiduciary responsibility in terms of their authority for all of the lands.

When we put western ideas of property and ownership into the equation, well then it became somebody's land. They owned it, and so the 1.8 million acres essentially were seen as something that the merchant bankers didn't need or that didn't belong to the inheritors of the crown lands previously. Merchant bankers came in and married Native Hawaiians and claimed land, so the 1.8 million acres wasn't seen as worth anything.

The 200,000 acres that Mr. Kane administers right now again were seen as well, we will just give that to the Hawaiians. Nobody wants it. There is no water. There is no infrastructure, There is no anything. It is not useful to anybody who wants to make money out of it, so we will give that to the Native Hawaiians. Now, come to 2010, how would you like to have, Doc, 1.8 million of acres of land in Hawaii today? How would you like to have 200,000 acres in additional land reserved for Hawaiians by Congressional act?

Mr. HASTINGS. I want to help the negotiations.

[Laughter.]

Mr. ABERCROMBIE. When we come down to it, when you get right down to the nitty gritty of all of this, this has nothing to do with the Constitution. This has nothing to do with race. This has to do with assets, land and money, and when that 1.8 million acres wasn't yielding any money, when that 200,000 acres was out there, and it didn't have any value to them, let me tell you now you got two million acres of land in Hawaii, you have hundreds of millions of dollars in funds that are under the care of the Office of Hawaiian Affairs right now, which will go to this new entity.

You have an income stream in the tens of millions of dollars coming from the lease arrangements on either the ceded lands or the Hawaiian Homelands, so that you can build houses, you can put infrastructure in. Now everybody is interested that they are not discriminated against, and what they mean is how can they get in on owning, controlling, maneuvering and manipulating that two million acres of land, the hundreds of millions of dollars and the tens of millions of dollars of income stream. I rest my case.

[Laughter.] [Applause.]

Mr. YOUNG. I am out of time.

Mr. FALEOMAVAEGA. Will the gentleman yield further?

Mr. YOUNG. If I have some time, go ahead.

Mr. FALEOMAVAEGA. Just a short note, Mr. Chairman, and also to Ms. Hirono. There is another portion of what my good friend Congressman Abercrombie noted. When the Homestead Commission Act passed in 1921 by the Congress, the descendants, and by the way the big merchants that were there controlling the economy, we call them the big five, if you will, were descendants of the missionaries who came to the islands, gave us the Bible, and now they own the land, and the Hawaiians own the Bible.

We have a nice statement from those of us from the islands, the missionaries came to do good, and they did very well. In essence, Mr. Chairman, this Homestead Commission Act was passed. The 200,000 acres were the worst portions of the land given to the Native Hawaiians supposedly to get them back to agriculture and to become self-sufficient as it was the dream and the aspirations of Prince Kuhio when he served as a territorial delegate for 20 years.

The sad story to say, that was the Hawaiians trail of many tears because they continue to suffer. From 1921, they were never given any opportunities to collectively be part of the economy, if you will, and then for all these years, this is own they have suffered, and I thank the gentlelady from Wyoming for good questions, and I sincerely hope that she will join us in appreciating what these native peoples have had to endure, and I thank the gentleman from Alaska for his support in this bill. Thank you.

The CHAIRMAN. The gentleman from Colorado. Mr. Coffman.

Mr. COFFMAN. Thank you, Mr. Chairman. You may have covered this, but if we pass this, if this legislation is passed, is there any impact to the Federal treasury? Does this drive any entitlements whereby people are not eligible for now that would be eligible for under any other legislative programs?

Ms. HIRONO. Any of those kinds of issues would have to be decided by Members of Congress, by the appropriate Interior Depart-

ment, other groups that would have to agree. There is nothing in the bill that says that there will appropriated certain sums of money under this bill.

Mr. COFFMAN. And maybe this is something for the next panel, but just to make sure, are there some reclassification issues that might occur on Native Hawaiians that would, in fact, make them eligible for an array of new programs by virtue of this?

Ms. HIRONO. There is nothing in the language of this bill that would lead me to conclude that.

Mr. COFFMAN. Thank you, Mr. Chairman. I yield back the balance of my time.

The CHAIRMAN. Any further questions or comments or history? All right. Mazie, thank you very much.

Ms. HIRONO. Thank you.

The CHAIRMAN. You have been very helpful to us and very patient with your time. You, by the way, are welcome to join the Committee for the next panel. Come on up and play deal or no deal with the Ranking Member.

Mr. ABERCROMBIE. Mr. Chairman? Mr. Chairman?

The CHAIRMAN. Yes.

Mr. ABERCROMBIE. While you are bringing up the second panel, could I just make a brief comment in answer to Mr. Coffman's again very good question? On the strictly administrative side, there is no impact according to the OMB from the previous administration, and I expect it won't be any different from this.

The other things is, it will probably have a positive impact on the Federal Treasury because business will be done, taxes will be paid as a result that we wouldn't otherwise at presently have any opportunity to collect because we can't get anything going until we get this thing done. This is going to be an enormously good thing and more taxes both locally and nationally will be paid.

The CHAIRMAN. Thank you. Our next panel, and I am going to apologize ahead of time if I butcher the pronunciation of some of the names, but I will call up The Honorable Micah Kane, the Chairman of Department of Hawaiian Homelands, Kapolei, Hawaii; The Honorable Haunani Apoliona. Neil, would you like to introduce this panel?

Mr. ABERCROMBIE. Can I help you out here?

[Laughter.]

Mr. ABERCROMBIE. Haunani Apoliona.

The CHAIRMAN. Who is the Office of Hawaii Affairs from Honolulu;, Ms. Gail Heriot, the U.S. Commission on Civil Rights, San Diego, California; Mr. Michael Yaki, the U.S. Commission on Civil Rights, San Diego, California, and Mr. Christopher Bartolomucci, a partner in Hogan & Hartson here in Washington, D.C.

Ladies and gentleman, welcome to the Committee. We appreciate the distance you have traveled in some cases and the time that you have given to be with us today. We do have all of your prepared testimonies, and they will be made part of the record as if actually read, and you are encouraged to summarize, and you may proceed in the order in which I introduced you and in the manner you wish.

STATEMENT OF THE HONORABLE MICAH KANE, CHAIRMAN, DEPARTMENT OF HAWAIIAN HOMELANDS

Mr. KANE. Thank you, Chairman Rahall.

The CHAIRMAN. Yes, Mr. Chairman.

Mr. KANE. Representative Hastings, Representative Abercrombie, Representative Hirono and members of the Committee. Thank you for this opportunity to testify in strong support of this measure. My name is Micah Kane. I am the Chairman of the Hawaiian Homes Commission. I also serve as the Director of the Department of Hawaiian Homelands, the entity that Representative Abercrombie eluded to in the prior testimony.

I come here with the support of our Republican Governor and the support of our Republican Attorney General. I would also like to thank our Representative Abercrombie for his continued support back home across the aisle. As he stated earlier, this is not a partisan issue. This is an issue that has very broad support. In fact, prior to holding this position as the Director of the department, I served as the Chairman of the Hawaii Republican Party, and even that position, our party back home passed multiple resolutions in support of this measure.

I think that fact is very important to support what Mr. Abercrombie was alluding to earlier. In 1921, Hawaiian Homes was established by an act of Congress. It was the Congress' first attempt to reconcile the past wrongs that the United States did to our Kingdom. It set aside 200,000 acres of land for the purpose of rehabilitating Native Hawaiians. In 1959, when we became a state as part of the Admission Act, the responsibility was transferred to the State of Hawaii, and today I run one of 16 departments.

I sit as a member of the Governor's cabinet, as one of nine members that are appointed by the Governor on a nine-member commission. For the last 80 years, the department has thrived. It has had its challenges, but today we manage 29 homestead communities with over 36,000 people who reside on our lands. They are democratically elected communities. Today, we are the largest master planned community developer in the State of Hawaii.

We are the largest affordable housing developer in the State of Hawaii. We are self-sufficient in our operations as the representative eluded to from the dispositions of the lands that we have. We don't take a single dollar in state taxpayer money to operate our water systems, our roadway systems, and we are very proud of that. In summarizing my testimony, and again I have to thank Representative Abercrombie for his comments, there is tremendous broad support for this measure, and it is for this simple reason because this is not new to us.

The mechanics of operating and engaging an entity like this is nothing new to the people of Hawaii nor the leadership of Hawaii. While our mission at the department is to serve a specific beneficiary group, we don't build segregated communities. When we build a park or a community center, we build it as a gather place. When we dedicate land for a public school, a private school or a charter school, it is not exclusive to Native Hawaiian children. We open it up to others.

Our resources are commonly dedicated for infrastructure improvements that go beyond just serving our community. When we

build a water line, a sewer line, or a roadway system, we take into consideration our neighbors. We are a land-locked state, and we can't operate in isolation. When you enter our communities, you don't know when you start or end, and we take pride in that. There is three primary points that I would like to make that I think are critical in our discussion today. The department of Hawaiian Homelands is the closest example of a governing entity.

That step is small for us as we move to implement the actions that the Akaka bill asks us to do. We are democratically elected communities who operate much like a county. We have five counties in the State of Hawaii. Our CIP budget would be the second largest in the State to the Honolulu County, which is the eleventh largest city in our country. We operate again with a very large CIP budget. The second point is we have become a critical component of Hawaii's economy, our social fabric and are a critical partner in overcoming major challenges our state faces.

The Department of Hawaiian Homelands is at the forefront of our state's initiative to reduce our dependency on fossil fuel. We will continue to lead in that effort, and Hawaii will benefit from that effort. The Department of Hawaiian Homelands is at the forefront of driving education opportunities both K through 12 and at the higher education level into rural communities. We are proud of that. We want to continue to partner in that effort.

Finally, we are at the forefront of helping our state overcome major infrastructure challenges much like in your states whether it be Colorado, Wyoming or California. Finally, many of the comments coming from those who have concerns about this measure seem to think that this bill may draw a line in the sand between those who have and those who have not when in reality it builds a bridge. I know it is difficult for many of you who do not come from our island to feel that, but it truly is the case.

I stand on the remainder of my testimony and thank you for your continued support. Mahalo.

[The prepared statement of Mr. Kane follows:]

Statement of Micah A. Kane, Chairman, Hawaiian Homes Commission

Aloha kakou, Chairman Rahall, Representative Abercrombie, Representative Hastings and members of this committee.

I am Micah Kane, Chairman of the Hawaiian Homes Commission, and I thank you for this opportunity to express support for this bill and to address how federal recognition plays a critical role in sustaining our Hawaiian Home Lands program.

In 1921, the United States Congress adopted the Hawaiian Homes Commission Act and set aside more than 200,000 acres of land in Hawaii to rehabilitate the native Hawaiian people. With Statehood in 1959, the responsibility to administer the Hawaiian home lands program was transferred to the State of Hawaii. The United States, through its Department of the Interior, maintains an oversight responsibility and certain major amendments to the Act require Congressional consent.

For more than 80 years, the Department of Hawaiian Home Lands has worked determinedly to manage the Hawaiian Home Lands trust effectively and to develop and deliver lands to native Hawaiians. Currently, there are over 36,000 native Hawaiians living in 29 homestead communities throughout the State. Each community is an integral part of our state's economic, social, cultural, and political fabric.

Passage of H.R. 2314 will enable the Hawaiian Homes Commission to not only continue fulfilling the mission Congress entrusted to us, but to reach incredible successes that we are only starting to realize.

These five reasons are why we need this bill to be passed:

1. Our housing program benefits the entire state.

The Department of Hawaiian Home Lands is the largest single family residential developer in the State of Hawaii and has provided nearly 3,000 families homeownership opportunities in the past five years. Each home we build represents one more affordable home in the open market or one less overcrowded home. In a state with high living costs and an increasing homeless population, there is no question that we are doing our part in raising the standard of living for all residents of our great state.

2. We build and maintain partnerships that benefit entire communities.

We think regionally in our developments and we engage the whole community in our planning processes. Our plans incorporate people, organizations (e.g. schools, civic clubs, hospitals, homeowner associations), all levels of government and communities from the entire region—not only our beneficiaries. It is a realization of an important Hawaiian concept of ahupuaa—in order for our Hawaiian communities to be healthy; the entire region must also be healthy. This approach encourages a high level of cooperation, promotes respect among the community, and ensures that everyone understands how our developments are beneficial to neighboring communities and the region.

3. We are becoming a self-sustaining economic engine.

Through our general lease program, we rent non-residential parcels to generate revenue for our development projects. Since 2003, the Department has doubled its income through general lease dispositions. We have the ability to be self-sufficient. Revenue generation is the cornerstone to fulfilling our mission and ensuring the health of our trust.

4. Hawaiian communities foster Native Hawaiian leadership.

Multi-generational households are very common in our Hawaiian homestead communities. This lifestyle perpetuates our culture as knowledge and values are passed through successive generations. These values build strong leaders and we are seeing more leaders rising from our homesteads and the Hawaiian community at-large. It is common to see Native Hawaiians in leadership positions in our state. Three members of Governor Lingle's cabinet are Hawaiian, as are almost one-fifth of our state legislators. Hawaiian communities grow Hawaiian leaders who make decisions for all of Hawaii.

5. Hawaiian home lands have similar legal authority as proposed under H.R. 2314.

Because of our unique legal history, the Hawaiian Homes Commission exercises certain authority over Hawaiian home lands, subject to state and federal laws, similar to that being proposed under H.R. 2314.

The Commission exercises land use control over our public trust lands, but complies with State and County infrastructure and building standards. The Commission allocates land within its homestead communities for public and private schools, parks, churches, shopping centers, and industrial parks.

Amendments to the trust document, the Hawaiian Homes Commission Act, require State legislative approval and, in some instances, Congressional consent. Hawaiian home lands cannot be mortgaged, except with Commission approval, and cannot be sold, except by land exchanges upon approval of the United States Secretary of the Interior.

The State and Counties exercise criminal and civil jurisdiction on Hawaiian home lands. Gambling is not allowed and the Commission cannot levy taxes over Hawaiian home lands.

The Hawaiian Home Lands Trust and our homesteading program is part of the essence of Hawaii. On behalf of the Hawaiian Homes Commission, I ask that you approve this bill so we can work toward recognition and continue doing good work for all the people of Hawaii.

STATEMENT OF THE HONORABLE HAUNANI APOLIONA, CHAIRWOMAN, OFFICE OF HAWAIIAN AFFAIRS, HONOLULU, HI

Ms. APOLIONA. Chairman Rahall, Representative Hastings, Congressman Abercrombie, Congresswoman Hirono and members of

the Committee of Natural Resources, I am Haunani Apoliona, a Native Hawaiian, elected to the Office of Hawaiian Affairs Board of Trustees in 1996 and since 2000 have served as the chairperson of the nine-member elected Board of Trustees, two of whom are here today, Trustee Akana and Trustee Machado behind me, along with our Board of Trustees Council, Former Associate Justice of the Hawaii State Supreme Court, Robert Klein.

Mahalo for holding this hearing today. As was stated much earlier this morning, it is a special day. It is a holiday in our state for King Kamehameha honoring this native Hawaiian leader, indigenous leader who unified the Hawaiian Islands, so OHA proudly is here today to testify in support of H.R. 2314. In 1978, Hawaii citizens convened a constitutional convention and Hawaii voters later participated in a statewide referendum to ratify amendments to the Hawaii state constitution.

Included in those amendments was the authorization to establish the Office of office of Hawaiian Affairs [OHA] as the State's institutional mechanism to afford the native people of Hawaii the means to give expression to their rights under Federal law and policy to self-determination and self-governance. Since that time, OHA has administered resources, programs and services to Native Hawaiians consistent with the provisions of the compact between the United States and the State of Hawaii as embodied in the Hawaii Statehood Act.

Mr. Chairman and members of the Committee, thousands of years before western contact was first recorded in 1778, the native people of Hawaii occupied and exercised our sovereignty in the islands that were later to constitute the State of Hawaii. In 1849, our government entered into a treaty of friendship, commerce and navigation with the United States, and while our government was later removed from power by armed force in 1893, our relationship with the United States did not end.

In the ensuing years, the U.S. Congress enacted well over 150 Federal statutes defining the contours of our political and legal relationship with the United States, including Congress enacting and the President signing Public Law 103-150 in 1993 that extends apology to the Native Hawaiian people for the United States' involvement in the overthrow of our government. Today, the indigenous native people of Hawaii seek the full restoration of our native government through the enactment of H.R. 2314.

We do so in recognition of the fundamental principle that Federal policy of self-determination and self-governance assures that the three groups of America's indigenous native people, American Indians, Alaska Natives and Native Hawaiians have equal status under Federal law. Native governments in the continental United States and Alaska vary widely in governmental form and structure. Our government will be reorganized to reflect our unique history, our culture, values and traditions.

We do not seek to have our lands held in trust by the United States or the State of Hawaii or to have our assets managed by the Federal or state governments. We do not seek the establishment of new Federal programs. Federal statutes have already provided that authority, and we have been successfully administering programs under those authorities for decades. Specific to H.R. 2314, we wish

to express the need for three technical amendments with regard to certain portions of this bill.

With these technical amendments, we believe the bill will better reflect our continuing political and legal relationship with the United States. Our first and highest priority we suggest that the definition of the term Native Hawaiian in H.R. 2314 be amended to conform with the definition of Native Hawaiians in existing Federal statutes based on U.S. political relationship with Native Hawaiians. This would be achieved by amending H.R. 2314 to additionally include the definition that has been used in all of the Federal statutes affecting Native Hawaiians for more than 30 years.

The now standard definition of Native Hawaiian, which is, "the lineal descendants of those aboriginal indigenous native people who occupied and exercised sovereignty in the islands that comprise the State of Hawaii prior to 1778," we know of no statement or action by the Congress that would suggest that the Congress intends to depart from this long-standing and well-established Federal law and policy definition that has been in place for more than 30 years and which affords the maximum inclusion and participation by Native Hawaiians in the H.R. 2314 process.

Our second recommended technical amendment underscores a fundamental premise in Federal law that one of the most basic aspects of sovereignty is defining membership or citizenship in a native government. We believe that we can identify with a great measure of certainty those who would quality as Native Hawaiians under the Act, and we could capably certify to the Secretary of the Interior that each person listed on a roll of those Native Hawaiians who elect to participate in the reorganization of a Native Hawaiian government meets the definition of Native Hawaiian.

We do not believe it is a wise expenditure of Federal funds in these tough economic times to call for the establishment of yet another Federal commission when these matters can be effectively and efficiently addressed by the members of the Native Hawaiian community. Thus, we would recommend the elimination of Section 7[b] of the bill and additional conforming changes to other relevant parts of the bill that reference a commission.

Finally, we believe Section 8 of H.R. 2314 requires review and technical amendments. Current language in this section appears to shield the United States from possible liability against claims of Native Hawaiians that are available to other citizens. For instance, the current claims section is written so broadly as to bar any claims that might arise out of a personal injury or death of a Native Hawaiian for which the Federal or state governments or their representatives bear direct responsibility.

We do not believe that the Congress intends that this bill should deny Native Hawaiians their constitutional rights. Section 8 of H.R. 2314 provides a process for negotiation amongst the governments of the United States, the State of Hawaii and the Native Hawaiian people and will address many matters including assertions of historical wrongs committed by the United States or the State of Hawaii against Native Hawaiians.

The bill further provides that once resolution of the various matters listed in H.R. 2314 have been achieved, there will be rec-

ommendations for implementing legislation submitted to the Committees of the U.S. Congress, to the Governor and the legislature of the State of Hawaii.

Accordingly, we firmly believe that H.R. 2314 already contains sufficient authorization for the three governments to address and resolve Native Hawaiian grievances through the negotiations process authorized in 8[b][1][F] of the bill and that the bill is not intended to alter the status quo prior to the outcomes of that negotiation process. However, as currently formulated, certain provisions of Section 8 would alter the substantive rights of Native Hawaiians well before a negotiation process begins.

Those provisions are internally inconsistent with the philosophy of Section 8 and should be amended. Mahalo for the opportunity to testify in support of H.R. 2314. There is no legislation at this time that is more important to our people. We look forward to working with the Committee on specific legislative language consistent with our recommendations. Thank you.

[The prepared statement of Ms. Apoliona follows:]

Statement of Trustee Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs

NāʻŌiwi ʻŌlino

E ō e nā ʻŌiwi ʻŌlino ʻeā
Nā pulapula a Hāloa ʻeā
Mai Hawaiʻi a Niʻihau ʻeā
A puni ke ao mālamalama ʻeā ē

Kuʻē au i ka hewa, kuʻē!
Kū au i ka pono, kū!
Kū au i ka hewa, kūʻē!
Kū au i ka pono, kū!

Answer, O Natives, those who seek knowledge
The descendants of Hāloa
From Hawaiʻi island in the east to Niʻihau in the west
And around this brilliant world

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

Introduction

E nāalakaʻi a me nā lālā o kēia Kōmike o nā Kuleana o ka ʻAhaʻōlelo Nui o ʻAmelika Hui Pū ia, aloha mai kākou. He loa ke ala i hele ʻia e mākou, nā ʻOiwi ʻōlino o Hawaiʻi, a he ala i hehi mua ʻia e nā aliʻi o mākou, e laʻa, ʻo ka Mō ʻī Kalākaua, ke Kamaliʻiwahine Kaʻiulani, a me ka Mōʻīwahine hope o ke Aupuni Mōʻī Hawaiʻi, ʻo ia ko mākou aliʻi i aloha nui ʻo Liliʻuokalani. A he nui no hoʻi nā Hawaiʻi kūnou mai ai i mua o ʻoukou e nānā pono mai i ke kulana o ka ʻōiwi Hawaiʻi, kona nohona, kona olakino, ka hoʻonaauao a pēlāwale aku.

Ua pono ka helena hou a mākou nei a loaʻa ka pono o ka ʻāina, ke kulaiwi paʻa mau o ka lāhui ʻōiwi o Hawaiʻi paeʻāina, ʻo ia wale nō ka Hawaiʻi. No laila, eia hou no ka ʻōiwi Hawaiʻi, he alo a he alo, me ka ʻAhaʻōlelo Nui.

ALOHA

Chairman Rahall, Ranking Member Hastings, and Members of the Committee on Natural Resources, my name is Haunani Apoliona and I serve as the Chairperson of the Board of Trustees for the Office of Hawaiian Affairs (OHA), a body corporate established in 1978 by the Hawaiʻi State Constitution and implementing statutes.

The mission of the Office of Hawaiian Affairs is to protect and assist Native Hawaiian people and to hold title to all real and personal property in trust for the Native Hawaiian people.

OHA is working to bring meaningful self-determination and self-governance to the Native Hawaiian people, through the restoration of our government-to-government relationship with the United States.

I testify today in support of enactment of H.R. 2314 and its companion legislation in the U.S. Senate, S. 1011.

Federal Policy of Self-Determination and Self-Governance

As this Committee well knows, on July 8, 1970, President Richard M. Nixon, announced that from that day forward, the policy of the United States would recognize and support the rights of America's indigenous, native people to self-determination and self-governance. In the ensuing 39 years, each succeeding U.S. President has reaffirmed this policy as the fundamental basis upon which Federal law and Federal actions affecting this nation's First Americans would be premised.

In carrying out this Federal policy, six U.S. Presidents have assured all Americans that there will be equal status and equal treatment under Federal law accorded to the three groups that make up this nation's population of indigenous, native people—American Indians, Alaska Natives and Native Hawaiians.

The Evolution of Self-Determination and Self-Governance Policy in the State of Hawai'i

1959—Hawaii Admissions Act—Establishment of a Public Trust

In 1959, the State of Hawaii was admitted into the Union of States as the 50th State. As a condition of its admission, the United States called upon the new State to accept, in trust, the transfer of lands set aside for Native Hawaiians under Federal law—the Hawaiian Homes Commission Act of 1920—lands which had, up until that time, been held in trust for Native Hawaiians by the United States. In addition, the United States retained the exclusive authority to initiate enforcement action should there be any breach of the homelands trust. As an additional condition of admission, the provisions of the Hawaiian Homes Commission Act were incorporated into the State's Constitution.

The United States also ceded to the State of Hawai'i lands that had been previously transferred to the Federal government, and imposed upon the State a requirement that those lands be held in a public trust for Native Hawaiians and the general public, and further provided that the revenues derived from those lands be used for five authorized purposes, one of which was the betterment of the conditions of Native Hawaiians.

1978—Amendment to State Constitution—Office of Hawaiian Affairs Established

Less than twenty years later, in 1978, the citizens of the State of Hawai'i went to the polls to participate in an historic statewide referendum in which they voted to amend the Constitution of the State of Hawai'i to provide for the establishment of the Office of Hawaiian Affairs, as a means for Native Hawaiians to give expression to their rights to self-determination and self-governance. The action taken by the citizens of Hawai'i was a natural outgrowth of the responsibilities assumed by the State of Hawai'i upon its admission into the Union of States.

The 1978 amendments to the State's Constitution establishing the Office of Hawaiian Affairs, authorized the Office of Hawaiian Affairs to hold title to all real and personal property then or thereafter set aside or conveyed to it and required that the property be held in trust for Native Hawaiians.

The Constitutional amendments further provided for a nine-member Board of Trustees that would be responsible for the management and administration of the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for the benefit of Native Hawaiians, including all income and proceeds from the pro rata portion of the public trust, as well as control over real and personal property set aside by state, federal or private sources and transferred to the Office of Hawaiian Affairs for the benefit of Native Hawaiians.

Finally, the 1978 amendments to the State Constitution charged the Board of Trustees of the Office of Hawaiian Affairs with the formulation of policy relating to the affairs of Native Hawaiians. The amendments also reaffirmed the State's commitment to protect all rights, customarily and traditionally exercised by Native Hawaiians for subsistence, cultural and religious purposes and which were possessed by those Native Hawaiians who were descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778—which was the date of the first re-

corded European contact with the aboriginal, indigenous, native people of Hawai'i—subject to the right of the State to regulate those rights.

Later, statutory provisions were enacted into law to implement the State's constitutional amendments which provided that:

"Declaration of Purpose. (a) The people of the State of Hawai'i and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawai'i reaffirmed their solemn trust obligation and responsibility to native Hawaiians and further declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawai'i."

The duties of the Board of Trustees of the Office of Hawaiian Affairs, as defined by statute are extensive, and over the past 31 years of its existence, the Office has been recognized not only within the State of Hawai'i, but nationally and internationally, as the principal governmental voice of the Native Hawaiian people.

Dismantling of the Original Native Hawaiian Government

For nearly a century before the forced annexation of the Kingdom of Hawai'i in 1898, the United States, Great Britain and France were amongst the many nations that recognized the Native Hawaiian government as sovereign, and entered into treaties and agreements with the Native Hawaiian government. Later, those who engineered the overthrow of the government of the Kingdom of Hawai'i on January 17, 1893, engaged in a systematic effort to dismantle the native government, and by their actions, severely compromised the ability of Native Hawaiians to manage their own affairs.

Notwithstanding the illegal overthrow of their government, Native Hawaiians steadfastly resisted the efforts to divest them of their rights to self-determination, and when the Provisional Government and its successor, the Republic of Hawai'i, sought the United States' annexation of Hawai'i—Native Hawaiians turned out in large numbers to register their opposition to annexation through petitions signed by hundreds of thousands of Native Hawaiians. (See The Hui Aloha Aina Anti-Annexation Petitions, 1897 - 1898, compiled by Nalani Minton and Noenoe K. Silva (UHM Library KZ245.H3 M56 (1998)).

Within a little over 20 years of annexation, the Native Hawaiian population had been decimated. Native Hawaiians had been wrenched from their traditional lands, compelled to abandon their agrarian and subsistence ways of life, forced into rat-infested tenement dwellings, and were dying in large numbers. Those who survived disease and pestilence never gave up their quest for self-determination, and sought, through their delegate to the U.S. Congress, the enactment of a law that would enable them to be returned to their lands.

Hawaiian Homes Commission Act of 1920

That law, the Hawaiian Homes Commission Act of 1920, set aside approximately 203,500 acres of land on the five principal islands comprising the Territory of Hawai'i, for homesteading and farming and the raising of livestock by Native Hawaiians. Upon statehood, the Hawaiian homelands that were held in trust by the United States for Native Hawaiians, were transferred to the State of Hawai'i, and a provision of the compact between the United States and the State of Hawai'i required that the State assume a trust responsibility for the homelands.

Since 1921, the Hawaiian Homes Commission Act and the lands set aside under the Act have been administered by the Hawaiian Homes Commission, whose board is composed of predominantly Native Hawaiian commission members, and an agency of the State of Hawai'i, the Department of Hawaiian Homelands.

Apology Resolution—One Hundred Years After the Dismantlement of the Native Hawaiian Government

In 1993, the United States Congress adopted and the President signed a joint resolution extending an apology to the Native Hawaiian people for the United States' involvement in the overthrow of the Kingdom of Hawai'i, and acknowledging that the United States' annexation of Hawai'i in 1898 resulted in the "deprivation of the rights of Native Hawaiians to self-determination." (See Apology Resolution, Public Law No. 103-150, 107 Stat. 1510 (1993), see also Robert N. Clinton, Arizona State Law Journal, "There is Not Federal Supremacy Clause for Indian Tribes," Symposium on Cultural Sovereignty, Spring 2002, 34 Ariz. St. L. J. 113, 165.)

Also acknowledging the impact of annexation on Native Hawaiian self-determination, the U.S. Departments of Justice and Interior called upon the Congress to "enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body." U.S. Depts. of Justice and Interior,

From Mauka to Makai: The River of Justice Must Flow Freely at 4 (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000).

Notwithstanding the Dismantlement of Their Government, Political Organization Amongst Native Hawaiians Continues

Since the time of the overthrow of the Kingdom of Hawai'i, Native Hawaiians have given expression to their political leadership through organizations like the Royal Societies. Royal societies have continued to function from their founding to the present day and wield considerable political and cultural influence in the Native Hawaiian community. These royal societies formally link the modern day Native Hawaiian community with the Kingdom of Hawai'i. There are four societies—the Royal Order of Kamehameha; 'Ahahui Ka'ahumanu; Hale O Nā Ali'i O Hawai'i; and Māmakakaua, Daughters and Sons of Hawaiian Warriors.

While each of the four has their own history and role, they share certain traits. All have royal origins, which are reflected in unique insignia and regalia which remain in use today and distinguish the four societies to Native Hawaiians. Each is also led by descendants of the royalty and chiefs who served at the society's founding and each currently has members and active chapters statewide. Formal leadership resides in these modern day successors to the royal families and chiefs.

Another manifestation of Native Hawaiians' desire to maintain a distinct Native Hawaiian role in the evolution of Hawai'i's society, was the establishment of a Hawaiian Civic Club in Honolulu in December of 1917, initiated by Hawai'i's delegate to the U.S. Congress and a Native Hawaiian, Prince Jonah Kūhio Kalaniana'ole. This first club was dedicated to the education of Native Hawaiians, the elevation of their social, economic and intellectual status as they promote principles of good government, outstanding citizenship and civic pride in the inherent progress of Hawai'i and all of her people.

Today, there are 52 Hawaiian Civic Clubs across the United States through which Native Hawaiians actively contribute to the civic, economic, health and social welfare of the Native Hawaiian community, by supporting programs of benefit to the people of Hawaiian ancestry, providing a forum for full discussion of all matters of public interest, honoring, fulfilling, protecting, preserving and cherishing all sources, customs, rights and records of the Native Hawaiian ancient traditions, cemetery areas and the historic sites of Native Hawaiians. One of the Hawaiian Civic Clubs, Ke Ali'i Maka'āinana, is named in honor of Prince Jonah Kūhio Kalaniana'ole, and is primarily composed of members from Virginia, Maryland and the District of Columbia.

Another expression of Native Hawaiian self-determination is found in the State Council of Hawaiian Homestead Associations, which was established in 1987 to provide a means of expressing the collective voice of those Native Hawaiians residing on the homelands so that they might address issues common to all homesteaders and to make their concerns known to the Department of Hawaiian Homelands. The State Council is made up of 24 organizations representing over 30,000 Native Hawaiian homesteaders.

As the instrument of self-determination and self-governance that the citizens of Hawaii established it to be, the Office of Hawaiian Affairs is still the largest governmental entity representing the interests and needs of Native Hawaiians, which U.S. Census figures indicate include 401,102 Native Hawaiians residing in Hawai'i and the continental United States.

Restoration of the Native Hawaiian Government

Like our brothers and sisters in Indian country whose Federally-recognized tribal status was being terminated at the very time our State was being admitted to the Union of States, we seek Congress' action in restoring to the Native Hawaiian people that which the Congress has restored to the so-called "terminated" tribes—the Federal recognition of our governmental status, and a reaffirmation of the continuing political and legal relationship we have with the United States of America.

It is well documented that throughout the United States, Native governments are best suited to ensure the perpetuation of their people and their cultures through the development of educational and language programs, culturally-sensitive social services, and the preservation of traditional cultural practices. In Hawai'i, where our native culture is the primary attraction in a tourist industry that fuels the State's economy, preservation of Native Hawaiian culture is an economic imperative.

We believe that the restoration of our Native government will provide the Native Hawaiian people with the tools we need to achieve self-sufficiency, economic security, and provide for the health and welfare of our people.

Political and Legal Relationship with the United States

As Native Hawaiians, we believe that our continuing legal and political relationship with the United States is not in doubt. It is manifested in treaties and given expression in well over one hundred Federal laws.

Since 1910, the United States Congress has enacted over 160 Federal statutes that are designed to address the conditions of Native Hawaiians. As we have described, the Hawaiian Homes Commission Act of 1920 set aside over 200,000 acres of land in our traditional homeland—the Islands of Hawai'i—so that we might return to the land, build homes, grow our traditional foods, raise livestock and cattle, and teach our children the values that are so closely tied to our respect for the 'āina (land), and our desire to care for the land, mālama 'āina.

The Act by which Hawai'i gained its admission into the Union of States is, of course, a Federal law—a compact between the United States of America and the State of Hawai'i—which explicitly recognizes the distinct status of Native Hawaiians under both Federal and State law and the State's constitution, and which expressly provides for the protection of the Native Hawaiian people and the preservation of resources to provide for the betterment of the conditions of Native Hawaiians. No other group of citizens in the State of Hawai'i has this unique status.

The Hawaiian Homes Commission Act of 1920 and the Hawai'i Admissions Act of 1959 are but two of the Federal statutes that serve to define the contours of the political and legal relationship that Native Hawaiians have with the United States.

There is the Native Hawaiian Education Act, first enacted into law by the Congress, in 1988. It authorizes funding for preschool through university educational programs, including programs for the gifted and talented, and Native Hawaiian language immersion instruction and curricula—all of which have contributed to the improvement in educational performance and achievement of Native Hawaiian students, and the reduction of school drop-out rates.

There is the Native Hawaiian Health Care Improvement Act, also enacted by the Congress in 1988, which provides support to the Native Hawaiian health care systems that oversee the operation of clinics and outpatient facilities serving predominantly Native Hawaiian communities on the five principal islands of Hawai'i.

Title VIII of the Native American Housing Assistance and Self-Determination Act authorizes funding for the construction of housing for low-income Native Hawaiian families who are eligible to reside on the Hawaiian homelands and Federal loan guarantees for the development of housing projects on the homelands.

