CAN CONGRESS CREATE A RACE-BASED GOVERNMENT? THE CONSTITUTIONALITY OF H.R. 309/S. 147

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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CAN CONGRESS CREATE A RACE-BASED GOVERNMENT? THE CONSTITUTIONALITY OF H.R. 309/S. 147

TUESDAY, JULY 19, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Subcommittee on the Constitution. I am the Chairman, Steve Chabot. We expect the Ranking Member, Mr. Nadler, to be here very shortly. At that time we are going to recognize Mr. Abercrombie, who wants to bring up something that we are happy to participate in.

We welcome everyone here today. I would like to thank everyone for coming. Some of you have clearly come from a very long distance from here. This is a hearing before the Subcommittee on the Constitution to examine whether Congress can create a race-based government within the United States, and, in particular, the constitutionality of H.R. 309, a bill that would authorize the creation and recognition of a Native Hawaiian quasi-sovereign government.

I would like to recognize, as I mentioned at the outset, that this Committee does not have jurisdiction over H.R. 309 itself, but I believe this bill and the companion bill in the Senate raise constitutional questions of such magnitude that we would be doing a disservice to the public and to our constituents if we did not closely examine the constitutional implications of H.R. 309.

We have a very distinguished panel before us here this afternoon. I would like to thank them for taking the time to provide us with their insight and expertise. I know Mr. Burgess, who flew all the way from Hawaii, had an extremely long trip. I appreciate his efforts particularly in coming here. We look forward to the testimony of all the witnesses here this afternoon.

Since the Civil War, the United States has strived to become a color blind society. We have struggled to insure that the principles on which our country was founded are applied equally, and that every person receives just and fair treatment under our laws.

But the issue that we are focused on today suggests that race should be the sole criteria for how individuals are treated, and many of us believe that this would be a mistake. In asking Congress to take steps toward authorizing the creation of a race-based

government, some refer us back to our Nation's history and treatment of Native American Indians in this country. Under article 1, section 8, Congress has the power "to regulate commerce with the Indian tribes."

It is under this power that we have afforded unique protections to Indian tribes over the last 229 years. But those protections center on preserving the quasi-sovereign tribal status that Indians have lived under since the beginning of their existence, a point that has been reiterated time and time again by the Supreme Court.

In fact, in *U.S. v. Sandoval,* the Supreme Court rejected the idea that "Congress may bring a community or body of people within range of this power by arbitrarily calling them an Indian tribe, finding that in respect of distinctly Indian communities, the questions whether, to what extent and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress."

It is on this premise that unique treatment has been provided to Indians. It is on this basis that Native Hawaiians would seek quasi-sovereign status similar to Native American Indians. However, unlike Native American Indians and Alaska tribes, the only factor that would bind together a quasi-sovereign Native Hawaiian government, if formed today, would be race. Race alone does not and should not be the basis for creating a sovereign entity.

It is the antithesis of our form of Government and contrary to the principles on which this country was founded. The Supreme Court stated in *Rice v. Cayetano* that "the law itself may not be an instrument for generating the prejudice and hostility, all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions."

Justice Scalia stated most appropriately in *Adarand Contractors Inc.* that "to pursue the concept of racial entitlement, even for the most benign purposes, is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the Government, we are just one race here. We are American." That was Justice Scalia in that particular opinion that I just referred to.

It is here in America that all cultures are free to practice their traditions, cultures and religions free from Government intrusion. It is here in America where injustices that have occurred are remedied to make individuals and groups whole. However, America should not be a place where governments are defined by race or ancestry or the color of one's skin.

It should not be a place neighbors, who may have lived next to each other for decades, are suddenly subject to two different civil and criminal standards because of race. It's with that understanding that we all look forward to exploring the issues before us today. And the statement that I just made is obviously not necessarily the statement that every Member of Congress would have made with respect to this, and it's not obviously the views of all the witnesses that are with us here this afternoon.

I would now yield to Mr. Nadler, and then we will yield, of course, to Mr. Abercrombie.

Mr. NADLER. Thank you, Mr. Chairman. Let me just say, Mr. Chairman, that on this occasion, I must state my regret that this is not a field hearing, an on-site field hearing.

Mr. Chairman, I would like to join you in welcoming our distinguished panel and also in welcoming our distinguished colleagues from the State of Hawaii. The record of concern and energetic efforts of all the people of Hawaii is admirable, and I want to commend them for their work on this very complex but important issue.

Obviously, our Subcommittee does not have jurisdiction over this legislation, but we do have jurisdiction over the Constitution. Questions of this legislation's constitutionality have been raised, and I hope that we can make some contribution in sorting out these issues.

In that consideration, I believe that the Subcommittee should listen very carefully to the voices of Hawaii's elected representatives. Our colleagues, and the distinguished Attorney General of Hawaii, have a great deal to contribute.

I would also note that the minority, the Democratic Members of this Subcommittee, has invited a Republican Attorney General. The issues concerning Native Hawaiians are not partisan issues, so we should have the advantage hopefully of examining these questions in a cooler than perhaps normal atmosphere.

It is no secret that the treatment of the native people who inhabited the United States before the Europeans arrived has been a disgrace. It is a terrible legacy of the settlement of this hemisphere that the people who first inhabited these lands were murdered, enslaved, thrown off their land and robbed of their sovereignty.

There is little we can do today about that shameful past, but we can try to achieve justice for those living in the present day. I believe there is really one core issue in this case, and that is whether Native Hawaiians are, like the tribes of the mainland, entitled to some right to self-determination, apart from their individual rights as citizens of the United States. If so, how do we enable them to realize these rights of self-determination without violating the rights of others.

Terms like race-based government do not appear to enlighten this question very much. Perhaps the testimony will persuade me otherwise, but I am dubious of the concept.

This is a new issue for our Committee, and an important one to the people of Hawaii and to the Nation. I thank my colleagues and you, Mr. Chairman, for raising these significant issues, and I look forward to hearing from our witnesses. I ask also ask unanimous consent that the statement by the gentleman from Hawaii be included in the record, and that all Members have 5 legislative days to revise and extend their remarks and to include additional materials into the record.

I thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much. I would at this time ask unanimous consent be given to allow two non-Judiciary Committee Members, Mr. Abercrombie and Mr. Case, to serve as a resource to this Committee. They won't be making opening statements or asking questions, but should any of the panel members wish to ask

them questions or refer to them, they would be able, during Members' up here time, to do that. Without objection, so ordered.

At this time, I would like to recognize Mr. Abercrombie to make a statement—this isn't an opening statement, but make a brief statement here.

Mr. ABERCROMBIE. Mr. Chairman, on behalf of Mr. Case and myself, let me thank you for the opportunity to be with you and address the issues, as have been stated, are very, very important to us, and I think to anyone interested in the Constitution, especially as we are coming up on the anniversary in September of the signing of the Constitution. It's traditional in Hawaii, before we begin any deliberations or even when we greet people whom we haven't met before, and would like to accommodate as friends, that you be greeted with a lei of welcome and as symbolic of the aloha spirit in Hawaii of welcoming.

With that in mind, Mr. Chairman, with your permission, the Chair of the Board of Trustees of the Office of Hawaiian Affairs, Haunani Apolonia, and the Representative from Molo'kai, Colette Mochado, would like to present you and Mr. Nadler with leis of greeting from Hawaii.

Mr. CHABOT. Without objection, so ordered.

Mr. ABERCROMBIE. Yes.

Mr. CHABOT. If Mr. Nadler has no objection, I have no objection.

Mr. ABERCROMBIE. Mr. Chairman, you are going to receive a kiss with this. Hopefully it will be recorded for all to see. I guarantee you won't get in trouble with this one.

Mr. CHABOT. Thank you.

Mr. ABERCROMBIE. Mr. Chairman, under the rules of the House regarding shameless pandering, Mr. Case and I, on behalf of all of our friends here from Hawaii—and I have to note a conflict too. My neighbor is here, Judge Robert Klein, came as well, hopefully bringing greetings from my wife. And in that regard, Mr. Chairman, Mr. Case and I would like to present you and the staff with some chocolate-covered macadamia nuts.

Mr. NADLER. Mr. Chairman .

Mr. CHABOT. Yes, Mr. Nadler.

Mr. NADLER. Can we all agree that the macadamia nuts and the leis will not unduly prejudice the consideration of this country?

Mr. CHABOT. Yes, they are under the gift ban limit, I think, so I think we are in good shape. Thank you very much. In light of my opening statement, I wasn't sure if I was going to get these or not. But I appreciate that very much.

Mr. ABERCROMBIE. Mr. Chairman, when you meet someone in Hawaii, not only do you get a lei, but then you have to eat.

Mr. CHABOT. Thank you very much. We appreciate the ceremony that you just did very well. I know that other Members of the Committee are feeling somewhat left out at this point, but it was very kind of you. Again, we appreciate it very much.

Without objection, all Members will have 5 legislative days to submit additional materials, and they are not to be the macadamia nuts, for a hearing record, and without objection, so ordered.

I will now introduce the members of the panel here. Our first witness is the Honorable Mark Bennett, Attorney General for the State of Hawaii. Mr. Bennett was appointed Attorney General by

Hawaii Governor Linda Lingle in 2003. Prior to his appointment, Mr. Bennett was a litigator for the Honolulu-based law firm of McCorriston Miller Mukai MacKinnon L.L.P., where he specialized in complex litigation. In 2004, Mr. Bennett was named by the National Association of Attorneys General as Chair of its Antitrust Committee succeeding Eliott Spitzer, Attorney General of New York. Mr. Bennett has been married to Patricia Tomi Ohara for 20 years.

Our second witness will be Mr. Shannen Coffin. Mr. Coffin is currently a partner with the law firm of Steptoe & Johnson, where he practices law in the areas of constitutional and appellate litigation. He served as counsel of record for *amicus curiae* Campaign for a Color Blind America in the *Rice v. Cayetano* case, a case that we will most certainly discuss later in this hearing. Mr. Coffin stepped away from the private practice between the years 2002 and 2004, where he served as the Deputy Assistant Attorney General for the Federal Programs Branch of the Department of Justice Civil Division. There he oversaw and coordinated trial litigation on behalf of the Federal Government for constitutional and other challenges to Federal statutes and agency programs. We thank you for being here as well as Attorney General Bennett for being here.

Our third witness is Mr. William Burgess. Mr. Burgess is a retired attorney who is a resident of the State of Hawaii. Mr. Burgess has been active in Hawaii's grassroots efforts to make Hawaii a color-blind society and together with his wife, have formed Aloha for All, Inc., an advocacy organization. He was a delegate to the 1978 Hawaiian constitutional convention, the same year that the Office of Hawaiian Affairs was established. What I find most interesting about Mr. Burgess' resume is that he lists as one of his current occupations "student of Hawaii history." I am sure we will learn more about that later in the hearing.

Our fourth and final witness this afternoon will be Mr. Bruce Fein, a renowned constitutional law expert. Mr. Fein previously served as the Assistant Director of Office of Legal Policy at the Department of Justice, legal advisor to the Assistant Attorney General for Antitrust and the Associate Deputy Attorney General. He was appointed to serve as the general counsel for the Federal Communications Commission and as a research director for the Joint Congressional Committee on Covert Arms Sales to Iraq. He is the author of numerous articles, papers and treatises in the areas of the United States Supreme Court, the U.S. Constitution and international law.

We thank all of you, again, for being here, and for those of you who have not testified before the Committee before, I might note that we have a lighting system here. Each of the witnesses will be given 5 minutes. It will start green and be that way for 4 minutes. It will then change to yellow. That tells you have 1 minute to wrap up, and then it will go red, at which time we would hope that you would have either completed or wrap up shortly thereafter. I will give you a little leeway. We don't want to cut anybody off, but we would ask you to stay within the 5 minutes as much as possible.

It is the practice of this Committee to swear in all witnesses appearing before it, so if you would, we would ask each of you to please stand and raise your right hands.

[Witnesses sworn.]

Mr. CHABOT. Thank you very much. You can all please be seated. We will begin with you, Mr. Bennett.

TESTIMONY OF THE HONORABLE MARK BENNETT, ATTORNEY GENERAL, STATE OF HAWAII

Mr. BENNETT. Mr. Chairman, and Members of the Committee. I would like to express my appreciation for you allowing me to testify here today on this very important issue. I support the Akaka bill because it is just and because it is fair and because it treats Native Hawaiians like America's other indigenous people.

It has the support in Hawaii, the bipartisan support of virtually every elected official. It has the support of Republicans like Governor Linda Lingle and myself. It has the support of 75 out of 76 members of our State legislature. It has the support of all of our mayors, and it does not have that support for political reasons. It has that support because we all agree that this is the just thing to do.

The title of this hearing asks essentially two questions: Does S. 147 create a race-based government? The answer to that question is a resounding no. Is H.R. 309/S. 147 constitutional? The answer to that question is a resounding yes.

While it is true that race is a characteristic for determining who gets to vote in the determination of forming a Native Hawaiian governing entity, for more than 100 years the Supreme Court has stated that race is one of the characteristics of determining whether individuals are part of a group or a tribe recognizable under the Indian Commerce Clause. So to say that this is a race-based government, is also to say that every recognized Indian tribe is a race-based government as well.

Indeed, Mr. Chairman, this Congress, since 1910 has passed, and we have attached to our testimony as exhibits, more than 160 separate bills that recognize the special status of Native Hawaiians and their status akin to Native American Indians. Indeed the State of Hawaii's Admissions Act itself required Hawaii as a condition of entering the union to provide special benefits for Native Hawaiians.

As recently as 2000, in the Hawaiian Homeland Act, this Congress said we are not extending benefits because of race, but because of Hawaii's people, Native Hawaiian's status as an indigenous people and the political status of Native Hawaiians is comparable to that of American Indians. Those are the words of this Congress repeated over and over again in litigation.

In *Morton v. Mancari* the seminal case in this area, the Supreme Court said that even though the criteria for determining tribe membership may be based on race, it is not racial, it does not violate the 14th amendment, it is political, and it is recognized as such in the Constitution. That is why this bill is constitutional.