The Native Hawaiian Homelands Recovery Act enables the Department of Hawaiian Homelands to reclaim lands that become surplus to the needs of the United States and add them to the inventory of lands set aside for Native Hawaiians under the authority of the Hawaiian Homes Commission Act.

Nationwide, the Comprehensive Employment and Training Act has had its most successful implementation through a statewide nonprofit Native Hawaiian organization known as Alu Like, Inc., and other employment and training initiatives administered by the U.S. Department of Labor have helped to reduce the still high unemployment rates amongst Native Hawaiians.

The Native American Veterans' Housing Act provides support to Native Hawaiian veterans in enhancing homeownership opportunities.

Under the authority of the National Museum of the American Indian Act, Native Hawaiians were the first group of Native Americans to repatriate the human remains of their ancestors from the Smithsonian Institution.

The Native American Graves Protection and Repatriation Act provides Federal authorization for Native Hawaiians to repatriate human remains from military installations in Hawai'i and to reacquire precious Native Hawaiian artifacts from museums and scientific institutions across the country and in Europe.

The Native American Languages Act was one of the first sources of Federal funding for the Native Hawaiian language immersion education programs that now serve as the basis not only for language immersion programs in Hawai'i's public schools but also as a national model for Native language instruction, curriculum development, and Native language preservation across the United States.

The Native American Programs Act and the support it provides through the Administration for Native Americans for the social and economic development of Native communities has enabled Native Hawaiian farmers to recapture the large-scale practice of growing taro root—an integral staple of the traditional Native Hawaiian subsistence diet. As Native Hawaiians have been able to return to their native foods, rates of diabetes, hypertension, heart disease and cancer have plummeted. This Act has also served as a principle impetus for the start-up of small Native Hawaiian businesses, particularly in rural areas of Hawai'i, where development capital and financial institutions are scarce.

The establishment of the Office of Native Hawaiian Relations in the U.S. Department of the Interior is one of the first institutional steps the Federal government has taken in fulfilling the mission of the Apology Resolution to effect a reconciliation between the United States and the Native Hawaiian people.

And years ago, the Congress anticipated the restoration of the Native Hawaiian government when it enacted legislation to transfer an island in Hawai'i, Kaho'olawe, that had previously been used by the U.S. for military practice as a bombing range, to the State of Hawai'i. Pursuant to State statute, upon the reorganization of the Native Hawaiian governing entity, the Island of Kaho'olawe will be transferred to the Native Hawaiian government.

Conclusion

Across this great world of ours, there is a common history that the aboriginal, indigenous, native people and their descendants share. It is a history of conquest and domination over the lives of native people—it is a history of disenfranchisement and forced assimilation. It has resulted in the demoralization of native people and fostered a dependence on government that is alien to the natural ways of native people, regardless of where they reside.

What history has also shown is that given the opportunity, native people will readily and willingly cast aside the shackles of dependence and seize the initiative to take care of themselves and their families and their communities.

Some who have not experienced a similar history or the same hardships question why native people seek the right to shape their own destinies, control their own institutions, care for their children and provide for their future generations through the restoration and recognition of their governments. Perhaps they take these rights for granted and assume that all Americans enjoy the same opportunities. Sadly, they do not.

Through the enactment into law of H.R. 2314, the Native Hawaiian people seek the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.

The Native Hawaiian people want to assure a brighter future for their children, and the opportunity to participate in the larger society on the equal footing that better health care, access to quality education, safe communities, and preservation of their institutions and traditional cultural values affords.

STATEMENT OF GAIL HERIOT, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Ms. HERIOT. Thank you for this opportunity to testify before the Committee on Natural Resources. My name is Gail Heriot, and I am here in my capacity as a member of the United States Commission on Civil Rights. Three years ago, the Commission issued a report opposing the proposed Native Hawaiian Government Reorganization Act. A strong majority viewed this legislation as an effort to shore up an unconstitutional system of special economic benefits for a particular racial or ethnic group. The Commission, therefore, recommended against it.

I am not going to go into the century-old history that some of those present have talked about except to point out that it is both hotly disputed and beside the point. Ask me about it later if you wish to. At this point, let me simply note that the Kingdom of Hawaii was a remarkably multi-racial and cosmopolitan society from its inception in 1810 thanks in part to the man we honor today, King Kamehameha I. Throughout the 19th century, it welcomed immigrants with the spirit of Aloha such that by 1893 ethnic Hawaiians were already a minority on the island.

Even if the overthrow of the Hawaiian monarchy was somehow wrongful, it is difficult to see how establishing a tribal organization for ethnic Hawaiians in particular would right that wrong. The

Kingdom of Hawaii's 1840 constitution began with a passage that translates, "God has made of one blood all races of people who dwell upon this earth in unity and blessedness." The proposed legislation does not honor to the Hawaiian monarchy or to Kamehameha himself who provided the foundation for that multi-racial and by the standards of the time remarkably modern and cosmopolitan island kingdom.

I should add that any debt to ethnic Hawaiians was expunged in 1959 when 94.3 percent of all Hawaiians voted to accept statehood and to live under the laws of the United States, very much including the Constitution's Equal Protection Clause, which I believe prohibits this kind of legislation. To understand why some want tribal status for ethnic Hawaiians at this late date, one must know a bit about Hawaiian racial politics.

In an age in which racial entitlement through an unfortunately feature of the political landscape in so many parts of the country, Hawaii is in a special league. The State's Office of Hawaiian Affairs administers a huge public trust funded from revenues from millions of acres of public lands, which in theory should benefit all Hawaiians, but which actually provides benefits exclusively for ethnic Hawaiians. Among other things, ethnic Hawaiians are eligible for business loans, housing and educational programs.

The problem for supporters of these special benefits came in the year 2000 when the Supreme Court decided the case of *Rice v. Cayetano*. Under Hawaiian law, only ethnic Hawaiians could vote for OHA trustees. Unsurprisingly, the Supreme Court held this to be a violation of the 15th Amendment. That ruling caused a bit of an uproar. If the 15th Amendment prohibits Hawaii from limiting voting rights to ethnic Hawaiians, the 14th Amendment's Equal Protection Clause probably prohibits all or most of the system of exclusive benefits for ethnic Hawaiians.

That is where the tribe idea came in. States cannot discriminate on the basis of race except in extraordinary cases, but state and Federal governments may discriminate in favor of or against for that matter tribal members. If ethnic Hawaiians could be morphed into a tribe, and the State of Hawaii can then transfer the Office of Hawaiian Affairs' function to that tribe, the system of economic benefits for ethnic Hawaiians can be preserved or so the advocates of H.R. 2314 hope.

If the Federal and state governments cannot confer preferential benefits upon citizens based on race, they cannot create a tribe for the purpose of conferring benefits based on race. The very act of creating the tribe is an operation performed on a racial group, not a tribal group. The Constitution's requirements cannot be bypassed that easily. Moreover, nothing in the Constitution authorizes Congress to retroactively create an Indian tribe out of individuals who are already full citizens and who do not have a long and continuous history of separate self-governance.

While the case of the Menominee Indians has been cited as a counter-example, I believe it is not. The Menominee tribe was recognized for generations, but its recognition had been withdrawn during a period under which derecognition was briefly fashionable. During that period, they were not recognized, but they continued to exist as a corporation under the laws of the State of Wisconsin.

The tribe hadn't changed, just its relationship to the Federal government.

Unlike ethnic Hawaiians, they did not need the Federal government to help them figure out who their leaders are or who their members are. They knew. If ethnic Hawaiians can be transformed into a tribe and thereby gain the authority to promulgate a criminal code and punish offenders, impose and collect and taxes and the privilege of sovereign immunity, other groups are likely to want the same in the future. Chicanos in southern California, for example, or for that matter, Cajuns in Louisiana. Where is the political will going to come from to tell them no?

[The prepared statement of Ms. Heriot follows:]

Statement of The Honorable Gail Heriot,
United States Commission on Civil Rights

Thank you for this opportunity to testify before the Committee on Natural Resources on the occasion of Kamehameha Day. My name is Gail Heriot and I'm here in my capacity as a member of the United States Commission on Civil Rights.

The Commission on Civil Rights was established pursuant to the Civil Rights Act of 1957, the first civil rights statute to be passed by Congress since Reconstruction. It has existed in its present form—four of its members appointed by the President and four by Congress—since 1983. The Commission takes great pride in its role as advisor to Congress and the President on matters of civil rights.

Three years ago, the Commission issued a report opposing the passage of the proposed Native Hawaiian Government Reorganization Act. Although that report focused on an earlier version of the proposed legislation, that earlier version was substantially similar to H.R. 2314. Specifically, the report stated:

> "The Commission recommends against passage of the Native Hawaiian Government Reorganization Act...or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

For reasons I will discuss below, the majority of members of the Commission regard this bill as both bad policy and quite likely unconstitutional.

What the H.R. 2314 Bill Will Do: Put as simply as possible, the proposed law would require the federal government to assist the nation's approximately 400,000 ethnic Hawaiians to organize themselves into a vast indigenous tribe. Ultimately, this purported tribe would almost certainly have powers like those of mainland Indian tribes—including the power to make and enforce laws, promulgate a criminal code, punish offenders, impose and collect taxes and exercise eminent domain—as well as police powers and the privilege of sovereign immunity. If all 400,000 join, it would be by far the largest tribe in the nation and almost as large as some states, with about half its members residing in Hawaii and half scattered across the mainland.

This reorganization of the Hawaiian political landscape would be a massive undertaking, The first step would be the creation of an Office for Native Hawaiian Affairs ("ONHA") at the U.S. Department of Interior. (See Section 5.) That office would assist "adult [ethnic Hawaiians] who wish to participate in the reorganization of the Native Hawaiian government." (See Section 7(b).)

The specific task of determining who is and who is not a true "Native Hawaiian" as defined in the bill would fall to a nine-member Commission appointed by the Secretary of the Interior. These nine government appointees would be required to have "not less than 10 years of experience in the study and determination of Native Hawaiian genealogy" and "the ability to read and translate into English documents written in the Hawaiian language." (See Section 7(b)(2)(B).) This replaces an earlier version of the bill requiring that members be ethnic Hawaiian themselves—a clear violation of the Constitution—although the substitute language might still be challenged as intending to have that racially discriminatory effect. Once appointed, these commission members would ensure that only those who can demonstrate their true Native Hawaiian bloodline are permitted to join. The one-drop rule—notorious in other contexts—would apply. (See Section 3(10)(A).)

Once the tribal roll is certified and published, the members, with ONHA's assistance, would establish an interim government, which would then draft organic governing documents and hold elections to establish the permanent government. Fed-

eral recognition will be "extended to the Native Hawaiian government as the representative governing body of the Native Hawaiian people" once these documents have been presented to the Secretary of the Interior and properly certified. (See Section 7.)

Note that the Guaranty Clause of the U.S. Constitution, which guarantees all states a republican form of government, will not apply to the new Native Hawaiian government. See U.S. Const. art. IV, sec. 4. Similarly, the Titles of Nobility Clauses will not apply unless the Native Hawaiian government is interpreted by the courts to be a government that derives its powers solely from federal delegation. See U.S. Const. art. I, sec. 9, cl. 8 (limitation on federal power to confer titles of nobility); U.S. Const. art. I, sec. 10, cl. 2(similar limitation on state power). As H.R. 2314 asserts that "the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," it is clear that many ethnic Hawaiians will not regard the new government as deriving its powers solely from federal delegation. Rather, they will argue that it derives its power from their own inherent sovereignty and is thus not subject to any of the limitations on power found in the U.S. Constitution, including its Bill of Rights. Since H.R. 2314 itself is strangely unclear on this important issue, it will have to be resolved in the courts or in the rough-and-tumble of politics. If it is resolved in favor of inherent sovereignty (limited or otherwise), a restoration of the Hawaiian monarchy would likely be legally permissible.

Only after this new political behemoth is created will the federal government "enter into negotiations" with it over such matters as "the exercise of civil and criminal jurisdiction," "the delegation of government powers and authorities...by the United States or by the State of Hawaii," "any residual responsibilities of the United States and the State of Hawaii," and "grievances regarding assertions of historic wrongs committed against Native Hawaiians by the United States or by the State of Hawaii." By then, of course, the balance of political power would have shifted decidedly in favor of the new government. It would be in a position to assert that it possesses inherent sovereignty and hence has powers quite apart from those delegated to it by the federal and state governments. Moreover, even if it were to concede that its powers derive solely from federal delegation, it will likely have the political clout to ensure that those powers are extensive.

Among the issues left for negotiation is the status of the immense property holdings of the State of Hawaii. As the bill puts it: "[T]he United States and the State of Hawaii may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement addressing...the transfer of lands, resources and other assets and the protection of existing rights related to such land or resources." (See Section 8.) The bill does not specify whether the tribe will purchase these assets or receive them as a gift, but ethnic Hawaiian activists have said that they expect the latter. Indeed, as I will discuss below, it is the anticipated transfer of those assets that inspired H.R. 2314 in the first place.

Historical Arguments for H.R. 2314: Both supporters and opponents agree that the bill must be understood in the context of history, but they differ over which aspects of history are important.

Supporters argue that the American government was complicit in the 1893 overthrow of Queen Liliuokalani, which illegally denied not just the Queen's individual right of sovereignty, but the ethnic Hawaiians' collective right. H.R. 2314 will help remedy this wrong, they argue, by restoring self-governance to ethnic Hawaiians.

The claim of American complicity has always been hotly disputed. As far as I know, everyone agrees that the overthrow of Queen Liliuokalani was accomplished mainly by white subjects of the Queen, not by the United States. At least some and perhaps most were native-born to the Islands. Some say that the crew of the U.S.S. Boston came ashore to assist in the overthrow at the behest of the American ambassador; others say they came ashore only to protect American property. President Grover Cleveland was among those who believed that the Boston crew was complicit in the overthrow—and he strongly disapproved of its actions. Congress, on the other hand, issued a report—called the Morgan Report—that came to the opposite conclusion. See Senate Report 227, 53rd Congress, Second Session (February 26, 1894). I do not claim to have the ability to sort out the dispute and will not try.

All of this is remarkably beside the point. Even if the Boston crew did participate in the overthrow, it would not give rise to a claim that ethnic Hawaiians have been robbed of their sovereignty. For one thing, the Kingdom of Hawaii was a monarchy. Perhaps Queen Liliuokalani's right of sovereignty was violated by the overthrow (although, given how few monarchists there are left in the world today, it is not clear how many would regard her right to the throne as inviolable). See *Rex v. Booth,* 2 Haw. 616 (1863)(stating that "[t]he Hawaiian Government was not established by

the people" and that instead "King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty").

Moreover, the Kingdom of Hawaii was a multi-racial society from its inception in 1810. In the true spirit of Aloha for which Hawaii is famous, its rulers were welcoming of immigrants, who came from all over the world, particularly from Portugal, China, Japan, the United States, Great Britain, and Germany. The 1840 Constitution established a bicameral parliament whose members were multi-racial. By 1893, ethnic Hawaiians were a minority of the population. Anyone who was born on Hawaiian soil or who swore allegiance to the Queen was considered a subject of the Queen and hence "Hawaiian," regardless of race. This was no kinship-based tribe. It is thus difficult to argue that ethnic Hawaiians in particular have a right to sovereignty that was violated by the overthrow.

More important, all of this has been water under the bridge at least since 1959 when Hawaii was made a State. Contemporary accounts describe the inhabitants of the Islands dancing in the streets on that occasion. On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of statehood. At that point, whatever wrongs that might have occurred in the past were waived. Statehood made Hawaiians of all races full and equal members of the greatest nation on Earth, fully entitled to the protection of its laws and the right to participate in its political process. All they had to do was agree to live under its laws, including its Constitution. Hawaiians of all races thought that was a bargain. I agree with them and so do most of my colleagues on the Commission on Civil Rights.

I believe that to truly understand the motivations behind H.R. 2314, one must look at more recent history—especially the decision of the U.S. Supreme Court in *Rice v. Cayetano,* 528 U.S. 495 (2000). The first version of this bill was introduced shortly after that case was decided. That was no coincidence.

In *Rice*, the Supreme Court ruled that the Constitution's Fifteenth Amendment, which prohibits both the United States and the individual States from discriminating by race in voting rights, prohibited Hawaii from holding elections in which only ethnic Hawaiians could vote.

To understand how these racially-exclusive elections came to be, one needs to know a little about the sad state of contemporary Hawaiian racial politics. The election was for trustees of the Office of Hawaiian Affairs ("OHA"), a department of the State of Hawaii that receives and administers 20% of gross revenues from much of the State's Ceded Lands Trust. In theory, this trust should be administered for the benefit of all Hawaiians, especially those in need. But for reasons that are both historical and political, it is actually operated for the benefit of ethnic Hawaiians (as well as for the benefit of the OHA bureaucracy itself). Among other things, ethnic Hawaiians are eligible for special home loans, business loans, housing and education programs. It is the protection of these racially-exclusive benefits that motivates many of the supporters of H.R. 2314.

Supporters of the bill argue that these benefits are a perfectly legitimate continuation of federal policy toward ethnic Hawaiians that began long ago with policies like the Hawaiian Homes Commission Act of 1921. The primary asset of the OHA public trust is the accumulated revenues from some 1.8 million acres of land that were once owned by the Kingdom of Hawaii and became public lands of the Republic of Hawaii after the overthrow of Queen Liliuokalani. the lands became the property of the Republic of Hawaii. Upon annexation, all the approximately 1.8 acres of public lands held by the Republic of Hawaii were ceded to the united States to be held "solely for the benefit of the inhabitant of Hawaiian Islands for educational and other purposes." Upon statehood in 1959, some 1.4 million acres were returned to Hawaii to be held in a public trust for one or more of five purposes. One of those five purposes was "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended." The other purposes were (1) "for the support of the public schools and other public educational institutions"; (2) "for the development of farm and home ownership on as widespread a basis as possible;" (3) "for the making of public improvements"; and (4) "for the provision of lands for public use." Act of March 18, 1959, section 5(f), P.L. 86-3, 73 Stat. 4.

Activists in Hawaii have argued that revenue from the ceded lands should be used exclusively for the benefit of ethnic Hawaiians and reject the other four purposes. There is, however, no requirement that the State of Hawaii use the property for any particular reason among the five—especially not for the one reason that is constitutionally suspect since it involves a preference for a particular race. Indeed, curiously, the Hawaiian Homes Commission Act, to which the legislation refer applies only to individuals who are at least half-ethnic Hawaiian. Nevertheless, as things evolved, OHA has operated its part of the public trust for the benefit of anyone with ethnic Hawaiian ancestry. For quite some time on the OHA web site, the caption

proudly proclaimed its racial loyalty, "Office of Hawaiian Affairs: For the Betterment of Native Hawaiians." Only recently has this been taken down.

But *Rice v. Cayetano* put these programs in jeopardy. Opponents of the benefits argue that since the Supreme Court held that racially-exclusive OHA elections violated the 15th Amendment, the Court would almost certainly hold that OHA's racially-exclusive benefits violate the 14th Amendment's Equal Protection Clause. By legislatively transforming ethnic Hawaiians from a racial group to a semi-sovereign tribal group, Akaka bill supporters hope that prohibitions on race discrimination will no longer apply. See *Morton v. Mancari,* 417 U.S. 535 (1974)(holding that the Bureau of Indian Affairs preference for tribal members did not constitute race discrimination under the Fifth Amendment). But for reasons I will describe below, the Constitution's ban on race discrimination cannot be avoided so easily.

H.R. 2314 Is Unconstitutional: The Constitution confers upon Congress the power to regulate commerce with Indian tribes. Specifically, it provides, "The Congress shall have the power...To regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." U.S. Const. art. I, sec. 8, cl. 3. This is the sole mention of Indian tribes in Article I, which gives Congress its powers, and a thin reed indeed upon which to predicate a power to create a tribal government.

The United States has long recognized the sovereign or quasi-sovereign status of certain tribes. But until now, it has done so only with groups that have a long, continuous history of self-governance. Tribes were treated as semi-autonomous entities, because they were; they had never been brought under the full control of both federal and state authority. Federal policy toward them was simply an appropriate bow to reality. To withdraw recognition to any such group without very good reason would be an injustice.

By retroactively creating a tribe out of individuals who are already full citizens of both the United States and the State of Hawaii, and who do not have a long and continuous history of separate self-governance, H.R. 2314 would be breaking new ground. Supporters of the bill have argued that the recognition of the Menominee tribe by Congress in 1973 is a counter example. But their argument falls short. In the middle of the 20th century, it became briefly fashionable to advocate the termination of the special status of Indian tribes under the law. In 1961, the Menominee tribe in Wisconsin became the first to have its trust relationship with the United States and its semi-sovereign status terminated. The Menominees, however, did not simply melt into the population of the State of Wisconsin. The tribe incorporated under the laws of Wisconsin and continued to function as an entity. By the 1970s, the termination option was no longer fashionable and the Menominee tribe requested and received re-recognition by Act of Congress.

Unlike ethnic Hawaiians, the Menominees never lacked organization. Even during the brief period they lacked federal recognition, the tribe maintained a corporate existence under the laws of the State of Wisconsin. They did not need Congress to help them identify who was a Menominee and who was not. They knew. All they wanted or needed was renewal of federal recognition and of the federal trust relationship. H.R. 2314 requires the Secretary of Interior to appoint and assist a Commission to determine the initial membership on the Native Hawaiian tribe. To my knowledge and to the knowledge of my colleagues on the Commission who voted in the majority, this would be unprecedented. See *United States v. Sandoval,* 231 U.S. 28 (1913)("it is not meant by this [decision] that congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe....").

If ethnic Hawaiians can be accorded tribal status, why not Chicanos in the Southwest? Or Cajuns in Louisiana? Indeed, it is implausible to say that Congress has the power to confer this benefit only upon racial or ethnic groups, since ordinarily Congressional power is at its lowest ebb with issues that touch on race or ethnicity. Religious groups—like the Orthodox Jews in New York or the Amish in Pennsylvania or the Mormons in Utah—may be particularly interested in gaining tribal status, since the Establishment Clause would not apply to tribes, but they would nevertheless be able to exercise governmental powers. Becoming a tribe will thus arguably allow them to surmount the difficulties discussed by the Supreme Court in *Board of Education of Kiryas Joel School District v. Grumit,* 512 U.S. 687 (1994).

Some legal scholars are already arguing that special status ought to be broadly available to what have been called "dissident" communities of many types. See, e.g., Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian Country: A Liberal Theory,* 84 Va. L. Rev. 1053 (1998); Mark D. Rosen, "Illiberal" Societal Cultures, Liberalism and American Constitutionalism, 12 J. Contemp. Legal Issues 803 (2002). Who will say no to these (and other) groups?

Even if Congress does have the power to create a political entity where none currently exists, they cannot do so in this case, since the reason for doing so is to confer benefits on a racial group. Such a scheme violates the Fifth Amendment's Due Process Clause. Insofar as the State of Hawaii is complicit in the scheme by transferring the Ceded Lands to the new Native Hawaiian government, it will be violating the Fourteenth Amendment's Equal Protection Clause.

Rice v. Cayetano caused an uproar in Hawaii that has not yet subsided. The best hope of those who favor the OHA's special programs that benefit ethnic Hawaiians is to transform them from programs that favor one race or ethnicity over another into programs that favor the members of one tribe over non-members. As the Supreme Court held in *Morton v. Mancari,* 417 U.S. 535 (1974), a case involving a hiring preference for tribal members at the U.S. Bureau of Indian Affairs, such a benefit is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." In other words, it's not race discrimination, it's discrimination on the basis of tribal membership.

The question then boils down to this: Can the United States government and the State of Hawaii achieve by indirection what they very likely could not have achieved directly on account of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment? I would respectfully submit that the answer is no. That is not because *Morton v. Mancari* is not good law. It is. (Note, however, that the Mancari decision may be a double-edged sword. If discrimination by the Bureau of Indian Affairs in favor of tribal members is not race discrimination then presumably discrimination against tribal members by a state government is not race discrimination.) But it cannot apply to a tribal group that does not yet exist. The very act of transforming ethnic Hawaiians into a tribe is an act performed on a racial group, not a tribal group. When, as here, it is done for the purpose of conferring massive benefits on that group, it is an act of race discrimination subject to strict scrutiny—scrutiny that it likely cannot survive.

The proof of all this is apparent if one simply alters the facts slightly. If the State of Hawaii were operating its special benefits programs for Whites only or for Asians only, no one would dream that the United States could assist them in this scheme by providing a procedure under which Whites or Asians could be declared a tribe.

The Ironies of H.R. 2314: Today we honor King Kamehameha I, the man who united the warring tribes of the Hawaiian Islands and founded the Kingdom of Hawaii in 1810. Part of his success lay in the fact that, unlike those who had previously attempted this feat, he was able to take advantage of technology and expertise brought to him by foreigners—men like John Young and Isaac Davis, British immigrants, who were rewarded for their loyalty to the King with the governorships of Hawaii Island and Oahu respectively.

The attitude of Hawaiian monarchs toward immigrants can be understood with reference to the Constitution of 1840, which was signed by two hands—that of Kamehameha's son King Kamehameha III and that of the holder of the second-highest office in the nation, Keoni Ana, the son of John Young. Its opening sentence, the substance of which was suggested by an American missionary, was based loosely on a Biblical verse: *"Ua hana mai ke Akua i na lahuikanaka a pau i ke koko hookahi, e noho like lakou ma ka honua nei me ke kuikahi, a me ka pomaikai."* Translated, the passage might read: "God has made of one blood all races of people to dwell upon this Earth in unity and blessedness."

It does no honor to King Kamehameha I or his son to attempt to reverse that tradition. See Kenneth Conklin, What Kamehameha Hath Joined Together, Let No Akaka Rip Asunder, http://www.angelfire.com/big09a/AkakaKamehameha061109.html.

Both during and after the Kingdom, Hawaii has been one of the best examples of a racial melting pot in the world. Intermarriage has been long been common. The Hawaiian royal family itself, including Queen Liliuokalani, married people of other races. Queen Emma was the granddaughter of John Young. As a result, the overwhelming majority of "Native Hawaiians" who qualify for special benefits today (and who would qualify as "Native Hawaiian" under H.R. 2314) are of mixed race. This should be kept in mind whenever one hears argument that "we" owe "them" or "they" owe "us." We are they, and they are we. As Americans and as Hawaiians, we are of one blood.

According to the statistics posted on the OHA web site, only about 3.95% of ethnic Hawaiians living in Hawaii have what the OHA not-so-delicately calls a "blood quantum" that is "100% Hawaiian." Only 34.88% have a "50% to 99% Hawaiian" "blood quantum." And 61.17% have a "blood quantum" of less than 50%." These figures were compiled back in 1984. We have had another generation since then, and that tradition of intermarriage has continued and probably even accelerated. That's the wonderful thing about love. It transcends even the silliest of politics.

The greatest irony may be that the descendants of 19th century white settlers on Hawaii are much more likely to be of mixed race than the descendants of whites, Asians or African Americans who came to Hawaii more recently, simply because they have had more opportunities for intermarriage over the years. That makes for an interesting situation. If those 19th century white settlers are the ones who wronged the 19th century ethnic Hawaiians, it is strange that we in the 21st century would think that we're making things right again by conferring special benefits on their descendants. Yet that is precisely the logic of H.R. 2314.

The Popularity of H.R. 2314 Among Hawaiians: Why then is H.R. 2314 so popular among Hawaiians? The answer is that it may not be. The most frequently cited poll on this point was commissioned in 2003 by OHA, which has spent over $2 million lobbying for this legislation. That poll asked:

> "The Akaka-Stevens bill proposes that Hawaiians be formally recognized as the indigenous people of Hawaii, giving them the same federal status as 560 Native American and Alaska Native tribes already recognized by the U.S. government. Do you think that Hawaiians should be recognized by the U.S. as a distinct group, similar to the special recognition given to Native Americans and Alaska Natives?"

Eighty-six percent (86%) of the 303 ethnic Hawaiians polls and seventy-eight percent (78%) of the 301 "non-Hawaiians" said "yes." But what are they saying "yes" to? "Recognition." Who wouldn't want to be recognized?

In contrast, the Grassroot Institute, which opposes the bill, conducted a poll with 39,000 responses in 2005 that asked:

> "The Akaka Bill question, 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?"

The results of the poll appear to show that Hawaiians oppose the bill by a ratio of 2 to 1 (56.8%/28.2%). Even ethnic Hawaiians were against the bill. Forty-eight percent (48%) opposed it to only forty-three percent (43%) in favor and nine percent (9%) not responding.

The Grassroot Institute poll has been criticized on the ground that it asks the following question directly before the question about the proposed Native Hawaiian Government Reorganization Act: "Do you support laws that provide preferences for people groups based on their race?" According to critics, such a question may skew the results. On other hand, the Grassroot poll probably better reflects the reality of the proposed law than the OHA's "recognition" poll. See Andrew Walden, Huge Poll Shows Strong Opposition to Akaka Bill, Hawaii Reporter (July 18, 2005), available at http://www.hawaiireporter.com/story.aspx?afba19b6-cb1c-4377-84b0-0f62d89b7a4e

The obvious way to resolve the discrepancy between the polls is to conduct a referendum on the matter. Indeed, if the citizens of Hawaii knew that such a vote is going to occur, it is likely that they would better inform themselves on the issue. That would be all to the good. Voters would learn, for example, that while tribal governments ordinarily enjoy the power of eminent domain, the power to tax and the power to punish members (and some non-members) for violations of their criminal code, they ordinarily are not limited in their authority by the Bill of Rights or the Fourteenth Amendment. And while the Indian Civil Rights Act, 25 U.S.C. sec. 1301-1303, is an effort to fill the void, it does not cover the full range of rights. Moreover, the remedy for the violation of the act is limited to habeas corpus. In other words, only if the tribal government has actually imprisoned the wronged party can the federal courts act. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Otherwise the wronged party's remedy must lie, if at all, in tribal court.

But while bill opponents are eager for a referendum on the proposed legislation, supporters are reluctant. That fact alone tells a story.

Conclusion: The Commission on Civil Rights urges the 111th Congress to reject this unconstitutional and unwise bill. Legislation subdivides the American people into discrete racial or ethnic subgroups accorded varying degrees of privilege has no place in Hawaiian tradition or in American society.

The Commission Report is available on our website: http://www.usccr.gov.

Supplemental Testimony of Gail Heriot

At the request of Representative Neil Abercrombie, I hereby submit this supplemental testimony.

H.R. 2314's Constitutionality: Mr. Abercrombie requested me to reflect, among other things, upon what could done to improve the likelihood that H.R. 2314 will

pass constitutional muster in the courts. Here are my preliminary thoughts on that issue:

As currently drafted, the bill is premised on the argument that "the aboriginal, indigenous, native people...who resided in...Hawaii...on or before January 1, 1893" were wrongfully divested of "their inherent sovereignty" by the overthrow of Queen Liliuokalani a few weeks after that date. As the Supreme Court has already decided in *Rice v. Cayetano,* 528 U.S. 495 (2000), this is a racial group. Congress may attempt to transform it into a tribal group, but until it does so, it is a racial group.

It is also a vastly under-inclusive group if the purpose of H.R. 2314 is to remedy the alleged wrong of the overthrow. If there was any "people" who exercised sovereignty in the Kingdom of Hawaii in 1893, it was a much larger group than the "aboriginal, indigenous, native people." [1]

The Kingdom of Hawaii was a multi-racial, cosmopolitan society that welcomed immigrants from China, Germany, Great Britain, Japan, Portugal, the United States as well as other lands. Many of the members of its legislature and its royal ministers were non-ethnic Hawaiian. Even the husband of the Queen was a non-ethnic Hawaiian. Anyone who swore allegiance to the monarch became a Hawaiian subject. In addition, just as in the United States, anyone born on the islands was a subject. By 1893, ethnic Hawaiians were a population minority in Hawaii. And although they were not yet quite a minority among actual subjects of the Queen (as opposed to resident aliens), given immigration, birth and death rates, ethnic Hawaiians would have become a minority of the Queen's subjects within a handful of years. [2]

Consequently, if the bill were constructed so as to apply not to a racial group, but to the group that was arguably wronged by the overthrow of Queen Liliuokalani,

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[1] An alternative way to look at it is that it was that sovereignty was not vested in a group but in a single individual—the Queen. This perspective has the virtue of having been explicitly endorsed by the highest court in the Kingdom. See *Rex v. Booth,* 2 Haw. 616 (1863)(rejecting the notion of popular sovereignty and stating that "[t]he Hawaiian Government was not established by the people" and that instead "King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty"). The 1864 Constitution states, "The King is Sovereign of all the Chiefs and of all the People; the Kingdom is His." Haw. Const. art. 34 (1864). Similarly, the 1887 Constitution states, "The King is Sovereign of all the Chiefs and of all the People." Haw Const. art. 34 (1887). Under this view it was not the people of the Kingdom of Hawaii who were wronged by the overthrow, but the Queen herself and arguably any designated heir.

[2] Like all nations of the world in the 19th century, the Kingdom of Hawaii did not operate under a rule of universal adult suffrage. Women, for example, could not vote. Many men could not either. For example, article 62 of the 1864 Constitution contained no racial requirements at all, but it did contain property and income requirements and a literacy requirement. It read:

> "Every male subject of the Kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall be possessed of Real Property in this Kingdom, to the value over and above all incumbrances of One Hundred and Fifty Dollars or of a Leasehold property on which the rent is Twenty-five Dollars per year—or of an income of not less than Seventy-five Dollars per year, derived from any property or some lawful employment, and shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters of his District as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that District...."

Haw. Const. art. 62 (1864). This meant that ethnic Hawaiians (as well as Hawaiian subjects of other races) who did not qualify could not vote.

The 1887 Constitution or so-called "Bayonet Constitution" enhanced the property qualifications for voting for the Legislature's upper house (which previously had been appointed by the King) and eliminated such qualifications for voting for the lower house. It also effectively disenfranchised those of Asian descent and liberalized the literacy requirements imposed on voters born after 1840. See Hawaii Const. of 1887, art. 59 & 62.

According to historian Ralph Simpson Kuykendall, by the time of the overthrow, approximately 75% of ethnic Hawaiians were without the right to vote owing to gender, age, property or literacy requirements. Many of European or American descent were also disenfranchised. Nevertheless, while the descendants of Portuguese, Britons, Germans and Americans were a strong majority of those voting in the elections for the House of Nobles, ethnic Hawaiians formed the majority of the electorate for the House of Representatives. Very large numbers of non-ethnic Hawaiians also voted in the House elections. See Ralph Simpson Kuykendall, III Hawaiian Kingdom: The Kalakaua Dynasty 453 (1967).

The United States surely has no interest in perpetuating the effects of the Kingdom's disenfranchisement of Asians, of women, or of illiterate or propertyless subjects. At the same time, it should have no interest in pretending that subjects of the Queen who were clearly enfranchised were not. If H.R. 2314 is to pass, the most promising way out of the racial difficulty would be to permit descendants of all subjects of the Kingdom of Hawaii to join the tribal entity contemplated in the proposal. While such an approach will not necessarily remedy all the constitutional defects of H.R. 2314, and may raise some issues, it is somewhat more likely to pass constitutional muster than the current version of the bill.

the bill's chances might be improved. That group would have to include the descendants of all subjects of Queen Liliuokalani, not just those who are descended from "the aboriginal, indigenous, native people."

It is no more appropriate to say that only the "aboriginal, indigenous, native people" had a right of sovereignty in the Kingdom of Hawaii in 1893, than it is to say only descendants of the peoples who inhabited the United States in 1776 have a right of sovereignty that could be violated today. The United States has welcomed immigrants from around the world for hundreds of years. Many become citizens at their first opportunity. Their children, born on U.S. soil, are citizens from birth. The Kingdom of Hawaii was no different. The notion that only ethnic Hawaiians could have been divested of their inherent sovereignty is not correct. It is the application of a narrowly racial lens to a situation that was far more complex and nuanced.

The Kingdom of Hawaii should be given its due in the history of nations. Despite numerous hardships, Hawaiians created a multi-racial society of remarkable modernity for its time.[3] It does them no honor to suggest otherwise.

One could object to this proposed modification of H.R. 2314 on the ground that it could empower the descendants of the white Hawaiians who were responsible for the overthrow of the Queen.[4] While this may be regarded as less-than-optimal by some, it is defect not just of the proposed modification, but of H.R. 2314 in its present form. The Office of Hawaiian Affairs reports that as of 1984 only 3.95% of ethnic Hawaiians had a "blood quantum" level that is "100% Hawaiian." Intermarriage between ethnic Hawaiians and persons of American or European extraction has been common for over 150 years. Given the length of time over which such intermarriage could occur, it stands to reason that those responsible for the overthrow are especially likely to have ethnic Hawaiian descendants.[5]

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[3] In addition to its geographic isolation (and as a result of it), Hawaii had the problem that ethnic Hawaiians had little resistance to diseases that had plagued much of the rest of the world for millennia. Yet Hawaii's leaders remained welcoming to the outside world.

[4] One possible solution to this problem would be to limit membership in the new tribe to those who could prove descent from a loyal subject of the Queen. But to use race as a proxy for loyalty would be violation of the Constitution. It is for good reason that the Supreme Court's decision in *Korematsu v. United States,* 323 U.S. 214 (1944), suffers from a poor reputation.

[5] A second constitutional objection to the bill as currently drafted is that Congress lacks the authority to create (or re-create) a tribe with sovereign powers as opposed to the authority recognize a group with a long and continuous history of sovereignty. This is a difficult objection to overcome, but arguably if the bill were to take a more modest approach by disavowing the notion that the new entity will have sovereign power, its chances could improve. Under those circumstances, the tribal entity, if it were to have any powers that cannot be exercised by ordinary voluntary associations, must acquire those powers as the result of Congressional delegation. Congress, of course, cannot delegate powers that it does not have. Consequently, any governing entity would be governed to the same extent as the federal government by the Bill of Rights, including the Establishment Clause of the First Amendment and Takings Clause of the Fifth Amendment. H.R. 2314, as currently drafted, is arguably not so limited.

Two points that bear responding to came up during the hearing that relate to the authority of Congress to create (or re-create) a tribe that has not had a continuous history of sovereignty. First, one witness cited to *United States v. Lara,* 541 U.S. 193, 200 (2004) for the proposition that Congressional authority to legislate with respect to Indian tribes is "plenary and exclusive." I note that Presidential power with respect to foreign relations is also broad. But that power does not give the President the right to designate a portion of New Jersey or its population as a foreign nation. Neither does Congressional power over Indian tribes give it the authority to create a tribe out of a group of citizens of the State of Hawaii who have not maintained a continuous political existence outside of the mainstream of state and national politics.

Second, one of the witnesses argued that the Menominee Restoration Act, 25 U.S.C. sec. 903-903f, is precedent for the proposition that Congress has the authority to assist in the reconstitution of a tribe whose existence as political entity has not been continuous. The witness suggested that the Menominee tribe, like ethnic Hawaiians, had become so disorganized in the 1960s that it needed federal assistance to accomplish basic functions like the identification of its members and its leaders. This is simply untrue. The Menominee tribe (population approximately 4000) was ancient tribe that was recognized by the United States from an early date. For a brief time (1961 to 1973) in American history, it was not officially "recognized" as part of a short-lived federal plan to de-recognize all tribes and allow them to exist as voluntary associations under state law rather than as sovereign or semi-sovereign entities. Lack of recognition and lack of existence are not the same thing. During that period, the Menominee legally existed as Menominee Enterprises, Inc. It members were shareholders and its leaders officers of the corporation. The witness argued that the Menominees must have lost track of their membership (much as ethnic Hawaiian could be said to have lost track of their members today) since the Menominee Restoration Act required them to re-open their tribal roll. Note, however, that the tribal roll is a list required by the federal government for federal purposes. Lack of an official roll is not the same thing as lack of ability to identify one's members with reasonable accuracy. The United States doesn't have a "national roll" either; nor does Italy or Canada. And yet when necessary they are able to identify their members with reasonable accuracy without assistance from other

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One could also object that this proposal would turn H.R. 2314 on its head—that the very purpose of the bill is to confer benefits on ethnic Hawaiians, especially to preserve the benefits they currently enjoy from the Office of Hawaiian Affairs and put at risk by *Rice v. Cayetano,* 528 U.S. 495 (2000). But that is precisely the purpose the Constitution forbids.

The Ceded Lands: During the hearing, Mr. Abercrombie asked me about my statement that Hawaiian activists "have argued that revenue from the ceded lands should be used exclusively for the benefit of ethnic Hawaiians." In my effort to clarify this statement, I said that I thought this statement was meant to refer to that part of the revenue that is currently being controlled by the Office of Hawaiian Affairs. I have since checked my sources and considered the matter more carefully.

Some prominent Hawaiian activists have taken the position that all Ceded Lands revenue should go towards ethnic Hawaiians. Indeed, some take the position that the Ceded Lands themselves should be owned by ethnic Hawaiians. For example, Professor Jonathan Osorio, until recently the chair of the University of Hawaii Kamakakuokalani Center for Hawaiian Studies, has stated that the notion that Hawaii is part of the United States is a "fiction" and denounced any notion that the "US has some legitimacy in its claims to our land and our loyalty."[6] Similarly, Dr. Kekuni Blaisdell recently referred to the Ceded Lands as "our national lands" that were seized illegally and subsequently transferred by "a thief transferring the goods to someone else."[7]

State Representative Mele Carroll, who as Chair of the House Committee on Hawaiian Affairs will have an important role the transfer of property to the Native Hawaiian Governing Entity, has certainly been more circumspect. But even she has recently said things that would surprise some. When asked in a recent television show, "Do you agree that all the Ceded Lands rightfully belong to the Hawaiians?", she responded: "I believe that all of the Hawaiian Islands belong to the Hawaiians. We never gave it up." She was then asked, "And when the Akaka bill passes, will you sponsor a bill to transfer all the Ceded Lands to the Native Hawaiian Governing Entity?" Rep. Carroll responded, "You know, that's a question for all Hawaiians. I cannot speak for just one." While she acknowledged that non-ethnic Hawaiians would have to be involved too and that it would be difficult to go back, she nevertheless stated, "But, you know, as a Hawaiian myself, I believe we never gave it up."[8]

One thing is clear: The negotiations over the transfer of "land, resources and other assets" pursuant to Section 8 of H.R. 2314 are very likely to be rocky. Over a million acres of land are at stake in this bilateral monopoly transaction. Even before H.R. 2314 has passed and the negotiations have begun, the dispute has already reached the United States Supreme Court once. See Hawaii v Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009)(rejecting OHA's position that the Apology Resolution prohibits Hawaii from transferring even a square inch of the Ceded Lands prior to resolution of Hawaiian land claims). The issue will not be resolved quickly.

Popular Sentiment on H.R. 2314: During the hearing on June 11, 2009, my attention was drawn to a poll undertaken by the Office of Hawaiian Affairs in 2007. To the best of my recollection, I was unaware of this poll of 380 persons, which is now being touted as proof that most Hawaiians support H.R. 2314. I have now looked at it and found that it is in not inconsistent with my statements in my earlier written submission. The Office of Hawaiian Affairs first asked whether "*Hawaiians should be recognized by the U.S. as a distinct indigenous group*"? (Italics added.) It got a response similar to that in the previous Office of Hawaiian Affairs cited in my previous testimony: Seventy percent (70%) said yes. Everyone likes to be recognized. But when it asked the more relevant question: "There has been talk of cre-

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sovereigns. And they know exactly what territory is theirs, often down to the square inch. The Menominees were similar. They could identify members better than most sovereign nations by starting with their earlier tribal roll and adding births since termination. They knew the officers, shareholders and assets of their corporation. On the other hand, ethnic Hawaiians have nothing that approaches this ability to identify group members. They have no clear leaders or institutions. They cannot identify tribal property. They exist only as a racial group.

[6] See Trisha Kehaulani Watson, Jon Osorio's Response to the Ceded Lands Settlement: An Open Letter to the Lahui, The Honolulu Advertiser (May 29, 2009), available at: http://hehawaiiau.honadvblogs.com/2009/05/23/jon-osorios-response-to-the-ceded-lands-settlement-an-open-letter-to-the-lahui/.

[7] See Gordon Y.K. Pang, No Ceasing Ceded-Lands Fight: UH Professor Believes Recent Agreement Fails to Resolve All Concerns, Honolulu Advertiser (May 23, 2009), available at http://www.honoluluadvertiser.com/article/20090523/NEWS23/905230321.

[8] See KBS Hawaii, Insights (recorded May 21, 2009), available at http://www.pbshawaii.org/ourproductions/insights__programs/insights20090521__hawaiian.htm (italics representing the emphasis supplied by original speakers).

ating a Hawaiian governing entity that would represent the Hawaiian people in their dealings with the state and the federal government. Do you agree or disagree that an entity of some kind should be formed?" This time only 51% of respondents agreed—well within the 5% margin for error.[9] Had the Office of Hawaiian Affairs stated (accurately) that this governing entity would not simply "represent" ethnic Hawaiians but would almost certainly govern them, just as the name implies by promulgating both civil and criminal laws and imposing and collecting taxes, there is no reason to suspect that the results would have been different from those obtained by the Grassroot Institute in its much larger (39,000 respondents) poll. The Grassroot Institute poll, conducted in 2005, found strong opposition to such a government. Congress, however, has no need to rely upon polls. It could request the State of Hawaii to hold a plebiscite on the matter—something opponents of the bill have advocated and proponents have repeatedly refused to do.

The Report of the U.S. Commission on Civil Rights: As I discussed in my initial testimony, the U.S. Commission on Civil Rights has recommended against the passage of an earlier and substantially similar version of H.R. 2314. Specifically, the report stated:

> "The Commission recommends against passage of the Native Hawaiian Government Reorganization Act...or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

Every deliberative body should have its dissenters, and in Commissioner Yaki, who appeared at the June 11, 2009 hearing alongside me, we at the Commission on Civil Rights certainly have ours. But his characteristically theatrical criticisms of the procedures used to produce the Commission's Report are wholly unfounded.

While there was a time in the not-too-distant past that Commission procedures were not as solicitous of minority views as they should have been, that time is now past. In 2005, not long after Gerald Reynolds was appointed Chair, the Commission adopted procedures designed to lean over backwards to ensure fairness. Our internal regulations now require our staff to exert their best efforts to ensure that the witnesses who appear at briefings represent all significant perspectives on the issue under consideration. Since then, staff members have always been successful in securing witnesses that give a full airing of views at our briefings, including our briefing on the proposed Native Hawaiian Government Reorganization Act.[10] Two witnesses testified in favor of that bill and two against it, making for a far more balanced presentation than the five-to-one hearing conducted by the House Committee on Natural Resources in connection with this testimony. Moreover, contrary to the impression Commissioner Yaki may have left, the Commission's report was based not just on witness testimony, but upon a careful review of the literature, including a briefing book prepared by the Commission's staff as well as extensive independent research by Commission members and their special assistants. Members of Congress can rest assured that Commission members were not under-informed.

Commissioner Yaki's suggestion that because the Commission's report was completed in four months (a shorter period than is typical for Commission reports) that it is somehow tainted is also unfounded. The Commission would like to be able to complete all its reports in a similar time frame, but often it cannot. This report in particular was shepherded through somewhat more quickly than average so that it could be issued before the time we were led to believe Congress would likely be voting on the matter. Under the circumstances, it would have been inappropriate not to move the report ahead. While Commissioner Yaki complains that the report was "stripped" of its findings and recommendations, what he really means is that proposed findings and recommendations that he may have wished to adopt were not in fact adopted by the Commission. Various recommendations were given due consideration; ultimately the Commission chose to adopt a report with one simple recommendation—that the proposed Native Hawaiian Government Reorganization Act not be adopted as law.

Like Commissioner Yaki's criticisms of the Commission's report, his criticisms of the Hawaii State Advisory Committee are both unfounded and further evidence that no effort by the Commission towards bipartisanship goes unpunished. Six of the Commission's eight current members were appointed by President George W. Bush or by Republican leaders in Congress. A coalition of the Republicans and the Repub-

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[9] http://www.oha.org/pdf/070904_Poll_Results.pdf.

[10] Even on those occasions on which witnesses whose views were expected to be congenial to Commissioner Yaki mysteriously withdrew at the last moment, we have been able to move forward with a diverse panel—more diverse than would have been the case prior to the new procedures.

lican-appointed Independents on the Commission could dominate the state advisory committee chartering process if those members wanted to do so. They have they voting strength to appoint only those whose views are center or right of center. But these members haven't wanted to dominate the process. In contrast to the practices of the Commission prior to their becoming the majority, the Commission's rules, which to the best of my knowledge were supported by all the Republican-appointed members, now require the membership of state advisory committees to include a range of perspectives. Both the major political parties must be represented. Some members of our Commission remember all too well what it was like to be shut out of the process and they are determined that they will not behave in the same manner as their predecessors.

Under the new rules, the Hawaii State Advisory Committee was re-chartered in 2007. There was nothing exceptional or irregular about this process or its timing. Re-charters are supposed to occur every two years. Of the 17 members, seven are Democrats, seven are Republicans and three are independent of either party.[11] In apparent contrast to the previous Hawaii State Advisory Committee, there is quite a bit of disagreement on the issues. Some members support S. 2314; others do not. Two Republican members have recently resigned. The only complaints that I aware of in connection with the Hawaii State Advisory Committee came from members (from both political parties) who were concerned that Commissioner Yaki's no doubt heartfelt interest in the issues sometimes outstrips his dedication to proper decorum.

The CHAIRMAN. Mr. Yaki.

STATEMENT OF MICHAEL YAKI, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Mr. YAKI. Thank you, Mr. Chair, Mr. Ranking Member, members of the Committee. My name is Michael Yaki, and unlike my colleague, I am from Sausalito, California, look further north, not San Diego. I am a Commissioner of the United States Commission on Civil Rights, and thank you for inviting me here today to participate in your hearing on H.R. 2314.

I am here today in my individual capacity as a member of the commission because I voted against the release of the briefing report made public by the commission in May 2006, over three years ago, that came out in opposition to a version of this legislation that is being considered here today.

I am here to testify first why, in my opinion, the report by the U.S. Commission on Civil Rights should be disregarded in any deliberation on this bill and second to reiterate a few key points about why this bill passes constitutional muster, why it is sound public policy and again why the commission was completely wrong on where it went. As you know, the commission was formed in 1957. It has had a long and proud history for some time.

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[11] I have no information on the political affiliations of the members of the previous Hawaii State Advisory Committee other than it had ten members when it unanimously adopted an otherwise controversial report entitled, "Reconciliation at a Crossroads: The Implication of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians. Its then-chair, Charles Kauluwehi Maxwell, Sr. (known to his radio audience as "Uncle Charlie") feels so strongly that what America has done to Hawaii "from the overthrow of the monarchy through annexation and statehood" was "despicable" that he refused to sing *God Bless America* at a Rotary Club luncheon to which he was invited to speak. See Walter Wright, Hawaiian "Warriors" Possible, Activist Says, Honolulu Advertiser (April 5, 2000). See also Charles K. Maxwell, Viewpoint: The People of Hawaii Should Rise Against Attack on Hawaiian Entitlements, The Maui News (June 26, 2002)(" If...Hawaiians are removed from their entitlements, I predict that the Hawaiian people will rebel and take to the streets, causing Hawaii's economy to drop like a lead weight. This is not a threat, it's reality. We can be pushed only so far.") For good or ill, the Hawaii State Advisory Committee, as it is currently constituted, is unlikely to adopt any report on a controversial issue unanimously.

Typically, the commission would engage in an inquiry on a perceived civil rights wrong or an injustice through hundreds of hours of testimony, witnesses, hearings, sworn testimony, documents, you name it the commission would go about its work in a very methodical manner. The commission, in fact, produced the factual reports that this Congress relied upon to pass the 1964 Civil Rights Act and the 1965 Voting Right Act and many other key pieces of legislation that are a part of the fabric of this nation today.

In stark contrast, the report on the Native Hawaiian Government Reorganization Act was a product of a two-hour hearing with four witnesses, no field interviews, no documents were produced, none were examined. The Hawaii State Advisory Commission, which is an adjunct of the Convention on Civil Rights had many hearings and produced several reports on the issue of sovereignty over the years. None of them, and no one from the Hawaii State Advisory Commission was invited to appear.

So forget just the ignorance of what had been done in the past by the Hawaii State Advisory Commission. This Congress in 1993 through its process produced what we have termed the apology resolution that you have talked about here today. That also was not part of the briefing materials or record that was part of this particular meeting. In addition, subsequent to the apology resolution, Department of the Interior and Justice held reconciliation hearings in Hawaii in furtherance of the apology resolution. None of those materials were introduced as part of the record of our briefing.

When you take this all into consideration, a truncated hearing, the deliberate exclusion, that is the only way I can put it, of relevant evidence, the failure to include the prior activities of the Hawaii State Advisory Committee, the Congress, the Departments of Justice and the Interior, compounded by what was truly amazingly faulty legal analysis. If you actually read this report, there are no findings in it.

There are no findings of fact. There are no findings of law. There is only simply one recommendation, and the recommendation as made by my colleague here today, who by the way in her defense was not a member of the commission at the time this report was done, but that recommendation basically being that the commission opposes this and any other legislation that would discriminate on the basis of race or national origin, et cetera, et cetera.

Again, this report that the commission came about with has no findings of fact and no findings of law. It did not include your own deliberations, which was passed by bipartisan majority. It did not include work by the Federal government. It did not include work of its own state advisory commission, but let me go on to the last point, which is what was the recommendation of the commission, and again it is based on a very faulty premise, which we have talked about here today. This act does not discriminate on the basis of race.

It is in fact about native, indigenous peoples. It is about the Indian Commerce clause in the Constitution, not about the 5th, the 14th or the 15th Amendment. That is not what we are talking about here today. In fact, if you read Cayetano and the other cases, they are very careful not to tread into that territory. Why? Because for the very simple reason that the very purpose of this act is to

bestow upon Native Hawaiians the very same protections and privileges that Native Americans and Native Alaskans receive in this country.

I have now gone completely off text. I am just going to start talking about a few things that are made up. One of the points made by one of the speakers talked about is this popular in Hawaii? Does a majority support it? I would just simply say that a Ward Research Poll done in 2007 continued to show overwhelmingly strong support for this legislation. Seventy percent supported the concept of creating Native Hawaiians as an indigenous peoples under the Constitution of the United States.

Sixty-seven percent supported the continuation of the land benefits related from the Hawaiian Home Commissions, et cetera, and it goes on an on as a majority. Finally, just to state one simple fact about the Admissions Act. The Admissions Act itself recognized the special status of the Native Hawaiian people through the reservation of the Hawaiian Homes Commission and other acts. When one member talked about were there any special benefits to be conferred by this legislation.

In fact, the Congress of the United States has already enacted over 150 different programs for Native Hawaiians in education, job training, whatever. There is going to be no expansion there at all. It is simply this: Do Native Hawaiians have the right and privilege as the indigenous peoples of those islands to be afforded the same legal status as Native Americans and Native Alaskans? I think the answer is clearly yes. Thank you for your consideration of this measure, and I urge its passage.

[The prepared statement of Mr. Yaki follows:]

Statement of Michael Yaki, Commissioner,
U.S. Commission on Civil Rights

Mr. Chair, Mr. Ranking Member, Members of the Committee, my name is Michael Yaki. I am a Commissioner on the United States Commission on Civil Rights, and thank you for inviting me here today to participate in your hearing on H.R. 2314, the Native Hawaiian Government Reorganization Act of 2009 on June 11, 2009.

I come here today in my individual capacity as a member of the Commission. The reason for this distinction is that I voted against the release of a briefing report made public by the Commission in May 2006—over three years ago—that came out in opposition to a version of the present legislation under consideration today.

I want to thank my fellow Commissioner Arlan Melendez and his special assistant, Richard Schmechel, for helping to prepare my testimony for today, as well as my own special assistant, Alec Deull, whose first week on the job involved helping me to prepare as well.

As a point of personal privilege, I would also like to mention that I had the honor last year of serving as the National Platform Chair for President Obama's campaign and the Democratic National Committee. And I would further like to point out that the Platform contained, among many, many other things, an endorsement of the Legislation that is being considered today.

I am here to testify about why, in my opinion, that Report by the U.S. Commission on Civil Rights in opposition to this Legislation should be disregarded in any deliberation on this bill. Second, I wish to reiterate a few key points that you will hear or have heard from other witnesses as to why, in my opinion, this bill passes constitutional muster, is sound public policy, and should be passed by the Congress. Much of my rationale is also contained in my dissenting opinion to the Commission report, which I have attached as an exhibit to my written testimony.

CONGRESS SHOULD IGNORE THE RECOMMENDATION OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS WITH REGARD TO THE PRESENT LEGISLATION

First, let me deal with the Commission report. The Commission, as you know, was founded by President Eisenhower in 1957 and subsequently reauthorized by Congress over the years. Presently it is comprised of 8 appointees—four by the President, four by the Congress, for six year staggered terms. At its inception, the role of the Commission was to engage in vigorous, in-depth fact-finding to create the factual predicate for action by the Executive and Legislative branches. Typically, the Commission would engage in an inquiry on a perceived injustice or violation of a civil right, relying on hundreds of hours of testimony and thousands of hours of staff time reviewing documents and interviewing witnesses. The report that would be produced would take similar amounts of time to formulate and analyze. But the end products were magnificent. The Commission's report on discrimination and Jim Crow laws resulted in the passage of the 1964 Civil Rights Act. The Commission's report on rampant voter discrimination gave Congress the means necessary to justify the 1965 Civil Rights Act. But I would be hesitant to say that the integrity and thoroughness of those years has been replicated in the three years that I have served on the Commission.

To provide a stark contrast, the report on the Native Hawaiian Government Reorganization Act in 2006 was the product of a two "hour briefing, with a total of 4 witnesses invited to our headquarters in Washington DC. No field interviews were conducted. No documents were produced, and none were examined. One witness who opposed the legislation cited a report that has been widely discredited by all notable historians of the time. The Commission is supposed to have fifty State Advisory Committees, appointed by the Commission, who serve as our eyes and ears and which prepare their own reports. The Hawai'i State Advisory Commission had, in the past, engaged in thorough public hearings on the islands and prepared several reports on the issue of sovereignty for the Native Hawaiian peoples. These reports concluded that the plight of the Native Hawaiians was constitutionally no different than that of other Native American populations in our country, and should be treated the same.

But did our Commission ask a single person involved in the preparation of these reports to attend? No. Were these reports introduced into the record for consideration? No. Did members of our Hawai'i State Advisory Commission attempt to contact us and introduce these reports? Yes, but they were ignored by the majority-controlled staff.

The deliberate ignorance of past practices and information was not confined to the state of Hawai'i. In 1993 the Congress passed a joint resolution, signed by President Clinton, which became Public Law 103-50, which acknowledged the 100th year commemoration of the overthrow of the Kingdom of Hawai'i. Public Law 103-50 also apologized to Native Hawaiians for the role of the U.S. Navy in facilitating the overthrow of Queen Liliuokalani. In essence, the U.S. government acknowledged the illegal overthrow in 1893, and called upon the President to engage in a policy of reconciliation with Native Hawaiians. To facilitate this mandate, the U.S. Departments of Justice and Interior facilitated hearings in 1999 on reconciliation. All this information—the Apology Resolution, the reconciliation hearings, and the reports produced at the time—were never made part of the analysis of the Commission report.

Finally, and perhaps most fatally—though I submit any one of these omissions was fatal to the integrity of the report in and of itself—the draft report contained erroneous legal analyses of the Constitutional bases for recognition of Native Americans, which I will discuss in more detail later in my testimony.

The convergence of a truncated hearing, the deliberate exclusion of relevant evidence, the failure to include prior activities not only of the Hawai'i State Advisory Committee but the Congress and the Departments of Justice and Interior, compounded by faulty legal analysis, led to the extraordinary step by the Commission of stripping the report of all findings and all recommendations. The embarrassment of poor scholarship, a paucity of outreach, and deliberate exclusion of previous Congressional and Executive action on this issue, in my opinion, was too much for even my most adamant colleagues to endure. In sum, the briefing and the report were exposed for the sham/kangaroo court that it was. As such, this Committee should give no credence at all to its sole recommendation, since it had little to no factual or analytical basis.

All that remained in the report was a single, generic recommendation that could apply to a variety of prescriptive and proscriptive government actions—that the Commission opposed "any legislation that 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 latter half of my testimony is to explain my why colleagues were dead wrong in applying this general principle to the Legislation at hand.

THE CONSTITUTIONALITY OF THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT

You will hear from others far more learned than myself on the constitutionality of this Legislation. Yet, because my colleagues raised the issue, permit me a short rebuttal to what I believe is a specious and misplaced claim.

The Native Hawaiian Government Reorganization Act does not purport to discriminate on the basis of race or national origin, or "subdivide" (whatever that term means) the American people into subgroups. That is because the Native Hawaiian Government Reorganization Act is not legislation based on the 5th or 14th Amendments of the United States Constitution. It is, as the United States Supreme Court said in U.S. vs. Lara in 2004, well-settled that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes' powers that we have consistently described as plenary and exclusive."

Under the U.S. Constitution, therefore, America's indigenous, native people are recognized as groups that are not defined by race or ethnicity, but by the fact that their indigenous, native ancestors exercised sovereignty over the lands and areas that subsequently became part of the United States. It is the pre-existing sovereignty—sovereignty that pre-existed the formation of the United States—which the U.S. Constitution recognizes and, on that basis, accords a special status to America's indigenous, native people. Let me elaborate.

The courts have described Congress's power over Indian affairs as "plenary and exclusive." United States v. Lara, 541 U.S. 193, 200 (2004). In one of its most recent rulings, the U.S. Supreme Court has described the dynamic nature of Congress' constitutional authority in the field of Native affairs in this manner, "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time," and "such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty." United States v. Lara, 541 U.S. 193, 200 (2004).

As, over the course of our history, the term "Indians" has been used to describe the indigenous people encountered in geographic areas of the continental United States beyond the original thirteen states that were parties to the first Constitution, including the indigenous native people of Alaska and Hawaii, it is both important and relevant to revisit the origins of this term.

Historical documents and dictionaries make clear that the terms "Indians" and "Indian tribe" were terms derived from commonly-used European parlance which sought to describe the aboriginal, indigenous native people of the various nation states around the world as early as the 1500s. These were never words that the indigenous peoples applied to themselves. The debates of the Continental Congress and the written discourse amongst the Framers of the Constitution as it relates to this provision of the Constitution use the terms "Indians" and "Indian tribes" interchangeably, and it was only in the last draft of the Constitution that emerged from the conference that the term "Indian tribes" was ultimately adopted.

The significance of this research cannot be underestimated. There are those who criticize whether Native Hawaiians comprise "Indians" within the meaning of the Constitution. Under the doubters' bizarre theory, Native Hawaiians are not Indians as envisioned by the Founding Fathers, as if only those indigenous people in situ at the founding were eligible for inclusion. That is clearly not the case. At the time of the ratification of the Constitution, the vast majority of the continental United States was not yet within our borders and with it the vast majority of Native American peoples who populated the Great Plains and the West. To exclude the Native Hawaiians on these grounds is the proverbial distinction without a difference.

Understanding what is encompassed in these terms is significant for other constitutional purposes, because they describe the scope of Congress' authority to enact legislation affecting America's indigenous peoples, notwithstanding the fact that the Congress has from time to time chosen to define the indigenous, native people of the United States by reference to blood quantum or race. Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. And with reference to the issue of the use of blood quantum or race, it is Congress' constitutional authority under the Indian Commerce Clause that has led the Supreme Court to draw a legal distinction between laws enacted for the benefit of America's indigenous, native people and assertions that such laws, such as an Indian employment preference law, constitute racial discrimination. In the landmark case, Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L.Ed.2d 290 (1974) the U.S. Supreme Court observed:

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

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique status is of long standing....and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. "

It is within this legal framework that the Congress has enacted legislation to extend federal recognition to various groups of America's indigenous peoples. As Professors Viet Dinh and Christopher Bartolomucci observed in their testimony submitted to the Commission for its January 20, 2006, briefing on S. 147—the 2005 version of this Legislation—the U.S. Supreme Court has sustained this exercise of Congress's constitutional authority most recently in 2004 when it recognized Congress' power to restore previously extinguished sovereign relations with Indian tribes. The Court observed that "Congress has restored previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated." Id. (citing Congress' restoration of the Menominee Tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress' power "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State." Lara, 124 S. Ct. at 205.

The argument that recognition of a Native Hawaiian governing entity would discriminate on the basis of race conflicts with the long-standing principles of federal law concerning the relationship between the United States government's and the indigenous peoples who have inhabited this land from time immemorial—a relationship that has long been recognized by Congress, the federal courts, and the Executive branch. Those making this argument are suggesting that Native Hawaiians should, and indeed must, be treated differently from the other indigenous peoples residing in what is now the United States. H.R. 2314 is intended to establish parity for Native Hawaiians with the other indigenous peoples of America. Those who invoke the equal protection or due process clauses of the Constitution to oppose this legislation are using the very cornerstones of justice and fairness in our democracy to deny equal treatment to one group of indigenous people.

It is disingenuous that the opponents of NHGRA are suggesting that extending this same U.S. policy to Native Hawaiians—the indigenous, native people of the fiftieth state—would lead to racial balkanization. There are over 560 federally recognized American Indian and Alaska Native governing entities in 49 of 50 states, coexisting with all peoples and federal, state and local governments. There is absolutely no evidence to support this notion, and seems to be spread simply to instill unwarranted fear and opposition to the NHGRA.

This legislation seeks parity in U.S. policies towards the three indigenous, native people in the 50 states, American Indians, Alaska Natives and Native Hawaiians This legislation does not extend or create new legal boundaries, does not extend or create new constitution doctrine. Well within the plenary powers of the United States, and which has been repeatedly exercised throughout the history of our country, Congress may act to recognize a native, indigenous people for the purposes of establishing sovereign rights.

If one accepts the majority on the U.S. Commission on Civil Rights' pronouncement against subdividing the country into "discrete subgroups accorded varying degrees of privilege," then the Commission should immediately call for an end to any recognition of additional Indian tribes. Since that would clearly contravene the Constitutional authority of Congress, that would seem to be an unlikely—and illegal—outcome. Given that the authority for NHGRA stems from the same constitutional source as that for Native Americans, then the Commission majority has chosen to ignore the constitutionality of the proposed law.

It is also important to remember what this Legislation does not do. It does not, as it could, immediately create a de facto sovereign relationship for the Native Hawaiians. To that end, I am sure you have heard from constituents and advocates who believe the legislation does not go far enough and, indeed, from a constitutional viewpoint that may be true. Congress' powers are broader. This legislation is, within the broad powers of Congress, a process, carefully tailored and crafted by the authors to take into account the uniqueness of the islands of Hawai'i and the Native

Hawaiians which may lead to self expression, self-determination, and restoration of sovereign rights. It is the right bill for the right time and the right circumstances.

CONCLUSION

I must confess that there could be bias in my testimony. If my father's father was to be believed—and don't we always believe our grandparents?—my grandfather was the product of a union between a Japanese laborer and a Native Hawaiian. My grandfather was born in Hana, Maui, and placed in an orphanage at an early age. Unfortunately, the orphanage burnt down and with it, all records of my great-grandmother.

That was the sole connection I had to Hawai'i throughout most of my childhood and adult life, save for the occasional vacation on the beaches. But through this legislation, through working with individuals in Hawai'i, with people in the Office of Hawaiian Affairs, I have come to learn more about these special people and their place in our country.

The Native Hawaiian Government Reorganization Act is about justice. It is about righting a wrong. It is about recognition of the identity and sovereignty of a people who survived attempts by our government to strip them of these precious rights over a hundred years ago. Far from the racial balkanization spread by opponents, the Act is simply a step—a baby step at that—towards potential limited sovereignty and self-governance.

I am proud that Hawai'i is a role model for multi-cultural living in the United States. I am proud of how the Aloha spirit imbues the people, the culture, the way of life in the islands. For all the reasons that make Hawai'i so special, the Native Hawaiian Government Reorganization Act will succeed. I urge this Subcommittee, and this Congress, to pass H.R. 2314.

Thank you for the privilege of testifying today.

ATTACHMENT TO WRITTEN STATEMENT:

Dissenting Statement of Commissioner Michael J. Yaki[1] to The Native Hawaiian Government Reorganization Act of 2005: A Briefing Before The United States Commission on Civil Rights Held in Washington, D.C., January 20, 2006

Preface

As a person quite possibly with native Hawaiian blood running through his veins,[2] it is quite possible to say that I cannot possibly be impartial when it comes to this issue. And, in truth, that may indeed be the fact. Nevertheless, even before my substantive objections are made known, from a process angle there were serious and substantial flaws in the methodology underlying the report.

First, the report relies upon a briefing from a grand total of four individuals, on an issue that has previously relied upon months of research and fact gathering that has led to two State Advisory Commission reports, one Department of Justice Report, and Congressional action (the "Apology Resolution"), not to mention testimony before the Congress on the NHGRA bill itself that was never incorporated into the record.

The paucity of evidence adduced is hardly the stuff upon which to make recommendations or findings. Even though the Commission, to its credit, stripped the report of all its findings for its final version, does that not itself lend strength and credence to the suggestion that the briefing was flawed from the inception? And if so flawed, how can the Commission opine so strongly upon a record that it could not even find supported now non-existent findings?

Second, aside from ignoring the volumes of research and testimony that lie elsewhere and easily available to the Commission, we ignored soliciting advice and comment from our own State Advisory Commission of Hawai'i. Over the past two decades, the Hawai'i Advisory Committee to the United States Commission on Civil Rights ("HISAC") has examined issues relating to federal and state relations with Native Hawaiians. As early as 1991, HISAC recommended legislation confirming federal recognition of Native Hawaiians. A mere five years ago, the HISAC found that "the lack of federal recognition for native Hawaiians appears to constitute a

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[1] Commissioner Arlan Melendez joined in the dissenting statement.