I am joined in this view by those who I consider conservative political theorists and legal scholars. We have attached to our testimony the detailed analysis of this bill by Viet Dinh, Professor and former high-ranking official in the Department of Justice, whose qualifications in this area are unquestionable.

I have discussed this matter with several of my more conservative colleagues, including former Attorney General Bill Pryor, current Texas Attorney General Greg Abbott, both of whom concluded beyond question that this bill is constitutional. Professor Dinh recognizes four separate clauses in the Constitution providing that.

Are Native Hawaiians—would they have been viewed as Indians by the Framers of the Constitution? Unquestionably. The Declaration of Independence itself describes Indians as inhabitants of the frontier, not just of 13 original colonies, but after-acquired territory.

Captain Cook, in 1778, when he first visited Hawaii, and his men described the aboriginal inhabitants as Indians, the framers would have recognized them as such and the Framers would have recognized that Congress's power under the Indian clause indeed gives the Congress the ability to recognize Native Hawaiians. There has been no case ever in the history of the United States of which I am aware overturning a decision of Congress in this area.

If there were any question, Mr. Chairman, about this, the *Lara* case from 2004 made clear that Congress's powers in this area are plenary, and the Menomonee Restoration Act upheld in that decision bears striking similarity to the act under consideration here. Whether the Indian tribes are fully assimilated, whether there is no Federal supervision of them, whether or not their government has been continuous, are irrelevant to the constitutional issue as determined by the Supreme Court.

Indeed, if the opponents of this bill were correct, the Alaska Natives Claims Settlement Act could not possibly have been constitutionally adopted. Native Alaskans are not Indians, but the criteria they share with American Indians is the fact that they are one of America's indigenous people.

Mr. Chairman, if I could have a short additional time.

Mr. CHABOT. If you could wrap it up in another minute, we would appreciate it.

Mr. BENNETT. Thank you. Combined with the plenary power of Congress, and combined with the injustice done to Native Hawaiians in which the United States participated, the ability of the Congress to recognize that in this bill is, I would submit to you, constitutionally unquestionable. *Rice* is not in any way contrary. I could address that if I received questions.

Mr. Chairman, Native Hawaiians do not ask for special treatment. Native Hawaiians ask for the type of fairness that we Americans pride ourselves on. They ask not to be treated as second class among America's indigenous people. They ask to be given the same rights and privileges so that they can take their place with other American indigenous people, and this bill before this Committee does that, as I started out by saying, Mr. Chairman, it is not a matter of race, it is not unconstitutional, it is a matter of justice and fairness, and that is what this bill accomplishes.

Thank you.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Bennett follows:]

PREPARED STATEMENT OF THE HONORABLE MARK J. BENNETT

Good afternoon. Thank you for giving me the opportunity to address the important question presented today. Let me begin by noting, with due respect, that the title of this hearing "Can Congress Create a Race-Based Government?" itself reflects a fundamental misunderstanding of what the Akaka Bill does, and assumes a conclusion, erroneous I submit, to the very question it purports to ask.

Simply put, the Akaka Bill does NOT create 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, and I quote, *"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."* [Hawaiian Homelands Homeownership Act of 2000, Section 202(13)(B)]. Thus, Congress does not view programs for Native Hawaiians as being "race-based" at all. 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, and the contention that recognizing Native Hawaiians would create a "racial" classification would be flat wrong, and would ignore 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.

Moreover, although the initial voting constituency encompasses all those with Native Hawaiian blood, that simply reflects the unsurprising obvious fact that native peoples, by definition, share a blood connection to their native ancestors. The Supreme Court, in *Morton v. Mancari,* upheld a congressional preference for employment of Indians within the Bureau of Indian Affairs, even though not all tribal Indians were given the preference, but only those tribal Indians *with one-quarter Indian blood.*

Those who contend that the Supreme Court in *Rice v. Cayetano* found the category consisting of Native Hawaiians to be "race-based" under the Fourteenth Amendment and unconstitutional are also simply wrong. The Supreme Court limited its decision to the context of Fifteenth Amendment voting rights, and expressly refused to address the applicability of *Mancari* to Native Hawaiian recognition. Indeed, the Supreme Court in *Rice* made no distinction whatsoever between American Indians and Native Hawaiians.

Some opponents of the Akaka Bill argue that including *all* Native Hawaiians, regardless of blood quantum, is unconstitutional, citing the concurring opinion of Justices Breyer and Souter in *Rice v. Cayetano.* But that 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. Because the Akaka Bill gives Native Hawaiians the ability to select for themselves the membership criteria for "citizenship" within the Native Hawaiian government, no constitutional problem arises.

The notion that S.147 creates some sort of unique race-based government at odds with our constitutional and congressional heritage contradicts Congress' longstanding recognition of other native peoples, including American Indians, and Alaska Natives, and the Supreme Court's virtually complete deference to Congress' decisions on such matters.

Hawaiians are not asking for "special" treatment—they're 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. Hawaiians are simply asking for similar recognition, as the native indigenous peoples of the Hawaiian Islands who have suffered similar hardships, and who today continue to be at the bottom in most socioeconomic statistics.

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. 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, and not just a racial minority that descends from foreign immigrants, it cannot be arbitrary to provide recognition to Native Hawaiians. Indeed, because Native Hawaiians are not only indigenous, but also share with other Native Americans a similar history of tragic dispossession, cultural disruption, and loss of full self-determination, it would be "arbitrary" to not recognize Native Hawaiians.

The Supreme Court long ago stated that "Congress possesses the broad power of legislating for the protection of the Indians *wherever* they may be," *[U.S. v. McGowan]* "whether within its original territory or *territory subsequently acquired.*" *[U.S. v. Sandoval]*

To those who say that Native Hawaiians do not fall within Congress's power to deal specially with "Indian Tribes," because Native Hawaiians simply are not "Indian Tribes," I say they are simply wrong. For the term "Indian," at the time of the framing of the Constitution, simply referred to the aboriginal "inhabitants of our Frontiers." And the term "tribe" at that time simply meant "a distinct body of people as divided by family or fortune, or any other characteristic." Native Hawaiians easily fit within both definitions.

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." [e.g., Haw'n Homelands Homeownership Act of 2000]. The Akaka Bill simply takes this recognition one step further, by providing Native

Hawaiians with the means to re-organize a formal self-governing entity for Congress to recognize, something Native Americans and Native Alaskans have had for decades.

Some opponents of the bill have noted that Hawaiians no longer have an existing governmental structure to engage in a formal government-to-government relationship with the United States. That objection is not only misguided but self-contradictory. 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, by facilitating the overthrow of the Hawaiian Kingdom, and later annexing the Hawaiian Islands. Unlike other Native Americans who were allowed to retain some measure of sovereignty, Congress did not leave Native Hawaiians with any sovereignty whatsoever. It cannot be that the United States's complete destruction of Hawaiian self-governance would be the reason Congress would be precluded from ameliorating the consequences of its own actions by trying to restore some small measure of sovereignty to the Native Hawaiian people.

The objection is self-contradictory because 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, some opponents of the bill 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 is absurd. The fact that Native Hawaiians, over one hundred years ago, were enlightened enough to maintain a government that was open to participation by non-Hawaiians, should not deprive Native Hawaiians today of the recognition they deserve. Indeed, it is quite ironic that those who oppose the Akaka Bill because it purportedly violates our nation's commitment to equal justice and racial harmony would use Native Hawaiians' historical inclusiveness, and willingness to allow non-Hawaiians to participate in their government, as a reason to deny Native Hawaiians the recognition other native groups receive.

The same irony underlies the objection that because Native Hawaiians are not a fully segregated group within the Hawaiian Islands and instead are often integrated within Hawaii society at large, and sometimes marry outside their race, they cannot be given the same recognition that Native American and Alaska Natives receive. Anyone concerned about promoting racial equality and harmony should be rewarding Native Hawaiians for such inclusive behavior, or as we say in Hawaii, "aloha" for their fellow people of all races, rather than using it against them. In any event, American Indians, too, have intermarried—at rates as high as 50% or more—and often venture beyond reservation borders, and yet those facts do not prevent them or their descendants from federal recognition.

In short, there is simply no legal distinction between Native Hawaiians and American Indians or Alaska Natives, that would justify denying Native Hawaiians the same treatment other Native American groups in this country currently enjoy.

The Akaka Bill, under any reasonable reading of the Constitution and decisions of the Supreme Court, is constitutional, just as is 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. The Supreme Court, as noted before, has made clear that Congress' power to recognize native peoples is virtually unreviewable.

And so I emphasize and repeat, that Hawaiians are not asking for "special" treatment—they're 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.

The Akaka Bill does *not* permit total independence; it will *not* subject the United States or Hawaii to greater potential legal liability; and it does *not* allow gambling. Nor would passage of the bill reduce funding for other native groups, who, by the way, overwhelmingly support the bill. Instead, the Akaka Bill will finally give official and long overdue recognition to Native Hawaiians' inherent right of self-determination, and help them overcome, as the United States Supreme Court in *Rice* put it, their loss of a "culture and way of life." The Akaka Bill would yield equality for all of this great country's native peoples, and in the process ensure justice for all.

Mr. CHABOT. Mr. Coffin, you are recognized for 5 minutes.

TESTIMONY OF SHANNEN COFFIN, PARTNER, STEPTOE & JOHNSON, L.L.P.

Mr. COFFIN. Mr. Chairman, and Members of the Subcommittee.

Mr. CHABOT. If you could turn that mike on, just hit the button there.

Mr. COFFIN. There we go. Mr. Chairman and Members of the Subcommittee. I would also like to thank the Subcommittee for the opportunity to discuss the constitutionality of H.R. 309. I am disheartened, however, that today's hearing is necessary. However noble its purpose, and however good the people it addresses—and I have no doubt of that—Congress's consideration of this legislation not only has the potential to be extraordinarily divisive, it also raises serious constitutional questions. The Supreme Court has observed that distinction between citizens based solely on ancestry are, by their very nature, odious.

Under the Supreme Court's equal protection jurisprudence, legislation that defines citizens on the basis of race is subject to strict judicial scrutiny and will be invalidated unless the classification is necessary and narrowly tailored to achieve a compelling State interest. This exacting standard applies whether the racial classification favors or disfavors a particular racial minority.

There is no doubt that H.R. 309 uses suspect racial classifications. It establishes, under the guise of Federal law, a racially-separate government that will exercise broad sovereign powers, the eligibility for which is limited to Native Hawaiians as defined by ancestry.

This isn't the first time, Mr. Chairman, that we have been down this road. As you mentioned, in *Rice v. Cayetano* the Supreme Court invalidated similar State legislation that limited the eligibility to vote in elections for a statewide office to lineal descendents of those inhabitants of the Islands at the time of Captain Cook's arrival in 1778. The Court flatly rejected the argument that such

a definition was not a racial classification, reasoning that ancestry can be a proxy for race and, in that case, as in this case, it was.

The very object of the statutory definition in question in *Rice* was to treat early Hawaiians as a distinct people commanding their own recognition and respect. "This ancestral inquiry," the court concluded, "implicates the same grave concerns as a classification specifying a race by name. One of the principal reasons it is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his own merits and essential qualities." Under this standard the race-based legislation proposed in H.R. 309 is presumptively invalid, and it is not saved by the artifice that it creates, treating the Native Hawaiian people as an Indian tribe.

H.R. 309's preamble finds that the Constitution vests Congress with the authority to the address the conditions of the indigenous native people of the United States. But the Constitution says nothing about the condition of "indigenous native people." Instead, Congress is authorized by the Constitution to regulate conduct with Indian tribes. But for a number of reasons, Native Hawaiians do not as a group fall within the constitutional meaning of this term.

It bears emphasis that in *Rice v. Cayetano,* the Hawaiian government itself in its brief in opposition to the petition for a *writ of certiorari* to the Supreme Court, argued that "the tribal concept simply has no place in the concept of Hawaiian history." That was a statement by Governor Cayetano himself. The reasons for this admission are plenty but to summarize a few—Native Hawaiians are not geographically or culturally separated in Hawaii.

Indeed the historians will tell you—and I am not one—but there is a long and diverse history of intermarriage between ethnicities that exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed-upon leaders, no political organizations and no monarchs in waiting. At the time referenced in the bill, 1893, there was no similar race-based Hawaiian government. The Queen's subjects were often naturalized citizens coming from all over the globe.

Congress cannot change this conclusion by arbitrarily recognizing Native Hawaiians as an Indian tribe, as Mr. Chabot recognized from the *Sandoval* case. Even Justice Breyer, in his separate concurring opinion in *Rice,* noted, "there must be some limit on what is reasonable, at least when a State which it is not itself a tribe, creates the definition of tribal membership."

The passage of this bill would set the Nation down a dangerous slippery slope and effectively allow Congress to create new race-based government entities outside of our constitutional structure—to be used by groups in Texas and California and Louisiana, all racially-distinct groups with an individual history, to acquire special governmental privileges.

While none of these groups may currently possess the political clout to accomplish this objective, who is to say that their political persistence over time would not result in similar separatist governmental proposals?

Mr. Chairman, if I may make one more observation, before I close, it's ironic to me that the triggering date of this legislation is January 1, 1893, Mr. Chairman. At that very time, only a day

later, the Louisiana Supreme Court denied rehearing of a petition for relief by a Creole activist named Homer Plessy only one day later, who had the audacity to sit in an all-whites car in a Louisiana rail coach, when he was, in fact, one-eighth black. A few years later, however, the Supreme Court of the United States upheld his criminal conviction concluding that separate-but-equal was our constitutional standard.

H.R. 309 would take us back to those days when race was an appropriate basis to deny a class of people the liberties secured by the Constitution. As Justice Harlan said in his dissent, we are and we should be a color blind society. I urge Congress not to pass H.R. 309.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Coffin follows:]

PREPARED STATEMENT OF SHANNEN W. COFFIN

Dear Mr. Chairman and Members of the Subcommittee:

I would like to thank the Committee for the opportunity to discuss the constitutionality of H.R. 309, the Native Hawaiian Government Reorganization Act of 2005. While I welcome the opportunity to address this Subcommittee, I am disheartened that today's hearing is necessary. However noble its purpose, Congress's consideration of a bill to establish a race-based government entity under the guise of federal law is an unfortunate step backwards to a time in our history where race-conscious legislation was the norm.[1] In an age when our governmental institutions should be oblivious to considerations of race, H.R. 309 eschews principles of color-blindness in favor of a legislative scheme that elevates one racial component of our society to the exclusion of all others. Such legislation not only has the potential to be extraordinarily divisive, it also raises serious constitutional questions. The purpose of my testimony today is to explain the constitutional objections to the bill.

Although there is no express provision of the Constitution requiring the federal government to afford equal protection of the laws to its citizens, the Fifth Amendment's due process clause has been interpreted by the Supreme Court to incorporate principles of equal protection found in the Fourteenth Amendment.[2] Consequently, "[t]he Court's observations that '[d]istinctions between citizens solely because of their ancestry are by their very nature odious,' . . . and that 'all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,' . . . carry no less force in the context of federal action than in the context

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[1] *See Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (reasoning that legislature is permitted "to act with reference to the established usages, customs, and traditions of the people"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (prohibition of interracial marriage justified by state policy of "maintain[ing] White Supremacy").

[2] *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

of action by the States . . . ."[3] Under the Supreme Court's equal protection jurisprudence, legislation that classifies citizens on the basis of race is subject to the "most rigid judicial scrutiny,"[4] and will be invalidated unless the racial classification is necessary and narrowly tailored to achieve a compelling state interest.[5] This exacting standard applies whether the racial classification favors or disadvantages a particular racial minority.[6] In short, racial classifications are never considered benign: "[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[7] Congress should act with the same exacting scrutiny when considering legislation that classifies on the basis of race.

There can be little doubt that H.R. 309 uses suspect racial classification. It establishes, under the guise of federal law, a racially-separate government that will exercise broad sovereign powers.[8] Initial eligibility for participation in that government is limited to "Native Hawaiians," which is defined as "an individual who is one of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous native people who . . . resided in

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[3] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215-16 (1995) (citations omitted).

[4] *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[5] *See, e.g., Shaw v. Reno*, 509 U.S. 630, 643 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

[6] *Adarand*, 515 U.S. at 224 ("'The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'") (citation omitted).

[7] *Id.* at 230.

[8] The new "governing entity" will have the power to negotiate with the United States and the State of Hawaii for control of land, exercise of both civil and criminal jurisdiction in native courts, and the delegation of other governmental powers to the new entity. Its "organic governing documents" will address issues such as the power of the entity, the protection of Native Hawaiian civil rights, and criteria for membership in the "Native Hawaiian community."

the islands that now comprise the State of Hawaii on or before January 1, 1893 . . . and occupied and exercised sovereignty in the Hawaiian archipelago. . . ." H.R. 309, § 3(8)(A).

Sadly, we have been down this road before. In *Rice v. Cayetano*,[9] the Supreme Court considered similar state legislation that limited eligibility to vote in elections for the State's Office of Hawaiian Affairs to lineal descendants of those inhabitants of the islands that pre-dated the "discovery" of the islands by Captain James Cook, an English explorer, in 1778.[10] The Hawaiian defendants argued that such a definition was not, in fact, race-based. The Supreme Court flatly rejected that argument, reasoning:

> Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. . . . In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question . . . is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.[11]

So, too, here. Although the cut-off date of Section 3(8)(A) is later in time, and thus may broaden somewhat the racial definition of the favored class, the line drawn by the legislation is still drawn in terms of an individual's ancestry and thus evokes a clear racial purpose and effect of this legislation.[12] As the *Rice* Court concluded, this "ancestral inquiry . . . implicates the same

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[9] 528 U.S. 495 (2000).

[10] *Rice*, 528 U.S. at 500.

[11] *Id.* at 514-15 (citations omitted).

[12] The alternative definition of "Native Hawaiian" contained in Section 8(B) – an "individual who is one of the indigenous, native people of Hawaii and who was eligible for the programs authorized by the Hawaiian Homes Commission Act . . . or a direct lineal descendant of that individual" – is actually identical to a provision held to constitute a race-based classification in Rice. See Rice, 528 U.S. at 541 (Stevens, J., dissenting) (discussing Haw. Rev.

grave concerns as a classification specifying a particular race by name. One of the principal reasons it is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens."[13]

The race-based classification drawn by H.R. 309 is thus, without question, subject to the rigid demands of strict scrutiny. It is, as the Supreme Court has repeatedly held, presumptively invalid.[14] The bill cannot withstand that scrutiny on the basis of the artifice created therein, treating the Native Hawaiian people, as defined by the bill, as akin to an Indian tribe. While it is correct that the Supreme Court has upheld against equal protection challenges congressional legislation creating preferences for Indians, the Court has done so only where such preferences are directed toward "members of 'federally recognized' tribes," deeming such preferences as "political rather than racial in nature."[15] As the Supreme Court subsequently held in *Rice v. Cayetano*, even that holding in *Morton* was limited: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."[16]

Stat § 10-2, which incorporated the Hawaiian Homes Commission Act definition of Native Hawaiian).

[13] *Rice*, 528 U.S. at 517.

[14] *Shaw*, 509 U.S. at 643-44; *see also Adarand*, 515 U.S. at 227.

[15] *Morton v. Mancari*, 417 U.S. 535, 553 n.23 (1974).

[16] *Rice*, 528 U.S. at 520.

H.R. 309's preamble finds that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States."[17] But the Constitution says nothing about the conditions of "indigenous, native people." Instead, Indian tribes are implicated in only two express powers in the Constitution: 1) Congress's authority to "regulate Commerce…with the Indian tribes" (Art. I, § 8, cl. 3); and 2) the President's authority to make treaties (Art. II, § 2, cl. 2). While Congress has authority to recognize tribes for purposes of these provisions – and the federal government does so pursuant to 25 C.F.R. Part 83 – neither clause grants the expansive authority assumed by H.R. 309. Indeed, the Clauses assume the pre-existence of sovereign, independent Indian tribes.

But even assuming Congress's power to recognize pre-existing tribes, "Native Hawaiians" as defined in H.R. 309 would not meet the constitutional threshold for recognition. In *Rice*, the Supreme Court noted, in dicta, that "[i]t is a matter of some dispute. . . whether Congress may treat the native Hawaiians as it does the Indian tribes."[18] In truth, there was no dispute between the parties in that case, as even the Hawaiian government admitted in its brief in opposition to the petition for writ of certiorari in *Rice* that *"[t]he tribal concept simply has no place in the context of Hawaiian history."*[19]

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[17] H.R. 309, § 2(1).

[18] *Rice*, 528 U.S. at 518. In his concurring opinion joined by Justice Souter, Justice Breyer noted that there is "some limit on what is reasonable, at least when a State (which is not itself a tribe) creates the definition" of tribal membership. *Id.* at 527 (Breyer, J., concurring). Justice Breyer concluded that the definition at issue in *Rice,* which in part is replicated in H.R. 309, "goes well beyond any reasonable limit" and "is not like any actual membership classification created by any actual tribe." *Id.* at 527.

[19] *Rice v. Cayetano*, No. 98-818, Respondent Benjamin Cayetano's Brief in Opposition to Petition for Writ of Certiorari at 18 (emphasis added) (relevant portions attached). As the Hawaiian government explained in its brief "for the Indians the formerly independent sovereign

Congress cannot change this conclusion by arbitrarily recognizing Native Hawaiians as an Indian tribe. Although courts often defer to congressional judgment with respect to "distinctly Indian communities,"[20] it "is not meant by this that Congress may bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe . . . ."[21] Instead, an "Indian tribe" has been defined by the Supreme Court as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[22] This definition ensures that Congress is in fact merely recognizing a pre-existing sovereign rather than creating a new one.

As set forth more fully in the attached analysis of the Senate Republican Policy Committee, entitled "Why Congress Must Reject Race-Based Government for Native Hawaiians," H.R. 309 (and its Senate counterpart S. 147) falls well short of this exacting standard.[23] The bill's definition of "Native Hawaiian" is entirely race-based and wholly lacks a unity of leadership and geographic continuity.[24] To summarize:

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entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign entity was the Kingdom of Hawaii, not any particular 'tribe' or equivalent political entity." *Id.*at 18.

[20] *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[21] *Id.* at 46.

[22] *Montoya v. United States*, 180 U.S. 261, 266 (1900).

[23] Senate Republican Policy Committee (Jon Kyl, Chairman), *Why Congress Must Reject Race-Based Government for Native Hawaiians* at 5-8 (June 22, 2005) ("RPC Paper") (attached).

[24] In addition, even if an entity can come forward and show all of the necessary elements of an Indian tribe, that entity must also show that it has continuously existed since before the United States annexed its territory; modern associations cannot make a plausible claim to sovereignty merely because they share culture or ethnicity. *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985).

- Native Hawaiians are not geographically or culturally separated in Hawaii; indeed, there is a long and diverse history of intermarriage among ethnicities in Hawaii. At the time of Hawaiian statehood, the territory touted its racial and ethnic diversity, calling itself a "melting pot."

- "No political entity – whether active or dormant – exists in Hawaii that claims to exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed upon leaders, no political organizations, and no 'monarchs in waiting.'" RPC Paper at 7.[25] As the Hawaiian government has admitted, there is no tribal concept in the history of Hawaiian government.

- At the time referenced in the bill, 1893, there was no similar race-based Hawaiian government. Queen Liliuokalani's subjects were often naturalized citizens coming from all over the globe.[26]

My colleague Mr. Fein's testimony today will explain in detail many of the flaws of Congressional findings in the bill, but suffice it for me to say that, although Congress's fact-finding power is great, it cannot find facts in the absence of substantial evidence to support them. It can no more find that a group that has no similarities to an Indian tribe other than similar racial characteristics to one another than it can find that night is actually day.

A couple of final points about Congress's effort to "tribalize" the Native Hawaiians as a group. First, although an Indian tribe may define its membership on the basis of race as a part of its political organization, it is a different case when *Congress* seeks to do so. As Justice Breyer

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[25] *See also* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 576 (1996) ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and "there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe').

[26] Eleanor C. Nordyke, *The Peopling of Hawai'i* (2d ed. 1989) at 42-98; *see generally* RPC Paper at 7-8.

noted in his concurring opinion in *Rice*, "[t]here must . . . be some limit on what is reasonable, at least when a State (which is not itself a tribe) creates the definition" of tribal membership.[27] H.R. 309 does not leave up to a pre-existing sovereign the right to define its own membership, but rather, specifically defines, as a matter of federal law, the racial group eligible to determine the governmental organization and membership of the Native Hawaiian government. Thus, racial discrimination by Congress is the first step in the formation of the Native Hawaiian government.

Second, and perhaps most troubling, Congress's finding that a race-based group lacking political structure may be treated as an Indian tribe and effectively exempted from principles of equal protection sets a dangerous precedent. As explained in the brief of *amici curiae* Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation filed in *Rice v. Cayetano* ("CCBA Brief") (a copy of which is attached), such a race-conscious justification for a governmental organization would permit boundless deprivations of constitutionally protected rights by any number of states.[28] It could be used by groups such as the native Tejano community in Texas, the native Californio community of California, or the Acadians of Louisiana – all racially distinct groups that have a special relationship and unique history in their communities – to demand special governmental privileges.[29] While none of these groups may currently possess the political clout to accomplish this objective, who is to say that political persistence over time would not result in similar

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[27] *Rice*, 528 U.S. at 527 (Breyer, J., concurring).

[28] *See Rice v. Cayetano*, No. 98-818, CCBA Brief at 19-25 (available at 1999 WL 374577).

[29] CCBA Brief at 20-24.

separatist government proposals? As Justice Jackson observed in his dissenting opinion in *Korematsu v. United States*, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court for all time has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[30]

Viewed properly under the rubric of strict scrutiny, H.R. 309 would fall short of serving a compelling governmental interest, let alone being narrowly tailored to that interest. Congress has not found any evidence of present discrimination or the present effects of past discrimination against the Native Hawaiians as a group.[31] Nor is there any such evidence. And while it is difficult to see how the core components of the bill could be achieved in a race-neutral manner – indeed, a race-neutral State government already exists for the citizens of Hawaii – it is clear that there are narrower means of accomplishing at least some of the objectives of the bill. For instance, while the current bill limits membership of the commission that certifies membership in the Native Hawaiian governmental entity to Native Hawaiians, the Department of Justice has recommended that it could be composed of a racially diverse group of individuals sensitive to Native Hawaiian needs.[32]

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[30] 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)

[31] *See Adarand*, 515 U.S. at 222.

[32] *See* July 13, 2005 Letter from Will Moschella, Assistant Attorney General for Legislative Affairs to Senator John McCain, Chairman, Committee on Indian Affairs. Mr. Moschella's letter notes that there are "questions concerning the constitutionality of" a similar Senate bill.

In closing, this Subcommittee should not look only to the letter of the Constitution, which condemns the bill as unconstitutional, but to its spirit, in recommending that H.R. 309 not be adopted as federal law. The bill sets a terrible precedent of racial separateness and, if followed in other instances, would balkanize the American people. Rather than dividing the people of Hawaii along racial lines, Congress and the State of Hawaii should look to unite them – and unite all of us – as Americans. Thank you for your time.

Mr. CHABOT. Mr. Burgess, you are recognized for 5 minutes.

TESTIMONY OF H. WILLIAM BURGESS, FOUNDER, ALOHA FOR ALL

Mr. BURGESS. Aloha and good afternoon. Thank you for allowing me to testify. Thank you for asking the big question first, can Congress create a race-based government? For the many people in Hawaii who are gravely concerned about the Akaka bill, it is critically important to address the question of constitutionality first. If Congress doesn't, and the bill is enacted, that in itself will have a destabilizing effect in the State of Hawaii. It will validate the radical minority separatists, the red shirts marching in the streets, the protestors demanding that the U.S. pack up and leave Hawaii.

By the time the courts go through their process, appeals and trials and further appeals, 5 or more years will have passed. It may be impossible by that time to put the Aloha State back together again.