[2] My grandfather was born in Hana, Maui, and placed in an orphanage. The story passed down was that he was the product of a Japanese laborer on the islands and a Native Hawaiian. The orphanage records burned down some time ago, so we are unable to verify for sure whether he was half-native Hawaiian or not, but for anyone who knew or saw my grandfather, he had many Polynesian physical characteristics.

clear case of discrimination among the native peoples found within the borders of this nation."[3] The HISAC concluded "[a]bsent explicit recognition of a Native Hawaiian governing entity, or at least a process for ultimate recognition thereof, it is clear that the civil and political rights of Native Hawaiians will continue to erode."[4] The HISAC found that "the denial of Native Hawaiian self-determination and self-governance to be a serious erosion of this group's equal protection and human rights."[5] Echoing recommendations by the United States Departments of Justice and Interior, the HISAC "strongly recommend[ed]" that the federal government "accelerate efforts to formalize the political relationship between Native Hawaiians and the United States."[6] The HISAC's long-standing position of support for legislation like S. 147 to protect the civil rights of native Hawaiians belies recent assertions that such legislation discriminates on the basis of race and causes further racial divide.

The HISAC could and would have been a key source of information, especially updated information, on the state of the record. To exclude them from the dialogue I believe was indefensible and a deliberate attempt to ensure that contrary views were not introduced into the record.

Third, the report as it stands now makes no sense. The lack of findings, the lack of any factual analysis, now makes the report the proverbial Emperor without clothes. The conclusion of the Commission stands without support, without backing, and will be looked upon, I believe, as irrelevant to the debate. Such is the risk one runs when scholarship and balance are lacking.

Substantively, the recommendation of the Commission cannot stand either.

It is not based on facts about the political status of indigenous, Native Hawaiians; nor Native Hawaiian history and governance; or facts about existing U.S. policy and law concerning Native Hawaiians. It is a misguided attempt to start a new and destructive precedent in U.S. policy toward Native Americans. The USCCR recommendation disregards the U.S. Constitution that specifically addresses the political relationship between the U.S. and the nations of Native Americans. The USCCR disregarded facts when the choice was made not to include HISAC in the January 2006 briefing on NHGRA and not utilizing the past relevant HISAC reports concerning Native Hawaiians based on significant public hearing and facts. Springboarding from trick phrasing and spins offered by ill informed experts, at least one of whom has filed suit to end Native Hawaiian programs established through Congress and the state constitution, the USCCR majority recommendation is an obvious attempt to treat Native Hawaiians unfairly in order to begin the process of destroying existing U.S. policy towards Native Americans.

Facts About Indigenous Native Hawaiians, Native Hawaiian and U.S. History, and the Distinct Native Hawaiian Indigenous Political Community Today

Native Hawaiians are the indigenous people of Hawai'i, just as American Indians and Alaska Natives are the indigenous peoples of the remaining 49 states. Hawai'i is the homeland of Native Hawaiians. Over 1,200 years prior to the arrival of European explorer James Cook on the Hawaiian islands, Native Hawaiians determined their own form of governance, culture, way of life, priorities and economic system in order to cherish and protect their homelands, of which they are physically and spiritually a part. They did so continuously until the illegal overthrow of their government by agents and citizens of the U.S. government in 1893. In fact the U.S. engaged in several treaties and conventions with the Native Hawaiian government, including 1826, 1842, 1849, 1875 and 1887. Though deprived of their inherent rights to self-determination as a direct result of the illegal overthrow, coupled with subsequent efforts to terminate Native Hawaiian language, leaders, institutions and government functions, Native Hawaiians persevered as best they could to perpetuate the distinct vestiges of their culture, institutions, homelands and government functions in order to maintain a distinct community, recognizable to each other.

Today, those living in Hawai'i recognize these aspects of the distinct, functioning Native Hawaiian political community easily. For example: the Royal Benevolent Societies established by Ali'i (Native Hawaiian chiefs and monarchs) continue to maintain certain Native Hawaiian government assigned and cultural functions; the private Ali'i Trusts, such as Kamehameha Schools, Queen Lili'uokalani Trust, Queen

[3] Hawaii Advisory Committee to the U.S. Commission on Civil Rights, Reconciliation at a Crossroads: The Implications of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians, at ix (June 2001).

[4] Id. at 49.

[5] Id.

[6] Id.

Emma Foundation and Lunalilo Home, joined by state government entities established for indigenous Hawaiians, including the Office of Hawaiian Affairs and the Department of Hawaiian Homelands, and Native Hawaiian Serving institutions such as Alu Like, Inc. and Queen Lili'uokalani Children's Center continue the Native Hawaiian government functions of caring for Native Hawaiian health, orphans and families, education, elders, housing economic development, governance, community wide communication and culture and arts; the resurgence of teaching and perpetuation of Native Hawaiian language and other cultural traditions; Native Hawaiian civic participation in matters important to the Native Hawaiian community are conducted extensively through Native Hawaiian organizations including the Association of Hawaiian Civic Clubs, the State Council of Hawaiian Homestead Associations, the Council for Native Hawaiian Advancement, Ka Lahui and various small groups pursuing independence; and Native Hawaiian family reunions where extended family members, young and old, gather to talk, eat, pass on family stories and history, sometimes sing and play Hawaiian music and dance hula and pass on genealogy.

Indeed, if the briefing had been as consultative with the HISAC as it could have been, there would have been testimony that, for example, the Royal Order of Kamehameha, the Hale O Na Ali'I o Hawai'I, and the Daughters of Ka'ahumanu continue to operate under principles consistent with the law of the former Kingdom of Hawai'i. There would have been testimony that these groups went "underground" due to persecution but remained very much alive during that time.[7]

The distinct indigenous, political community of Native Hawaiians is recognized by Congress in over 150 pieces of legislation, including the Hawaiian Homes Commission Act and the conditions of statehood. Native Hawaiians are recognized as a distinct indigenous, political community by voters of Hawai'i, as expressed in the Hawai'i state constitution.

The notion introduced by opponents to the NHGRA that the Native Hawaiians don't "fit" federal regulations governing recognition of Native American tribes because they lacked a distinct political identity or continuous functional and separate government[8] would ignore all the manifestations of such identity, existence, and recognition noted above.

The NHGRA Does Not Set New Precedent in U.S.

The NHGRA is in fact a measure to establish fairness in U.S. policy towards the three groups of Native Americans of the 50 united states—American Indians, Alaska Natives and Native Hawaiians. The U.S. already provides American Indians and Alaska Natives access to a process of federal recognition, and the NHGRA does the same for Native Hawaiians based on the same constitutional and statutory standing.

I. Legal Authorities Establishing OHA / Purpose of OHA

Hawai'i became the fiftieth state in the union in 1959 pursuant to Pub. L. No. 86-3, 73 Stat. 5 ("Admission Act"). Under this federal law, the United States granted the nascent state title to all public lands within the state, except for some lands reserved for use by the federal Government ("public lands trust"). These lands "together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State] as a public trust for the support of the public schools,...the conditions of native Hawaiians' and other purposes.[9]

In 1978, the multicultural residents of Hawai'i voted to amend its state Constitution to 1) establish the Office of Hawaiian Affairs ("OHA") to "provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and...[to] unite Hawaiians as a people;"[10] and 2) to establish the public lands trust created by the Admission Act as a constitutional obligation of the State of Hawaii to the native people.[11]

The constitutional mandate for OHA was implemented in 1979 via the enactment of Chapter 10, Hawaii Revised Statutes. OHA's statutory purposes include "[a]ssessing the policies and practices of other agencies impacting on native

[7] Communication from Quentin Kawananakoa, former member of the Hawai'i State Advisory Committee, May 12, 2006.

[8] See 25 C.F.R. § 83.

[9] § 5 (f), 73 Stat. 6.

[10] 22 1 Proceedings of the Constitutional Convention of Hawai'i 1978, Committee of the Whole Rep. 13, p. 1018 (1980)

[11] William Burgess, who testified at the briefing, was a delegate to the 1978 Constitutional Convention, yet Mr. Burgess then voiced no opposition to the establishment of OHA. Communication of Martha Ross, Office of Hawaiian Affairs, May 2006.

Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a vehicle for reparations." [12] OHA administers funds derived for the most part from its statutory 20-percent share of revenues generated by the use of the public lands trust. [13]

Several legal challenges to the existence of OHA based upon the Fourteenth Amendment to the United States Constitution have been filed by various plaintiffs, some of who are represented by Mr. Burgess. Mr. Burgess has thus far failed to win the relief he has sought, including injunctive relief, either in the United States District Court for the District of Hawaii or the United States Court of Appeals for the Ninth Circuit. The denial of injunctive relief to Mr. Burgess's clients presents a powerful rebuttal to their claims that OHA's administration of its constitutional and statutory obligations to native Hawaiians and Hawaiians deprives all Hawaii's citizens of equal protection of law.

Mr. Burgess describes the "driving force" behind the NHGRA as "discrimination based upon ancestry." Nothing could be further from the truth or more illogical. The "driving force" behind the creation and passage of NHGRA is the desire of the Hawaiian people, and virtually every political representative in the State of Hawaii to achieve federal recognition and legal parity with federal recognition as with the other two native indigenous peoples of America, namely American Indian Nations and Native Alaskans. There is no constitutional impediment to congressional federal recognition of the Hawaiian people.26 [14]

Then-United States Solicitor John Roberts (now Chief Justice Roberts) argued in his prior legal briefs to the United States Supreme Court in *Rice v. Cayetano:* "[T]he Constitution, in short, gives Congress room to deal with the particular problems posed by the indigenous people of Hawaii and, at least when legislation is in furtherance of the obligation Congress has assumed to those people, that legislation is no more racial in nature than legislation attempting to honor the federal trust responsibility to any other indigenous people." It is, in sum, "not racial at all."

Roberts went on to say:

Congress is constitutionally empowered to deal with Hawaiians, has recognized such a "special relationship," and—"[i]n recognition of th[at] special relationship"—has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13) (emphasis added). As such, Congress has established with Hawaiians the same type of "unique legal relationship" that exists with respect to the Indian tribes who enjoy the "same rights and privileges" accorded Hawaiians under these laws. 42 U.S.C. § 11701(19). That unique legal or political status—not recognition of "tribal" status, under the latest executive transmutation of what that means—is the touchstone for application of Mancari when, as here, Congress is constitutionally empowered to treat an indigenous group as such.

NHGRA Is a Matter of Indigenous Political Status and Relationship Between the U.S. and the Native Hawaiian Government, and Not a Racial Matter.

Under the U.S. Constitution and federal law, America's indigenous, native people are recognized as groups that are not defined by race or ethnicity, but by the fact that their indigenous, native ancestors exercised sovereignty over the lands and areas that subsequently became part of the United States. It is the pre-existing sovereignty—sovereignty that pre-existed the formation of the United States—which the U.S. Constitution recognizes and, on that basis, accords a special status to America's indigenous, native people.

The tortured attempts by persons such as Mr. Burgess to distinguish Native Hawaiians from Native Americans ultimately fail by simple historical comparison. Like the Native Americans, the Native Hawaiians pre-dated the establishment of the United States. Like the Native Americans, the Native Hawaiians had their own culture, form of government, and distinct sense of identity. Like Native Americans, the United States stripped them of the ownership of their land and trampled over their sovereignty. The only distinction—one without a difference—is that unlike the

[12] HRS § 10-3 (4)-(6).
[13] HRS § 10-13.5.
[14] See *U.S. v. Lara.* 541 U.S. 193 (2004).

vast majority of Native American tribes, the Native Hawaiians were not shipped off, force-marched, and relocated to another area far from their original homelands.27 [15]

It is somewhat disingenuous that the opponents of NHGRA are suggesting that extending this same U.S. policy to Native Hawaiians, the indigenous, native people of the fiftieth state would lead to racial balkanization. There are over 560 federally recognized American Indian and Alaska Native governing entities in 49 of 50 states, coexisting with all peoples and federal, state and local governments. There is absolutely NO evidence to support this notion, and seems to be spread simply to instill unwarranted fear and opposition to the NHGRA.

NHGRA is Constitutional

In *United States v. Lara,* the Supreme Court held that "[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes powers that we have consistently described as plenary and exclusive." In 1954, Congress terminated the sovereignty of the Menominee Indian Tribe in Wisconsin. In 1973, Congress exercised its discretion, changed its mind, and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee Tribe.

NHGRA does little more than follow the precedent allowed by Lara and exercised in the Menominee case. Reliance on federal regulations as gospel ignores the fact that the plenary authority of Congress has resulted in restoration of tribal status, in the case of the Menominee, and the retroactive restoration of tribal lands, as in the case of the Lytton Band in California. The Attorney General of Hawaii, many distinguished professors, and the American Bar Association all firmly believe that Congress has the authority to recognize Native Hawaiians.28 [16]

All that NHGRA seeks is parity in U.S. policies towards the three indigenous, native people in the 50 states, American Indians, Alaska Natives and Native Hawaiians. Under the U.S. Constitution and Federal law, America's indigenous, native people are recognized as groups that are not defined by race or ethnicity, but by the fact that their indigenous, native ancestors, exercised sovereignty over the lands and areas that subsequently became part of the United States. It is the pre-existing sovereignty, sovereignty that pre-existed the formation of the United States which the U.S. Constitution recognizes and on that basis, accords a special status to America's indigenous, native people.

If one accepts the Commission's pronouncement against subdividing the country into "discrete subgroups accorded varying degrees of privilege," then the Commission should immediately call for an end to any recognition of additional Indian tribes. Since that would clearly contravene the Constitutional authority of Congress, that would seem to be an unlikely—and illegal—outcome. Given that the authority for NHGRA stems from the same constitutional source as that for Native Americans, then the Commission majority has chosen to ignore the constitutionality of the proposed law.

NHGRA Has the Support of the Residents of Hawai'i as Reflected in Two Scientific Polls, the Fact that the Majority of Officials Elected by the Voters of Hawai'i Support NHGRA.

The results of a scientific poll in Hawai'i showed 68 percent of those surveyed support the bill. [17] The statewide poll was taken Aug. 15-18 by Ward Research, a local

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[15] Although, like Native Americans, the land ceded to them under the Hawaiian Homes Act is, for the most part, largely uninhabitable or not readily susceptible to development.

[16] On February 13, 2006, the policy-making body of the 400,000 members American Bar Association (ABA) "...voted overwhelmingly in favor of a resolution to urge Congress to pass legislation to establish a process to provide federal recognition for a Native Hawaiian governing entity. Such legislation, S. 147, proposed by Sen. Daniel Akaka, is currently pending in Congress." As further explained by Alan Van Etten, Hawai'i state delegate, ABA, in a Letter to the Editor published on February 21, 2006 in the Honolulu Advertiser,—...The ABA's mission is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law. By passing the resolution, the delegates said yes to the establishment by Congress of a process that would provide Native Hawaiians the same status afforded to America's other indigenous groups, American Indians and Native Alaskans. The blessing by this country's largest and most prestigious legal organization would appear to put to rest the primary legal arguments advanced by this bill's opponents....The American Bar Association's support for Hawai'i's indigenous people sends a strong message that a process for Native Hawaiian recognition follows the rule of law and provides great impetus for Congress to take immediate action to pass the Akaka bill."

[17] OHA Poll Shows Strong Community Support for Akaka Bill, HONOLULU STAR BULLETIN, August 23, 2005.

public opinion firm. [18] The results are consistent with a 2003 poll. [19] While polls alone do not a mandate make, the consistency between the two polls shows that despite the best efforts of opponents such as Mr. Burgess, the multicultural, multiethnic residents of Hawaii support the recognition of Native Hawaiians and would allow them to take the first, tentative, steps toward recognition and sovereignty.

More importantly, the elected officials of Hawaii have almost unanimously thrown their support to the NHGRA. The NHGRA is supported by most of the elected officials of Hawai'i, including the entire Hawai'i Congressional Delegation, Governor Linda Lingle, the Senate and House of the State Legislature (except two members), all nine Trustees of the Office of Hawaiian Affairs and the mayors of all four counties of Hawai'i.

Conclusion

The NHGRA is about justice. It is about righting a wrong. It is about recognition of the identity and sovereignty of a people who survived attempts by our government to strip them of these precious rights over a hundred years ago. Far from the racial balkanization spread by opponents, NHGRA is simply a step—a baby step at that—towards potential limited sovereignty and self-governance.

Most who live in Hawai'i know the distinct Native Hawaiian community, with its own language and culture, is the heart and breath of Hawai'i. Hawai'i, and no other place on earth, is the homeland of Native Hawaiians.

On one thing the proponents and opponents of NHGRA seem to agree: Hawai'i is a special place in these United States, a multicultural society and model for racial and ethnic harmony that is unlike anywhere else in our country and, increasingly, the world. It is also a place where its multicultural residents recognize the indigenous Native Hawaiian culture as the host culture with a special indigenous political status where there are state holidays acknowledging Native Hawaiian monarchs, and the Hawaiian language is officially recognized.

Perhaps it is the "mainlanders" lack of context and experience that creates a debate where, in Hawai'i, there is practically none. In the mainland, we think of "Aloha" as Hawaii Five-O, surfing, and brightly colored shirts that remain tucked away in the back of our closets. In Hawai'i, however, Aloha and the Aloha spirit is more than just a slogan. It is proof positive of the influence and power of the Native Hawaiian people and culture that exists and thrives today. In my lifetime, I have seen growing awareness, acceptance and usage of Hawaiian culture, symbols, and language. It is now almost mandatory to use pronunciation symbols whenever Hawaiian words are printed, whereas twenty years ago it was ignored. Multiculturalism in modern Hawai'i means that non-Native Hawaiians respect and honor the traditions of a people who settle on these volcanic paradises after braving thousands of miles of open ocean. The least we can do, the "we" being the American government which took away their islands, is to accord them the basic respect, recognition, and privileges we do all indigenous peoples of our nation. NHGRA will give meaning to the Apology Resolution; it will begin the healing of wounds.

That same aloha spirit that imbues the multicultural islands of Hawai'i will, in my opinion, ensure that the processes contained in NHGRA will inure to the benefit of all the people of Hawaii. Perhaps more than any other place in our Union, fears of racial polarization, discrimination, or unequal treatment resulting from the passage of NHGRA should be seen as distant as the stars which the Hawaiians used to navigate their wa'a, their canoes, across the vastness of the seas.

STATEMENT OF H. CHRISTOPHER BARTOLOMUCCI, PARTNER, HOGAN & HARTSON, WASHINGTON, D.C.

Mr. BARTOLOMUCCI. Mr. Chairman and distinguished members of the Committee, thank you for the opportunity and privilege to testify today on H.R. 2314, the Native Hawaiian Government Reorganization Act of 2009. My testimony will focus on the legal issue of Congress' constitutional authority to enact this legislation. The

[18] OHA paid for the poll of 401 randomly selected Hawai'i residents, which had a margin of error of plus or minus 4.9 percentage points.

[19] OHA Poll Finds Public Favors Federal Recognition, HONOLULU ADVERTISER, October 24, 2003. Ward Research was hired in July of 2003 to conduct the telephone survey, in which 600 residents were contacted, about half of them Native Hawaiians. Federal recognition won support from 86 percent of the Hawaiian survey bloc, and 78 percent of the non-Hawaiian participants. However, the idea of creating a Hawaiian government drew 72 percent support from Hawaiian participants and 53 percent from non-Hawaiians.

principal legal question posed by H.R. 2314 is whether Congress has the power to treat Native Hawaiians the same way it treats this country's other indigenous groups, that is American Indians and Native Alaskans.

Constitutional text, Supreme Court precedent and historical events provide the answer. Congress' broad power to deal with Indian tribes allows Congress to recognize Native Hawaiians as having the same sovereign status as other Native Americans. H.R. 2314 would initiate a process through which Native Hawaiians would reconstitute their indigenous government.

Before Hawaii became a state, the Kingdom of Hawaii was a sovereign nation recognized as such by the United States. In 1893, American officials and the U.S. Military aided the overthrow of the Hawaiian monarchy. A century later, in 1993, the Congress in the apology resolution formally apologized to the Hawaiian people for the U.S. involvement in this regime change. Congress has ample authority to assist Native Hawaiians in their effort to reorganize their governing entity.

Congress' broadest power, the power to regulate commerce specifically encompasses the power to regulate commerce with the Indian tribes. Based upon the Indian Commerce Clause and other constitutional provisions, the Supreme Court has recognized Congress' plenary power to legislate regarding Indian Affairs. As the Supreme Court said in the 2004 case of *United States v. Lara*, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive."

Congress has used the very power in the past to restore lost tribal sovereignty. In 1954, Congress terminated the sovereignty of the Menominee Indian Tribe in Wisconsin. In 1973, Congress reversed course and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee. Pointing to the Menominee Restoration Act, the Supreme Court in the Lara case affirmed that the Constitution authorizes Congress to enact legislation recognizing the existence of individual tribes and restoring previously extinguished tribal status.

H.R. 2314 is patterned after the Menominee Restoration Act and would do for Native Hawaiians what Congress did for the Menominee. Commissioner Heriot in her remarks states that Congress cannot create a tribe. That is not at all what would be done in this legislation. This legislation would establish a process by which what everyone recognizes was an indigenous sovereign government would be reconstituted. A new tribe would not be created out of whole cloth.

Furthermore, Commissioner Heriot refers to the Menominee experience and contends that the Menominee continued to exist, that the tribe hadn't changed and that the Menominee didn't need the Federal government to figure out who its leaders and members were. In fact, the act that terminated the full sovereignty of the Menominee was called the Menominee Indian Termination Act, and that was essentially the effect it had.

It ended Federal supervision over the tribe, closed its membership roll and said that the members of the Menominee were subject to state laws the same as any other person. When Congress in 1973

restored the Menominee, the Menominee did need Federal assistance because the government had closed the roll, so in the Menominee Restoration Act, Congress set up a commission much like in the present bill that would assist the Menominee in voting for new leadership, and it supplied a definition of who would be a Menominee for purposes of voting to constitute the new commission.

The comparison between the Menominee legislation and H.R. 2314 is fairly close. H.R. 2314 does not run afoul of the Supreme Court's 2000 decision in *Rice v. Cayetano*. In *Rice*, the Court ruled the State of Hawaii could not limit the right to vote in the State election to Native Hawaiians, but Rice did not decide whether Congress may treat Native Hawaiians as it does other Native Americans.

Indeed. the Court in Rice expressly declined to address the question whether Native Hawaiians have a status like that of Indians in organized tribes and whether Congress may treat the Native Hawaiians as it does the Indian tribes. Some opponents of the legislation have pointed to Rice in support of an argument that the bill violates equal protection principles, but the Supreme Court has long held that Congressional legislation dealing with sovereign, indigenous groups is governmental, not racial in character and, therefore, is neither discrimination nor unconstitutional.

When Congress enacts laws for sovereign indigenous peoples as it has done for Native Alaskans and Indian tribes, it does so on a government-to-government basis. Scores of Federal laws and regulations exist relating to American Indians, Native Alaskans and Native Hawaiians, and none has ever been struck down as racially discriminatory. Ultimately, a decision by Congress to treat Native Hawaiians like other native groups is a political decision and one that the Federal Courts are not likely to second guess.

For example, in the 1913 case of *United States v. Sandoval*, which involved the New Mexican Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as other Indians even though their culture and customs differed from that of other Indian tribes. The Court decided that Congress' judgment was not arbitrary and that judicial review should end there. H.R. 2314 passes that legal test.

I have submitted with my written statement a legal opinion that I co-authored in 2007 with Professors Viet Dinh and Neal Katyal regarding Congress' authority to enact the version of the legislation pending in 2007, which was H.R. 505. H.R. 2314 does not differ in substance from H.R. 505. Therefore, the opinion that I authored with the professors on 505 also holds for H.R. 2314. That concludes my statement and I would, of course, be very happy to take the Committee's questions.

[The prepared statement of Mr. Bartolomucci follows:]

Statement of Christopher Bartolomucci, Hogan & Hartson L.L.P.

Mr. Chairman, Ranking Member Hastings, and distinguished Members of the Committee: Thank you for the opportunity and the privilege to testify today on H.R. 2314, "the Native Hawaiian Government Reorganization Act of 2009." My testimony will focus upon the legal issue of Congress' constitutional authority to enact H.R. 2314.

The principal legal question presented by H.R. 2314 is whether Congress has the power to treat Native Hawaiians the way it treats other Native Americans, i.e., American Indians and Native Alaskans. Constitutional text, Supreme Court prece-

dent, and historical events provide the answer: Congress' broad power in regard to Indian tribes allows Congress to recognize Native Hawaiians as having the same sovereign status as the other indigenous peoples of this country.

H.R. 2314 would establish a process by which Native Hawaiians would reconstitute their indigenous government. Before Hawaii became a State, the Kingdom of Hawaii was a sovereign nation recognized as such by the United States. In 1893, American officials and the U.S. military aided the overthrow of the Hawaiian monarchy. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change.

Congress has ample authority to assist Native Hawaiians in their effort to reorganize their governing entity. Congress' broadest constitutional power—the power to regulate commerce—specifically encompasses the power to regulate commerce "with the Indian tribes." Based upon the Commerce Clause and other constitutional provisions, the Supreme Court has recognized Congress' plenary power to legislate regarding Indian affairs. As the Supreme Court said in 2004 in the case of *United States v. Lara,* "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive." "

Congress has used that power in the past to restore lost tribal sovereignty. In 1954, Congress terminated the sovereignty of the Menominee Indian tribe in Wisconsin. In 1973, Congress reversed course and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee. Pointing to the Menominee Restoration Act, the Supreme Court in Lara affirmed that the Constitution authorizes Congress "to enact legislation "recogniz[ing]...the existence of individual tribes" and "restor[ing] previously extinguished tribal status." H.R. 2314 is patterned after the Menominee Restoration Act and would do for Native Hawaiians what Congress did for the Menominee.

H.R. 2314 does not run afoul the Supreme Court's 2000 decision in *Rice v. Cayetano.* In Rice, the Court ruled that the State of Hawaii could not limit the right to vote in a state election to Native Hawaiians. But Rice did not address whether Congress may treat Native Hawaiians as it does other Native Americans. Indeed, the Court in Rice expressly declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the Native Hawaiians as it does the Indian tribes."

Some opponents of H.R. 2314 have pointed to Rice in support of an argument that the bill violates equal protection principles. But the Supreme Court has long held that congressional legislation dealing with indigenous groups is political, not racial, in character and therefore is neither discrimination nor unconstitutional.

When Congress enacts laws for indigenous peoples, it does so on a government-to-government basis. Scores of federal laws and regulations exist relating to American Indians, Native Alaskans, and Native Hawaiians, and none has ever been struck down as racially discriminatory.

Ultimately, a decision by Congress to treat Native Hawaiians like other native groups is a political decision—one that the federal courts are not likely to second guess. In the 1913 case of *United States v. Sandoval,* which involved the New Mexican Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as Indians, even though their culture and customs differed from that of other Indian tribes. The Court decided that Congress' judgment was not arbitrary and that judicial review should end there. H.R. 2314 passes that legal test.

For the remainder of my prepared statement, I have attached a legal opinion that I co-authored with Viet D. Dinh and Neal K. Katyal for the Office of the Hawaiian Affairs of the State of Hawaii, dated February 26, 2007, and titled "The Authority of Congress to establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity." Although that opinion addressed the version of the legislation pending in 2007—H.R. 505—the present legislation, H.R. 2314, does not differ in substance from the 2007 version. Therefore, the opinion rendered on H.R. 505 also holds for H.R. 2314.

The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity

Prepared for

Office of Hawaiian Affairs
State of Hawaii

by

H. Christopher Bartolomucci
Viet D. Dinh
Neal K. Katyal

February 26, 2007

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Executive Summary

Like the Native American tribes that once covered the continental United States, Native Hawaiians were a sovereign people for hundreds of years until a U.S. military-aided uprising overthrew the recognized Hawaiian monarchy in 1893 and a subsequent government acceded to U.S. annexation. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change.

The U.S. Congress is now considering legislation establishing a process by which Native Hawaiians would reconstitute the indigenous government they lost to foreign intervention. The proposed Native Hawaiian Government Reorganization Act of 2007 ("NHGRA"), S. 310/H.R. 505, would establish a commission to certify a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. Those Native Hawaiians would set up an interim governing council, which in turn would hold elections and referenda among Native Hawaiians to draw up governing documents and elect officers for the native government. That entity eventually would be recognized by the United States as a domestic, dependent sovereign government, similar to the government of an Indian tribe.

Congress has the constitutional authority to enact the NHGRA and to recognize a Native Hawaiian governing entity as a dependent sovereign government within the United States—in other words, to treat Native Hawaiians just as it treats Native Americans and Alaska Natives.

First, there is no question that Congress has the power to recognize, and restore the sovereignty of, Native American tribes. The Supreme Court has acknowledged Congress' plenary power—inherent in the Constitution and explicit in the Indian Commerce Clause, art. I, § 8, cl. 3, and Treaty Clause, art. II, § 2, cl. 2—to legislate regarding Native American affairs, and Congress has used that power to restore the relationship with tribal governments terminated by the United States. In 1954, Congress terminated the Menominee tribe in Wisconsin. In 1973, Congress enacted a law restoring the federal relationship with the Menominee and assisting in its reorganization. The bill before Congress is patterned after that law and would do for Native Hawaiians what Congress did for the Menominee.

Second, Congress has the power to treat Native Hawaiians just as it treats Native Americans. This is because Congress' decision to treat a group of people as a native group, and to use its broad Indian affairs power to pass legislation regarding that group, is a political decision—one that courts are not likely to second-guess. Indeed, the Supreme Court has said that so long as Congress' decision to treat a native people as a group of Native Americans is not "arbitrary," the courts have no say in the matter. The NHGRA passes that legal test. Furthermore, Congress has long considered Alaska Natives to be Native Americans and recognized Native Alaskan governing bodies, even though Alaska Natives differ from American Indians historically and culturally. The Supreme Court has not questioned Congress' power to do so. If Congress may treat Alaska Natives as a dependent sovereign people, it follows that Congress may do the same for Native Hawaiians.

The principal constitutional objection to the NHGRA—that it impermissibly classifies on the basis of race—fails to recognize that congressional legislation dealing with indigenous groups is political, not racial, in character and therefore is neither discriminatory nor unconstitutional. *Rice v. Cayetano,* 528 U.S. 495 (2000), specifi-

cally declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518. On those specific questions posed by the NHGRA, the Court could not be more clear or supportive of Congressional power to reaffirm the status of Native Hawaiians as an indigenous, self-governing people and reestablish a government-to-government relationship:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

United States v. Antelope, 430 U.S. 641, 645 (1977). To be sure, there are non-legal, policy arguments that can be voiced against the NHGRA, but if the Congress of the United States decides that the NHGRA is good policy, we believe that there is no constitutional barrier to Congress' enactment of the legislation.

I. The Native Hawaiian Government Reorganization Act

The stated purpose of the NHGRA 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." NHGRA § 4(b). To that end, the NHGRA authorizes the Secretary of the Interior to establish a Commission that will certify and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. *Id.* § 7(b). For the purpose of establishing the roll, the NHGRA defines the term "Native Hawaiian" as:

> (I) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who (I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and (II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or (ii) 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 (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.

Id. § 3(10).

Through the certification and maintenance of the roll of Native Hawaiians, the Commission will launch the process by which Native Hawaiians will set up a Native Hawaiian Interim Governing Council called for by the NHGRA. *Id.* § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council, determine the Council's structure, and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

The NHGRA provides that the Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity." *Id.* § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id.* § 7(c)(2)(B)(iii)(IV).

II. Congress' Authority to Enact the NHGRA

Congressional authority to enact S. 310/H.R. 505 encompasses two subordinate questions: First, would Congress have the power to adopt such legislation for members of a Native American tribe in the contiguous 48 states? Second, does such power extend to Native Hawaiians? The answer to both questions is yes.

A. Congress' Broad Power to Deal with Indians Includes the Power to Restore Sovereignty to, and Reorganize the Government of, Indian Tribes.

There is little question that Congress has the power to recognize Indian tribes. As the Supreme Court has explained, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive."—*United States v. Lara,* 541 U.S. 193, 200 (2004). See also *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs"); *Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 531 n.6 (1998) (same); 20 U.S.C. § 4101(3) (finding that the Constitution "invests the Congress with plenary power over the field of Indian affairs"). The NHGRA expressly recites and invokes this constitutional authority. See NHGRA § 2(1) ("The Constitution vests Congress with the au-

thority to address the conditions of the indigenous, native people of the United States."); id. § 4(a)(3).

This broad congressional power derives from a number of constitutional provisions, including the Indian Commerce Clause, art. I, § 8, cl. 3, which grants Congress the power to "regulate Commerce...with the Indian Tribes," as well as the Treaty Clause, art. II, § 2, cl. 2. See Lara, 541 U.S. at 200-201; *Morton v. Mancari,* 417 U.S. 535, 552 (1974). The Property Clause, art. IV, § 3, cl. 2, is also a source of congressional authority. See *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87-88 (1918); see also *Alabama v. Texas,* 347 U.S. 272, 273 (1954) (per curiam) ("The power...to dispose of any kind of property belonging to the United States is vested in Congress without limitation.") (internal quotation marks omitted). [1]

Congress' legislative authority with respect to Indians also rests in part "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as "necessary concomitants of nationality."—Lara, 541 U.S. at 201 (citing, inter alia, *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 315-322 (1936)). See also Mancari, 417 U.S. at 551-552 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

Plenary congressional authority to recognize Indian tribes extends to the restoration of the federal relationship with Native governments and reorganization of those governments. In Lara, the Court held that Congress' broad authority with respect to Indians includes the power to enact legislation designed to "relax restrictions" on "tribal sovereign authority." 541 U.S. at 196, 202. "From the Nation's beginning," the Court said, "Congress' need for such legislative power would have seemed obvious." *Id.* at 202. The Court explained that "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time," and "[s]uch major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty." *Id.* The Court noted that today congressional policy "seeks greater tribal autonomy within the framework of a "government-to-government" relationship with federal agencies." *Id.* (quoting 59 Fed. Reg. 22,951 (1994)).

Of particular significance to the present analysis, the Court in Lara specifically recognized Congress' power to restore previously extinguished sovereign relations with Indian tribes. The Court observed that "Congress has restored previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated." *Id.* (citing Congress' restoration of the Menominee tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress' power "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State." *Id.* Thus, when it comes to the sovereignty of Indian tribes or other "domestic dependent nations," *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831), the Constitution does not "prohibit Congress from changing the relevant legal circumstances, i.e., from taking actions that modify or adjust the tribes' status." Lara, 541 U.S. at 205. Indeed, the Supreme Court has gone so far as to hold that it is not for the federal judiciary to "second-guess the political branches' own determinations" in such circumstances. *Id.* (emphasis added).

United States v. John, 437 U.S. 634 (1978), further supports congressional authority to recognize reconstituted tribal governments and to re-establish sovereign relations with them. There, Congress' power to legislate with respect to the Choctaw Indians of Mississippi was challenged on grounds that "since 1830 the Choctaw residing in Mississippi have become fully assimilated into the political and social life of the State" and that "the Federal Government long ago abandoned its supervisory authority over these Indians." *Id.* at 652. It was thus urged that to "recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary." *Id.* The Court unanimously rejected the argument. "[W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaw than with the affairs of other Indian groups." *Id.* at 652-653. The "fact that federal supervision over them has not been continuous," according to the Court, does not "destroy[ ] the federal power to deal with them." *Id.* at 653.