Now how do the bill's proponents address the question of constitutionality? They are in denial. They deny that the Constitution applies because Native Hawaiians are indigenous people. That's the same argument that they made unsuccessfully in *Rice v. Cayetano.* That's the same argument that was made 25 years ago when a State senator asked the Attorney General of Hawaii for an opinion whether this restricted voting in the OHA elections was constitutional, and the attorney general at that time cited *Morton v. Mancari* as an authority for the proposition that indigenous people can be treated separately.

But *Rice v. Cayetano* put that to rest. It said that *Morton v. Mancari* applies only to Federally-recognized tribes, and it doesn't apply to State agencies.

Now, nevertheless, the Attorney General of the State of Hawaii made that argument again in *Arakaki v. State.* That was the first suit to invalidate—following the *Rice* decision—to invalidate the requirement that State—that in the State law, as saying that the trustees, even though everyone could vote, the trustees had to be Native Hawaiian. And the district court rejected that, rejected the *Mancari* argument. They have been wrong every time they made their argument, and they are wrong now. Here is how their argument goes, as I understand it: All we want for Native Hawaiians is parity. American Indians and Alaska natives get all these benefits, it's just not fair for Native Hawaiians not to get them too.

But the Akaka bill would not give Native Hawaiians just parity, it would give them supremacy. It would bestow upon Native Hawaiians, merely by virtue of their ancestry, power to create their own separate sovereign government.

Millions of people in the United States have some Native American ancestry. According to census 2000, 2.1 million people on their census forms said they were part American Indian. Some anthropologists estimate that as much as 15 million people in the United States have some discernible amount of Native American blood.

But only those Native Americans who are members of Federally-recognized Indian tribes have the power or have the right of continuing a preexisting tribal government. No Native American has the power, merely by virtue of ancestry, to create a government. If

Native Hawaiians were given parity with native Americans, then the U.S. Indian laws would apply to them.

Under the mandatory criteria for recognition of tribes, Native Hawaiians wouldn't qualify, because they have no government to be recognized. Congress can only recognize existing sovereigns. It can't create new ones. There is no such power in the Constitution.

Oh, I see my time is up, Mr. Chairman, may I wrap up briefly in one more minute?

Mr. CHABOT. Yes, if you would wrap it up, thank you.

Mr. BURGESS. To summarize, the arguments for the Akaka bill are the arguments for the same old make-believe tribe and pasted-on victimhood, dressed up in nice language, but with no shred of better logic or law than they had 5 years ago or 25 years ago. The U.S. can't give rights to groups of people merely because they share an ancestry. If there was no tribal government continuing to the present day, there is no basis for special treatment. Congress can write laws, but it can't change history. The fact that Congress passed 160 unconstitutional laws doesn't make any one of them legitimate.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Burgess follows:]

PREPARED STATEMENT OF H. WILLIAM BURGESS

109th Congress
House Judiciary Committee, Subcommittee on the Constitution
Oversight hearing Tuesday, July 19, 2005, 2:00 p.m.

Can Congress Create A Race-Based Government?: The Constitutionality of H.R.309/S.147, the Native Hawaiian Government Reorganization Act of 2005 ("Akaka Bill")

Testimony by H. William Burgess on his own behalf and on behalf of Aloha for All[1]

Aloha and good afternoon.

I am an attorney who practiced law in Hawaii for 35 years until I retired in 1994. For the last seven years I have been advocating and litigating for the basic democratic principle of equality under the law.

I know that Chairman Sensenbrenner has been concerned about this bill for some time. In July 2001, he said in his letter to Speaker Hastert , "the primary purpose of the Akaka bill is to establish a separate government for a particular race of people called "Native Hawaiians." The **many** people in Hawaii who oppose the bill2 are glad that the Judiciary Committee's particular expertise on civil-liberties issues is now being called into action.

Background of the Akaka bill. The original version of S. 147, commonly referred to as the "Akaka bill", was first introduced in the year 2000 shortly after the Supreme Court, in *Rice v. Cayetano,* struck down the racial restriction on voting for the Office of Hawaiian Affairs. Because that decision threatened many other laws and programs for the "benefit" of Hawaiians, Senator Akaka with Senator Inouye's endorsement, proposed candidly to circumvent the Supreme Court's decision by having Congress "recognize" Hawaiians (defined substantially the same way the Supreme Court had held in *Rice* to be "racial") as the equivalent of an Indian tribe.

The bill encountered resistance and did not pass in 2000 or subsequently. (It did pass a sparsely attended House in 2000 when Representative Abercrombie

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1. Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and property owners in Hawaii who believe that Aloha is for everyone and every citizen is entitled to the equal protection of the laws without regard to her or his ancestry. For further information about the Akaka bill see: http://www.aloha4all.org (click on Q&A's) and http://www.angelfire.com/hi2/hawaiiansovereignty/OpposeAkakaBill.html or email hwburgess@hawaii.rr.com .

2. Hawaii residents oppose the bill by a margin of 2 to 1. The comprehensive statewide telephone survey just completed shows 67% responding to the question are against the Akaka bill.

included it in a vote on non-controversial items.) Efforts to attach it as a rider to appropriations bills in 2000, 2001 and 2004 were defeated. Hawaii's political leaders have resubmitted the bill to the 109th Congress as S. 147 and H.R. 309. It is expected to reach the Senate floor before August 7, 2005,

A radical change in existing law. Although the proponents assert the bill will simply give Native Hawaiians "parity" with the Federal Government's treatment of American Indians and Alaska Natives, the bill would in reality make a radical change in existing law. The bill would give Native Hawaiians, merely because of their ancestry, something no American Indian has: the right to create the equivalent of a tribe where none now exists.

For Native Americans, ancestry alone confers no special status. Membership in a tribe that has existed continuously is required. According to Census 2000 there are over 4 million people with some Native American ancestry. But less than 2 million of them are members of recognized tribes and only those recognized tribes can have a government-to-government relationship with the United States.

Congress may "acknowledge" or "recognize" groups which have existed as tribes, i.e., autonomous quasi-sovereign governing entities, continuously from historic times to the present (25 C.F.R. 83.7) but it has no power to create a tribe arbitrarily. (*U.S. v. Sandoval*, 231 U.S. 28 (1913)). One D.O.J. attorney put it succinctly, "We don't create tribes out of thin air."[3]

In 1790 (20 years before 1810 when he unified the Hawaiian islands) Kamehameha the Great brought John Young and Isaac Davis on to join his forces and welcomed them into his family. Non-natives thereafter continued to intermarry, assimilate and contribute to the governance under the great King and under every subsequent government of Hawaii since then, both in high governmental positions as cabinet members, judges, elected legislators, and as ordinary citizens.

Unlike the history of Native Americans, there has never been in Hawaii, even during the years of the Kingdom, any "tribe" or government of any kind for Native Hawaiians separate from the government of the rest of Hawaii's citizens. The Hawaiians-only nation the Akaka bill proposes to "reorganize" has never existed. See Patrick W. Hanifin's *To Dwell on the Earth in Unity:* Rice, Arakaki*, and the Growth of Citizenship and Voting Rights in Hawaii.*
http://www.angelfire.com/hi2/hawaiiansovereignty/HanifinCitizen.pdf

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3. *Connecticut v. Babbitt*, U.S. Court of Appeals, Second Circuit, January 6, 2000. Alice Thurston arguing on behalf of the Interior Secretary, "When the Department of Interior recognizes tribes, it is not saying, 'You are a tribe.' It is saying, 'We recognize that your sovereignty exists.' We don't create tribes out of thin air." *Without Reservation*, Benedict, page 352.

Our friends, neighbors, fellow professionals, judges, political leaders. aunties, uncles, nieces, nephews, calabash cousins, spouses and loved ones of Hawaiian ancestry are governed by the same federal, state and local governments as the rest of us. That is why Congress cannot use laws applicable to Indian tribes to create a new government in Hawaii.

Sen. Inouye, in his remarks on introduction of S. 147/H.R.309 at 151 Congressional Record 450 (Senate, Tuesday, January 25, 2005) concedes 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, superior political rights are 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."

- 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 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. The Constitution forbids the United States from granting titles of nobility itself. That must also preclude 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 be Native Hawaiian." Restricting federal appointments based on race would violate the Equal Protection clause of the Fifth Amendment, among other laws, and would require the Secretary to violate her oath to uphold the Constitution.

- §7(c) requires 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. Same Constitutional violations as immediately above.

- §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 her 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) 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 US & 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 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, boggles the mind. 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.

Nor do Native Hawaiians suffer from the grinding poverty of Native American tribes. The Senate Indian Affairs Committee's March 3, 2004 Views and Estimates of the 2005 budget request notes that "the vast majority of Native economies are moribund" (page 3) "with unemployment averaging 45%" and "per capita income for Indians averages $8,284." (page 4).

By contrast Census 2000 shows per capita income for Native Hawaiians in Hawaii at $14,199 and median family income of $49,282. For the 60,000 Native Hawaiians residing in California, where they are free from the incentive-smothering

entitlement programs provided in Hawaii, the per capita income of Native Hawaiians is $19,881 and median family income is $55,770. Striking evidence that Native Hawaiians are fully capable of prospering, without being wards of the DOI and without entitlements from Hawaii, is shown in the Census 2000 reports of median per capita income of Male, full time, year round Native Hawaiian workers: $33,258 in Hawaii and $38,997 in California.

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.

Rejection of democracy and Aloha. Today the State of Hawai'i is, by law as well as by aspiration, a multiracial, thoroughly integrated state. The Akaka bill is a frontal assault on both Aloha and the American ideal of equality under the law. It would elevate one racial group to the status of a hereditary elite to be supported by citizens who are not of the favored race. As U.S. District Judge Helen Gillmor said in Arakaki I, "This Court is mindful that ours is a political system that strives to govern its citizens as individuals rather than as groups. The Supreme Court's brightest moments have affirmed this idea" (citing Brown v. Board of Education and other cases); "while its darkest moments have rejected this concept" (citing Dred Scott, Plessy v. Ferguson, Bradwell v. Illinois and Korematsu).

See Paul Sullivan's *Killing Aloha, The Native Hawaiian Recognition Bill is wrong for Native Hawaiians, wrong for the State of Hawaii and wrong for the United States* with a comprehensive section-by-section analysis of the bill, http://www.angelfire.com/hi5/bigfiles2/AkakaSullivan012505.pdf.

Keep Hawaii one state indivisible. Carving up Hawaii into separate sovereign enclaves would hurt all of us, whether we are of Hawaiian or any other ancestry. A house divided against itself cannot stand. The Constitution "looks to an indestructible union, composed of indestructible States." Texas v. White, 7 Wallace 700 (1869).

Please say yes to equality under the law. Reject H.R. 309. Mahalo,

Honolulu, Hawaii July 14, 2005.

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Mr. CHABOT. Mr. Fein, you are recognized for 5 minutes.

TESTIMONY OF BRUCE FEIN, PRESIDENT, THE LICHFIELD GROUP

Mr. FEIN. Thank you, Mr. Chairman, and Members of the Subcommittee. I am grateful for the opportunity to present my views on the constitutionality of H.R. 309. It is somewhat alarming that the Senate has taken this particular bill as the companion of H.R. 309 to the floor almost without considering the nature of constitutionality.

So the Congress is a legislative body of limited powers under the Constitution. In order to act, you must find affirmative authority in article 1, which identifies the enumerated powers of Congress. The only reference in article 1 that could plausibly apply to Native Hawaiians is article 1, section 8, clause 3, which empowers Congress to regulate commerce with Indian tribes.

Now, to regulate commerce is not to create a governing entity of any race or otherwise. Justice Samuel Miller in the *Kagama* case made that quite clear. The reference to Indian tribes in that provision of the Constitution is recognition of a preexisting sovereign power exercised by those who had a common ancestry. They occupied a distinct territory. They exercised government power through leadership or otherwise over their particular members.

There is nothing else in article 1 that would plausibly—other than this particular Indian commerce clause—enable Congress to create the race-based government, the Native Hawaiian entity that is contemplated by H.R. 309.

The other provision that is occasionally invoked is the treaty power. Treaties were, indeed, consummated between the United States and Indian tribes, both prior to the constitutional ratification in 1789 and for perhaps 100 years thereafter.

But treaties also were negotiated between the United States and the Kingdom of Hawaii after its formation in 1810, and the language is quite distinct. When you view the description of the ratifying parties in both cases, the United States invariably, in its treaties with the Indian tribes, identifies the tribes by name, with an understanding of what particular leadership existed and an authority to bind the members of the tribe.

If you compare the treaties with the Kingdom of Hawaii, they are really carbon copies of the same kind of treaties that were negotiated with Britain and France, the same language and the same understanding that the United States was not dealing with a tribe but with a foreign nation. A foreign nation is distinct from a Indian tribe in article 1 section 8, clause 3.

Indeed, that understanding can be fortified by Senator Daniel Inouye. Which he said earlier this year because the Native Hawaiian government is not an Indian tribe, a body of Federal Indian law that would otherwise customarily apply when the United States extends material recognition to an Indian group does not apply. He, himself, I think, would be a very strong witness against the idea that Native Hawaiians at all are like Indian tribes.

But again, I go beyond that and say there is no plausible affirmative power in Congress to create a race-based government where none existed before. There is a suggestion that there aren't racial

classifications in this particular bill. But I think the clearest example of that error is the requirement that the Secretary of Interior appoint 9 Native Hawaiians in order to set the creation of the Native Hawaiian entity in motion.

There is nothing at all that would require those particular nine Commissioners to be Native Hawaiians opposed to white or yellow or red or otherwise. They can all read the law and implement the particular prescriptions for setting up the Native Hawaiian government. Yet there is a race-based criterion here. I think that discredits the idea that racial distinctiveness is not the underlying purpose and motivation of the statute.

There has also been a suggestion that because there are so many laws passed that recognize the distinction of Native Hawaiians that somehow they have sort of grandfathered this in is constitutional, but I point out it leaves at least three major cases of the United States Supreme Court, which upended practices which were more than 200 years old.

In *Elrod v. Burns,* for example, the Court held unconstitutional patronage for Government employment that had been in practice for more than 2000 years. In *Bowling v. Sharpe,* the Supreme Court overturned a Congressional decision made as early as 1866 to require segregated schools in the District of Columbia. In *INS v. Chata,* the Supreme Court overturned hundreds of legislative vetoes that had commenced in 1930, in 1982, holding that every one of them violated the Presentment Clause.