Congress exercised this established authority to restore the government-to-government relationship with the Menominee Indian tribe of Wisconsin, see Lara, 541 U.S. at 203-204, and it can do the same here. Indeed, the NHGRA government reorga-

[1] As discussed herein, see infra at 16, Congress in 1921 reserved some 200,000 acres of public land for the benefit of Native Hawaiians. The NHGRA is related to, and would help to realize the purpose of, that exercise of the Property Clause power by commencing a process that would result in the identification of the proper beneficiaries of Congress' 1921 decision.

nization process closely resembles that prescribed by the Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

In 1954, Congress adopted the Menominee Indian Termination Act, 25 U.S.C. §§ 891-902, which terminated the government-to-government relationship with the tribe, ended federal supervision over it, closed its membership roll, and provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 407-410 (1968). In 1973, Congress reversed course and adopted the Menominee Restoration Act, which repealed the Termination Act, restored the sovereign relationship with the tribe, reinstated the tribe's rights and privileges under federal law, and reopened its membership roll. 25 U.S.C. §§ 903a(b), 903b(c).

The Menominee Restoration Act established a process for reconstituting the Menominee tribal leadership and organic documents under the direction of the Secretary of the Interior. The Restoration Act directed the Secretary (a) to announce the date of a general council meeting of the tribe to nominate candidates for election to a newly-created, nine-member Menominee Restoration Committee; (b) to hold an election to select the members of the Committee; and (c) to approve the Committee so elected if the Restoration Act's nomination and election requirements were met. *Id.* § 903b(a). Just so with S. 310/H.R. 505. The NHGRA authorizes the Secretary of the Interior to establish a Commission that will prepare and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. NHGRA § 7(b). The legislation also provides for the establishment of a Native Hawaiian Interim Governing Council. *Id.* § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council; determine the Council's structure; and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

The Menominee Restoration Act provided that, following the election of the Menominee Restoration Committee, and at the Committee's request, the Secretary was to conduct an election "for the purpose of determining the tribe's constitution and bylaws." 25 U.S.C. § 903c(a). After the adoption of such documents, the Committee was to hold an election "for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws." *Id.* § 903c(c). Likewise, the NHGRA provides that the Native Hawaiian Interim Governing Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity." NHGRA § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id.* § 7(c)(2)(B)(iii)(IV).

The courts have approved the process set forth in the Menominee Restoration Act to restore sovereignty to the Menominee Indians. See Lara, 541 U.S. at 203 (citing the Restoration Act as an example where Congress "restored previously extinguished tribal rights"); *United States v. Long,* 324 F.3d 475, 483 (7th Cir. 2003) (concluding that Congress had the power to "restor[e] to the Menominee the inherent sovereign power that it took from them in 1954"), cert. denied, 540 U.S. 822 (2003). The teachings of these cases would apply to validate the similar process set forth in NHGRA.

B. Congress' Power to Enact Special Legislation with Respect to Indians Extends to Native Hawaiians.

The inquiry, therefore, turns to whether Congress has the same authority to deal with Native Hawaiians as it does with other Native Americans in the contiguous 48 states. Congress has determined—and would determine again in passing the NHGRA—that it has such authority. See 42 U.S.C. § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."); NHGRA § 4(a)(3) (finding that "Congress possesses the authority under the Constitution, including but not limited to Article I, section 8, clause 3, to enact legislation to address the conditions of Native Hawaiians").

We conclude that courts will likely affirm these assertions of congressional authority. [2] As we explain below, court review of congressional decisions recognizing

[2] The Supreme Court has not decided this question. Rather, its last pronouncement on the issue, in *Rice v. Cayetano,* expressly declined to answer whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518. See infra at 24-25.

native groups qua native groups is extraordinarily deferential: The courts may interfere with such a determination only if it is "arbitrary." And a congressional decision through the NHGRA to recognize Native Hawaiians in the same way it has recognized other indigenous groups cannot fairly be said to be arbitrary. To the contrary, it is supported not just by extensive congressional fact-finding (which standing alone would suffice to insulate the statute from court review for arbitrariness), but also by numerous other factors, including the parallels between the United States' historical treatment of Native Hawaiians and its treatment of other Native Americans.

i. Courts review a congressional decision to recognize a native group only for arbitrariness.

Under *United States v. Sandoval,* 231 U.S. 28 (1913), Congress has the authority to recognize and deal with native groups pursuant to its Indian affairs power, and courts possess only a very limited role in reviewing the exercise of such congressional authority. In Sandoval, the Supreme Court rejected the argument that Congress lacked authority to treat the Pueblos of New Mexico as Indians and that the Pueblos were "beyond the range of congressional power under the Constitution." *Id.* at 49.

The Court first observed:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States...the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

Id. at 45-46. The Court went on to say that, although "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," nevertheless, "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 46. Applying those principles, the Supreme Court concluded that Congress' "assertion of guardianship over [the Pueblos] cannot be said to be arbitrary, but must be regarded as both authorized and controlling." *Id.* at 47. And the Court so held even though the Pueblos differed (in the Court's view) in some respects from other Indians: They were not "nomadic in their inclinations"; they were "disposed to peace"; they "liv[ed] in separate and isolated communities"; their lands were "held in communal, fee-simple ownership under grants from the King of Spain"; and they possibly had become citizens of the United States. *Id.* at 39.

Sandoval thus holds, first, that Congress, in exercising its constitutional authority to deal with Indian tribes, may determine whether a "community or body of people" is amenable to that authority, and, second, that unless Congress acts "arbitrarily," courts do not second-guess Congress' determination. The courts have employed this approach in a number of other cases. See *United States v. Holliday,* 3 Wall. 407, 419 (1866) ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same."); Long, 324 F.3d at 482 ("[W]hile we assume that Congress neither can nor would confer the status of a tribe onto a random group of people, we have no doubt about congressional power to recognize an ancient group of people for what they are."). [3]

ii. Congress' determination that Native Hawaiians are amenable to its constitutional authority over native groups is amply supported and cannot fairly be deemed arbitrary.

The language of the NHGRA contains a congressional determination that Native Hawaiians are amenable to its plenary authority over native groups. See, e.g., NHGRA § 4(a)(3). It cannot be said that this determination is an arbitrary exercise of Congress' power to recognize and deal with this Nation's native peoples. This is so for at least four reasons, explained in more detail below: First, Congress has made extensive findings of fact, both in the NHGRA and other legislation, that support its determination. Second, Congress has long treated Native Hawaiians like other Native Americans, and no Act of Congress doing so has been struck down by the courts. Third, Native Hawaiians bear striking similarities to Alaska Natives, the

[3] See also Lara, 541 U.S. at 205 (federal judiciary should not "second-guess the political branches' own determinations" with respect to "the metes and bounds of tribal autonomy"); *United States v. McGowan,* 302 U.S. 535, 538 (1938) ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out").

latter of whom are treated by Congress as Native Americans. And finally, Congress has recognized that the United States owes moral obligations to Native Hawaiians; such obligations constitute an implicit basis for congressional power to legislate as to indigenous peoples.

Congress' findings as to Native Hawaiians, and Native Hawaiian history, preclude a claim of arbitrariness.

The NHGRA expressly finds that Native Hawaiians "are indigenous, native people of the United States," NHGRA § 2(2); that the United States recognized Hawaii's sovereignty prior to 1893, id. § 2(4); that the United States participated in the overthrow of the Hawaiian government in 1893, id.§ 2(13); and that "the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," id. The statute further finds that that Native Hawaiians continue to reside on native lands set aside for them by the U.S. government, "to maintain other distinctly native areas in Hawaii," and "to maintain their separate identity as a single distinct native community through cultural, social, and political institutions," id. §§ 2(7), 2(11), 2(15); see also U.S. Department of Justice & U.S. Department of the Interior, From Mauka to Makai: The River of Justice Must Flow Freely, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians at 4 (Oct. 23, 2000) (hereinafter "The Reconciliation Report") (finding that "the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions"). Finally, the NHGRA finds that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past. See id. § 2(22)(A) ("Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands"); id. § 2(22)(B).

These findings all support the conclusion that Native Hawaiians, and the Native Hawaiian experience, are similar to other Native Americans in important ways. Indeed, the NHGRA reflects some of Congress' prior determinations that Native Hawaiians are like other Native Americans. See NHGRA § 2(2) (finding that Native Hawaiians "are indigenous, native people of the United States"); id. § 2(20)(B) (Congress "has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf"); id. § 4(a)(1); Native American Languages Act, 25 U.S.C. § 2902(1) ("The term "Native American" means an Indian, Native Hawaiian, or Native American Pacific Islander"); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (declaring it to be the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians"); 42 U.S.C. § 11701(1) (finding that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778").

These extensive factual findings are crucial because they render implausible any argument that Congress' decision to treat Native Hawaiians like other Native Americans is without a rational basis. Like in Sandoval, whatever differences there may be between Native Hawaiians and other Native Americans, it cannot be said in light of Congress' findings that it is "bring[ing] a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe." 231 U.S. at 46. There is nothing arbitrary about such a legislative choice; it reflects a long pattern of Congress' dealings with Native Hawaiians.

Native Hawaiian history confirms that the congressional determination in the NHGRA is both supportable and supported. Although unique in some respects, the Native Hawaiian story is in other ways very similar to the story of all Native Americans. By the time Captain Cook, the first white traveler to Hawaii, "made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion." Rice, 528 U.S. at 500. Hawaiian society, the Court noted, was one "with its own identity, its own cohesive forces, its own history." *Id.* As late as 1810, "the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I." *Id.* at 501.

During the 19th century, the United States established a government-to-government relationship with the Kingdom of Hawaii. Between 1826 and 1887, the two nations executed a number of treaties and conventions. See id. at 504. But in 1893,

"a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the monarchy [of Queen Liliuokalani] with a provisional government." *Id.* at 505. In 1894, the U.S.-created provisional government then established the Republic of Hawaii. See id. In 1898, President McKinley signed the Newlands Resolution, which annexed Hawaii as a U.S. territory. See id.; *Territory of Hawaii v. Mankichi,* 190 U.S. 197, 209-211 (1903) (discussing the annexation of Hawaii); Lara, 541 U.S. at 203-204 (citing the annexation of Hawaii as an example of Congress' adjustment of the autonomous status of a dependent sovereign). Under the Newlands Resolution, the Republic of Hawaii ceded all public lands to the United States, and the revenue from such lands was to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Rice, 528 U.S. at 505.

In 1921, concerned about the deteriorating conditions of the Native Hawaiian people, Congress passed the Hawaiian Homes Commission Act, "which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians." *Id.* at 507. In 1959, Hawaii became the 50th State of the United States. In connection with its admission to the Union, Hawaii agreed to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution, and the United States adopted legislation transferring title to some 1.4 million acres of public lands in Hawaii to the new State, which lands and the revenues they generated were by law to be held "as a public trust" for, among other purposes, "the betterment of the conditions of Native Hawaiians." *Id.* (quoting Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 5, 6).

In 1993, a century after the Kingdom of Hawaii was replaced with the active involvement of the U.S. Minister and the American military, "Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people." *Id.* at 505; see Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In the Apology Resolution, Congress both "acknowledge[d] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and issued a formal apology to Native Hawaiians "for the overthrow of the Kingdom of Hawaii 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.* §§ 1, 3, 107 Stat. 1513.

In short, the story of the Native Hawaiian people is the story of an indigenous people having a distinct culture, religion, and government. Contact with the West led to a period of government-to-government treaty making with the United States; the involvement of the U.S. government in overthrowing the Native Hawaiian government; the establishment of the public trust relationship between the U.S. government and Native Hawaiians; and, finally, political union with the United States. Given the parallels between the history of Native Hawaiians and other Native Americans, Congress has ample basis to conclude that its power to deal with the Native Hawaiian community is coterminous with its power to deal with American Indian tribes. Cf. Long, 324 F.3d at 482 ("This case does not involve a people unknown to history before Congress intervened....[W]e have no doubt about congressional power to recognize an ancient group of people for what they are.").

Congress' long history of treating Native Hawaiians, and Alaska Natives, like Native Americans further supports its determination in the NHGRA.

Congress' authority to treat Native Hawaiians like American Indians is further supported by the numerous statutes Congress has enacted doing just that. See, e.g., Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; Native Hawaiian Health Care Act, 42 U.S.C. § 11701(19) (noting Congress' "enactment of federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities"); see also Statement of U.S. Representative Ed Case, Hearing Before the Senate Committee on Indian Affairs on S. 147, the Native Hawaiian Government Reorganization Act, at 2-3 (March 1, 2005) ("[O]ver 160 federal statutes have enacted programs to better the conditions of Native Hawaiians in areas such as Hawaiian homelands, health, education and economic development, all exercises of Congress' plenary authority under our U.S. Constitution to address the conditions of indigenous peoples.") (prepared text) (hereinafter, "Senate Indian Affairs Committee Hearing on S. 147"); cf. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). [4] For example, The Augustus F. Haw-

[4] In *Ahuna v. Department of Hawaiian Home Lands,* 640 P.2d 1161 (Hawaii 1982), the Hawaii Supreme Court assessed the trust responsibilities that the Hawaiian Homes Commission owes

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kins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, authorized "supplemental programs to meet the unique educational needs of Native Hawaiians" and federal grants to Native Hawaiian Educational Organizations to help increase educational attainment among Native Hawaiians. 20 U.S. C. §§ 4902-03, 4905 (1988). The Hawaiian Homelands Homeownership Act of 2000 provides governmental loan guarantees "to Native Hawaiian families who otherwise could not acquire housing financing." Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000). Congress has also enacted legislation authorizing employment preferences for Native Hawaiians. See, e. g., 1995 Department of Defense Appropriations Act, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) ("In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island...the Secretary of the Navy shall...give especial preference to businesses owned by Native Hawaiians."). See also Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (involving grant applications aimed at combating drug abuse and providing: "The Secretary shall encourage the submission of and give special consideration to applications under this section to programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women, handicapped individuals, and families of drug abusers."); Workforce Investment Act of 1998, 29 U.S.C. § 2911(a) ("The purpose of this section is to support employment and training activities for Indian, Alaska Native, and Native Hawaiian individuals"); American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-92, 2991a (including Native Hawaiians in a variety of Native American financial and cultural benefit programs: "The purpose of this subchapter is to promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives."); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. § 4577(c)(4) (giving preference to grant applications aimed at combating drug abuse: "The Secretary shall encourage the submission of and give special consideration to applications under this section for programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women, handicapped individuals, public inebriates, and families of alcoholics."); 20 U.S.C. § 4441 (providing funding for Native Hawaiian arts and cultural development); Older Americans Act of 1965, 42 U.S.C. § 3001 et seq., 45 C.F.R. § 1328.1 (2004) (establishing a "program...to meet the unique needs and circumstances of Older Hawaiian Natives"). No court has struck down any of these numerous legislative actions as unconstitutional. [5]

That Congress has power to enact such special legislation for Native Hawaiians is made still clearer by congressional action dealing with Alaska Natives, who—like Native Hawaiians—differ from American Indian tribes anthropologically, historically, and culturally. In 1971, Congress adopted the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629h, which is predicated on the view that congressional power to deal with Alaska Natives is coterminous with its plenary authority relating to American Indian tribes. See 43 U.S.C. § 1601(a) (finding a need for settlement of all claims "by Natives and Native groups of Alaska"); id. § 1602(b) (defining "Native" as a U.S. citizen "who is a person of one-fourth degree of more Alaska Indian...Eskimo, or Aleut blood, or combination thereof."); id. § 1604(a) (directing the Secretary of the Interior to prepare a roll of all Alaskan Natives). The Supreme Court has never questioned the authority of Congress to enact such legis-

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to "native Hawaiians." The court specifically relied on federal Indian law principles regarding lands set aside by Congress in trust for the benefit of native Americans. The court reasoned that "[e]ssentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans." *Id.* at 1169.

[5] The vast number of federal and state programs that could be called into question by a ruling against the NHGRA renders even smaller the chance of a successful court challenge. It is not a persuasive answer to claim that all of these statutes, too, are unconstitutional. "Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established." *Close v. Glenwood Cemetery,* 107 U.S. 466, 475 (1883); see also *Reno v. Condon,* 528 U.S. 141, 148 (2000).

lation. See Native Village of Venetie, supra; *Morton v. Ruiz,* 415 U.S. 199, 212 (1974) (quoting passage of Brief for Petitioner the Secretary of the Interior referring to "Indians in Alaska and Oklahoma"); see also *Pence v. Kleppe,* 529 F.2d 135, 138 n.5 (9th Cir. 1976) (when the term "Indians" appears in federal statutes, that word "as applied in Alaska, includes Aleuts and Eskimos"). If Congress has authority to enact special legislation dealing with Alaska Natives, it follows that Congress has the same authority with respect to Native Hawaiians.

The U.S. government's complicity in overthrowing the Hawaiian Kingdom reinforces Congress' moral and legal authority to enact the NHGRA.

Finally, Congress could easily conclude that its moral and legal authority to establish a process for the reorganization of the Native Hawaiian governing entity also derives from the role played by the United States—in particular U.S. Minister John Stevens, aided by American military forces—in bringing a forcible end to the Kingdom of Hawaii in 1893.

As Congress recounted in the Apology Resolution, Stevens in January 1893 "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii." 107 Stat. 1510. In pursuit of that objective, Stevens "and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaii nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government." *Id.* See also S. Rep. No. 108-85, 108th Cong., 2d Sess. 11 (2003) (on Stevens' orders, "American soldiers marched through Honolulu, to a building known as Ali'iolani Hale, located near both the government building and the palace"); Rice, 528 U.S. at 504-505. The next day, the Queen issued a statement indicating that she would yield her authority "to the superior force of the United States of America whose Minister Plenipotentary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu." 107 Stat. 1511. The United States, quite simply, effected regime change in Hawaii because "without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms." *Id.* On December 18, 1893, President Cleveland described the Queen's overthrow "as an "act of war," committed with the participation of a diplomatic representative of the United States and without the authority of Congress." *Id.*

Given the role of United States agents in the overthrow of the Kingdom of Hawaii, Congress could conclude that its "unique obligation toward the Indians," Mancari, 417 U.S. at 555, extends to Native Hawaiians. Congress' power to enact special legislation dealing with native people of America is derived from the Constitution "both explicitly and implicitly." *Id.* at 551. See Lara, 541 U.S. at 201 (to the extent that, through the late 19th Century, Indian affairs were a feature of American military and foreign policy, "Congress' legislative authority would rest in part...upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government"). The Supreme Court has explained that the United States has a special obligation toward the Native Americans—a native people who were overcome by force—and that this obligation carries with it the authority to legislate with the welfare of Native Americans in mind. As the Court said in *Board of County Commissioners of Creek County v. Seber,* 318 U.S. 705 (1943):

> From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation * * *.

Id. at 715 (citation omitted).

In the case of Native Hawaiians, the maneuverings of the U.S. Minister and the expression of U.S. military force contributed to the overthrow of the Kingdom of Hawaii and the ouster of her Queen. The events of 1893 cannot be undone; but their import extends to this day, imbuing Congress with a special obligation and the inherent authority to restore some semblance of the self-determination then stripped from Native Hawaiians. Certainly it cannot be said that Congress' conclusion to this effect would be arbitrary. In the words of Justice Jackson,

> The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 355 (1945) (concurring opinion). [6]

III. Objections to the NHGRA

In 2005, hearings on a previous incarnation of the NHGRA drew several speakers who objected to the legislation on constitutional grounds. We have considered these objections and do not believe they would be persuasive to a court considering the NHGRA's lawfulness.

A. As an Exercise of Congress' Indian Affairs Powers, the NHGRA Is Not an Impermissible Classification Violative of Equal Protection.

The principal constitutional objection to the NHGRA—that it classifies U.S. citizens on the basis of race, in violation of the constitutional guarantee of equal protection—would depart from long-standing precedent with respect to both Native Americans and equal protection.

Those who level this objection have cited *Rice v. Cayetano,* supra, for support. But Rice is inapposite for two reasons: (1) It did not concern Congress' special powers to employ political classifications when dealing with Native Americans but rather concerned a state legislative determination; and (2) it was limited to the unique 15th Amendment voting context.

First, in Rice, the Court held that the Fifteenth Amendment to the Constitution did not allow the State of Hawaii to limit to Native Hawaiians eligibility to vote in elections to choose trustees for the Office of Hawaiian Affairs, a state governmental agency. See Rice, 528 U.S. at 523-524. In this instance, by contrast, the reorganized Native Hawaiian governing entity will be neither a United States nor a state governmental body, but rather the governing entity of a sovereign native people. Because the NHGRA is an exercise of Congress' Indian affairs powers, the legislation is "political rather than racial in nature," Mancari, 417 U.S. at 553 n.24, and under well-settled precedent it does not violate the Constitution's equal protection guarantees. As the Court explained:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians....Federal regulation of Indian tribes...is governance of once-sovereign political communities; it is not to be viewed as legislation of a—"racial" group consisting of Indians...." *Morton v. Mancari,* supra, at 553 n.24.

United States v. Antelope, 430 U.S. at 645-646 (footnote omitted); see also *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 500-501 (1979) ("It is settled that "the unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.") (quoting Mancari, 417 U.S. at 551-552). In short, Rice simply has no application here. See *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1279 (9th Cir. 2004) ("Rice does not bear on the instant case because...[w]hile Congress may not authorize special treatment for a class of tribal Indians in a state election, Congress certainly has the authority to single out "a constituency of tribal Indians" in legislation "dealing with Indian tribes and reservations.""") (quoting Rice, 528 U.S. at 519-20). [7]

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[6] NHGRA opponents have argued that the "Republic of Hawaii," which succeeded the Kingdom of Hawaii after Queen Liliuokalani was overthrown, extinguished native Hawaiians' claims to tribal status, and that as a result there was no Native Hawaiian sovereignty at the time of U.S. annexation. But this argument relies on the notion that the United States did not play a role in the Queen's ouster, and that the Republic of Hawaii was a legitimate government. Congress has explicitly found to the contrary, see, e.g., Apology Resolution, and that congressional finding is due substantial deference from the courts.

[7] The Ninth Circuit recently described a special relationship between Congress and the Hawaiians in *Doe v. Kamehameha Schools,* 470 F.3d 827 (9th Cir. 2006):

> Beginning as early as 1920, Congress recognized that a special relationship existed between the United States and Hawaii. See Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921) (designating approximately 200,000 acres of ceded public lands to Native Hawaiians for home-

In Mancari, the Supreme Court rejected the claim that an Act of Congress according an employment preference for qualified Indians in the Bureau of Indian Affairs violated the Due Process Clause and federal anti-discrimination provisions. The Court explained that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." 417 U.S. at 554 (citing cases involving, inter alia, the grant of tax immunity and tribal court jurisdiction). The Court laid down the following rule with respect to Congress' special treatment of Indians: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* Clearly, and as explained above, the NHGRA can be "rationally tied" to Congress' discharge of its duty with respect to the native people of Hawaii. As such, it does not violate equal protection principles.

A more subtle variation of the objection is that because the NHGRA does not immediately result in recognition of a sovereign Native Hawaiian entity, the "race-based" classifications Congress makes now—before that entity is reconstituted—violate equal protection principles. This argument, albeit clever, ignores the fact that in passing the NHGRA, Congress would be finding (as it has before) that Native Hawaiians are, and have been, an indigenous political entity analogous to American Indian tribes, and that they never ceased to retain elements of their political and cultural unity. See, e.g., NHGRA §§ 2(13), 2(15), 2(22). The NHGRA simply reflects Congress' determination that such an entity already exists—the legislation declares, it does not create. As a result, Native Hawaiians are deemed a political unit even before formal recognition of their sovereignty, and the lines drawn by Congress in the NHGRA are not racial at all, but instead fall within Congress' plenary power as to indigenous peoples. See Mancari, 417 U.S. at 551-552. [8]

To be sure, Justice Breyer's separate concurrence in Rice suggested that there is a limit to how attenuated a purported tribal member's connection to the tribe may be. See 528 U.S. at 527. However, to overread this point as an objection to the NHGRA would be to confuse the limited power other bodies—agencies, states, and courts—have as to Indian affairs with the robust plenary power enjoyed by Congress. Justice Breyer, writing for himself and Justice Souter, noted only that while "a Native American tribe has broad authority to define its membership, [t]here must...be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition." Rice, 528 U.S. at 527 (Breyer, J., concurring) (citation omitted) (emphasis added). He rightly makes no mention of a congressional definition, or of a constitutional limit on congressional power. Rice involved state, not congressional, action, and as cases such as Mancari reflect, Congress has far more latitude when dealing with Native Americans than do the states. See Rice, 528 U.S. at 520 ("OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations."); id. at 522 ("[T]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies. To extend Mancari to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs").

Second, Rice dealt exclusively with the Fifteenth Amendment and voting restrictions. Nowhere did it mention the equal protection clause. Only the dissents mentioned the Fourteenth Amendment. See id. at 528-28 (Stevens, J., dissenting); id.

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steading). Over the years, Congress has reaffirmed the unique relationship that the United States has with Hawaii, as a result of the American involvement in the overthrow of the Hawaiian monarchy. See, e.g., 20 U.S.C. § 7512(12), (13) (Native Hawaiian Education Act, 2002); 42 U.S.C. § 11701(13), (14), (19), (20) (Native Hawaiian Health Care Act of 1988).

Id. at 847-48. The Ninth Circuit also recently pointed out that Congress has repeatedly singled out Native Hawaiians to provide them with special benefits:

Congress has relied on the special relationship that the United States has with Native Hawaiians to provide specifically for their welfare in a number of different contexts. For example, in 1987, Congress amended the Native American Programs Act of 1974, Pub.L. No. 100-175, § 506, 101 Stat. 926 (1987), to provide federal funds for a state agency or "community-based Native Hawaiian organization" to "make loans to Native Hawaiian organizations and to individual Native Hawaiians for the purpose of promoting economic development in the state of Hawaii." A year later, Congress enacted the Native Hawaiian Health Care Act of 1988, Pub.L. No. 100-579, § 11703(a), 102 Stat. 2916 (1988), "for the purpose of providing comprehensive health promotion and disease prevention services as well as primary health services to Native Hawaiians."

Id. at 848.

[8] The Mancari principle can apply as fully with respect to indigenous groups not currently recognized as sovereign as it does with respect to indigenous groups already so recognized. If that were not so, then the congressional power to recognize and restore sovereignty to tribes—affirmed by the Supreme Court in Lara, 541 U.S. 193—could not exist; such congressional restoration would by definition violate equal protection principles.

at 548 (Ginsburg, J., dissenting). By contrast, the majority decision consistently referenced the Fifteenth Amendment's unique history and requirements. See, e.g., id. at 512 (discussing concern about giving "the emancipated slaves the right to vote"). It is doubtful that the rigid rules applied to voting would translate directly into the Fourteenth Amendment context, which is by its nature more flexible. E.g., *Hayden v. Pataki,* 449 F.3d 305, 351-352 (2d Cir. 2006) ("The text and the legislative history of the Fifteenth Amendment demonstrate that it did not simply mimic § 2 of the Fourteenth Amendment, but, instead, broke new ground by instituting a ban on any disenfranchisement based on race."). [9]

Finally, in connection with any discussion of the equal protection implications of the NHGRA, it should be noted that the equality of treatment, under federal law, between Native Hawaiians and other native groups is one of the purposes and justifications for the NHGRA. Native Hawaiians have been denied some of the self-governance authority long established for other indigenous populations in the United States. As Governor Lingle testified to Congress,

> The United States is inhabited by three indigenous peoples—American Indians, Native Alaskans and Native Hawaiians....Congress has given two of these three populations full self-governance rights....To withhold recognition of the Native Hawaiian people therefore amounts to discrimination since it would continue to treat the nation's three groups of indigenous people differently....[T]oday there is no one governmental entity able to speak for or represent Native Hawaiians. The [NHGRA] would finally allow the process to begin that would bring equal treatment to the Native Hawaiian people.

Testimony of Linda Lingle, Governor of the State of Hawaii, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) (prepared text). See also Statement of Sen. Byron Dorgan, Vice Chairman, Senate Indian Affairs Committee Hearing on S. 147, at 1 (March 1, 2005) ("[T]hrough this bill, the Native Hawaiian people simply seek a status under Federal law that is equal to that of America's other Native peoples—American Indians and Alaska Natives.") (prepared text); Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) ("In this legislation, as Hawaiians, we seek only what long ago was granted this nation's other indigenous peoples.") (prepared text).

B. The Fact that Native Hawaiians Allowed Foreigners Into Their Society Prior to 1893 Has No Bearing on the Analysis.

Opponents of the legislation also have argued that Congress cannot recognize Native Hawaiians as a sovereign people because they did not enjoy such a status even before 1893. In support of this argument, they have said, among other things, that (1) Native Hawaiian society was multiracial and whites held high-ranking positions in Queen Liliuokalani's government, and (2) the Hawaiian government was a monarchy and thus sovereignty did not rest with the people.

We do not believe this argument carries much constitutional weight. First, the fact that Hawaii was a monarchy prior to U.S. annexation is irrelevant to the analysis. The American Indian and Alaska Native groups that have been recognized as dependent sovereigns had a wide range of political structures prior to the arrival of whites, and that fact has never been deemed to have any bearing on congressional power to recognize their sovereignty or tribal status. See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 664 & n.5 (1979) ("[S]ome bands of Indians...had little or no tribal organization * * *. Indeed, the record shows that the territorial officials who negotiated the treaties on

[9] Opponents of the legislation also have relied on yet another constitutional provision, arguing that a congressional grant of superior political rights to Native Hawaiians would violate Art. I, sec. 9, which forbids the creation of a hereditary aristocracy. This argument is baseless. Apart from the absurdity of characterizing Native Hawaiians as "noble" after the enactment of the NHGRA (as opposed to simply being partially restored to their preexisting condition), no court has ever relied on Art. I, sec. 9's "title of nobility" clause to strike down any enactment of Congress—indeed, it appears that no court has ever relied on the clause for any holding whatsoever. In any event, a congressional finding that Native Hawaiians are an indigenous group analogous to Native American tribes would bring the NHGRA within Congress' plenary authority to legislate with regard to Native Americans, and as a result the "superior" rights granted to Native Hawaiians by the NHGRA would be no different, as a constitutional matter, from the "superior" rights granted to other American Indian groups. As discussed above, such groups' status as political entities removes congressional enactments about them from the strict scrutiny given racial classifications under traditional equal protection analysis. See Mancari, 417 U.S. at 551-552. There is no reason why the analysis should proceed differently under any other constitutional equality guarantee. See *Zobel v. Williams,* 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring) (comparing the Fourteenth Amendment to Art. I, sec. 9).

behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties.”). Congress is certainly well within its powers to determine that the situation of Native Hawaiians parallels those of other federally recognized tribes.

Second, the fact that Native Hawaiians invited foreigners into their midst prior to 1893 is equally irrelevant to their inherent sovereignty vel non. Taken to its logical endpoint, this argument suggests that any sovereign political group that permits outsiders into its ranks surrenders its sovereignty; this clearly cannot be. It would be a perversion of the United States’ trust responsibility toward indigenous people to punish a group for having been too inclusive when settlers arrived, while rewarding those who were exclusive or discriminatory. In any event, participation of non-Hawaiians in the Hawaiian monarchical government was at least in part the result of direct pressure by Europeans and Americans who sought increased influence over Hawaiian affairs. See Rice, 528 U.S. at 504. It would be equally perverse to find that this pressure—which led to the overthrow of the Native Hawaiian monarch—negates the possibility of a sovereign Native Hawaiian government going forward.

Opponents of the legislation also have advanced a related argument: They have said that because foreigners were part of the Hawaiian polity in 1893, there was never a solely Native Hawaiian entity of the sort that would be reconstituted by the NHGRA—in other words, that if one were to accurately reconstitute the Hawaiian sovereign, one would have to include lineal direct descendants of non-indigenous Hawaiian natives, over whom Congress has no Indian affairs power. The flaw in this argument is that it discounts both the realities of Hawaiian history and the great deference paid to congressional line-drawing in the Indian affairs arena.

Under Sandoval, supra, Congress has extraordinarily broad authority to decide who falls within its Indian affairs power; the logical concomitant of this authority is the power to decide who falls outside the groups it chooses to recognize. For this reason, a congressional decision on how to define “Native Hawaiian” would be reviewable only for arbitrariness. The NHGRA’s approach cannot be said to run afoul of this highly deferential standard. As the Supreme Court has noted, much of the nineteenth century foreign presence in Hawaii—both within Hawaiian government and in the broader polity—was unwanted and in fact actively resisted by Native Hawaiians. See Rice, 528 U.S. at 504 (finding that there was “an anti-Western, pro-native bloc” in the Hawaiian government, that in 1887 Westerners “forced...the adoption of a new Constitution” that gave the franchise to non-Hawaiians, and that the U.S.-led 1893 uprising was triggered in part by the queen’s attempt to promulgate a new constitution again limiting the franchise to Hawaiians). Furthermore, Congress has long distinguished between indigenous Hawaiians and others who may have lived in the Hawaiian Islands at the time of annexation. See Hawaiian Homes Commission Act §§ 201, 203 (setting aside land to provide lots to Native Hawaiians with 50 percent or more Hawaiian blood). With all of these facts in mind, Congress supportably could find that an initial definition of “Native Hawaiian” as limited to those with some Hawaiian blood is appropriate. [10]

NHGRA opponents have made one additional argument aimed at pre-statehood days: They say that Native Hawaiians’ failure to preserve their polity through some sort of treaty or other formal recognition at the time of annexation (or later, at the time Hawaii joined the Union) waives any claim of revival now. But the lack of a treaty recognizing Native Hawaiian sovereignty at the time of annexation is immaterial for several reasons. First, the argument is ahistorical: The 1898 annexation post-dated the era when the United States signed treaties with native groups. See Lara, 541 U.S. at 201 (“[I]n 1871 Congress ended the practice of entering into treaties with the Indian tribes”) (citing 25 U.S.C. § 71). This change in U.S. policy did not alter the sovereignty of native groups. Cf. id. (noting that 25 U.S.C. § 71 “ ‘in no way affected Congress’ plenary powers to legislate on problems of Indians.’ “) (quoting *Antoine v. Washington,* 420 U.S. 194, 203 (1975)). Second, yet again, it would be perverse to punish an indigenous group precisely because it had been so thoroughly removed from power in its own land that it did not have the means to win concessions from the annexing entity. And third, as a factual matter, there were concessions made by the United States analogous to the treaties signed with American Indian groups. See Hawaiian Homes Commission Act, supra.

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[10] In any event, of course, the congressional definition is preliminary—it defines only the roll of those who may participate in reconstituting the Native Hawaiian entity. Congress could rationally conclude that the initial definition of “Native Hawaiian” should be limited to indigenous Hawaiians and their descendants, while leaving the subsequent dependent sovereign entity some leeway to later determine—just as virtually every Native American tribe determines for itself—who else (if anyone) should be included in its ranks.

Finally, it is unclear why a failure to recognize Native Hawaiians at the time of Hawaiian statehood should have any effect on congressional power to recognize them now; this argument, like many of those above, appears grounded in an improperly cramped view of congressional authority as to native groups. But in any event, it is simply inaccurate to say no steps were taken in 1959 to recognize the separate existence of a Native Hawaiian people. As noted supra at 16, Hawaii agreed in connection with its admission to the Union to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution. Furthermore, the United States transferred title to some 1.4 million acres of public lands in Hawaii to the new State as a public trust for the betterment of "Native Hawaiians." Admission Act § 5(f). These actions constitute the sort of recognition of a continuing indigenous corpus that NHGRA opponents wrongly claim was lacking.