So, there isn't any reluctance of the Supreme Court to find that longevity is not the equivalent of constitutionality. Also, with regard to the insinuation that if there were injustices committed against Native Hawaiians at sometime in the 1893 overthrow or otherwise, this particular Akaka bill is the only way to remedy those. That is absolutely false. When it was found by this Congress that there were injustices to the Japanese Americans during World War II, there is the Civil Liberties Act of 1988 that provided reparations of $20,000 to those who are detained or their families. And that didn't require creating a race-based Japanese government.

With regard to the Indians, there is the Indian Claims Commission that was established and operated for many, many years, amid claims of moral or equitable entitlement against the United States use. So there are hundreds of alternate ways other than creating a race-based sovereignty in which these historical grievances can be assessed.

I am not suggesting that all of the claims are valid. Some may be, maybe some are not. But there is no requirement that they undertake a race-based government in order to overcome historical grievances.

Mr. CHABOT. Your time has expired, Mr. Fein, if you could wrap up.

Mr. FEIN. Yes, the last thing I would say is that the one thing that has distinguished the strengths of the United States has been commitment to equal opportunity and equal dignity irrespective of race or ancestry. I think that came home right after 9/11. We all stood up. We all felt the thrill of being Americans. We would not be intimidated. Because we had our courage, our patriotism awakened by these high and noble ideals. The Akaka bill, in my judg-

ment, besmirches those ideals. It would weaken the country and it must be defeated. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Statement of Bruce Fein on the Constitutionality of Creating a Race-Based Native Hawaiian Government (H.R. 309)

Before the House Judiciary Subcommittee on the Constitution

Tuesday, July 19, 2005

Dear Mr. Chairman and Members of the Subcommittee:

I am grateful for the opportunity to address the constitutional authority of Congress to create a race-based government of Native Hawaiians pursuant to the "Akaka Bill," H.R. 309. Congress enjoys no such authority under the Indian Commerce Clause or otherwise. Native Hawaiians share virtually none of the earmarks of Native American Indian Tribes that have justified congressional conferral of semi-sovereign powers under federal law. The race-based government celebrated by the Akaka Bill would flagrantly violate the equal protection component of the Fifth Amendment. It would invite a Balkanization of the United States. It would mark the beginning of the end of E Pluribus Unum as the nation's exalted creed. It should be repudiated every bit as forcefully as was Jim Crow.

Hawaii has been the quintessential example of the American "melting pot", with intermarriage a salient feature of Hawaiian social life. Three fourths of Native Hawaiians have less than 50% of Native Hawaiian blood. King Lunalilo, on the day of his coronation in 1873, boasted: "This nation presents the most interesting example in history of the cordial co-operation of the native and foreign races in the administration of

its government, and most happily, too, in all the relations of life there exists a feeling which every good man will strive to promote." Senator Daniel Inouye (D. Hawaii) echoed the King 121 years later in commemorating the 35th anniversary of Hawaii's statehood: "Hawaii remains one of the greatest examples of a multiethnic society living in relative peace."

Native Hawaiians are not a distinct community. They occupy no demarcated territory set aside only for Native Hawaiians like Indian reservations. No treaties were ever made between a Native Hawaiian entity and the United States. The strongest evidence that Native Hawaiians cannot be likened to Native American Indian tribes is that a statute is required to provide federal recognition because the Department of Interior's standards for tribal recognition cannot be satisfied.

There has never been a Native Hawaiian government or entity. Since the arrival of Captain Cook in 1778, Native Hawaiians and non-Native Hawaiians have uniformly been governed by a common Hawaiian sovereign. Throughout the past two centuries of Hawaiian history, including the entire period of the Kingdom, they served side-by-side in the legislature, Cabinet, and national Supreme Court. Both Native Hawaiians and non-Native Hawaiians exercised the franchise. With rare exceptions, the laws of the Hawaiian Kingdom generally eschewed racial distinctions.

Native Hawaiians have never experienced racial discrimination. None lost an inch of land or other property when the Monarchy was overthrown in 1893 as a step towards establishing a republican form of government. They were never less than equal, and for the past 30 years, Native Hawaiians have invariably been privileged children of the law with regard to housing, education, or other social assistance. The U.S.

Constitution scrupulously protects their right to celebrate their culture. That explains why Queen Liliuokalani confided to then Senator George Hoar (R. Mass.) that, "The best thing for [Native Hawaiians] that could have happened was to belong to the United States."

Ben Franklin sermonized at the signing of the Declaration of Independence that "we must all hang together, or assuredly we shall all hang separately." Abraham Lincoln preached that "A house divided against itself cannot stand." Supreme Court Justice Benjamin Cardozo in Baldwin v. Seelig, 294 U.S. 511, 523 (1935), observed: "The Constitution was framed...upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Justice Antonin Scalia lectured in Adarand Constructors v. Pena, 515 U.S. 200 (1995), that the Constitution acknowledges only one race in the United States. It is American.

The United States Supreme Court in United States v. Sandoval, 231 U.S. 28, 45 (1913), expressly repudiated congressional power arbitrarily to designate a racial or ethnic group as an Indian tribe crowned with sovereignty, whether Native Hawaiians, Jews, Hispanics, Polish Americans, Italian Americans, Japanese Americans, or otherwise. Associate Justice Willis Van Devanter explained with regard to congressional guardianship over Indians: "[I]t is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as

dependent tribes requiring guardianship and protection of the United States are to be determined by Congress, and not by the courts."

In that case, for example, Congress properly treated Pueblos as an Indian tribe because "considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary...." Chief Justice John Marshall in The Cherokee Nation v. Georgia, 30 U.S. 1 (1831), likened an Indian Tribe's dependency on the United States to the relation of a ward to his guardian. The Akaka Bill, however, does not and could not find that Native Hawaiians need the tutelage of the United States because of their backwardness or child-like vulnerability to exploitation or oppression. Indeed, their political muscle has made them cosseted children of the law. The Supreme Court, however, identified helplessness and dependency as the touchstone for recognizing Indian Tribes in Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943):

> "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 and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

The Court highlighted the same point in United States v. Kagama, 118 U.S. 375, 383-384 (1886):

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States,-- dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very

> weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."

Finally, the Constitution aimed to overcome, not to foster, parochial conflicts or jealousies. That goal would be shipwrecked by a congressional power to multiply semi-sovereign Indian tribes at will.

Congress would not be powerless to rectify historical wrongs to Native Hawaiians absent the Akaka Bill. Congress enjoys discretion to compensate victims or their families when the United States has caused harm by unconstitutional or immoral conduct, as was done for interned Japanese Americans in the Civil Liberties Act of 1988. Congress might alternatively establish a tribunal akin to the Indian Claims Commission to entertain allegations of dishonest or unethical treatment of Native Hawaiians. As the Supreme Court amplified in United States v. Realty Co., 163 U.S. 427, 440 (1896): "The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based on considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of the individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition of claims against the government which are thus founded."

The Akaka Bill's specific findings to justify its constitutionality are wildly misplaced. Finding (1) asserts that Congress enjoys constitutional authority to address the conditions of the indigenous, native people of the United States. But the finding fails to identify the constitutional source of that power, or how it differs from the power of

Congress to address the conditions of every American citizen. Congress does not find that Native Hawaiians were ever subjugated or victimized by racial discrimination or prevented from maintaining and celebrating a unique culture. Moreover, as noted above, the United States Supreme Court explicitly repudiated congressional power to arbitrarily designate a body of people as an Indian tribe in United States v. Sandoval, *supra*. As Alice Thurston unequivocally stated arguing for Interior Secretary Babbitt in Connecticut v. Babbitt, 228 F.3d. 82 (2nd Cir. 2000): "When the Department of the Interior recognizes a tribe, it is not saying, 'You are now a tribe.' It is saying, 'We recognize that your sovereignty exists.' We don't create tribes out of thin air."

Finding (3) falsely asserts that the United States "has a special political and legal responsibility to promote the welfare of the native people of the United States, including Native Hawaiians." No such responsibility is imposed by the Constitution or laws of the United States. No decision of the United States Supreme Court has ever recognized such a responsibility.

Finding (4) recites various treaties between the Kingdom of Hawaii and the United States from 1826 to 1893. The treaties were with a government of both Native Hawaiians and non-Native Hawaiians, and thus discredit the idea of a distinct Native Hawaiian sovereignty.

Finding (5) falsely declares that the Hawaiian Homes Commission Act (HHCA) set aside approximately 203,500 acres of land to address the conditions of Native Hawaiians in the then federal territory. In fact, the HHCA established a homesteading program for only a small segment of a racially defined class of Hawaii's citizens. Its intended beneficiaries were not and are not now "Native Hawaiians" as defined in the

Akaka bill (i.e., those with any degree of Hawaiian ancestry, no matter how attenuated), but exclusively those with 50% or more Hawaiian "blood" – a limitation which still applies with some exceptions for children of homesteaders who may inherit a homestead lease if the child has at least 25% Hawaiian "blood."

The HHCA was enacted by Congress in 1921 based on stereotyping of "Native Hawaiians" (50% blood quantum) as characteristic of "peoples raised under a communist or feudal system" needing to "be protected against their own thriftlessness". The racism of Plessy v. Ferguson, 163 US 537 (1896), was then in its heyday. If that derogatory stereotyping were ever a legitimate basis for federal legislation, Adarand Constructors v. Pena, *supra.*, and a simple regard for the truth deprive it of any validity today.

Finding (6) asserts that the land set aside assists Native Hawaiians in maintaining distinct race-based settlements, an illicit constitutional objective under Buchanan v. Warley, 245 U.S. 60 (1917), and indistinguishable in principle from South Africa's execrated Bantustans.

Finding (7) notes that approximately 6,800 Native Hawaiian families reside on the set aside Home Lands and an additional 18,000 are on the race-based waiting list. These racial preferences in housing are not remedial. They do not rest on proof of past discrimination (which does not exist). The preferences are thus flagrantly unconstitutional. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, *supra.*

Finding (8) notes that the statehood compact included a ceded lands trust for five purposes, one of which is the betterment of Native Hawaiians. As elaborated above, the

20% racial set aside enacted in a 1978 statue violates the general color-blindness mandate of the Constitution.

Finding (9) asserts that Native Hawaiians have continuously sought access to the ceded lands to establish and maintain native settlements and distinct native communities throughout the State. Those objectives are constitutionally indistinguishable from the objectives of whites during the ugly decades of Jim Crow to promote an exclusive white culture exemplified in *Gone with the Wind* or *The Invisible Man*. The United States Constitution protects all cultures, except for those rooted in racial discrimination or hierarchies.

Finding (10) asserts that the Home Lands and other ceded lands are instrumental in the ability of the Native Hawaiian community to celebrate Native Hawaiian culture and to survive. That finding is generally false. The United States Constitution fastidiously safeguards Native Hawaiians like all other groups in their cultural distinctiveness or otherwise. There is but one exception. A culture that demands racial discrimination against outsiders is unconstitutional and is not worth preserving. Further, as Senator Inouye himself has proclaimed, Native Hawaiians and other citizens are thriving in harmony as a model for other racially diverse communities under the banner of the United States Constitution.

Finding (11) asserts that Native Hawaiians continue to maintain other distinctively native areas in Hawaii. Racial discrimination in housing, however, is illegal under the Fair Housing Act, the Civil Rights Act of 1871, and the Equal Protection Clause of the Fourteenth Amendment if state action is implicated.

Contrary to Finding (13), the Monarchy was overthrown without the collusion of the United States or its agents; the Native Hawaiian people enjoyed no more inherent sovereignty under the kingdom than did non-Native Hawaiians; in any event, sovereignty at the time of the overthrow rested with Queen Liliuokalani, not the people; the public lands of Hawaii belonged no more to Native Hawaiians than to non-Native Hawaiians; and, there was never a legal or moral obligation of the United States or the Provisional Government after the overthrow to obtain the consent of Native Hawaiians to receive control over government or crown lands. No Native Hawaiian lost a square inch of land by the overthrow.

Findings (16), (17), and (18) corroborate that the United States Constitution guarantees religious or cultural freedom to Native Hawaiians as it does for any other distinctive group. On the other hand, the finding falsely asserts that Native Hawaiians enjoy a right to self-determination, i.e., a right to establish an independent race-based nation or sovereignty. The Civil War definitively established that no individual or group in the United States enjoys a right to secede from the Union, including Native American Indian tribes.

Finding (19) falsely asserts that Native Hawaiians enjoy an "inherent right" to reorganize a Native Hawaiian governing entity to honor their right to self-determination. The Constitution denies such a right of self-determination. A Native Hawaiians lawsuit to enforce such a right would be dismissed as frivolous. Further, there has never been a race-based Native Hawaiian governing entity. An attempt to reorganize something that never existed would be an exercise in futility, or folly, or both.

Finding (20) falsely insinuates that Congress is saddled with a greater responsibility for the welfare of Native Hawaiians than for non-Native Hawaiians. The Constitution imposes an equal responsibility on Congress. Race-based distinctions in the exercise of congressional power are flagrantly unconstitutional. *See* Adarand Constructors, *supra.*

Finding (21) repeats the false insinuation that the United States is permitted under the Constitution to create a racial quota in the administration of public lands, contrary to Adarand Constructors, *supra.*

Subsection (A) of Finding (22) falsely asserts that sovereignty in the Hawaiian Islands rested with aboriginal peoples that pre-dated Native Hawaiians, i.e. that the aboriginals were practicing and preaching government by the consent of the governed long before Thomas Jefferson's Declaration of Independence. But there is not a crumb of evidence anywhere in the world that any aboriginals believed in popular sovereignty, no more so than King Kamehameha I who founded the Kingdom of Hawaii by force, not by plebiscite.

Subsection (B) falsely insinuates that Native Hawaiians as opposed to non-Native Hawaiians enjoyed sovereignty or possessed sovereign lands. The two were equal under the law. In any event, sovereignty until the 1893 overthrow rested with the Monarch. Sovereign lands were employed equally for the benefit of Native Hawaiians and non-Native Hawaiians.

Subsection (C) falsely asserts that the United States extends services to Native Hawaiians because of their unique status as an indigenous, native people. The services are extended because Native Hawaiians are United States citizens and entitled to the

equal protection of the laws. The subsection also falsely insinuates that Hawaii previously featured a race-based government.

Subsection (D) falsely asserts a special trust relationship of American Indians, Alaska Natives, and Native Hawaiians with the United States arising out of their status as aboriginal, indigenous, native people of the United States. The United States has accorded American Indians and Alaska Natives a trust relation in recognition of existing sovereign entities and a past history of oppression and helplessness. The trust relationship, however, is voluntary and could be ended unilaterally by Congress at any time. Native Hawaiians, in contrast, have never featured a race-based government entity. They have never suffered discrimination. They voted overwhelmingly for statehood. And they have flourished since annexation in 1898, as Senator Inouye confirms.

Finding (23) falsely insinuates that a majority of Hawaiians support the Akaka Bill based on politically correct stances of the state legislature and the governor. The best polling barometers indicate that Hawaiian citizens oppose creating a race-based governing entity by a 2-1 margin, with 48% of Native Hawaiians in opposition. If the proponents of the Akaka Bill genuinely believed Finding (23), they would readily accede to holding hearings and a plebiscite in Hawaii as a condition of its effectiveness as was done for statehood.

Even assuming Congress enjoyed authority to create a race-based Native Hawaiian government under the Indian Commerce Clause, treaty making power, or some inherent national power, the Akaka Bill would nevertheless violate the equal protection component of the Fifth Amendment as elaborated in Bolling v. Sharpe, 347 U.S. 497 (1954). The Akaka Bill disfranchises non-Native Hawaiians in the election of a Native

Hawaiian entity because of race. The Supreme Court invalidated a comparable race-based disenfranchisement in the election of trustees of the Office of Hawaiian Affairs. Writing for the Court in Rice v. Cayetano, 528 U.S. 495, 517 (2000), Justice Anthony Kennedy elaborated on the evils of a race-based politics:

> "The ancestral inquiry mandated by [Hawaii] is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' Hirabayashi v. United States, 320 U.S. 81 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name."

The Akaka Bill also clashes with the spirit of Article IV's prohibition on creating a new State within the jurisdiction of another State without its consent. The Native Hawaiian entity to be fashioned within Hawaii would not be contingent on the consent of the State of Hawaii.

Native Hawaiians are indistinguishable from numerous other racial or ethnic groupings in their historical relations with the United States. If the Akaka Bill can make Native Hawaiians into Indian tribes by fiat, then Balkanization will soon follow as groups clamor for separate sovereignties to obtain a treasure trove of race-based legal immunities and privileges. Indeed, Mexican Americans have already formed MEChA (Movimiento Estudiantil Chicano de Aztlan) claiming a right to "repatriate" Aztlan, land from eight or nine states including Colorado, California, Arizona, Texas, Utah, New Mexico, Oregon,

and parts of Washington transferred by the Treaty of Guadalupe Hidalgo from Mexico to the United States.

It could be expected that every group possessed of an historical grievance, genuine or concocted, would assert a right to a separate sovereignty, including African-Americans, Chinese-Americans, Japanese-Americans, Irish-Americans, Italian-Americans, Jews, Mormons, Roman Catholics, or the Amish. The United States would degenerate into the Holy Roman Empire.

The 9/11 abominations underscored the strength of the United States, the thrill, pride and courage of its citizens awakened by equal opportunity and respect irrespective of ancestry. The Akaka Bill would erode that strength.

It must be defeated.

Mr. CHABOT. The Members of the panel here will now have 5 minutes each to ask questions.

I would begin by asking unanimous consent to enter three letters into the record. The first is a July 13 letter from the Department of Justice to Senator McCain. Second is a letter dated July 19 from Senator Kyl to this Subcommittee and the third is a letter from a Hawaiian citizen by the name of David Rosen.

Without objection, they will be entered into the record.

If any other Members want to enter such letters or things, of course as always, we would permit that to occur. I now recognize myself. I would direct this question to each of the panel members.

Some of article 1, section 8 has been referred to, I think, by all of the Members. The Indian commerce clause states that "Congress shall have the power to regulate commerce with the Indian tribes."

Now, H.R. 309 and its proponents suggests that the Indian commerce clause confers to Congress the power to regulate all aboriginal, indigenous people. What authority does article 1, section 8 give to Congress, and what is your best shot at what is the difference between what Congress has done with respect to Native Americans and to Alaskans versus what is being asked for in this particular legislation?

We will start with you, Mr. Bennett. We will just go down the line.

Mr. BENNETT. Thank you. I think that the constitutional issue is whether the Congress' action, in recognizing an indigenous American group, is arbitrary. There has been no case that I know of in the history of the republic where the courts have said that the Congress has overstepped its authority.

I believe the Indian Commerce Clause, as interpreted as recently as *Lara* and back in *Morton v. Mancari* has said, that recognition to aboriginal groups in the United States is political. It is not racial, that Congress' power in this regard is plenary and exclusive. And the fact that Hawaii was an after-acquired part of the lands of the United States, as opposed to part of the 13 original colonies, is entirely irrelevant to the constitutional analysis.

So, in short, I believe that Congress's power is plenary. I believe that the Supreme Court has said over and over again that Congress's power is plenary. I believe that Congress has the right to say that Native Hawaiians are so akin to Indian tribes and are unquestionably aboriginal inhabitants of part of the United States, part of the aboriginal requirements, that it is a political decision for the political branches to determine whether or not to afford recognition and that such recognition would clearly be upheld.

Mr. CHABOT. Thank you. Mr. Coffin.

Mr. COFFIN. Mr. Chairman, I disagree that this is a plenary power of Congress. There is a defined term in the Constitution. Well, there is a specific term in the Constitution, that is Indian tribes.

The Supreme Court, as early as 1900 in *Montoya v. United States,* described an Indian tribe as a body of Indians having the same or similar race, united community under one leadership and inhabiting particular, although perhaps ill-defined territory. So there are components to the definition that certainly aren't met here when you are defining solely based on race.

Mr. CHABOT. Thank you. Mr. Burgess.

Mr. BURGESS. Mr. Chairman, my impression is——

Mr. CHABOT. I think your mike is not on.

Mr. BURGESS. Oh, I'm sorry. Thank you. This bill is radically broader than the treatment of Native Americans in the United States. As I said originally, that Native Americans, to be recognized for special treatment, have to be members of Federally-recognized tribes. There are millions that don't have that qualification, simply because they are not members of recognized tribes. They are subject to the Constitution just like everyone else.

But this—think of the precedent that this would set, if the principle is adopted—which Mr. Bennett and other proponents of the bill offer—just think of what it says. Anyone who is a descendant of anyone who is indigenous to the United States, to the land that later became part of the United States, has the right to form their own new separate government.

Imagine how about how the people in the southwestern part of the United States who are seeking to liberate Colorado, Arizona, parts of California, if those indigenous people simply, because of their ancestry, have the right to create their own separate government. What is going to happen to the southwestern part?

Mr. CHABOT. Indeed before I run out of time, I would like to let Mr. Fein answer, thank you.

Mr. FEIN. It is always easier to start with the actual language, the Constitution, rather than resorting to conundrums and emanations. The language is Congress has authority to regulate commerce with Indian tribes. That doesn't come close to suggesting that Congress has the power to create a tribe or an entity that didn't exist before. You can quote from the Department of Interior itself, its chief attorney in a famous case, *Kearny v. Babbitt,* saying "when the Department of Interior recognizes a tribe, it is not saying you are now a tribe, we are saying that we recognize that your sovereignty exists."

We don't create tribes out of thin air. That's exactly what this bill would do. It would create a tribe, a Native Hawaiian entity that doesn't exist now. It never existed during the Hawaiian kingdom. Indeed, it represented, perhaps, the best example of a fusion of Native Hawaiian or non-Native Hawaiian influences.

If you would just indulge me, let me read this quote from a historical expert on the Kingdom of Hawaii, R.S. Kuykendall, "we can see that the policy being followed in the Kingdom looked to the creation of an Hawaiian State by the fusion of native and foreign ideas and the union of native or foreign personnel bringing into being a Hawaiian body politic in which all elements, both Hawaiian and *haole* should work together for the common good under the mild and enlightened rule of a Hawaiian king." That, Mr. Chairman, is not a description of an Indian tribe.

The CHAIRMAN. Thank you very much. I might note to other Members, our clock is on the blink here, it looks like the yellow light isn't working. So bear with us here. Mr. Nadler is recognized for 5 minutes.

Mr. NADLER. Thank you, I was intrigued by what Mr. Fein said. So the fact that the tribe of Hawaiians gave political rights under

the Kingdom to other people means they could no longer be considered as a tribe, is that what you are saying?

Mr. FEIN. No, that is not accurate.

Mr. NADLER. Let me ask Mr. Bennett to comment on the comments of the constitutional speakers. We have heard over the last few minutes. Why do you think they are wrong?

Mr. BENNETT. Well, why I think they are wrong because the words of the Indian Commerce Clause have to be taken with the gloss that the Supreme Court has used in interpreting them for well over 100 years. Indeed, in the *Lara* case, the Supreme Court said specifically that Congress's power in their area is plenary and exclusive. So it is——

Mr. NADLER. That means that Congress can create a tribe?

Mr. BENNETT. It means that Congress can recognize an indigenous people as a tribe even though their form of government in the past was different. Even though they have ceased to have a government, that was exactly the issue in *Lara* itself. Congress had derecognized the Menomonee tribe. It had terminated their tribal existence, and then some years later Congress through the Menomonee Restoration Act, Congress resurrected the Menomonee tribe and the argument was Congress can't resurrect what no longer exists. And the Supreme Court said, no that is just simply wrong. It is up to the political branches to make these kinds of decisions.

I believe that it is impossible to read *Lara* without concluding that in this case, with the historic distinct culture, religion and government of the Hawaiian people, that at one time existed and that was terminated by force with the assistance of the United States, I think it is just clear that our Congress can exercise its plenary power to right that injustice and to recognize Native Hawaiians.

Mr. NADLER. So you would say that if the people of Hawaii, native peoples of Congress were recognized as a quote, unquote, Hawaiian tribe, then the fact of the annexation to the conquest of Hawaii, when they had native government under Queen Liliuokalani, that they gave citizenship rights to other peoples was the choice of that that tribe and doesn't detract from the possibility of recognizing it as such?

Mr. BENNETT. Absolutely. The fact that when the Hawaiians had a government, the fact that they accorded rights to individuals who weren't Hawaiians, certainly the Supreme Court would say it would be absurd to hold that argument against them. In fact, one of the arguments made by the opponents of the bill is that because the government was completely destroyed and didn't exist anymore, that prevents Congressional recognition. And that is equally absurd to say that if the destruction had only been partial, and hadn't been complete, then the government could be recognized today. It makes no legal sense. It certainly makes no textual sense. It makes no sense for a country that prides itself on its justice and fairness.

Mr. NADLER. Now, Mr. Bennett, now, Mr. Attorney General, is it your reading then that by Indian tribe, the Constitution means any indigenous group of people that Congress chooses to recognize?

Mr. BENNETT. I think that it absolutely requires certain characteristics, including being the original aboriginal inhabitants of particular territory, and the straw men that are being set up with the southwest.

Mr. NADLER. Are not the original aboriginal inhabitants?

Mr. BENNETT. Exactly.

Mr. NADLER. So, we could recognize, if we wanted to, the Aztecs in California, if there were any, but not the Mexicans?

Mr. BENNETT. Absolutely. That's absolutely right.

Mr. NADLER. It is your contention that it is the plenary power of Congress to recognize the Hawaiian people as an indigenous people or to recognize six different groups of Hawaiian people as six different Hawaiian tribes, it is up to Congress?

Mr. BENNETT. It is, but I don't think anyone has ever proffered——

Mr. NADLER. So I am trying to say how the Congress are. We can define it any way we want as long as they are the aboriginal people.

Mr. BENNETT. As long as they are the aboriginal people and as long as it is not arbitrary.

Mr. NADLER. You might say six would be arbitrary.

Mr. BENNETT. I would say historically it might be, yes.

Mr. NADLER. Thank you very much. I yield back.

Mr. CHABOT. Thank you. The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman, I do appreciate this testimony and the distance that some of you had to travel to be here today. I do think this is the appropriate place to discuss this issue before the Constitution Subcommittee. I ask you all to consider our Constitution, consider some of the constraints that were bound by here in this Congress.

We swear an oath to uphold the Constitution of the United States. It doesn't always adhere to the letter of this Constitution. It should be. I appreciate the points made by Mr. Fein with regard to our Constitution.

As I look back on this testimony and try to sort out here the relevant points, and there are a lot of different points that have been brought between all of the different witnesses here, it strikes me that as I listen to the testimony of Mr. Bennett, and I had some notes here that says race is one of the characteristics of a tribe. And, let me see, the question of—is this determination of a Native Hawaiian race-based, the answer was a resounding no, which I heard very clearly, Mr. Bennett.

So I turned to the bill, and I look under definition of Native Hawaiians, and it says an individual who is one of the indigenous native people of Hawaii and who is a direct lineal descendent of the aboriginal indigenous native people. Now, if you are going to measure the inclusion in a native aboriginal people by their descendency, how do you argue that this is not a race-based type of determination on Hawaiian citizenship or Hawaii and native aboriginal membership?

Mr. BENNETT. I would argue in the words of the Supreme Court of the United States the issue in *Morton v. Mancari* was a benefit that was provided to certain Indians who were only one quarter

blood or more. And the challenge made in *Morton v. Mancari* is the criteria here is race, this is clearly violative of the 14th amendment. And what the Supreme Court said is absolutely not. Although you are looking at blood quantum, the power of Congress to recognize aboriginal people or Indian tribes, the power of Congress to make these divisions is a political determination of Congress, not racial.

Mr. KING. Thank you, Mr. Bennett, and I appreciate that. That is a clarification that I really needed. So if it is not race and it not ancestry, would you concede that Congress has the authority that if the bill is going to pass, to declare everyone who has a residence or citizenship of Hawaii to be a member of native aboriginal people?