C. The Claim that Congress Can Only Recognize a Native Group that Has Had a "Continuous" Governmental Structure is Incorrect as a Matter of Constitutional Law.

NHGRA opponents also have argued that Congress cannot recognize Native Hawaiians as a sovereign indigenous people because they have not existed as a coherent "tribe" on a consistent basis since Hawaii's annexation; this argument sometimes relies on the proposition that Congress may not recognize a tribe unless its existence has been "continuous." This objection suffers from numerous fundamental flaws. In our judgment, it would not carry the day in any challenge to the NHGRA's constitutionality.

i. The supposed "continuity" rule does not bind Congress.

First, and most importantly, congressional power to recognize Indian tribes is not hamstrung by a "continuity" rule or any similar requirement. The "continuity" rule cited by opponents of the legislation is drawn in the main from Department of the Interior regulations that govern when that agency will recognize an Indian tribe pursuant to its delegated power. See 25 C.F.R. § 83.1 et seq. But these regulations govern nothing more than the scope of the agency's power, and they in no way mean Congress' authority is similarly cabined. To the contrary, Congress has plenary power to establish the criteria for recognizing a tribe; it may delegate this authority to the executive branch at its discretion, and the executive branch restricts its agency decision-makers by means of regulations they are bound to follow. See *Miami Nation v. United States Dep't of Interior,* 255 F.3d 342, 345 (7th Cir. 2001). In other words, the reservoir of authority lies in Congress. The Agent (an executive agency) cannot tell the Principal (Congress) what recognition criteria to employ.

This structural arrangement, in turn, governs the shape of judicial review. As Judge Posner has explained, it means that a decision recognizing a tribe is reviewable by the courts only if it was made by an agency within the agency's regulatory framework; in that circumstance, the decision is "within the scope of the Administrative Procedure Act" and therefore within the competence of the courts. *Id.* at 348. Otherwise, the decision "has traditionally been held to be a political one not subject to judicial review." *Id.* at 347 (quoting William C. Canby, Jr., American Indian Law in a Nutshell 5 (3d ed. 1998)). [11]

Like the Department of the Interior, some courts have employed a "continuity" requirement when examining whether a group of Native Americans qualifies as the successor of an earlier tribe for purposes of exercising treaty rights. See, e.g., *United States v. Washington,* 641 F.2d 1368, 1373 (9th Cir. 1981) ("Washington I"). Again, however, the courts do so only as a default rule in the face of congressional silence about a tribe's qualifications; if Congress has chosen to recognize (or decline to recognize) a tribe, the courts defer to that decision, recognizing Congress' far greater authority in the arena. See *United States v. Washington,* 394 F.3d 1152, 1158 (9th Cir. 2005) ("Washington II") (noting "the traditional deference that the federal courts pay to the political branches in determining whether a group of Indians constitutes a tribe"); Canby, American Indian Law in a Nutshell 6 ("Once granted,...the recognition will bind the courts until it is removed by the Executive or Congress."); Holliday, 3 Wall. at 419 ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same."). In short, the courts uniformly have recognized that "Congress has the power, both directly and by delegation to the Presi-

[11] In any event, reliance on these regulations is misplaced because they are expressly inapplicable to Native Hawaiians. See 25 C.F.R. § 83.3(a) ("This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department."); id. § 83.1 (defining continental United States to mean "the contiguous 48 states and Alaska").

dent, to establish the criteria for recognizing a tribe." Miami Nation, 255 F.3d at 345.

ii. Even if a "continuity" rule applied, Native Hawaiians would meet it.

The "continuity" rule does not limit congressional power to recognize a Native Hawaiian sovereign entity. However, even assuming that it did, Native Hawaiians would be able to meet its mandate.

Courts that use a "continuity" rule in the absence of congressional direction have explained that it is not absolute—that is, it does not require that a native group have maintained a robust political structure no matter the circumstances. To the contrary, these courts sensibly have recognized that native groups often were subject to intense pressure—military, economic, and otherwise—to abandon their lands and submit to Western governments. They therefore hold that any modern tribal vestige demonstrating that assimilation is not complete suffices to meet the continuity test. As the Washington I court wrote:

> [C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status. Over a century, change in any community is essential if the community is to survive. Indian tribes in modern America have had to adjust to life under the influence of a dominant non-Indian culture....A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities.

641 F.2d at 1373. Therefore, only when assimilation is "complete" do those purporting to be the tribe lose their claim to tribal rights. *Id.*; see also *Native Village of Venetie I.R.A. Council v. State of Alaska,* 944 F.2d 548, 557 (9th Cir. 1991) ("[A] relationship...must be established, but some connection beyond total assimilation is generally sufficient."). Further, the courts "have been particularly sympathetic to changes wrought as a result of dominion by non-natives." *Id.* The relaxed construction of the "continuity" rule in this circumstance reflects the principle that "if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe * * *." *Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575, 586 (1st Cir. 1979).

If such a continuity test applied here, it would be met on the strength of Congress' findings of fact. As discussed above, Congress has determined—both in the NHGRA and elsewhere—that Hawaiians have indeed maintained elements of their political and cultural structure in the years since Hawaiian annexation. See, e.g., NHGRA § 2(9) ("Native Hawaiians have continuously sought access to the ceded lands in order to establish and maintain native settlements and distinct native communities"); id. § 2(11) ("Native Hawaiians continue to maintain other distinctly native areas in Hawaii"); id. § 2(15) ("Native Hawaiians have continued to maintain their separate identity as a single distinct native community through cultural, social, and political institutions"); see also The Reconciliation Report at 4 (noting that native Hawaiian people "continue to maintain a distinct community and certain governmental structures"). This, combined with the fact (found by Congress) that the United States played a role in the ouster of the Hawaiian government, see Apology Resolution, supra, and the fact (also found by Congress) that "the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," NHGRA § 2(13), brings Native Hawaiians within the relaxed "continuity" requirement established by such cases as Washington I. [12]

* * *

The Supreme Court has confirmed that Congress has broad, plenary constitutional authority to recognize indigenous governments and to help restore the federal relationship with indigenous governments overtly terminated or effectively decimated in earlier eras. See Lara, 541 U.S. at 203 (affirming that the Constitution authorizes Congress to enact legislation "recogniz[ing]...the existence of individual tribes" and "restor[ing] previously extinguished tribal status"). That authority extends to the Native Hawaiian people and permits Congress to adopt the NHGRA, which would recognize the Native Hawaiian governing entity and initiate a process for its restoration.

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[12] Furthermore, that many native Hawaiians are integrated into multiracial communities does not set them apart from Alaska Natives, who have been similarly assimilated and whose dependent sovereignty has nonetheless been recognized by Congress. See *Metlakatla Indian Community v. Egan,* 369 U.S. 45, 50-51 (1962) (describing how the "Indians of southeastern Alaska...have very substantially adopted and been adopted by the white man's civilization").

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The CHAIRMAN. Thank you, again. Gentleman from Hawaii?

Mr. ABERCROMBIE. Thank you very much, Mr. Chairman. Ms. Heriot, thank you for coming and testifying today. I am well aware myself of what it is like to be in a situation where you are the only one holding a particular viewpoint, and you stated it clearly.

Ms. HERIOT. Still kind of like the sport of it.

Mr. ABERCROMBIE. Yes, very good, and particularly when it comes to something like civil rights there can be clear disagreement as to what constitutes that, and I take it as a premise that your testimony is trying to defend what in fact are civil rights, and that the commission forms a very valuable service in that regard.

What I would like to do right now if I can is engage in a bit of a dialogue with you in the hopes that perhaps you will come to see that both of our commitments to civil rights in the United States may not be as far afield as we might initially be led to think by your interpretation so far of what this legislation is about. I am hoping that with just a touch of history from me that perhaps you will grant—I was going to say the opportunity, but grant my request that perhaps you might do some rethinking on this, and we might be closer than we might otherwise appear to be on the surface.

I was in the legislature and in the negotiations that brought about the legislation that was passed, the proposed constitutional amendments. I think from an historic point of view, I may be one of the only people that has this continuity of legislative relationship. The whole idea we thought of the legislation establishing the Office of Hawaiian Affairs.

I am referring to this specifically now because of *Rice v. Cayetano*, which has been mentioned here, we thought we were resolving the issue that had been on the table since 1959 with the Admissions Act, which included the benefit for Native Hawaiians in the overall context of the rights, which you cite in your testimony. We thought we were handling that. When I was first elected to the legislature in 1974, involved in racial politics, you mentioned racial politics, I was just recently named the Scot of the Year in Hawaii, OK?

The Scot of the Year. I am glad I got your attention on that one Ms. Heriot. When I am introduced on occasion across the mainland, especially in saying here is the representative from Hawaii, and everybody looks around for Don Ho, and they see me instead, and I routinely say to people that I am Hawaii's answer to affirmative

action in this regard, so I am well aware of what racial politics are, and I don't think I would be sitting in this seat if racial politics in the garden variety understanding of what racial politics was prevailing.

I assure you both in 1974 when I was on the Water, Land and Hawaiian Homes Committee and now, we have always known what the assets are. It is water, and it is land and then Hawaiian Homes. That was the committee. I remember asking the Chairman, Chairman Richard Kawakami, from Hawaii why are we dealing with the ceded lands in Hawaiian Homes? Why doesn't the State just turn it over to the Hawaiians. He said that is what we want to do. We just have to figure out how. We have been figuring it out for 50 years now since 1959 and statehood, so when we did this in 1978, we thought we were resolving that issue.

Now, the people of Hawaii understood very clearly when we passed the constitutional amendment then when we said Native Hawaiians should elect the trustees, it wasn't because we were trying to be racially discriminatory or anything. We thought that is the most sensible way to do this. Now, we probably should have been aware that because it is a state agency, and by the way OHA is constantly criticized for being a state agency, well hell, we were the State Legislature. What else could we create.

Because it was a state agency, the Court ruled, and this is all that happened in *Rice v. Cayetano*, that everybody had to vote, not just Native Hawaiians. OK. Great. Everybody voted, and what did they do? They voted Native Hawaiians in to be the trustees because everybody is agreed in Hawaii that everybody benefits when we deal with issues associated with Native Hawaiian ceded lands, Department of Hawaiian Homelands. We are all agreed on that.

It has never been racial. It is always been historic and political. Always, and I want to point out, Mr. Chairman, that Representative Tom Gill, our predecessor here, ranks and will rank in the history of the House of Representatives right up with Patsy Mink, also a Representative from Hawaii. Patsy Mink wrote Title IX that saw that you cannot discriminate against women, and Tom Gill was the author of the clause in the Civil Rights Act against racial discrimination, so believe me.

We do not need to be lectured in Hawaii about racial discrimination when it has been our representatives who have led the way in making sure that where civil rights are concerned discrimination whether on the basis of gender or on the basis of race is not tolerated legally.

What I am asking is could you at least contemplate the idea that H.R. 2314 has no basis in racial politics but is, in fact, a document put together to try to resolve legislatively the questions of dealing with Native Hawaiian assets as defined in the Admissions Act and that could you consider then that if you are willing to grant that, that this bill might, in fact, then help to resolve those issues?

Ms. HERIOT. Well, Congressman, I think you hit the nail on the head in regards to this issue. I think the problem is when race gets introduces, the issues are never resolved, that it just goes around and around and around, and that is why the 14th Amendment was passed as it was. Now, if this bill defined the potential members of the tribal group in a way that was not racial, that was historic,

if this were perhaps the descendants of the people that lived in the Kingdom of Hawaii, which again was a multi-racial culture——

Mr. ABERCROMBIE. Well, then you will excuse me. That is OK because time is short. The definition as suggested by the Chairwoman Haunani is that we go back to 1778 and anybody who can trace their ancestry back that far.

Ms. HERIOT. But the wrong that has been asserted is the overthrow of the kingdom, which occurred much, much later at a time when ethnic Hawaiians were a minority in the State of Hawaii.

Mr. ABERCROMBIE. Yes, but that is my point is this is never racial. The Native Hawaiians are probably the most racially mixed group of people on the face of the Earth. I suspect you and I have less in the way of cosmopolitanism than virtually all Hawaiians.

Ms. HERIOT. That is absolutely true that only about I believe according to the——

Mr. ABERCROMBIE. So then why is this a racial issue?

Ms. HERIOT. Because it is defined in terms of that.

Mr. ABERCROMBIE. No, no. You are defining it.

Ms. HERIOT. I can read it into the record if you want. I think most people would agree this is an effort to define a group based on whether or not they are descended from a race of people who lived in Hawaii prior to contact with the rest of the world.

Mr. ABERCROMBIE. Yes.

Ms. HERIOT. The Supreme Court decided——

Mr. ABERCROMBIE. That is what indigenous people are.

Ms. HERIOT. Yes.

Mr. ABERCROMBIE. Yes.

Ms. HERIOT. And this is a race as the Supreme Court has held in *Rice v. Cayetano* when Native Hawaiians were the only people who could vote for trustees. This was rejected on the basis of the 15th Amendment.

Mr. ABERCROMBIE. Yes.

Ms. HERIOT. Now, it is true that they left the question open of whether or not it would be different if this were a tribe, but the problem is, it is not a tribe now, and the only way to make a tribe is by operating a law working on a racial group.

Mr. ABERCROMBIE. Nobody has ever thought of it that way. The word tribe only comes up with folks from the mainland. We never even heard of that the whole time I have been in Hawaii. This is my 50th anniversary. The only time this tribe business comes up is when it is injected because someone wants to try and keep us from resolving these issues. I appreciate that though. Thank you. Mr. Yaki, do you see what I am driving at?

Mr. YAKI. Thank you very much, Congressman. Two points I wish to raise in response to what my colleague just said. One, quite frankly that I do not wish to sound as offended as I probably want to be, but when she talks about the fact that Native Hawaiians were a very small minority of the population in 1890, I would just point out the fact that as the Congressman from American Samoa pointed when Cook landed on the islands, there were about 300,000 to 400,000 Native Hawaiians.

The introduction of disease brought about by settlers decimated that population down to 40,000, so the idea that they were a minor-

ity at the time in 1890, well to say that without understanding the context I think is wrong.

The CHAIRMAN. Well, would you agree that whether you are a minority numerically is immaterial to the issue at hand.

Mr. YAKI. It is, and my next point was simply going to be the point is that the failure to recognize by my colleague that these were the indigenous peoples who had traveled thousands of years before to settle on those islands, and this legislation tracks those individuals is exactly what we have done elsewhere. When we talk about tribes, tribes as you know is a western anthropological term. It really has no meaning to a lot of the different governing structures of the native peoples of this country.

California had a much looser band structure than some of the more organized in the Midwest and Colorado, et cetera. The Native Alaskans, for example, are completely not by any term a tribe, so the idea that there is some constitutional definition rigidity to the term tribe is erroneous. Clearly, over time the Supreme Court has talked about indigenous peoples, and that is the clear point and the clear message of this legislation. It relates to the indigenous peoples of the islands of Hawaii.

As long as you focus on that, it is not 15th Amendment, it is not the 14th Amendment, it is not the 5th, it is not the whatever it is. It is the Indian Commerce Clause plenary power of Congress to recognize those individuals. That is the focus of this legislation.

Mr. ABERCROMBIE. Now, just one more moment, Mr. Chairman, if you will. Mr. Bartolomucci, in your testimony I wanted just to reflect this last commentary here. We are, in fact, here talking about native people, right?

So the Indian Tribal Clause within the Constitution is I don't know if phrase of art is the correct terminology here legally, but that is the way at the time of the formation of the Constitution, that was the only entity or designation rather that the writers of the constitutional documents could refer to, right, so that when you try to apply the Constitution in a contemporary context, indigenous people is what they were really talking about, is that correct?

The word tribe might have been used, but it is almost a generic term for the relationship of the United States government to indigenous people. Is that a fair summary?

Mr. BARTOLOMUCCI. You are correct, Congressman Abercrombie. The term Indian tribe really is in reference to indigenous people, so the Indian commerce clause is properly understood, and the Supreme Court has said this again and again as conferring upon Congress a broad plenary power to deal with indigenous, native groups that exercised a sovereignty, so that——

Mr. ABERCROMBIE. And do we not do that in this Committee routinely?

Mr. BARTOLOMUCCI. Correct.

Mr. ABERCROMBIE. As recently as last week, Mr. Chairman, isn't that the case?

The CHAIRMAN. Correct.

Mr. ABERCROMBIE. Yes. Now it may be controversial, but the question of whether we can do it is not at issue. The question is do we want to do it? That is always at issue and, of course, that

is what has to be decided now. Just one last point very quickly with Mr. Kane.

Mr. Kane, was I essentially correct, and am I reflecting correctly your testimony that the question of sovereignty per se is not an issue when it comes to paying taxes, connecting sewer lines, the practical every day realities, signing contracts, issuing bonds, all the rest that for all intents and purposes the practical implementation of being able to exercise authority by some governing entity that emerges out of this enabling legislation would not be a difficulty, that we have practical every day examples already in existence which would continue to apply.

Mr. KANE. It hasn't been in the past, and I don't perceive it being a challenge going forward. In fact, the mechanics and agreements that we have in place in dealing with the state Land Use Commission as well as the respective county Planning Commission allow the department to work in cooperation with those regulatory agencies. While the Department of Hawaiian Homelands holds the authority to its land use jurisdiction, we do work in cooperation and, in fact, have very good working relationships with them.

Mr. ABERCROMBIE. Has there ever been any difficulty since statehood to your knowledge with dealing with any Federal agency, Department of Justice, Interior, Commerce, Courts, anything?

Mr. KANE. Absolutely not. In fact, in many cases, we are shoring up systems, and in very few cases do we have stand-alone systems. In fact, our legislatures continually appropriate funding to projects that benefit not only our community but a broader community because that is just he way we function.

Mr. ABERCROMBIE. Thank you, and then finally, Mr. Chairman, and with respect to full disclosure, I want to indicate that the counsel to the Office of Hawaiian Affairs is, in fact, my next door neighbor, Judge Klein, so I want to make sure that you know that and that it is on the record. I am not trying to hide anything.

The CHAIRMAN. Thank you very much. Gentlelady from Wyoming?

Ms. LUMMIS. Thank you, Mr. Chairman. Do we have time to squeeze me in before votes?

The CHAIRMAN. Yes. We are on. I am not sure how many votes we have got, but we do have votes, two votes that are underway at the present time, but we will come back. I don't know what is wrong with our light. Well, there is our lights.

Ms. LUMMIS. OK. Thank you.

Mr. ABERCROMBIE. I beg your pardon, Mr. Chairman, I beg the pardon of all the members. I had no idea that the vote was one.

The CHAIRMAN. No. Gentlelady from Wyoming is recognized.

Ms. LUMMIS. No problem. Thanks, Mr. Chairman. Thank you for being here today. This is a fascinating discussion for someone who is being exposed to it for the first time. I am curious. When Hawaii became a state, clearly these issues must have been visited then, or if they were visited then were found to be not appropriate given the statehood that Hawaii was seeking. What has changed, and I ask that question of Mr. Kane?

Mr. KANE. I think I would have to disagree with your premise.

Ms. LUMMIS. OK.

Mr. KANE. I don't think there was—and so I would just have to disagree with your initial premise.

Ms. LUMMIS. OK. Mr. Chairman, so this was discussed at the time of statehood?

Mr. KANE. Well, I believe the fact that the State of Hawaii accepted statehood and the conditions that came with it was just a continuation of that authority to operate the Department of Hawaiian Homelands, and so the State of Hawaii embraced that, and today we are a fundamental part of our economy.

We are a fundamental part of the fabric of our society and are a fundamental part of our culture that attracts people to come all across the world to visit our place and our culture, and I think people respect that and appreciate that, and I think statehood, they understood that, and I think they understand that today.

Ms. LUMMIS. OK. Thank you. Ms. Apoliona. I appreciated your testimony and your desire to teach people and different generations about respect for land and culture. That is important in Wyoming as well, so that was very significant to me. If this bill is signed into law, what percentage of currently publicly owned lands in Hawaii is eligible to be turned over to Federally designated Native Hawaiian governing entities?

Ms. APOLIONA. I think representative Abercrombie referred to the potential 1.8 million acres that remains as public trust lands, but the key to this whole process has been underscored in several of the responses. If you look at the bill, it would be a negotiations process. Assuming the bill passes, the governing entity is established after a process of Native Hawaiians deriving what the governing structure would look like, which would be appropriate to our community.

The United States government, the State of Hawaii government and the native government would have to sit down and negotiate some of these issues related to and including as I said in my testimony some of the comments related to historical wrongs, et cetera, which may include the discussion on lands. That is a negotiation process that we know will be very challenging.

However, it is due process of three governments working together needs to occur, so I cannot at this point say to you a certain acreage or a certain location of public lands would come back or be part of the assets transferred back to the native government, and in addition to the negotiations, then we would have to have statutes, whether they be state statutes or Congressional actions taken to implement the agreements through a negotiations process would need to occur, so it would be a long process, an arduous one, but one that we must go forward on.

To answer your question on what exactly is going to come back, I can't tell you because we are not at that point yet.

Ms. LUMMIS. OK. Thank you. Mr. Kane, I do want to hear what you have to say about that, but I want to ask one more question of Mr. Yaki before we do. I am struggling with the difference between what we are talking about here versus my contacts as a Wyoming native about tribal definitions and the sovereign relationship between the State of Wyoming and the northern Arapaho, the Shoshone and so forth.

Why should Congress not apply the same criteria to the request of Native Hawaiians as is applied to the tribes that I deal with within the contiguous United States?

Mr. YAKI. Well, without knowing the exact details of the sovereign negotiations that go on between the tribes in your state and the Federal government and the State of Wyoming, I would simply say this: What you are asking though begs the question of why we are here today because the point of this is to create that scenario by which Native Hawaiians can engage in those discussions.

Now, there are some interest limitations in this bill that may not be, for example, in any of the compacts that some of your tribes may have with your state government, such as limitations on gaming and other sorts of things, so in some ways, and I think this is a very important point to stress, this legislation is good legislation. It is for some people, and you probably heard about it I am sure the Congressman has heard about from some people, it doesn't go far enough. It doesn't immediately create a sovereign government and initiate state-to-state relations.

It doesn't do that and probably because of the very reasons brought about by many here today, including my colleague, and especially Congressman Abercrombie about how Hawaii operates a little bit differently, and it is about trying to do this together, trying to make it work together. I think this is going to be a process that will be harmonious, that will be one that attempts to reach reconciliation and compromise, but no one exactly knows where it is going to lead.

This legislation is about broad principles, about working toward self-governance and self-determination, which your tribes have. It allows them to begin the first what I call baby steps toward that, which quite frankly is a little bit less than what other people have gotten over the years, but it is the way this legislation is written. It is a way this legislation is deemed to pass, and I believe it is a reasonable step toward attaining what the tribes in your state already have.

Ms. LUMMIS. OK. Thank you. Mr. Kane, I may catch you after. I don't want to hold everybody up here because we have to go to vote, so I might just catch you before we walk out of the room and get your response privately. Great. Thank you so much. Thanks, Mr. Chairman.

The CHAIRMAN. Thank you. The Chair is going to have to recess the hearings for these votes on the House Floor. With the panels' patience, if you can return, I am sure there are more questions.

Mr. FALEOMAVAEGA. There will be.

The CHAIRMAN. OK. But we have more questions on that side?

Mr. FALEOMAVAEGA. Yes.

The CHAIRMAN. Can the panel return? Then the Committee will stand in recess for 15 minutes.

[Recess.]

Mr. ABERCROMBIE [presiding]. Thank you for your patience. Let us see. I think, Mr. Kane, you were not being questioned at the end, but there was a question raised to which I believe the gentlewoman from Wyoming was going to speak to you, but perhaps you could put your answer on the record, and we will start from there if that is all right.

Mr. KANE. Thank you, Congressman. I refer to the governing entity, and I wanted to parallel it to what we do today with the Hawaiian Homes Commission Act when a change occurs that affects our trust. As you know, a bill needs to be enacted at the legislature, adopted by our legislature, signed off by our Governor, and then if it has significant impacts, consent by the legislature as well as the Department of the Interior.

That is the same process that the entity would go through as it negotiates through this effort, and I think it is important, or I think it would be important for members to recognize that it is not a significant change to a process that we are familiar with now, and again I think the mechanics of those activities are somewhat minor in nature because we are familiar with them.

Mr. ABERCROMBIE. When you say the legislature the second time, you mean the Congress, the national legislature?

Mr. KANE. Yes, sir.

Mr. ABERCROMBIE. Yes. Thank you.

Mr. ABERCROMBIE. Eni, do you have a question at this point or an observation?

Mr. FALEOMAVAEGA. Yes. Thank you, Mr. Chairman. I do have some questions I wanted to share with the members of the panel, and again thank you all of you for testifying this morning. Mr. Kane, welcome.

Mr. KANE. Thank you.

Mr. FALEOMAVAEGA. I just wanted to ask whether or not the establishment of the Department of Hawaiian Homelands was something creative to the discretion of the Hawaii state government or did this have anything to do with the Hawaii State Admissions Act, which was enacted by the Congress? In other words, did this department, was it created simply because something that originated by the Hawaii State government, or how did it come about? I think that is the——

Mr. KANE. The Hawaiian Homes Commission Act established basically the Department of Homelands.

Mr. FALEOMAVAEGA. The Hawaiian Homes Commissions Act was an Act by Congress?

Mr. KANE. It was an act by Congress. It was an attempt to reconcile those political differences from the overthrow and before, and so that political relationship based on the treaties that occurred prior to the overthrow and then when the Hawaiian Homes Commission Act was passed was a direct relationship to those relationships. You cannot, in my opinion, turn off that political relationship when it is convenient to your argument, and that is what I believe some of the dissidence are trying to do.

You cannot again recognize those political relationships that occurred through treaties that the Hawaii Kingdom had with various countries as well as the United States, carry that political relationship through the Hawaiian Homes Commission Act that Congress set aside, carry that relationship through the political relationship that is acknowledged at the time of statehood and then try to make a race-based argument when it is convenient to you now, and I believe that is what seems to be occurring right now on those——

Mr. FALEOMAVAEGA. OK. And I just want to allude to our good friend, Ms. Heriot, certainly I am not trying to establish an adver-

sarial relationship with you, Ms. Heriot in terms of the positions that you have taken on this, but in asking Mr. Yaki, you did make reference to the Admissions Act. Wasn't one of the requirements of the Admissions Act that something had to be done for the Native Hawaiians?

I mean, didn't the Congress at that time recognize the existence of a group or people, if you call it a racial organization as Native Hawaiians, or did they just come out of thin air? I am trying to figure a sense of continuity from the time when Hawaii was a territory in 1900.

Ms. HERIOT. Yes. This is with regard to the ceded lands. Actually, the Admissions Act had five purposes that the public lands could be used.

Mr. FALEOMAVAEGA. OK. OK.

Ms. HERIOT. Only one of those was for the betterment of Native Hawaiians as defined in the Hawaiian Homes Commission Act.

Mr. FALEOMAVAEGA. Right. And the Congress——

Ms. HERIOT. Which, of course, is very different from the definition that is used in this statute.

Mr. FALEOMAVAEGA. Yes.

Ms. HERIOT. So actually, it is a violation of the Admissions Act to be using the property for any purpose other than one of those five, and the fact——

Mr. FALEOMAVAEGA. Let me interrupt you a minute. Congress also made a racial definition of American Indians that in order to be an American Indian you would have to be 50 percent blood or more, and they apply the same standard to Native Hawaiians. To be a Native Hawaiian, you have to be 50 percent or more. That classification of a Native American or American Indian, does it still apply today because I don't think so.

Ms. HERIOT. It is still in the statute. I mean, it was in the statute as passed in 1921. It is different from the definition. They are both racial definitions.

Mr. FALEOMAVAEGA. Yes.

Ms. HERIOT. And I think they are both unconstitutional.

Mr. FALEOMAVAEGA. But they continue to be applied from the time that the Congress made the definition of an American Indian as 50 percent blood or more. Did you think it was racially——

Ms. HERIOT. There were lots of legislation passed in the earlier part of the 20th century that is unconstitutional.

Mr. FALEOMAVAEGA. But do you agree that this definition of race, I mean 50 percent to be a Native Hawaiian or American Indian was a fair way to describe a people?

Ms. HERIOT. Do I think it was a fair way? No. I am definitely against the statute.

Mr. FALEOMAVAEGA. OK. Mr. Yaki, I just wanted to ask you for your comment on this.

Mr. YAKI. Well, thank you very much, Mr. Congressman, and thank you for your leadership on the issues and on behalf of the people of American Samoa. I would just simply reiterate the point that has been made by Mr. Bartolomucci, Kane and others and that is the fact is that the Admission Act had specific conditions within it that continued policies set forth by this Congress that rec-

ognized the unique and special nature of the Native Hawaiian peoples.

Some people try and call it a race issue. To me, it is and has been a perpetuation of the recognition of Native Hawaiians as a distinct indigenous people throughout the time of annexation and beyond, so I think that we can get into this argument about who classifies what as what, but the fact of the matter is that the Admissions Act by its very nature by incorporating in the Hawaiian Homes Act and other things continued that recognition that there is a special status for Native Hawaiian peoples within the State of Hawaii.

Mr. FALEOMAVAEGA. OK. One more question, Mr. Yaki. You had given an indication that there was some serious problems on how the U.S. Commission on Civil Rights came about in making the decision that it did.

Mr. YAKI. Yes.

Mr. FALEOMAVAEGA. And you mentioned that there were only four witnesses that testified before the Commission?

Mr. YAKI. Yes.

Mr. FALEOMAVAEGA. Can you elaborate a little further on this in terms of how this four witnesses came about to be the only ones to testify before the commission?

Mr. YAKI. Well, again as I think the Acting Chair alluded to the fact that before he had been in the minority as a minority when as I am on the commission one of the minorities in terms of the divide, it is basically divided.

Mr. FALEOMAVAEGA. Did you say it was politically slanted?

Mr. YAKI. I am not going to say how it was done, but I do not control the staff director. I do not control the staff. This was a briefing that came about in a rather large hurry, mainly because this legislation was starting to move toward the House Floor and to the Senate Floor. If you want to ask about——

Mr. FALEOMAVAEGA. Well, you indicated earlier there were no findings of fact. Can you elaborate on that?

Mr. YAKI. What happened was that a draft report came out which contained within it I would call extremely erroneous findings of fact and of conclusions from the testimony. Some of these were based upon again the fact that there was no allusion to what Congress had done prior to with the apology the resolution, the fact that there was no allusion to any of the factual inquiries performed by the Federal government or the Hawaiian State Advisory Commission to the U.S. Commission on Civil Rights.

It came to a point, if I may say, for lack of a better word, my colleagues were embarrassed to put a report with this kind of information in it to the point where they stripped all the findings and recommendations from the report except for the one generic one about we oppose legislation that divides people on the basis of race, which I submit does not apply to this legislation. This is not about race. It is about indigenous peoples, but I—yes, go ahead. I am sorry.

Mr. FALEOMAVAEGA. Go ahead. Go ahead.

Mr. YAKI. But I will add this one extra point about political issues. Soon thereafter, the staff director of the commission recon-

stituted the Hawaiian State Advisory Committee to the commission.

Mr. FALEOMAVAEGA. After the fact?

Mr. YAKI. After the fact, he reconstituted it, and in its place put a majority of people who had signed petitions against this legislation. Now, the criteria for membership on state advisory commissions is in general ancient civil rights, diverse backgrounds or what have you. I would submit, and this is my own opinion, I would submit that the only commonality of the majority of the people appointed to this Hawaii State Advisory Committee was one salient fact that they were opposed to this legislation.

The commission then proceeded to hurriedly convene a meeting of this committee, spent I would say to this day I do not know, but I can tell you that we spent more money on the Hawaii State Advisory Committee than probably all the other state advisory committees combined in a period of three months in order to get the commission to take a position against this legislation. Unfortunately for them, it failed despite all of that.

I think it was because the people of Hawaii who support this bill came out during the hearings and made it very clear that this was not something they wanted the Hawaii State Advisory Committee to the U.S. Commission on Civil Rights to do. Again, this is my own opinion, but based upon fact, the timing was very interesting, the composition of the committee was very interesting, the amount of money that we spent on this particular committee was extremely interesting, but luckily the end result was that they deadlocked and did not take a position against the legislation.

Mr. FALEOMAVAEGA. Just one more question, Mr. Chairman.

Ms. HERIOT. I assume you would like me to respond to that since this is a commission report.

Mr. FALEOMAVAEGA. Yes, but I will get back to you later Ms. Heriot. Mr. Bartolomucci and Mr. Yaki, again reading the case of Cayetano v the United States where the Supreme Court purposely narrowly defined the whole race issue under the 14th and 15th Amendments requirement as being race-based but totally ignored anything having to do with the history in terms of how Native Hawaiians are being considered by the Congress historically in every way in terms of the fact that these are indigenous peoples exactly the same as American Indians and Native Alaskans even though Native Alaskans were never defined as a tribe itself, but Congress has given that special trust responsibility in the same way.

Can you two comment? Was there any reason why the Supreme Court so narrowly made this decision, which was a split decision by the way to overturn the decisions that were made by the Federal District Court as well as the Court of Appeals in sustaining the decision?

Mr. BARTOLOMUCCI. Well, Congressman, it was a split decision. The majority garnered five votes. There were two Justices who concurred in the judgment in a separate opinion and two dissenting votes on the Court. As I have testified, the *Rice v. Cayetano* decision simply doesn't answer the question whether Congress has the power to enact H.R. 2314 because the issue there was whether

Hawaii could have a state law that limited who could vote in a state election, so it had nothing to do with Congressional authority.

It had nothing to do with Congress' power to recognize native indigenous sovereign groups for what they are, so it is a very limited utility in determining the legality of the pending bill.

Mr. YAKI. And I would actually argue that it is a very good argument in favor of the bill itself because the Court essentially contorted itself around the idea of how to make these specific findings.

If Congress had acted earlier, if this legislation as authored by Senator Akaka and Congressman Abercrombie had been in existence at the time, I submit there would have been a completely different analysis of it because of the very fact that Congress had not made the finding which it can under the Indian Commerce clause that Native Hawaiians constitute separate indigenous peoples with certain sovereign rights. That lack of congressional action I think it what led the Court to make its decision.

What this legislation would do is help to remedy I won't say the loopholes, but the issues that still remain out there and that continually I think bedevil the people of Hawaii and Native Hawaiians in terms of how do we attain the same status, the equal status of other Native Americans and Native Alaskans in this country.

Mr. FALEOMAVAEGA. Ms. Heriot, I am sorry. I didn't mean to put you off. Please.

Ms. HERIOT. Thank you. I just wanted to comment on the commission's report. First of all, it is really quite an accusation to suggest the commission's briefing report on this bill was anything out of the ordinary. It is quite false. I was not on the commission at the time, but I know a lot about how that briefing report was put together.

Mr. FALEOMAVAEGA. But you were not on the commission at the time that this was put together.

Ms. HERIOT. No, but I was a witness at that particular briefing.

Mr. FALEOMAVAEGA. But were you a member of the commission.

Ms. HERIOT. No, I was not.

Mr. FALEOMAVAEGA. OK.

Ms. HERIOT. But I have read that report thoroughly. I have spoken to quite a few of the commissioner who were involved in putting together that report. First of all, four witnesses is nothing out of the ordinary. Our staff works very, very hard to invite witnesses that take varying positions on all of the issues that come before us. In fact, that marks a change from the procedures during the previous——

Mr. FALEOMAVAEGA. Were you aware that other organizations wanted to testify before the commission?

Ms. HERIOT. It is absolutely routine. We allow anyone who wants to present evidence, and we have a much tougher time getting people to testify sometimes, so four witnesses is perfectly routine, and you can bet we invited a lot more. I happen to know because I was a witness at that particular briefing. They were having a hard time getting witnesses because I was called just 72 hours ahead of time and told we are having a really tough time getting witnesses. Can you please, please, please come, and so I did.

In years past, the commission has a rather poor history of not getting both sides of an issue, but in the last few years under the

leadership of now Chairman Gerald Reynolds, we have new regulations, new procedures that ensure that absolutely, positively we get or try our very hardest to get all the major positions on any issue. Nothing odd about that at all with this report.

Now, what is different about this report is that it moved a little more quickly than some of our others for a very good reason. It was coming before the U.S. Congress, and we thought that if we were going to have a report on this, it needed to be finished up in time to actually influence the legislature.

Mr. FALEOMAVAEGA. My times has come up. I am sorry, Mr. Chairman, but can I just ask one more comment from Mr. Yaki to make up my portion of the time you wanted to——

Mr. YAKI. Thank you very much, Congressman. I just wanted to state that you were correct. Ms. Heriot was not a commissioner at the time. She was not involved in the deliberations. The debate on this report raged for quite some time over the accuracy of its draft findings in the commission in view of the facts before the commission voted to strip all the findings from the report. They stripped all the recommendations, except for the one that talks about subdivision on the basis of race.

In terms of procedures, I will tell you that this hearing came up out of the blue, not this one, the one on the Native Hawaiian Act came up very suddenly. The chartering of the state advisory came up very suddenly. You can just simply look at the facts and see for yourself exactly how it operated.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I am sorry. My time is up.

Ms. HERIOT. I do have some comment on that. Again, that is an accusation against the procedures of the commission. In fact, in years past, prior to the administration of Gerald Reynolds, we had state advisory committee that were chartered that were really not politically balanced. We have new rules, and those new rules require that the commission have political balance on its state advisory committees. That is what Commissioner Yaki is objecting to.

Mr. ABERCROMBIE. Thank you, Ms. Heriot. I presume when you say political balance you don't mean those who are for civil rights and those who are against it?

Ms. HERIOT. No, we do not. All the members of all our staff have a background in civil rights.

Mr. ABERCROMBIE. I am sure. Maybe at this juncture I should indicate that the Committee may be sending written questions to you and to the witnesses, and the record will stay open 10 business days, so if you care to comment further, don't feel that if you didn't have sufficient time to explicate everything you wished on this or any other element of what we are discussing today, please take the opportunity to send to us what you would like to have considered.

I can assure you on this Committee between the staff and the Committee members, everything that comes is read, is read thoroughly and digested and shared. You are not going through motions when you contribute to the record in this Committee. Ms. Heriot? Mr. Faleomavaega, are you finished?

Mr. FALEOMAVAEGA. Just one more. I just wanted to ask Sister Haunani thank you so much for your eloquent statement here. In your current capacity and the times that you have had I am sure

opportunities to associate and meet with several or many members of Native American tribes and organizations, I know this is one issue that has also been raised about will this cause any problems in terms of the recognition process to the native Hawaiians as it is with our native American Indians from Alaska as well as the continental U.S.

Has there been any indication in opposition from any of the tribes in the U.S. in terms of what the Native Hawaiians are trying to achieve here?

Ms. APOLIONA. Absolutely not. The National Congress of American Indians has stood firmly in support of passage of Federal recognition for Native Hawaiians as has the Alaska Federation of Natives, who one of their representatives is here this afternoon in the absence of their president, in addition the native groups, there have been many, other national groups that have been supportive of our effort because they understand justice, indigenous rights, et cetera, at home, and we talk about Kuhio Kalaniana'ole and his role as a delegate.

In addition to his policymaking here, he was very instrumental in forming and beginning community activism at home with Native Hawaiians because of what he saw happening with Hawaiian people over the years in decimation of our community. The president of that Association of Hawaiian Civic Clubs, which is the established community, civic group in the interest of Hawaiian movement forward established by Kuhio is here. Levomican who is sitting in the audience.

There has been vast and diverse and varied support, and certainly the native leadership of this country is supportive of this recognition bill for Hawaiians.

Mr. FALEOMAVAEGA. So the major factions, indigenous peoples of our country——

Ms. APOLIONA. Absolutely.

Mr. FALEOMAVAEGA. American Indians and the Native Alaskans fully support this.

Ms. APOLIONA. They stand with us, and they say hurry up.

Mr. FALEOMAVAEGA. And the sensitivity alluding to this, well, this is something that I share the Chairman and other members of the Committee have taken so differently where do you feel that being treated in a way that this proposed is given that you are being treated racially, or is it because of the fact that you are a defined indigenous group of people just like the American Indians and the Native Alaskans.

Ms. APOLIONA. Our position as my testimony, my written and oral testimony, states our history is very similar to the kind of history of our other native Americans in this country. We believe, and we know we are aboriginal native indigenous people of Hawaii, first people of Hawaii, and we do not understand why there is this confusion, and I will leave it at that. Our position is we are native, aboriginal indigenous people to Hawaii.

Mr. FALEOMAVAEGA. The Navajo National currently has a government composed of 250,000 Navajos. When they have their elections, can other people, the residence of Arizona, also participate in their elections, or are they strictly for the Navajo people to participate in?

Ms. APOLIONA. Congressman, I am not clear exactly how the Navajo Nation has their elections, but I would imagine that those elections of their leaders for their native government would be engaged in by their native people. Ultimately, for the Hawaiian government, I think the process of organizing and setting up organic documents, et cetera, will be outcomes of this process that we will go through.

In terms of who ultimately becomes members of the government, that is going to be determined by those that create the organic documents. At this point, the beginning process is being launched. It is intended to be launched by those aboriginal native indigenous people of Hawaii, native Hawaiians.

Mr. FALEOMAVAEGA. Thank you, Haunani. Thank you, Mr. Chairman.

Mr. ABERCROMBIE. Thank you. Ms. Heriot, on page 5 of your testimony, I am just curious about this. If you don't know it, names or groups, perhaps you could take a look and submit it for the record. You say activists in Hawaii have argued that revenue from the ceded lands should be used exclusively for the benefit of ethnic Hawaiians and reject the other four purposes. I have never had any experience with that. I have never heard that.

Is there some specific reference, individuals or groups that you are referring to, or is that anecdotal? Do you know offhand? If you don't, that is all right, but I assume that testimony is——

Ms. HERIOT. I think this is revenue that is going through the Office of Hawaiian Affairs.

Mr. ABERCROMBIE. I am sorry?

Ms. HERIOT. I think I am referring to the revenues from the ceded lands that go through the Office of Hawaiian Affairs, and maybe I need to clarify that.

Mr. ABERCROMBIE. OK. Well, then I will ask Haunani. I have never heard OHA say that the other four purposes should be rejected.

Ms. APOLIONA. No. We have never said that, and actually the revenues that are derived from the ceded do go to the four other purposes. In theory, the Office of Hawaiian Affairs has received only 20 percent of that revenue stream. The other 80 percent of the proprietary revenues and all of the sovereign revenues from the ceded land revenues go to the State of Hawaii.

Mr. ABERCROMBIE. Yes, so the State has continued, has it not, to exercise legislative authority over the ceded lands and what transpires regarding them?

Ms. APOLIONA. Absolutely. It is the State that creates the leases and the rents and whatever related to the——

Mr. ABERCROMBIE. So you have had negotiations with the State that ended up with the 20 percent figure, right?

Ms. APOLIONA. Yes, and it is just a revenue stream.

Mr. ABERCROMBIE. Yes, so all this has always been negotiated and concluded as a result of negotiations. It is never been arbitrarily decided?

Ms. APOLIONA. Right. Right. Sometimes it is been a struggle.

Mr. ABERCROMBIE. Well, yes. Yes. Then, maybe I should ask Judge Klein if he could come to the table as well if that is all right.

Ms. APOLIONA. Sure.

Mr. ABERCROMBIE. Because I have a question I would like to have his view. When one of the five purposes is, and I am talking about the Admissions Act now, Judge, that for the betterment of conditions of Native Hawaiians is defined in Hawaiian Homes Commission Act of 1920, as amended, is it fair to assume, and can you identify yourself for the record. I am sorry.

Judge KLEIN. Yes. Thank you, Congressman Abercrombie. Robert Klein. I am board counsel.

Mr. ABERCROMBIE. Can you pull the mic a little closer?

Judge KLEIN. I guess not. I will have to sit a little closer.

Mr. ABERCROMBIE. OK.

Judge KLEIN. Congressman Abercrombie. I am Robert Klein. I am board counsel for the Office of Hawaiian Affairs.

Mr. ABERCROMBIE. Thank you, and you previous tenure?

Judge KLEIN. I served eight years on the Hawaii Supreme Court as an Associate Justice.

Mr. ABERCROMBIE. Thank you. You are familiar obviously then as counsel to OHA with the five purposes associated with the Admissions Act.

Judge KLEIN. I would like to think so. That is correct.

Mr. ABERCROMBIE. OK. You may have had to rule at one time or another, I don't know, while you were Judge, but one of the purposes is for the betterment of conditions of Native Hawaiians as defined in Native Hawaiians Home Commission Act 1920, as amended. Am I, as a layperson, able to take from that it is inherent in the Admissions act that the Hawaiian Homes Commission Act had been amended and possibly could be amended in the future?

Judge KLEIN. Yes, absolutely. It has been amended quite a few times since 1959.

Mr. ABERCROMBIE. OK. So that means definitions with regard to what constitutes the rules, regulations, et cetera of the Hawaiian Homes Act is subject to periodic amendment?

Judge KLEIN. That is correct. As far as the beneficiary class, the only changes that can be made there are with the consent of Congress, so Congress has continuous oversight over the purposes and the beneficial——

Mr. ABERCROMBIE. So these definitions with respect to Native Hawaiians has always had a Congressional not just input, but a Congressional imprimatur?

Judge KLEIN. Exactly, and that is the words of the Admissions Act, Federal law, says that they can be only changed with the consent of the United States.

Mr. ABERCROMBIE. And is it your understanding as well that should H.R. 2314 pass substantially as it exists right now, that this is, in fact, enabling legislation for any entity, any governing entity to come into existence in Hawaii under the auspices of this bill that it would have to pass muster than with the Department of the Interior and the Congress?

Judge KLEIN. Yes, absolutely. That is accurate. Section 7 talks about that entire process so that when the organic documents are created by the interim governing council under Section 7, approval has to be given by the Secretary of the Interior and the documents have to contain about eight specific points that are required by

H.R. 2314 that must be covered in the organic documents and approved by the Secretary of the Interior.

Mr. ABERCROMBIE. So far from any imposition being able to be implemented by any governing entity that evolves out of this imposition with regard to taxes or land tenure or anything else like that, all of that is subject to I guess approval is the word, subject at least to the review of the Department of the Interior.

Judge KLEIN. And Section 8 of the bill covers the negotiations, the subjects that will be negotiated between the three governments, so that talks about natural resources, land and other issues including claims of the Hawaiian people subject to being negotiated, and that is found in Section 8.

Mr. ABERCROMBIE. So this bill, if anything, is a springboard? It certainly isn't anything that could remotely be seen as an easy process? There are lots of obstacles to be overcome here, is there not and lots of entities to be local, state and Federal to be both adjudicated and worked with before you come to any kind of conclusion that is capable of being presented for final approval?

Judge KLEIN. Absolutely correct. It is a process, and it is going to require a lot of work and dedication in the community back at home to come up with organic documents that satisfy the United States government, the Department of the Interior and that work well for the people.

Mr. ABERCROMBIE. OK. Just for the record then, in your role as counsel, what is your view? I won't say would you agree, but is it your view that *Rice v. Cayetano* has a—I hate to use the word narrow basis because that sort of implies a bit that it is trying to avoid an issue.

I don't mean it that way, but has as a basis the question of whether state law was properly applied to a state election with regard to constitutional rights and the view of the Court was is that the way the voting base was operating in Hawaii that it was unconstitutional in that it was a state, that OHA was a state entity and, therefore, everyone should be able to vote in it as opposed to some of the broader questions of racial discrimination and so on.

Judge KLEIN. Right. I mean, that is probably not exactly the way I would put it. I think the United States Supreme Court performed its constitutional role in judicial review of a state statute when called upon to do that by the Petitioner and came to the conclusion that the 15th Amendment was implicated by a state law that permitted only Hawaiians to vote in the affairs of a general election, and I guess the benefit that we have now from that is all of the trustees are presently served and elected by everyone in the State.

Mr. ABERCROMBIE. Yes. That takes me to a final point that I wanted to raise. This is in regard to whether or not there is support for this. Now, despite the fact that this is a state entity, the Office of Hawaiian Affairs, is not participation in the OHA elections in the hundreds of thousands?

Judge KLEIN. Absolutely. We have universal suffrage here in these OHA elections, and some of the trustees garner——

Mr. ABERCROMBIE. More votes than other elected officials, is that correct?

Ms. APOLIONA. Absolutely. Absolutely.

Mr. ABERCROMBIE. Haunani, I see you nodding gleefully there. Would you like to say how many voted you got in the last election as opposed to some others, and you can leave me out if you wish?

[Laughter.]

Ms. APOLIONA. No. We will say over 150,000. We will say that. I think the highest has been about 200,000 plus votes.

Mr. ABERCROMBIE. Right. Which compares favorably to any election from the Governor on down.

Ms. APOLIONA. Absolutely. Our trustees that are elected are elected in a fashion of statewide races only likened to the Governor and the lieutenant Governor race.

Mr. ABERCROMBIE. So the serious part of my question has to do with the fact then that people in Hawaii obviously don't consider the Office of Hawaiian Affairs then as representing some race-based entity from which they are prevented from having a say?

Ms. APOLIONA. Absolutely.

Mr. ABERCROMBIE. Because they exercise a franchise. They don't have to vote for you, right? They can leave it blank?

Ms. APOLIONA. That is correct, and some choose to vote. Some choose not to vote because some believe that this is really a mission for Hawaiians, but as I alluded to the numbers, there are many who do vote now that they have the opportunity who are not native Hawaiian. They vote.

Mr. ABERCROMBIE. And there are those who object to the existence of the Office of Hawaiian Affairs.

Ms. APOLIONA. Yes.

Mr. ABERCROMBIE. And they are free to run for office and to put in bills or even run for trusteeship to take OHA out of existence if they want, right?

Ms. APOLIONA. Yes, and they have tried, and so far they have failed.

Mr. ABERCROMBIE. Yes. Now, again I think they are a small minority, but nonetheless, that doesn't mean they don't have the right to do it, and they say so, and they say so with regularity as to what their views are here.

Ms. APOLIONA. Absolutely.

Mr. ABERCROMBIE. But my point is here is that in terms of popular sovereignty, it is well established that the Office of Hawaiian Affairs has had the approbation of the voting population in Hawaii pre-*Rice v. Cayetano* and post-*Rice v. Cayetano*.

Ms. APOLIONA. Yes.

Mr. ABERCROMBIE. Thank you. I think that is all I have.

Mr. FALEOMAVAEGA. I just have one more round, Mr. Chairman, if I could.

Mr. ABERCROMBIE. Sure.

Mr. FALEOMAVAEGA. I want to say my aloha to Judge Klein for being here.

Judge KLEIN. Aloha, Eni.

Mr. FALEOMAVAEGA. As you know, Judge Klein, we have had a very interesting history of how our nation has treated Native American Indians, and I have said this several times in times when we debate the issue of the welfare, the needs of our American Indian tribes and Native Alaskans. Our first national policy was to kill all the Indians. That was our national policy. Get rid of them.

Then the next national policy was to assimilate them, make them as part of America. Then the third policy was to terminate them.

They don't exist and now the latest is we need to re-recognize that they existed as tribes. We just had a tribe here who over 100 years finally have been approved by this body in their quest for being recognized as an American Indian Tribe. Five or six tribes of the State of Virginia, 400 years it has taken them to get recognition by this Congress and by our government.

Judge Klein, I have here a document that was a brief that was submitted on the Cayetano Supreme Court case, and I show that he is the Chief counsel, a gentleman by the name of John G. Roberts, Jr.. I believe he also made the oral arguments before the U.S. Supreme Court on behalf of the state of the respondents, and this Mr. Roberts also happens to be now the Chief Justice of the United States Supreme Court.

Judge KLEIN. That is correct.

Mr. FALEOMAVAEGA. And would you say that as a matter of basic ethics legally and all of that that the argument that the gentleman makes basically is to say that Native Hawaiians are in the same category as American Indians and Native Alaskans? Wasn't that basically the premise of his argument?

Judge KLEIN. Well, that is absolutely correct. Now Chief Justice Roberts, who is a conservative constitutional scholar and textualist, went back and looked at what the word Indian and what the word tribe meant back at the time of the framers of the Constitution and honored those definitions and found that the constitutional provision under Article I, Section 8, the Indian Commerce Clause, was certainly broad enough to reach the shores of Hawaii I think were the exact words he used in his brief.

We like to think we have support from the now Chief Justice and his rationale for saying that extending political recognition and legislation that favors Hawaiians is certainly available to Congress under Article I, Section 8 and would be constitutional.

Mr. FALEOMAVAEGA. So if I was an attorney, and if someone, one of the best legal minds in our country, to have written and prepared this brief before the Supreme Court of the United States, who else would you recommend to be your attorney before the U.S. Supreme Court to make a case on behalf of the Native Hawaiians than Mr. Roberts?

Judge KLEIN. He certainly does our legal position great honor when he writes like that. He is the best.

Mr. FALEOMAVAEGA. Well, Mr. Chairman, I do want to thank you for your patience, and I certainly want to welcome also and thank our members of our panel. This issue has been with us now for well over 10 years or even before that. Of course, we have done it twice successfully already, Mr. Chairman. It just so happens the other body unbelievable of the testimonies that you hear the members of the other body saying there are no Native Hawaiians in existence today. It is a myth. They don't exist.

This just blows my mind to hear from the highest authority of our country saying that Native Hawaiians don't exist anymore. It is somebody's imagination. The fact that there 400,000 existing, to say that they don't exist, Mr. Chairman, this is a travesty, not only a travesty of justice, unfairness, cruelty. I don't know how else I

could say it, but I sincerely hope that we get this bill out of here and get it passed behind this body. Thank you, Mr. Chairman, for your patience, and thank the members of the panel.

Mr. ABERCROMBIE. Thank you. Yes. I want to thank you all for being here and for testifying. Ms. Heriot, I want to thank you in particular again because as I said, it is not easy to be in a situation where issues are ranged against you and your views. Nonetheless, your position does represent some I think including on the Committee and perhaps on the Floor.

My request to you is that you consider, and perhaps if you want to comment over the next 10 days if you care to, I would be pleased to receive it, the Committee would, the differentiation we make and that I make in putting this bill forward. I certainly would never consciously put forward a bill I believe to be unconstitutional because I thought it was politically convenient to do it. Believe me.

When we put together the Office of Hawaiian Affairs for a constitutional amendment back in the mid and late 1970s, there was plenty of controversy over it, and it was not politically convenient to do it, so I have some experience with that. This bill was put forward in good faith on the basis of trying to establish legislatively a resolution of issues involving indigenous people.

To the degree and extent that you believe that the bill is not written sufficiently to address that, and instead has taken on a caste legislatively of being racially based, I would very much appreciate your suggestions as to what could be done in the legislation to make sure that there is no question that this is legislation aimed at the recognition of indigenous people. Believe me.

I have no pride of authorship in this, nor does Senator Akaka for that matter in terms of saying what we thought to be correctly stated legislatively with regard to the recognition of Native Hawaiians as indigenous people, that we thought we were doing in this and believe we are doing this legislatively. If the language is written in such a way that you conclude otherwise, if you could make suggestions with regard to how we could do that, believe me will pay close attention to it because we want to succeed with this.

We don't want to go to the Supreme Court eventually and then have someone say I know what you want to do, but and that is legitimate because the recognition of indigenous people is, in fact, something that is constitutionally established, but you folks didn't do it. You wrote it the wrong way, so believe me. I don't want you to leave this hearing thinking that we believe that we have something that can go back to Moses and be the right thing. My own believe is that Moses had a lot more than 10 Commandments when he was coming down but got argued down to 10.

The story goes is that Moses came down after all the days on the mount and people were getting very restless as they are here about this bill and came down and look, it took an awful long time. I was arguing with God after all, and I have good news and bad news. The good news is I got him down to 10, and the good news here is that we have this bill as it has evolved over this decade.

The bad news is he said adultery is still in. I don't know you feel about that. I won't comment further on that, but we don't want bad news of having written legislation with one intention, and it was a good intention, but it failed. If you can grant the idea that indige-

nous people should be recognized or can be recognized constitutionally and have suggestions, we would be pleased to receive them.

Ms. HERIOT. I would be happy to think about that and get you something in 10 days.

Mr. ABERCROMBIE. Thank you very, very much indeed. Anything else? Any final comments or anything for the good and welfare? Thank you very, very much. Aloha.

[Whereupon, at 1:24 p.m. the Committee was adjourned.]

[Additional statements submitted for the record follows:]

[A statement submitted for the record by Hon. Mark J. Bennett, Attorney General, State of Hawaii, follows:]

June 11, 2009

The Honorable Nick J. Rahall II
Chairman
Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

The Honorable Doc Hastings
Ranking Member
Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Testimony of Hawaii Attorney General Mark J. Bennett before the House Committee on Natural Resources on H.R. 2314, the Native Hawaiian Government Reorganization Act of 2009.

As Hawaii's Attorney General, I respectfully submit this testimony to the House Committee on Natural Resources, in support of the Native Hawaiian Government Reorganization Act of 2009. Thank you for providing me the opportunity to address this important bill.

This legislation, which I will refer to as the "Akaka Bill," in honor of its chief author and this body's only Native Hawaiian Senator, provides long overdue federal recognition to Native Hawaiians, a recognition that has been extended for decades to other Native Americans and Alaska Natives. It provides Native Hawaiians with a limited self-governing structure designed to restore a small measure of self-determination. American Indians and Alaska Natives have long maintained a significant degree of self-governing power over their affairs, and the Akaka Bill simply extends that long overdue privilege to Native Hawaiians.

The notion of some that the Akaka Bill creates a race-based government at odds with our constitutional and congressional heritage contradicts Congress's longstanding recognition of other native peoples, including American Indians, and Alaska Natives, and the Supreme Court's virtually complete deference to Congress's decisions on such matters. It is for this Congress to exercise its best judgment on matters of recognition of native peoples. Although some have expressed constitutional concerns, those concerns are, in my view, unjustified.

Native Hawaiians are not asking for privileged treatment—they are simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress has recognized the great suffering American Indians and Alaska Natives have endured upon losing control of their native lands, and has, as a consequence, provided formal recognition to those native peoples. Native Hawaiians are simply asking for similar recognition, as the native indigenous peoples of the Hawaiian Islands who have suffered comparable hardships.

The Constitution gives Congress broad latitude to recognize native groups, and the Supreme Court has declared that it is for Congress, and not the courts, to decide which native peoples will be recognized, and to what extent. The only limitation is that Congress may not act "arbitrarily" in recognizing an Indian tribe. *United States v. Sandoval.*[1] Because Native Hawaiians, like other Native Americans and Alaska Natives, are the indigenous aboriginal people of land ultimately subsumed within the expanding U.S. frontier, it cannot be arbitrary to provide recognition to Native

[1] 231 U.S. 28, 46 (1913).

Hawaiians. Indeed, because Native Hawaiians are not only indigenous, but also share with other Native Americans a similar history of dispossession, cultural disruption, and loss of full self-determination, it would be "arbitrary," in a logical sense, to not recognize Native Hawaiians.

The Supreme Court has never struck down a decision by the Congress to recognize a native people. And the Akaka Bill certainly gives the Court no reason to depart from that uniform jurisprudential deference to Congress's decisions over Indian affairs. The Supreme Court long ago stated that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be," *United States v. McGowan*,[2] "whether within its original territory or territory subsequently acquired." Sandoval, 231 U.S. at 46.

Some wrongly contend that the Akaka Bill creates a race-based government. In fact, the fundamental criterion for participation in the Native Hawaiian Governing Entity is being a descendant of the native indigenous people of the Hawaiian Islands, a status Congress has itself characterized as being non-racial. For example, Congress has expressly stated that in establishing the many existing benefit programs for Native Hawaiians it was "not extend[ing] services to Native Hawaiians because of their race, but because of their unique status as the indigenous people...as to whom the United States has established a trust relationship."[3] Thus, Congress does not view programs for Native Hawaiians as being "race-based."

Accordingly, a Native Hawaiian Governing Entity by and for Native Hawaiians would similarly not constitute a "race-based" government.

This is not just clever word play, but is rooted in decades of consistent United States Supreme Court precedent. The key difference between the category Native Hawaiians and other racial groups, is that Native Hawaiians, like Native Americans and Alaska Natives, are the aboriginal indigenous people of their geographic region. All other racial groups in this country are simply not native to this country. And because of their native indigenous status, and the power granted the Congress under the Indian Commerce Clause, Native Hawaiians, like Native Americans and Alaska Natives, have been recognized by Congress as having a special political relationship with the United States.

Those who contend that the Supreme Court in *Rice v. Cayetano*[4] found the category consisting of Native Hawaiians to be "race-based" under the Fourteenth Amendment and unconstitutional are simply wrong. The Supreme Court's decision was confined to the limited and special context of Fifteenth Amendment voting rights, and made no distinction whatsoever between Native Hawaiians and other Native Americans.

Furthermore, Congress has already recognized Native Hawaiians to a large degree, by not only repeatedly singling out Native Hawaiians for special treatment, either uniquely, or in concert with other Native Americans, but by acknowledging on many occasions a "special relationship" with, and trust obligation to, Native Hawaiians. In fact, Congress has already expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians."[5] The Akaka Bill simply takes this recognition one step further, by providing Native Hawaiians with the means to reorganize a formal self-governing entity, something Native Americans and Native Alaskans have had for decades.

Importantly, when Congress admitted Hawaii to the Union in 1959, it expressly imposed upon the State of Hawaii as a condition of its admission two separate obligations to native Hawaiians. First, it required that Hawaii adopt as part of its Constitution the federal Hawaiian Homes Commission Act, providing homesteads (for rent) to native Hawaiians.[6] Second, Congress required that the public lands therein granted to the State of Hawaii be held in public trust for five purposes, including "the betterment of the conditions of native Hawaiians."[7] In admitting Hawaii on such terms, Congress obviously did not believe it was creating an improper racial state government, in violation of the Fourteenth Amendment, or any other constitutional command, and Congress would not be doing so in this bill.

Some opponents of the bill have noted that Hawaiians no longer have an existing governmental structure with which to engage in a formal government-to-government relationship with the United States. That objection is not only misguided, but is also

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[2] 302 U.S. 535, 539 (1938).

[3] See, e.g., Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(B).

[4] 528 U.S. 495 (2000).

[5] See, e.g., Native Hawaiian Education Act, 20 U.S.C. § 7512(D); Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(D).

[6] The Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), Section 4.

[7] Id., Section 5.

refuted by the Supreme Court's Lara decision[8] issued just five years ago. It is misguided because Native Hawaiians do not have a self-governing structure today only because the United States participated in the elimination of that governing entity. That cannot bar the Congress from trying to restore a small measure of sovereignty to the Native Hawaiian people.

In addition, one of the very purposes and objects of the Akaka Bill is to allow Native Hawaiians to re-form the governmental structure they earlier lost. Thus, once the bill is passed, and the Native Hawaiian Governing Entity formed, the United States would be able to have a government-to-government relationship with that entity.

Finally, and perhaps most importantly, the objection is, in my view, inconsistent with the Supreme Court's Lara decision, in which the Court acknowledged Congress's ability to "restore[] previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated."[9] Indeed, Lara eliminates the above-described objection to the Akaka Bill, by recognizing Congress's ability to restore tribal status to a people who had been stripped of their self-governing structure.

Some contend that Native Hawaiians do not fall within Congress's power to deal specially with "Indian Tribes" because Native Hawaiians are not "Indian Tribes." However, the term "Indian," at the time of the framing of the Constitution, simply referred to the aboriginal "inhabitants of our Frontiers."[10] And the term "tribe" at that time simply meant "a distinct body of people as divided by family or fortune, or any other characteristic."[11] Native Hawaiians fit within both definitions.[12]

Finally, some contend that because the government of the Kingdom of Hawaii was itself not racially exclusive, that it would be inappropriate to recognize a governing entity limited to Native Hawaiians. This objection should be similarly unavailing. The fact that Native Hawaiians over one hundred years ago maintained a government that was open to participation by non-Hawaiians, should not deprive Native Hawaiians today of recognition. It would be ironic if the historical inclusiveness of the Kingdom of Hawaii, allowing non-Hawaiians to participate in their government, were used as a reason to deny Native Hawaiians the recognition other native groups receive.

The Akaka Bill, under a reasonable reading of the Constitution and decisions of the Supreme Court, is constitutional, just as the Alaska Native Claims Settlement Act for Alaska Natives and the Indian Reorganization Act for American Indian tribes—both of which assured their respective native peoples some degree of self-governance—are constitutional. The Supreme Court, as noted earlier, has made clear that Congress's power to recognize native peoples is virtually unreviewable. I respectfully submit that Congress should not refrain from exercising its authority and obligation to recognize native people simply because of the possibility the judicial branch could deviate from uniform precedent.

And so I respectfully emphasize and repeat that Native Hawaiians are not asking for privileged treatment—they areq simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress long ago afforded American Indians and Alaska Natives formal recognition. The Akaka Bill would simply provide Native Hawaiians comparable recognition, as the indigenous peoples of the Hawaiian Islands. Formal recognition will help preserve the language, identity, and culture of Native Hawaiians, just as it has for American Indians throughout the past century, and Alaska Natives for decades. To use the poignant words Justice Jackson employed sixty years ago: "The generations of [native people] who suffered the privations, indignities, and brutalities of the westward march...have gone...and nothing that we can do can square the account with them.

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[8] *United States v. Lara,* 541 U.S. 193 (2004).

[9] 541 U.S. at 203.

[10] Declaration of Independence paragraph 29 (1776); see also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955)(1789) (referring to Indians as "aboriginal inhabitants of America"). Indeed, Captain Cook and his crew called the Hawaiian Islanders who greeted their ships in 1778 "Indians." See 1 Ralph S. Kuykendall, The Hawaiian Kingdom at 14 (1968) (quoting officer journal).

[11] Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789).

[12] Some opponents of the Akaka Bill argue that including all Native Hawaiians, regardless of blood quantum, is unconstitutional, rely upon the concurring opinion of Justices Breyer and Souter in *Rice v. Cayetano*. 528 U.S. at 524. That argument is flawed because that concurring opinion did not find constitutional fault with including all Native Hawaiians of any blood quantum provided that was the choice of the tribe, and not the state. Id. at 527. The Akaka Bill gives Native Hawaiians the ability to select for themselves the membership criteria for "citizenship" within the Native Hawaiian government.

Whatever survives is a moral obligation...to do for the descendants of the [native people] what in the conditions of this twentieth century is the decent thing."[13]

The Akaka Bill does not permit secession; it will not subject the United States or Hawaii to greater potential legal liability;[14] and it does not allow gambling. Nor would passage of the bill reduce funding for other native groups, who, it should be noted, overwhelmingly support the bill. Instead, the Akaka Bill will give official recognition to Native Hawaiians' self-determination. The Akaka Bill would yield equality for all of this great country's native peoples.

As the Attorney General of Hawaii, I respectfully ask that you support this important legislation.

Statement submitted for the record by H. William Burgess of Aloha for All[1]

Aloha Chair and members. Aloha is for everyone but the Akaka bill isn't. Please consider the dangers of this bill which would sponsor a separate government for one race; break up and give away much of the State of Hawaii; set a dangerous precedent for the United States and almost certainly lead to secession.

Over four years ago, Senator Dan Inouye, in his remarks on introduction of the then-version of the Akaka bill (S. 147) at 151 Congressional Record 450 (Senate, Tuesday, January 25, 2005) conceded that federal Indian law does not provide the authority for Congress to create a Native Hawaiian governing entity.

"Because the Native Hawaiian government is not an Indian tribe, the body of Federal Indian law that would otherwise customarily apply when the United States extends Federal recognition to an Indian tribal group does not apply."

"That is why concerns which are premised on the manner in which Federal Indian law provides for the respective governmental authorities of the state governments and Indian tribal governments simply don't apply in Hawaii."

There being no tribe, the Constitution applies. The Akaka bill stumbles over the Constitution virtually every step it takes.

- As soon as the bill is enacted, a privileged class would be created in America. §§2(3) & (22)(D) and §§3(1) & (8) would "find" a "special political and legal relationship" between the United States and anyone with at least one ancestor indigenous to lands now part of the U.S. that "arises out of their status as aboriginal, indigenous, native people of the United States." Creation of a hereditary aristocracy with a special legal and political relationship with the United States is forbidden by the Anti-Titles of Nobility clause of the Constitution.

This "sleeper" provision would also have profound **international and domestic consequences** for the United States. For over 20 years, a draft Declaration of Indigenous Rights has circulated in the United Nations. The U.S. and other major nations have opposed it because it challenges the current global system of states; is "inconsistent with international law"; ignores reality by appearing to require recognition to lands now lawfully owned by other citizens." Enactment of the Akaka bill would undo 20 years of careful diplomatic protection of property rights of American citizens abroad and at home.

- Immediately upon enactment, **superior political rights would be granted to Native Hawaiians**, defined by ancestry: §7(a) The U.S. is deemed to have recognized the right of Native Hawaiians to form their own new government and to adopt its organic governing documents. No one else in the United States has that right. This creates a hereditary aristocracy in violation of Article I, Sec. 9, U.S. Const. "No Title of Nobility shall be granted by the United States" or, under Sec 10, by the states.
- Also, under §8(a) upon enactment, the delegation by the U.S. of authority to the State of Hawaii to "address the conditions of the indigenous, native people

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[13] *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 355 (1945) (Jackson, J., concurring).

[14] In important provisions, the bill expressly reaffirms and retains the United States's sovereign immunity, and disclaims creating a cause of action against the United States or any other entity or person, altering existing law regarding obligations on the part of the United States or the State of Hawaii, or creating obligations that did not exist in any source of Federal law prior to enactment of this bill. I believe these provisions, which maintain the status quo in many respects pending future legislation, are extremely important, as passage of this legislation should not serve as any justification for new litigation against the United States or the State of Hawaii.

[1] Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and almost all of whom are also homeowners in Hawaii. We believe that Aloha is for everyone; every citizen is entitled to the equal protection of the laws without regard to her or his ancestry. Aloha for All's quest in the courts and in the court of public opinion to restore equal justice under the law in the Aloha State is chronicled, in part, at: http://www.aloha4all.org .

of Hawaii" in the Admission Act is "reaffirmed." This delegation to the State of authority to **single out one ancestral group for special privilege** would also seem to violate the prohibition against hereditary aristocracy. As noted above, the Constitution forbids the United States from granting titles of nobility itself and also precludes the United States from authorizing states to bestow hereditary privilege.