Mr. BENNETT. No, because quite clearly myself, having been born in Brooklyn, was not a resident——

Mr. KING. So if it is not race, what is the distinction if it is a Hawaiian Native born there?

Mr. BENNETT. Sir, I can't help to repeat myself, which is to say the Supreme Court, going back to the *Montoya* case, which my colleague on my left quoted, said that one of the determinants of whether there is a recognizable tribe is indeed race, but the Supreme Court has also said, in case after case, that the fact that this is one of the components does not make the preferences or the creation race-based.

It makes it a political determination by Congress and *Morton*——

Mr. KING. But yet, Mr. Bennett, I have not heard anyone draw a distinction on how you determine a Native Hawaiian without going back to determine race or ethnicity as the component as a distinction if being born in Hawaii, being a Hawaiian of multigenerational Hawaiian does not qualify, then it seems to me that your only criteria left are to do with race and ethnicity.

So I would ask you, then, if that is the case and if your testimony is accurate with regard to no, it is not race based, would you support an amendment that would say nothing in this act shall be construed to authorize or permit the exercise of governmental powers by any entity that is defined by its members under race or ancestry?

Mr. BENNETT. No. I think that that would clearly contravene the body of law that is built up under the Indian Commerce Clause. Native Hawaiians have more than simply common racial characteristics. They are united in community. They, at one time, were under one government. They were inhabiting a particular territory, however ill-defined, the very criteria that the court in *Montoya* looked at in 1901, and the fact again that one of the components is race or ancestry——

Mr. KING. Then the only other component that you have mentioned in that is inhabiting a similar community which also works for every other ethnicity and they are also everywhere in America.

I turn to Mr. Fein to respond to this.

Mr. FEIN. I think Mr. Bennett is simply wrong in suggesting that from the beginning of the Kingdom in 1810 thereafter to the ouster of Queen Liliuokalani, that there ever was a particular community or reservation or land set aside for Native Hawaiians. The fact is that there wasn't a government for Native Hawaiians. The leader-

ship was always a leadership of everyone who was on Hawaii, native and non-native alike.

It was similar to the government of the Louisiana Purchase after 1807 when the Government established by the United States applied equally to indigenous Creoles or anyone else. There wasn't any separateness.

The only thing that the Native Hawaiians had in common with American Indians is that they are both relying upon ancestry. Other than that, all the other distinctive features that the Supreme Court has enumerated to justify recognizing an Indian tribe are absent with regard to Native Hawaiians.

The other thing I would like to underscore is that the Indian tribes and their position is an enormous exception to the general thrust and basic background of our Constitution. All the values, the liberties and the rights are based upon the fundamental idea of individual rights and equality, irrespective of race, ethnicity, religion or otherwise.

That is the background against which we are operating today in which we were operating in 1776. The Indian tribes were recognized as a preexisting situation, a *fete accompli* that they were dealing with at the time, recognizing that at war then clashed with the basic values of the Constitution, and therefore the Supreme Court would view with the highest kind of scrutiny and skepticism any deviation from that basic fundamental libertarian background in recognizing any power of Congress to create an entity that could violate the Constitution rather than enjoy the same rights and liberties of everyone else.

Mr. CHABOT. Gentleman's time has expired. Gentleman from Virginia, Mr. Scott is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, you described an unusual process that I think I will take advantage of because you said we could take advantage of the resource of our friends from Hawaii. And I would ask the gentleman from Hawaii, Mr. Abercrombie, if you had a question to ask, what would that question be?

Mr. ABERCROMBIE. Thank you very much. Perhaps, Mr. Chairman, we could help enlighten the process a little bit because so far we have had an excellent discussion in terms of some of the more abstract and philosophical points associated with the Constitution. But as we all know, the Constitution—the implementation of the Constitution takes place in real circumstances. So I would ask Mr. Bennett, if he could, excuse me, Mr. Bennett, domestic tranquility is now at stake here. But hopefully you are going to be my excuse.

Mr. Bennett, perhaps you could help enlighten the Committee by putting this into context. You mentioned a context before that this has to be played out in. The Admissions Act of 1959, which brings Hawaii into the Union, specifically provided for administration of what are called ceded lands.

And Mr. Chairman, I will spare you the history of land tenure when you go from a prefeudal Kingdom to a shotgun Republic to an annexed territory to a State in the Union of the United States. But please take my word for it, there is something called ceded lands. It is hundreds of thousands of acres. When you include with that—and I would ask you to respond also, Mr. Bennett, the question of Hawaiian homelands and the establishment by the Congress

of Hawaiian homelands with a blood quantum associated with it, if you could put into context then your position that this was a historical and political decision as opposed to a racial decision and make reference to what the Congress demanded and created, namely the Admissions Act, which brought Hawaii into the Union as a State and the Hawaiian Homelands Act, which is also created by the Congress in order to place Native Hawaiians on the land?

Mr. BENNETT. Thank you. And indeed, what you said is entirely accurate, that Hawaii would not have been allowed to become a State by the Congress unless it specifically included in its Constitution a guarantee that it would continue the Hawaiian homes program, which Congress established in the 1920's, which bases the right to occupy land on blood quantum of Native Hawaiians specifically, and based upon the fact that the government of the State of Hawaii would treat what you have described as the ceded lands, and hold them, in part, specifically for the benefits of the people, Native Hawaiians with a particular blood quantum. So that was part of the requirements imposed by this Congress on Hawaii to enter the union.

Mr. ABERCROMBIE. Ceded lands were—essentially for purposes of our conversation here—lands that came from the time of the kingdom, from the overthrow of the kingdom and were administered by successive governmental entities on behalf of Native Hawaiians, the benefit of Native Hawaiians, as they ostensibly had been administered when the kingdom was in existence, correct?

Mr. BENNETT. Absolutely.

Mr. CHABOT. Is the gentleman from Virginia—an additional minute, but the lights are out but you have another minute.

Mr. SCOTT. I would ask the other gentleman from Hawaii, if he had a question, what would that question be?

Mr. CHABOT. I had a feeling you might ask that.

Mr. CASE. Mr. Coffin, Burgess or Fein, any one of you, yes or no, Mr. Bennett made a representation that there had never been a case decided by the Supreme Court in which Congress' exercise of its power under the Indian Commerce Clause to provide Federal recognition to an Indian tribe had ever been overturned? Yes or no? Is that true? Are you aware of any such case in the 200-plus years of law on this subject.

Mr. COFFIN. The Supreme Court, on several occasions, recognized the limitations of Congress.

Mr. CASE. Have they ever overturned Congress' plenary powers to provide Federal recognition——

Mr. COFFIN. The issue has not been squarely presented to the United States Supreme Court, but in the most recent case dealing with the Native Hawaiian situation, Supreme Court scratched its head and said, there may very well be limitations on Congress' power to recognize——

Mr. CASE. Are you referring to the *Rice* case——

Mr. COFFIN. Yes, I am.

Mr. CASE. The decision under the 15th amendment——

Mr. COFFIN. And the 14th amendment, Mr. Case, provides the same answer.

Mr. CHABOT. The gentleman's time has expired. We want to thank the panel for their testimony here this afternoon. It has been

very helpful, as I mentioned at the outset of the hearing, we don't have direct jurisdiction over this particular bill. But it does raise significant Constitutional issues, and that was the purpose of the Constitutional Subcommittee holding this hearing this afternoon. I thought all four of the witnesses were very good and very helpful. I want to thank the Members for their attendance here this afternoon.

Mr. NADLER. Could I just ask that the record reflect that we have been joined for much of this hearing by Mr. Faleomavaega?

Mr. CHABOT. Yes. Absolutely. And I would have to say Eni is one of the more distinguished Members of the House of Representatives. And he and I had the good fortune to represent the Congress in the United Nations for a year together.

Mr. FALEOMAVAEGA. Would the Chairman yield?

Mr. CHABOT. Yes, I will.

Mr. FALEOMAVAEGA. I know the Chairman is going to be most reasonable and fair in the process. And I know that he will decide in our favor to recognize——

Thank you, Mr. Chairman.

Mr. CHABOT. I agree with the first part. I don't know if I agree with the second part.

So I want to thank again everyone for coming all those folks who also traveled all the way from the great State of Hawaii to be with us here this afternoon. And if there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 3:15 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

JOINT PREPARED STATEMENT OF THE HONORABLE NEIL ABERCROMBIE AND THE HONORABLE ED CASE, REPRESENTATIVES IN CONGRESS FROM THE STATE OF HAWAII

JOINT STATEMENT OF
CONGRESSMEN NEIL ABERCROMBIE AND ED CASE
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE
ON THE CONSTITUTION ON
H.R. 309/ S. 147, THE NATIVE HAWAIIAN GOVERNMENT
REORGANIZATION ACT OF 2005

July 19, 2005

Chairman Chabot, Ranking Member Nadler, and members of the Subcommittee, we submit this testimony in strong support of H.R. 309/S. 147, the Native Hawaiian Government Reorganization Act (the Akaka bill), of which we are the principal sponsors in the U.S. House of Representatives. We note first that we are joined in united support for this initiative by virtually all of Hawaii's other elected leaders, including Senators Daniel Akaka and Daniel Inouye, Governor Linda Lingle, our State Legislature, and the Office of Hawaiian Affairs, as well as virtually all of the principal national organizations representing American Indians and Alaska Natives.

Overview

The sole question presented to this Congress by the Akaka bill is whether we should undertake a process under which the federal recognition which has been accorded to other of our country's indigenous peoples may be extended to the indigenous peoples of our Hawaii (Native Hawaiians) and, if so, under what conditions. We note at the outset that the Akaka bill does not itself confer federal recognition nor any specific rights and obligations thereof; rather it outlines the steps through which federal recognition may be extended, leaving to later negotiations and mutual agreements of this Congress, our executive branch, the State of Hawaii and a Native Hawaiian entity the details of implementation.

This hearing is presented as a challenge to the constitutionality of the Akaka bill. Let us be direct: there is no question that the Akaka bill falls directly within the plenary power of this Congress, under our Constitution, to establish national policy with respect to and on behalf of our indigenous peoples, and Native Hawaiians are an indigenous people as and to the same extent as other indigenous groups on whom federal recognition has long been conferred.

More specifically, it is directly within Congress' authority under the Indian Commerce Clause to continue along the path that we have followed for the last century in our nation's relationship with the Native Hawaiian people into federal recognition. This follows not only on the Hawaiian Homes Commission Act of 1920, the Statehood Act of 1959, and the establishment over the last three decades of many federal programs of benefit for Native Hawaiians, but more inclusively and broadly on the 1993 Apology Resolution (P.L. 103-150).

The Apology Resolution, which passed in the 103rd Congress with overwhelming bipartisan support, not only offered our government's formal apology to Native Hawaiians for our country's complicity in the 1893 overthrow of the sovereign and independent Kingdom of Hawaii, but it committed our country to a process of reconciliation between the United States and the Native Hawaiian people. The Akaka bill is entirely consistent with and an integral part of reconciliation.

Plenary Authority of Congress Undisputed

The Indian Commerce Clause contained in Article I, Sec. 8 of our Constitution clearly provides this Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Congress has taken very seriously its responsibility toward our nation's indigenous peoples – American Indians, Alaska Natives, and Native Hawaiians – and the U.S. Supreme Court has continued to uphold Congress' plenary authority to do so. (*United States v. Lara, 541 U.S. 193 (2004)*

Indeed, in the case of Native Hawaiians, Congress has passed, and presidents have signed into law, over 160 bipartisan bills since the early 1900s for their benefit. The most prominent of these laws include the Hawaiian Homes Commission Act, Hawaii's State Admissions Act, the Native Hawaiian Education Act, the Native Hawaiian Health Care Act, the Apology Resolution, the Hawaiian Home Lands Recovery Act, and the Hawaiian Homelands Homeownership Act. And the Hawaii congressional delegation together with our state and local partners has long worked constructively with the executive branch toward the proper funding, implementation and administration of these crucial programs.

Challenges to Congress' Plenary Authority Never Upheld

Certain opponents of the Akaka bill have come before this subcommittee masking their policy disagreement with federal recognition for Native Hawaiians as constitutional infirmity. Their argument basically maintains that this Congress does not have constitutional power to determine the relationship between our federal government and our country's indigenous peoples.

But not a single case exists in which a court has declared invalid Congress' plenary authority under the Indian Commerce Clause to establish and define the political status of indigenous peoples. Moreover, out of the more than 160 laws passed for the benefit of Native Hawaiians, not a single one has been ruled unconstitutionally invalid by a court.

Political Relationship of Indigenous Peoples with the United States

The essence of the Akaka bill is to confirm and further define a political relationship between our federal government and Native Hawaiians. This is nothing more than another manifestation of the bedrock of our federal policy toward indigenous

peoples: the special government-to-government trust relationship between our government and federally recognized indigenous groups.

Historically, federal recognition of the political relationships of indigenous peoples with the U.S. government, particularly with American Indians, were a result of treaties, executive actions, statutory and case law, or the Department of Interior's administrative federal recognition process. In special circumstances, where such avenues were not otherwise available or feasible, Congress has directly provided federal recognition under unique historical conditions or challenges.

In a seminal case, *Morton v. Mancari, 417 U.S. 535 (1974)*, which remains good law, our U.S. Supreme Court held that our indigenous peoples have a unique and special political relationship with our federal government which is not "race-based" so as to be subject to equal protection challenges. In that case, a Bureau of Indian Affairs Indian hiring preference was upheld because federal programs dealing with Indians derive from the government-to-government relationship between the United States and Indian tribes.

Legislative History

This is the fourth Congress into which a united Hawaii delegation has introduced the Akaka bill. The current version, H.R. 309/S. 147, differs not in concept but in some details from the version first introduced in the 106th Congress because the Hawaii delegation has accommodated various concerns, including those of the current administration. As a result, this has always been a non-partisan effort supported by both sides of the aisle.

In particular, this House passed the Akaka bill in 2000 on the suspension calendar by voice vote. This was done with the approval of the leadership of both parties and the then-chair and ranking member, Congressmen Don Young and George Miller, respectively, of the then and current committee of jurisdiction, Resources. In the 107th Congress, the measure again passed out of Resources with the support of Chairman James Hansen and Ranking Member Nick Rahall. In the 108th Congress, this bipartisan support continued with the legislation again passing out of Resources with the support of Chairman Richard Pombo and Ranking Member Rahall. In each of these Congresses, the Akaka bill has passed through the committee of jurisdiction by voice vote or unanimous consent after due notice given to members and the public.