- § 7(b)(2)(A)&(B) Requires the Secretary of the DOI to appoint a commission of 9 members who "shall demonstrate—not less than 10 years of experience in Native Hawaiian genealogy; and "ability to read and translate English documents written in the Hawaiian language," This thinly disguised intent to restrict the commission to Native Hawaiians would likely violate the Equal Protection clause of the Fifth Amendment, among other laws, and would **require the Secretary to violate his oath to uphold the Constitution.**
- § 7(c)(1)(E) & (F) require the Commission to prepare a roll of adult Native Hawaiians and the Secretary to publish the racially restricted roll in the Federal Register and thereafter update it. Since the purpose of the roll is to **deny or abridge on account of race the right of citizens of the United States to vote**, requiring the Secretary to publish it in the Federal Register would cause the Secretary to violate the Fifteenth Amendment and other laws.
- § 7(c)(2) Persons on the roll may develop the criteria and structure of an Interim Governing Council and elect members from the roll to that Council. **Racial restrictions on electors and upon candidates both violate the Fifteenth Amendment and the Voting Rights Act.**
- § 7(c)(2)(B)(iii)(I) The Council may conduct a referendum among those on the roll to determine the proposed elements of the organic governing documents of the Native Hawaiian governing entity. Racial restrictions on persons allowed to **vote in the referendum would violate the 15th Amendment and the Voting Rights Act.**
- § 7(c)(2)(B)(iii)(IV) Based on the referendum, the Council may develop proposed organic documents and hold elections by persons on the roll to ratify them. This would be the third **racially restricted election and third violation of the 15th Amendment and the Voting Rights Act.**
- § 7(c)(4)(A) Requires the Secretary to certify that the organic governing documents comply with 7 listed requirements. Use of the roll to make the certification would violate the Equal Protection clause of the Fifth Amendment, among other laws, and would, again, require the Secretary to violate his oath to uphold the Constitution.
- § 7(c)(5) Once the Secretary issues the certification, the Council may hold elections of the officers of the new government. (If these elections restrict the right to vote based on race, as seems very likely) they would violate the 15th Amendment and the Voting Rights Act.)
- § 7(c)(6) Upon the election of the officers, the U.S., without any further action of Congress or the Executive branch, "reaffirms the political and legal relationship between the U.S. and the Native Hawaiian governing entity" and recognizes the Native Hawaiian governing body as the "representative governing body of the Native Hawaiian people." This would violate the Equal Protection clause of the 5th and 14th Amendments by giving one racial group political power and status and their own sovereign government. These special relationships with the United States are denied to any other citizens.
- § 8(b) The 3 governments may then negotiate an agreement for:
  transfer of lands, natural resources & other assets; and delegation of governmental power & authority to the new government; and exercise of civil & criminal jurisdiction by the new government; and "residual responsibilities" of the U.S. & State of Hawaii to the new government.

This **carte blanche grant of authority** to officials of the State and Federal governments to agree to give away public lands, natural resources and other assets to the new government, without receiving anything in return, is beyond all existing constitutional limitations on the power of the Federal and State of Hawaii executive branches. **Even more extreme is the authority to surrender the sovereignty and jurisdiction of the State of Hawaii over some or all of the lands, appurtenant reefs and surrounding waters of some or all of the islands of the State of Hawaii and over some or all of the people of Hawaii.** Likewise, the general power to commit the Federal and State governments to "residual responsibilities" to the new Native Hawaiian government.

- § 8(b)(2) The 3 governments may, but are not required to, submit to Congress and to the Hawaii State Governor and legislature, amendments to federal and state laws that will enable implementation of the agreement. Treaties with foreign governments require the approval of 2/3rd of the Senate. Constitutional

amendments require the consent of the citizens. But the Akaka bill does not require the consent of the citizens of Hawaii or of Congress or of the State of Hawaii legislature to the terms of the agreement. Under the bill, the only mention is that the parties may recommend amendments to implement the terms they have agreed to.

Given the **dynamics at the bargaining table created by the bill:** where the State officials are driven by the same urge they now exhibit, to curry favor with what they view as the "swing" vote; and Federal officials are perhaps constrained with a similar inclination; and the new Native Hawaiian government officials have the duty to their constituents to demand the maximum; **it is not likely that the agreement reached will be moderate or that any review by Congress or the Hawaii legislature will be sought if it can be avoided.** More likely is that the State will proceed under the authority of the Akaka bill to promptly implement whatever deal has been made.

The myth of past injustices and economic deprivations. Contrary to the claims of the bill supporters, the U.S. took no lands from Hawaiians at the time of the 1893 revolution or the 1898 Annexation (or at any other time) and it did not deprive them of sovereignty. As part of the Annexation Act, the U.S. provided compensation by assuming the debts of about $4 million which had been incurred by the Kingdom. The lands ceded to the U.S. were government lands under the Kingdom held for the benefit of all citizens without regard to race. They still are. Private land titles were unaffected by the overthrow or annexation. Upon annexation, ordinary Hawaiians became full citizens of the U.S. with more freedom, security, opportunity for prosperity and sovereignty than they ever had under the Kingdom.

The political and economic power of Hawaiians increased dramatically once Hawaii became a Territory. University of Hawaii Political Science Professor Robert Stauffer wrote:

It was a marvelous time to be Hawaiian. They flexed their muscle in the first territorial elections in 1900, electing their own third-party candidates over the haole Democrats and Republicans...The governor-controlled bureaucracy also opened up to Hawaiians once they began to vote Republican.

By the '20s and '30s, Hawaiians had gained a position of political power, office and influence never before—nor since—held by a native people in the United States.

Hawaiians were local judges, attorneys, board and commission members, and nearly all of the civil service. With 70 percent of the electorate—but denied the vote under federal law—the Japanese found themselves utterly shut out. Even by the late 1930s, they comprised only just over 1 percent of the civil service.

This was "democracy" in a classic sense: the spoils going to the electoral victors.

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Higher-paying professions were often barred to the disenfranchised Asian Americans. Haoles or Hawaiians got these. The lower ethnic classes (Chinese, Japanese and later the Filipinos) dominated the lower-paying professions.

But even here an ethnic-wage system prevailed. Doing the same work, a Hawaiian got paid more per hour than a Portuguese, a Chinese, a Japanese or a Filipino—and each of them, in turn, got paid more than the ethnic group below them.

Robert Stauffer, "Real Politics", Honolulu Weekly, October 19, 1994 at page 4.

The alliance between Hawaiians, with a clear majority of voters through the 1922 election, and more than any other group until 1938, and the Republican party is described in more depth in Fuchs, Hawaii Pono: A Social History, Harcourt, Brace & World, Inc., 1961, at 158-161.

Hawaiians prosper without "entitlements" or the Akaka bill.

The 2005 American Community Survey (ACS) for California, recently released by the U.S. Census Bureau, confirms Native Hawaiians' ability to prosper without special government programs. The estimated 65,000 Native Hawaiian residents of California, with no Office of Hawaiian Affairs or Hawaiian Homes or other such race-based entitlements, enjoyed higher median household ($55,610) and family ($62,019) incomes, relative to the total California population ($53,629 and $61,476 respectively) despite having smaller median household and family sizes. California is particularly appropriate for comparing earning power, because California has the greatest Native Hawaiian population outside of Hawaii; and it happens that the median age of Native Hawaiians residing in California (33.7 years) is almost identical to that of the general population of California (33.4 years).

The fact that Native Hawaiians are quite capable of making it on their own was suggested by Census 2000 which showed the then—60,000 Native Hawaiian residents of California enjoyed comparable relative median household and family incomes despite their 5 year younger median age.

See Jere Krischel, Census: Native Hawaiians Do Better When Treated Equally, CERA Journal Special Akaka Bill Edition included in our packets for Committee members.

Hawaiians today are no different, in any constitutionally significant way, from any other ethnic group in Hawaii's multi-ethnic, intermarried, integrated society. Like all the rest of us, some do well, some don't and most are somewhere in between.

The people of Hawaii don't want the Akaka bill

Grassroot Institute of Hawaii commissioned two comprehensive automated surveys of every household in the telephone universe of the State of Hawaii, one in July 2005 and the second in May 2006. Of the 20,426 live answers to the question, two to one consistently answered "No" when asked, "Do you want Congress to pass the Akaka bill?"

In1959, in the Hawaii statehood plebiscite, over 94% voted "Yes" for Statehood.

Racial Tensions are simmering in Hawaii's melting pot

So said the headline on the first page of USA Today 3/7/07 describing the attack Feb. 19th 2007 in the parking lot of the Waikele mall on Oahu, when a Hawaiian family beat a young soldier and his wife unconscious while their three year old son sat in the back seat of their car. The attack, "unusual for its brutality," sparked impassioned public debate.

Tenured University of Hawaii Professor Haunani Kay Trask's picture is displayed in the USA today article and the caption quotes her, "Secession? God I would love it. I hate the United States of America."

The USA Today article and related links may be found at http://tinyurl.com/2jle2e . See also, The Gathering Storm, Chapter 1 of *Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State* by Kenneth R. Conklin, PhD http://tinyurl.com/2f7p8b.

The brutality at Waikele mall is a flashing red light. Over 1 million American citizens in Hawaii are under siege by what can fairly be called an evil empire dedicated to Native Hawaiian Supremacy.

Red shirted protesters march often and anti-American signs are regularly posted along King Street on the Grounds of Iolani Palace. Our Governor wears the red protest shirts and tells them she supports their cause. Last August at a statehood day celebration at Iolani Palace, thugs with bull horns in the faces of the high school band members there to play patriotic music, drove them away.

Passage of the Akaka bill would encourage the Hawaiian Supremacists. Even if the bill is declared unconstitutional after a year or two or more of litigation, it may well be too late to put the Aloha State back together again.

A firm rejection of the Akaka bill by this Committee would reassure the people of Hawaii that racial supremacy and separatism are not acceptable. That, in the eyes of government, there is only one race here. It is American.

Mahalo,

Honolulu, Hawaii — June 11, 2009.

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Additional references and links:

Paul Sullivan's "Killing Aloha" an excellent point by point critique of S.310/H.R.105 from the 110th Congress, with the same text as H.R. 2314, is still timely and worthy of your careful consideration. It is available online at http://www.angelfire.com/planet/bigfiles40/AkakaSullivanKA110Cong.pdf or http://tinyurl.com/3ydth9

WHY ALL AMERICA SHOULD OPPOSE THE HAWAIIAN GOVERNMENT REORGANIZATION BILL, ALSO KNOWN AS THE AKAKA BILL. [5-paragraph summary of main points, followed by extensive references] http://tinyurl.com/yhhz7o

For Media and the Public: Up-to-Date, Basic, Quick Information About The Hawaiian Government Reorganization Bill (Also known as the Akaka bill). Three matched pairs (companion bills with identical content) of the Akaka bill are active in the 111th Congress. http://tinyurl.com/6ad8w

Major Articles Opposing the Hawaiian Government Reorganization bill (Akaka bill)—INDEX (2000 to 2009) http://tinyurl.com/5eflp .

Statement submitted for the record by Kenneth R. Conklin, Ph.D., Kane'ohe, Hawaii

TESTIMONY IN OPPOSITION TO H.R. 2314, THE HAWAIIAN GOVERNMENT REORGANIZATION BILL

Title: What Kamehameha hath joined together, let not Akaka rip asunder.

June 11 is Kamehameha Day—an official holiday of the State of Hawaii. On the weekend there will be parades featuring men, women, horses, and vehicles, all adorned with fresh flower leis. The Royal Hawaiian Band will play, hulas will be performed on decorated flatbed trucks rolling down the street; and people will enjoy poi, sushi, manapua, malasadas, shave ice, and all the foods of Hawaii's beautiful rainbow of races and cultures.

The greatest accomplishment of King Kamehameha The Great was to unify all the Hawaiian islands under a single government in 1810, putting an end to centuries of warfare and the slaughter of hundreds of thousands of native Hawaiian men, women and children.

But now once again we are threatened with the Akaka bill in Congress, whose primary purpose is to rip us apart along racial lines. It would authorize creation of a racially exclusionary government empowered to negotiate with federal, state and local governments for money, land, and legal jurisdiction. It would spawn new wars in courtrooms throughout America, and especially in Hawaii, as lawyers get rich fighting over all the elements of sovereignty including land ownership, voting rights, labor laws, zoning regulations, child custody when one parent has Hawaiian blood and the other does not; etc. There's no simple way to divide Hawaii's lands racially, because ethnic Hawaiians are thoroughly intermarried and assimilated throughout all neighborhoods. In Hawaii there are rich neighborhoods and poor ones, professionals and laborers; but always there are "Hawaiians" and "non-Hawaiians" working, playing, and praying side by side. Separate governments by race in Hawaii would create great injustice and social upheaval, reminiscent of the splitting apart of India to create Pakistan and the subsequent exchange of populations, land, and houses. Today's relations between India and Pakistan might characterize how things would turn out in Hawaii.

The Kingdom founded by Kamehameha was multiracial in all aspects. The reason he succeeded when all previous warrior chiefs for 1500 years had failed, was because he used British-supplied ships, guns, and cannons; together with the expertise of English sailors John Young and Isaac Davis. A grateful Kamehameha gave Young and Davis chiefly rank. He appointed Davis as Governor of O'ahu. More importantly, Kamehameha appointed John Young (Hawaiian name Olohana) as Governor of Kamehameha's home island (Hawaii Island), gave him land and a house immediately next to the great Pu'ukohola Heiau, gave him a daughter to be his wife, and gave him a seat next to himself in the ruling council of chiefs. John Young II (Hawaiian name Keoni Ana) was Kuhina Nui under Kauikeaouli Kamehameha III—the second-highest office in the nation. Every law was required to be signed by both the King and the Kuhina Nui, who in effect had veto power over the King. The granddaughter of John Young was Queen Emma, wife of Alexander Liholiho Kamehameha IV, and founder of Queen's Hospital and St. Andrews Cathedral.

John Young was so important to the founding of the Kingdom that his tomb is in Mauna Ala (the Royal Mausoleum on Nu'uanu Ave.), where it is the only tomb

built to resemble a heiau, and is guarded by a pair of pulo'ulo'u (sacred taboo sticks). Yet the Akaka bill would deny John Young membership in the Akaka tribe.

For short videos and audios about John Young, Father Damien (soon to be Saint Damien), navigator Mau Piailug, and other Hawaiian cultural heroes who lack Hawaiian blood and would be excluded under the Akaka bill, see http://akakabill.org/audio-downloads/

The first Constitution of Hawaii was proclaimed by an all-powerful King in 1840 and bears two signatures: Kamehameha Rex (Kauikeaouli Kamehameha III) and Keoni Ana (John Young Jr.).

The first sentence of that first Constitution, known to historians as the kokokahi sentence, was written on advice of American missionary William Richards. It is perhaps the most beautiful expression of unity and equality ever spoken or written: "Ua hana mai ke Akua i na lahuikanaka a pau i ke koko hookahi, e noho like lakou ma ka honua nei me ke kuikahi, a me ka pomaikai." In English, it can be translated into modern usage as follows: "God has made of one blood all races of people to dwell upon this Earth in unity and blessedness." For further information see "The Aloha Spirit—what it is, who possess it, and why it is important" at http://tinyurl.com/66w4m2

The Akaka bill would do exactly the opposite of the one-blood concept, ripping us apart for no reason other than race, establishing a binary opposition of "us vs. them," dividing Hawaiian children from non-Hawaiian parents, spawning jealousies between members of the Akaka tribe and their cousins who are not allowed to belong. This is not aloha.

Instead of one Hawaii there would be two. A government composed exclusively of ethnic Hawaiians would constantly demand more and more money, land, and special rights to be taken away from the ever-diminishing government representing all Hawaii's people. Ethnic Hawaiians would vote for State Senators and Representatives at the same time they are voting for tribal leaders who will sit across the bargaining table from them. This dual voting is far more serious in Hawaii than in any other state, because ethnic Hawaiians comprise 20% of the State's population, and politicians generally kow-tow to them out of fear of racial bloc voting. For example, Clayton Hee was head of the Office of Hawaiian Affairs for many years, and now sits as head of the state Senate committee that handles Hawaiian affairs. His thumb will weigh heavy on the scale when he decides how much of the State of Hawaii should be given to the Akaka tribe. 22 out of 51 members of the House belong to the "Hawaiian" caucus.

The Kingdom of Hawaii was founded by people of different races working together on the battlefield and in the government. That cooperation continued throughout the Kingdom's history. Every person born in the Kingdom, regardless of race, was thereby a subject of the Kingdom with all the same rights as ethnic Hawaiians. Immigrants could become naturalized subjects of the Kingdom, with full rights; and many Asians and Caucasians did so. From 1850 to 1893, about 1/4 to 1/3 of the members of the Legislature at various times were Caucasians appointed by the King to the House of Nobles and also elected to the House of Representatives (and later elected to the House of Nobles after a Constitutional change). Nearly all government department heads and judges were Caucasian. At the time the monarchy was overthrown in 1893 only 40% of Hawaii's people had a drop of Hawaiian native blood; and by the time of the first U.S. Census (1900) after Annexation, only 26% were full or part Hawaiian. The Hawaiian Government Reorganization bill (Akaka bill) proposes a government of, by, and for ethnic Hawaiians alone. There has never been a unified government for all the Hawaiian islands that included only ethnic Hawaiians, either among the leaders or among the people.

The Reform Constitution of 1887 (bayonet Constitution) had the primary purpose of fighting corruption by severely limiting the power of the King. It was actually a revolution, since a mob of 1500 armed men gave the King the choice of signing the Constitution or being ousted. One part of that Constitution denied voting rights to Asians. It was the first time in the history of Hawaii that voting rights were denied on the basis of race. But that evil in 1887 was embraced by Kalakaua and the natives just as much as it was embraced by the Caucasians, because both groups saw the rapidly rising Asian population as a threat to their joint hegemony. The number of Asian immigrants who gave up citizenship in the land of their birth to become naturalized subjects of the Kingdom was small. But Asians were rapidly becoming the majority race. All their babies born on Hawaiian soil were automatically subjects of the Kingdom and would become eligible to vote 20 years later unless something was done. That's why Kalakaua never protested the disenfranchisement of Asians, and signed the new Constitution to hang onto his crown at their expense. Today we once again have Hawaiian sovereignty activists telling Asians that they are merely settlers in an ethnic Hawaiian plantation even if their families have

been here for seven generations. The activists demand that Asians know their place, which is to be subservient to anyone with a drop of Hawaiian blood; and to help ethnic Hawaiians overthrow the yoke of American occupation and oppression. See a book review of "Asian Settler Colonialism" (UH Press, 2008) at http://tinyurl.com/8mkdmj

Today, everyone born or naturalized in Hawaii or anywhere else in the U.S. is a citizen of the U.S. with full voting rights, full property rights, and equal protection under the law. We can keep it that way only by defeating the Akaka bill. Please see "Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State" at http://tinyurl.com/2a9fqa

A letter to President Obama asks him to consider the evils of the Akaka bill in light of African-American history and aspirations. Suppose we create a government exclusively for all 40 Million Americans who have at least one drop of African blood, and empower that Nation of New Africa to negotiate for money, land, and jurisdictional authority. Would that be good for America? Would it be good for African-Americans? The impact on Hawaii of passing the Akaka bill would be far worse than the impact on all of America of creating a New-Africa tribe. That's because only 13% of Americans have at least one drop of African blood, whereas 20% of Hawaii's people have at least a drop of Hawaiian blood. America had a racial separatist movement, just as the Akaka bill heads the list of Hawaiian separatist proposals. But the black separatists like Elijah Muhammad, Louis Farrakhan, the Black Panthers, and Malcolm X (before his pilgrimage to Mecca), fortunately lost the battle for hearts and minds to integrationists like Martin Luther King. The letter to President Obama can be seen at http://tinyurl.com/bl9rvv

On Wednesday, June 15, 2005 the Grassroot Institute of Hawaii (a local think-tank) published an advertisement in the Honolulu Advertiser that took up almost the entirety of page 14. The ad featured a huge photo of the Kamehameha Statue at Ali'iolani Hale, together with text (below). The beautiful ad, in shades of gold, brown, red, and white, can be downloaded in pdf format at: http://tinyurl.com/agafh

Here is the text of the ad: "Kamehameha united us all. Long before he unified the islands in 1810, Kamehameha the Great brought non-natives on to his team and into his family. Ever since then, non-natives have continued to intermarry, assimilate and contribute to the social, economic and political life of Hawaii. Most Native Hawaiians today are mostly of other ancestries and Hawaii's racial blending has become a model for the world. Akaka would divide us forever. The Akaka bill would impose on the people of Hawaii an unprecedented separate government to be created by Native Hawaiians only. It would require the U.S. to recognize the new government as the governing body of ALL of the Native Hawaiian people whether a majority of Hawaiians agreed or not—no vote, no referendum, no chance to debate. On his deathbed, King Kamehameha the Great said, "I have given you—the greatest good: peace. And a kingdom which—is all one—a kingdom of all the islands." The Akaka Bill would divide the people of Hawaii forever and undo the unification which made Kamehameha not only the greatest of the Hawaiian chiefs, but one of the great men of world history."

We've all heard the closing line spoken by ministers presiding over weddings: What God hath joined together, let no man put asunder." Today, in honor of Kamehameha Day, let's say: What Kamehameha hath joined together, let not Akaka rip asunder.

Statement submitted for the record by Kai Landow, Vice Consul, Hawaiian Embassy, Germantown New York

The continuation of a racist policy by using the Hawaiian reorganization act.

DECLARATION OF RIGHTS (1839),

Both Of The People & Chiefs.
KaMehaMeha III Hawaiian Kingdom

"God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs and all people of all lands. These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of the laws.

The Great Mahele of 1848

The land will be held by the King, the chiefs and the people in common

The U.S. Attorney General Eric Holder is right that the dialogue about race is faced with cowardice. Even the reaction to his comments illustrated his point. Fox news pointed out the mistake of the Attorney General being so unprofessional as to publically discuss political issues.

We in Hawaii seem to have this conversation everyday! Race is at the core of the most everything here, whether it is the food we eat, the form of English we use or the issue of our civil and political rights. The State of Hawaii is formed on racism. We note the very foundation as a State is codified by a race based view of the law.

Americans pride yourselves on a democratic base for your constitution and knowing that over the years adjustments have been made to create a more perfect union. Today of course, arcane concepts of racial inequality have been expunged from the governance of the union. We witnessed the election of the first African American president and so we must conclude the U.S. has moved passed its race based laws of any kind or not?

So we have to ask ourselves Hawaiians and Americans alike, why in 2009 does the American government not only to continue to force an institutional racism on many of its citizens but upon people who legally assert their sovereignty? *Brown V. Board of Education*, *Plessey V. Ferguson* seemed to have no effect on modern views and leave Hawaiians in a *Dred Scott V. Sanford* status. Hawaiians were [allegedly] made American citizens in 1900 without the right to vote or make legal claims to their trust lands. Their Royal Patent land titles were not honored in court, except those of a select few were recognized [The American sugar planters and supporters]. Hawaiians are 3/5 of a man in the court at best.

From the Organic act April 30, 1900

That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

We know that only about 3,000 people had become citizens of the Republic of Hawaii and perhaps half of them signed under duress. The U.S. has mislaid the other 77,000 people.

When the right to vote was given to all people in the territory the American population was substantial enough to prevent democracy from returning control to the Hawaiians. Furthermore the Americans had taken physical control of much of the land as to prevent any legal challenges to ownership. The courts have become myopic and have no real ability to see original title sources of the land grants and seem to base title as having been originated somewhere in the 1920s. The Supreme Court had in the past recognized Hawaiian Kingdom land titles in Carter V Hawaii 1906, Damon V Hawaii 1904 and Kawananakoa V Polyblank 1907.

At the Supreme Court of the United States [SCOTUS] on February 25, 2009 we saw The State of Hawaii and the Federal government arguing that racism was their basis for land ownership of 2 million acres in Hawaii. OK, they did not use those words and it is a more complicated story than that. Let me say though, if the United States of America repudiated their race based claims in the law they would lose any claim to the lands I mentioned!

How can the U.S. have a race based land title? I have to give a little history here, A Hawaiian one. In 1839 KaMehaMeha III formed a constitutional monarchy based on the English model. This was a formalization of a unified government body in the Hawaiian archipelago that had begun around 1812. In a sense the Hawaiians ceased to be tribal people as understood in the European mind. Over the next 54 years the Nation known as the Hawaiian Kingdom signed treaties with at least 20 Nations [France, England, Japan, Italy and the USA for example.] They had at least 90 foreign legations and practiced international commerce. So it was a legally recognized independent nation state and a modern multi-cultural society.

Then in 1893 a group of greedy sugar planters [Dole, Thurston. Et al] conspired with the U.S. envoy John L. Stevens to depose Queen Liliuokalani. Permission was granted from the U.S. State Department for Stevens to have the Marines from the warship USS Boston and land in Honolulu to aid the sugar Planters in taking over the government for the interest of the United States. What were those American interests?

From the

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

STATE OF HAWAII, ET AL., PETITIONERS v. OFFICE OF HAWAIIAN AFFAIRS, ET AL.

February 2009

The strategic significance attached to Pearl Harbor is particularly inconsistent with the notion that the Congress thought it was acquiring imperfect title. The possibility that the United States military might one day lose access to Pearl Harbor (which the monarchy had granted on an exclusive but revocable basis, was a primary motivation for annexing Hawaii. See H.R. Rep. No. 1355, 55th Cong., 2d Sess. 4

The United States invaded and replaced the Hawaiian Kingdom so why did they then call themselves the Republic of Hawaii? I believe they had two main hurdles to legitimizing this unprovoked act of war. Firstly, 20 major nations had treaties of friendship with Hawaii [as well as their own desires to control it ports] and would object to this violation of the law of nations in force at that time. Secondly, that of the Supremacy clause [All treaties being the Supreme law of the land] and the Law of Nations! By international standards the U.S. actions were illegal and they felt compelled to try to answer these issues by claiming a phony civil war, with the victory, President of the Republic Sanford Dole conveniently asked to be annexed into the United States.

This phony Republic claimed to own the government, its lands and its subjects and delivered them into the hands of the US. We don't really know as a matter of law what the Republic actually had possession of; though I can tell you for certain it wasn't all of anything. For instance you cannot seize foreign citizens and force them to be your own citizens without agreement, we call that slavery. Further we can find no statute in the U.S. constitution to support the seizure of foreign citizens. We can look at the Amistad case [1839] to find the U.S. position on free born citizens.

From the SCOTUS Amistad opinion

They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government.

The Hawaiian Nationals are natives of the Hawaii and were essentially kidnapped into a foreign land. Instead of them moving laterally, the U.S. just moved the jurisdiction out from under them. These actions were in violation of the laws and American treaties, and the most solemn edicts of the U.S. government.

> *and the negroes, (Cinque, and others,) asserting themselves, in their answer, not to be slaves, but free native Africans, kidnapped in their own country, and illegally transported by force from that country; and now entitled to maintain their freedom.*

Hawaiians maintain their freedom and see no difference in legal status then free born Africans in 1839 [ironically the same year Kamehameha III establishes a modern government] who found legal vindication in the U.S. constitution. We note that they were considered native Africans, Mendi people and not a racial group. The Supreme Court found they had no jurisdiction to deport them back to Africa, being free men. So we wonder what basis the courts today find jurisdiction over Hawaiian nationals. We have pressed the courts in numerous filings, including Habeas Corpus and the courts have refused to address directly this issue. The State of Hawaii continues to arrest and hold our citizens without judicial review of their legal status.

The Republic succeeds in 1898 with a new president, William McKinley [and as a result of the Spanish/American war] to move to annex Hawaii. In the gift package to the US, was the lands known as the Crown Lands, these are approximately two million acres of the land for the use of the government of the Hawaiian Kingdom and for the benefit of the Subjects for common beneficial use. The Crown made these lands a private trust for the benefit of this specific group of beneficiaries, Hawaiian Kingdom Subjects. Their contemporary status would be for the heirs of those specific people.

In the Land grab, that was the point of occupation the Republic made themselves the trustee of the Crown lands and Ceded them to the Americans who took over the trusteeship.

How did the Newlands and Organic Act change history? The Hawaiian Nation entered if you like the debate in the Senate June 14, 1898 and came out a Hawaiian race. Mr. Cochran, Democrat Missouri said *Failure to annex the Hawaiian Islands would invite war Hawaii would be revolutionized and in five years it would be given over to pagan control.* I find it interesting that the Kingdom was founded as a Christian nation and yet it still is viewed as pagan regime. So what happened to the nation?

Shoots! Where did those 54 years disappear to? Actually 231 years, because the United States claimed Hawaiians were a racial group of people that existed before 1778. What happen in 1778? James Tiberius Cook arrived in Hawaii. So why do they need to go to a time before Cook? Because his seamen were spreading their Aloha with the Hawaiian maids and making little Hapa [mixed-raced babies?] children.

What happens in Law if the 54 or more years of democratic governance still has standing? The Kingdom still exists! Then what? Can a race be a government and make legal claims on a multi-cultural governments interest? I find this construct very difficult. It has been reinforced by *Mancari V. Morton* which determined Special rights for Indians based on Blood Quantum. There is a push by the Office of Hawaiian Affairs to make Hawaiians Indians. Haunani Apoliona head of OHA claims they are vulnerable until they become under the control of the Bureau of Indian Affairs. This would afford these Special rights and exchange them for absolute ownership of their lands.

Again, if you remove the race-based classification, you are left with private ownership by the original people of the Hawaiian Islands. Why then do the Hawaiians fear to discard the race based group? Because many people believe that the only way to make the Americans obey the laws of the United States is to give them most of their assets. So it comes down to giving 2 million acres in exchange for 200 million dollars [A trillion dollars worth of land at least] and some land [maybe a few hundred acres] to collect rent from. This is the proposed settlement for the Crown Lands alone. This money doesn't even go to Hawaiians, but a State agency known as the Office of Hawaiian Affairs [OHA] of whom they still need to beg for benefits. OHA purports to represent native Hawaiians. How does this agency define this group?

Native Hawaiians are defined as:

> *any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.*

In fairness OHA says on their website they can serve anyone with any measure of Blood Quantum and yet OHA said recently that resources of the settlement will be for the Native Hawaiians described under the 1920 HHCA act. The resources they claim belong to the Hawaiian Kingdom and are held in trust for its subjects of any race. The use of the Blood quantum is very effective in disrupting Hawaiian nationalism. Edward Said, the late Harvard professor called it the chauvinism of the disenfranchised. Set to fight amongst themselves over insufficient resources people will seek to define themselves into groups based on inaccurate demarcations of entitlement.

The frustration here is that the Americans actions are not in dispute. They freely admit that their actions were illegal and that seizing Hawaiian land and assets was the point. They have not only admitted in the Apology resolution to their thievery but in numerous reports [The Broken Trust, Mauka to Makai, etc] they show how they used the courts and the General store, which created a credit system that can only be paid off with the forfeiture of their land.

So there are two realities that are very hard to swallow. The Americans still argue against their own admissions of guilt in the courts. The Amicus brief by the U.S. in *OHA v. State of Hawaii* argues the Republic was legitimate and gave the U.S. perfect title to Hawaiian lands. They know it is a matter of fact in the historical record of the U.S. conspiracy to create the Republic.

From the SCOTUS opinion by Justice Alito on the Ceded Lands 07-1372

> *In 1893, [a] so-called Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the [Hawaiian] monarchy with a provisional government.*

The second are the conclusions of many people that somehow the despite the lack of legal basis there exists a real claim by the State of Hawaii and the American government here. They have very carefully avoided the claim of time. Too long a time has passed, so sad. They know that time extinguishment disembowels many other legal threads that create a democracy. Professor Jon Van Dyke tried to argue a 100 year rule in his book Who owns the Crown lands? He posited that laws disappear after a hundred years pass and I would guess that would include the U.S. Constitution. If they could have used this concept they would have never accepted the Hawaiian Kingdom Statutes. That is why today the State uses the State of Hawaii revised Statutes! What is revised? The Hawaiian Kingdom statutes are the basis for what is the State of Hawaii's legal foundation. This includes the Great Mahele, the convention to quite land titles. From this, all land in the Hawaiian archipelago with given Allodial title to the original owners of the land, the Hawaiians!

This argument of political settlement with a racial group over the ownership of a democratic nations land holdings is crap. It violates all the concepts of inter-

national law today and in 1893. So why do most people accept the racial status put upon the Hawaiian Nation?

We have yet to have that debate suggested by the U.S. attorney general Holder and Americans are not prepared to deal with the ramifications of accepting responsibility for the injustices to African Americans, First Nations, Asians, Hispanics, Hawaiians, ETC. There is a price to pay, a concrete price that is about real money and the return of real land. This whole mess is just so inconvenient for Americans and in this time of economic downturn it is not appropriate to dispense justice.

What is the point of continuing to force Blood Quantum qualifications on first nations and Hawaiians? This is clearly not what Hawaiians want and they have the right to determine their own citizens. I know a few people within first nations argue to keep these laws and a few will always profit by accepting the American line. It appears that the Supreme Court lead by Chief Justice Roberts is preparing to remove race based rights. The Native American Rights Attorney Kim Gottschalk told me of his fear the SCOTUS would overturn Mancari and then they would have nothing.

The solution proposed by the American representatives to congress from Hawaii is the Akaka bill, S1011/HR2314. The Akaka bill is designed to put native Hawaiians under a similar statue as American Indians.

The Native Hawaiian people are an indigenous people this is not race-based legislation," Rep. Mazie Hirono, D-Hawaii 6/11/09

I can only infer that Indigenous is the new minority. For over a hundred years the Americans have made Indigenous a race in terms of Hawaiians and if you can become a recipient of benefits from the Akaka bill by living in Hawaii for one year, I think she is correct. The main thrust of previous drafts of the bill is to give sovereign ownership of land to the military and the State. Who are these native Hawaiians that will form some kind of government if they are not raced-based?

What do you do when faced with a seemingly fatal blow to raced based rights? You embrace it and demand human rights! We for too long have accepted the ideas of the colonizer in a vain attempt to scrape together what little we can. The result is the one the American Government always wanted and needed. The direct theft of land and resources belonging to sovereign nations they themselves recognized and thus appearing to be just in the seizures.

So how then does America claim the race based ownership over Hawaii? When you claim a guardian/ward relationship over a tribal people, it appears their land title is held by the guardian. This is why those 54 years need to be desperately extinguished.

It is the appearance of legal and moral correctness that United States desperately needs. This is the vulnerable spot in their armor. If it is laid open that they are not a nation of law, then what claim of democracy can they have, what legitimacy lay in the courts. They fear the removal of the veil and the exposure of raw empire. As former President Clinton said One day we might not be the big dog on the block and how will the world treat us if we don't do the right things now?

To continue to argue nebulas legal positions will only aid the claim of legitimacy the Americans hold now. Embrace Human rights! Embrace original ownership rights, international sovereignty rights and see what comes of that.

The Akaka bill continues the oppression and piratical standard of the American nation. We appeal to your better nature and entreat you to begin negotiation with the very people you intend to pronounce more unwelcome legislation upon. This bill cannot fix what legal problems still exist for the U.S. and which the Organic Act, Annexation or Plebiscite could not.

Mahalo Nui

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