Equally bipartisan support for the Akaka bill has existed in the Senate, where the committee of jurisdiction, Indian Affairs, has reported versions of the bill out on voice vote. And the same dynamic is also present in our Hawaii state government, whose legislature has passed two resolutions in support, in 2001 and 2005, the first by voice vote and the second with just one of 76 legislators voting no. The Akaka bill has also had the support of both Hawaii governors serving during its pendency, one Republican and one Democrat.

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APPENDIX TO THE STATEMENT OF THE HONORABLE MARK BENNETT:
TABLE OF FEDERAL ACTS AFFECTING NATIVE HAWAIIANS

Table of Federal Acts Affecting Native Hawaiians

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 21, 1910	Pub. L. No. 61-266, 36 Stat. 703, 718 (1910)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indian and Native Hawaiians.
Act of Mar. 4, 1911	Pub. L. No. 62-525, 36 Stat. 1363, 1395 (1911)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 24, 1912	Pub. L. No. 63-302, 37 Stat. 417, 436 (1912)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 23, 1913	Pub. L. No. 63-3, 38 Stat. 4, 26 (1913)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 1, 1914	Pub. L. No. 63-161, 38 Stat. 609, 625 (1914)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 3, 1915	Pub. L. No. 63-263, 38 Stat. 822, 838 (1915)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1916	Pub. L. No. 64-132, 39 Stat. 262, 279 (1916)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 12, 1917	Pub. L. No. 65-21, 40 Stat. 105, 122 (1917)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 19, 1919	Pub. L. No. 66-21, 41 Stat. 163, 181 (1919)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1918	Pub. L. No. 65-181, 40 Stat. 634, 651 (1918)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 5, 1920	Pub. L. No. 66-246, 41 Stat. 874, 891 (1920)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 4, 1921	Pub. L. No. 66-388, 41 Stat. 1367, 1383 (1921)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 9, 1921	Pub. L. No. 66-34, 42 Stat. 108 (1921)	Creates a homesteading program for Native Hawaiians.
Act of June 12, 1922	Pub. L. No. 67-240, 42 Stat. 635, 643 (1922)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 3, 1923	Pub. L. No. 67-403, 42 Stat. 1221 (1923)	Amends Hawaiian Homes Commission Act by increasing dollar limits for residential loans and other provisions.
Act of Feb. 13, 1923	Pub. L. No. 67-409, 42 Stat. 1227, 1235 (1923)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 7, 1924	Pub. L. No. 68-214, 43 Stat. 521, 528 (1924)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 3, 1925	Pub. L. No. 68-586, 43 Stat. 1198, 1206 (1925)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 22, 1926	Pub. L. No. 69-141, 44 Stat. 305, 315 (1926)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 11, 1927	Pub. L. No. 69-600, 44 Stat. 1069, 1079 (1927)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 7, 1928	Pub. L. No. 70-105, 45 Stat. 246 (1928)	Amends the Hawaiian Homes Commission Act by requiring an annual area disposal limit and increases the dollar amount within the Hawaiian Home Loan fund.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of May 16, 1928	Pub. L. No. 70-400, 45 Stat. 573, 583 (1928)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians, including excavation and preservation of archaeologic remains.
Act of Feb. 20, 1929	Pub. L. No. 70-778, 45 Stat. 1230, 1241 (1929)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 19, 1930	Pub. L. No. 71-158, 46 Stat. 229, 241 (1930)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 26, 1935	Pub. L. No. 74-223, 49 Stat. 504 (1935)	Requires three of five Hawaiian Homes Commission members to be at least one-quarter Native Hawaiian.
Act of July 10, 1937	Pub. L. No. 75-200, 50 Stat. 497, 503 (1937)	Amends Hawaiian Homes Commission Act by establishing age minimum for lessee and adding more lands under the Act.
Act of June 20, 1938	Pub. L. No. 75-680, § 3, 52 Stat. 784, 784-85 (1938)	Authorizes leasing land within the Hawai□ National Park to Native Hawaiians and recognizes limited Native Hawaiian fishing rights in the area.
Act of Nov. 26, 1941	Pub. L. No. 77-325, § 3, 55 Stat. 782, 782 (1941)	Amends Hawaiian Homes Commission Act by creating a Home Development fund and allowing investing of loan fund.
Act of May 31, 1944	Pub. L. No. 78-320, 58 Stat. 260, 264 (1944)	Amends Hawaiian Homes Commission Act by returning lands under the Commission's jurisdiction to the Territory of Hawai□ .
Act of June 14, 1948	Pub. L. No. 80-638, 62 Stat. 390 (1948)	Amends Hawaiian Homes Commission Act by authorizing churches, hospitals, schools, theaters, and the Federal government to use the land.
Act of July 9, 1952	Pub. L. No. 82-481, 66 Stat. 511, 514 (1952)	Amends Hawaiian Homes Commission Act by adding lands to the Commission's jurisdiction.
Act of July 9, 1952	Pub. L. No. 82-482, 66 Stat. 514 (1952)	Amends Hawaiian Homes Commission Act by increasing dollar amounts in the Hawaiian Homes Land Fund and the Hawaiian Homes Development Fund.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 18, 1954	Pub. L. No. 83-417, 68 Stat. 263 (1954)	Amends Hawaiian Homes Commission Act by authorizing leases for irrigated pastoral lands.
Hawai'i Admission Act, Act of Mar. 18, 1959	Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959)	Admits Hawai'i as a State and establishes a public trust for the betterment of the conditions of Native Hawaiians, as defined by the Hawaiian Homes Commission Act.
Act of Dec. 23, 1963	Pub. L. No. 88-233, 77 Stat. 472 (1963)	Protects the corpus of the public lands trust, whose intended beneficiaries are Native Hawaiians, by revising procedures under the Hawai'i Statehood Act.
Act of July 11, 1972	Pub. L. No. 92-346, 86 Stat. 457 (1972)	Designates Honokohau as a National Historical Landmark and authorizes preservation of the site, giving employment preference to and providing training for Native Hawaiians.
Native American Programs Act of 1974	Pub. L. No. 93-644, § 801, 88 Stat. 2291, 2324 (1975)	Promotes Native Hawaiian, American Indian, and Alaska Native economic and social self-sufficiency through financial assistance to agencies serving Native Hawaiians.
Departments of Labor and Health, Education, and Welfare Appropriation Act, 1976	Pub. L. No. 94-206, 90 Stat. 3 (1975)	Appropriates funds for Native American programs (includes Native Hawaiians).
Act of Oct. 17, 1976	Pub. L. No. 94-518, § 401-405, 90 Stat. 2447, 2447, 2449 (1976)	Preserves Kalaupapa Settlement and authorizes a preference for former patients and Native Hawaiians to manage the site.
Act of Aug. 5, 1977	Pub. L. No. 95-93, sec. 303, § 701(a), 91 Stat. 627, 650 (1977)	Amends the Comprehensive Employment Training Act of 1973 to include employment training programs for Native Hawaiians.
Joint Resolution, American Indian Religious Freedom	Pub. L. No. 95-341, 92 Stat. 469 (1978)	Recognizes the rights American Indians, Eskimos, Aleuts, and Native Hawaiians to practice their traditional religions.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Nov. 20, 1979	Pub. L. No. 96-123, 93 Stat. 923 (1979)	Appropriates funds for Native Hawaiian health and human services programs as allowed under authorizing legislation, including assistance to research institutions with Indian, Alaska Native, Native Hawaiian, Hispanic, and Black students.
Education Amendments of 1980	Pub. L. No. 96-374, § 1331, 94 Stat. 1367, 1499 (1980)	Creates Advisory Council on Native Hawaiian Education to study the effectiveness of State and Federal education programs for Native Hawaiians.
Act of Dec. 22, 1980	Pub. L. No. 96-565, §§ 101-110, 94 Stat. 3321, 3321-23 (1980)	Establishes Kalaupapa National Historic Park which shall be administered by Hansen's Disease patients and Native Hawaiians.
Urgent Supplemental Appropriations Act, 1982	Pub. L. No. 97-216, 96 Stat. 180 (1982)	Appropriates funds for nursing research grants and encourages that priority be given to Native Hawaiians, other Native Americans, native American Pacific islanders, and Hispanics.
Supplemental Appropriations Act, 1982	Pub. L. No. 97-257, 96 Stat. 818 (1982)	Appropriates funds to promote economic and social self-sufficiency of Native Americans, including Native Hawaiians; also appropriates funds for Native Hawaiian education and health programs as allowed under authorizing legislation.
Act of July 30, 1983	Pub. L. No. 98-63, 97 Stat. 301 (1983)	Appropriates funds to address the unique health needs of Native Americans, including Native Hawaiians; also urges the National Cancer Institute to give greater attention to the Native Hawaiian population.
Native Hawaiian Study Commission Act	Pub. L. No. 96-565, §§ 301-307, 94 Stat. 3321, 3324-27 (1980)	Establishes Native Hawaiian Study Commission to study the culture, needs, and concerns of Native Hawaiians.
Department of Health and Human Services Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds to the Administration for Native Americans which promotes social and economic self-sufficiency for Native Americans, including Native Hawaiians; also appropriates funds to combat alcoholism among Native Hawaiians and declares Native Hawaiian cancer research a priority.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Labor Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for vocational training and other labor services for Native Hawaiians and other Native Americans.
Department of Education Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 21, 1982	Pub. L. No. 97-377, 96 Stat. 1830 (1982)	Appropriates funds to address alcohol abuse among Native Hawaiians.
Act of Aug. 22, 1984	Pub. L. No. 98-396, 99 Stat. 1369 (1984)	Appropriates funds for a Native Hawaiian health study and report.
Act of Oct. 12, 1984	Pub. L. No. 98-473, 99 Stat. 1837 (1984)	Appropriates funds for historic preservation of marine resources, including the Hawaiian voyaging canoe Hokuleʻa.
Department of Health and Human Services Appropriation Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian programs to promote economic and social self-sufficiency; also appropriates funds for parent-child centers and for Native Hawaiian cancer research.
Department of Education Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 19, 1985	Pub. L. No. 99-190, 99 Stat. 1185 (1985)	Appropriates funds for education assistance to health profession students who will serve geographical concentrations of Native Hawaiians and Indian reservations.
American Indian, Alaska Native and Native Hawaiian Culture and Art Development Act	Pub. L. No. 99-498, §§ 1501-1503, 1521-1522, 100 Stat. 1268, 1600, 1610-11 (1986)	Authorizes grants to support a program for Native Hawaiian culture and arts development.
Anti-Drug Abuse Act of 1986	Pub. L. No. 99-570, § 4134, 100 Stat. 3207, 3207-134 (1986)	Authorizes the Health and Human Services Secretary to contract with organizations that provide drug abuse prevention, education, treatment, and rehabilitation services to Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of July 11, 1987	Pub. L. No. 100-71, 101 Stat. 391 (1987)	Appropriates funds for the Native Hawaiian Culture and Arts Development Program.
Native American Programs Act Amendments of 1987	Pub. L. No. 100-175, sec. 506, § 803A, 101 Stat. 926, 926-75 (1987)	Establishes Native Hawaiian Revolving loan fund for Native Hawaiian organizations and Native Hawaiians to promote economic development.
Department of Health and Human Services Appropriations Act, 1988	Pub. L. No. 100-202, 101 Stat. 1329-263 (1987)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Jacob K. Javits Gifted and Talented Students Education Act of 1988	Pub. L. No. 100-297, sec. 1001, §§ 4101-4108, 102 Stat. 130, 237 (1988)	Authorizes grants or contracts with institutions (including Indian tribes and Native Hawaiian organizations) to carry out programs or projects designed to meet the educational needs of gifted and talented students.
Drug-Free Schools and Communities Act of 1986	Pub. L. No. 100-297, sec. 1001, §§ 5112, 5134, 102 Stat. 130, 253, 261 (1988)	Authorizes education grants, cooperative agreements, or contracts with organizations that primarily serve and represent Native Hawaiians; also appropriates funds for drug abuse education and prevention programs for Native Hawaiians.
Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988	Pub. L. No. 100-297, §§ 4001-4009, 102 Stat. 130, 358 (1988)	Recognizes the Federal government's legal responsibility to enforce Hawaii 's trust responsibilities to Native Hawaiians and creates new education programs targeting a model curriculum, family based education centers, gifted and talented, and special education programs.
Veterans' Benefits and Services Act of 1988	Pub. L. No. 100-322, § 413, 102 Stat. 487, 487 (1988)	Adds Native Hawaiians to the Advisory Committee on Native American Veterans which evaluates programs for Native American veterans.
Indian Housing Act of 1988	Pub. L. No. 100-358, sec. 2, § 204, 102 Stat. 676, 679 (1988)	Requires assessment of the housing and mortgage needs of Native Hawaiians.
National Science Foundation University Infrastructure Act of 1988	Pub. L. No. 100-418, § 6402, 102 Stat. 1107, 1543 (1988)	Reserves percentage of appropriation for institutions of higher learning that serve Native Americans (including Native Hawaiians) and specific ethnic groups.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriations Act, 1989	Pub. L. No. 100-436, 102 Stat. 1688 (1988)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Native Hawaiian Health Care Act of 1988	Pub. L. No. 100-579, 102 Stat. 2916 (1988); Pub. L. No. 100-690, § 2301-2312, 102 Stat. 4181, 4223 (1988)	Authorizes programs to improve the health status of Native Hawaiians; authorizes grants or contracts with Papa Ola Lokahi to develop comprehensive heath care master plan to improve Native Hawaiian health.
Health Professions Reauthorization Act of 1988	Pub. L. No. 100-607, sec. 604, § 751, 102 Stat. 3048, 3126 (1988)	Provides health professionals with incentives to staff health centers serving Native Hawaiians, Indians, and rural areas.
Nursing Shortage Reduction and Education Extension Act of 1988	Pub. L. No. 100-607, sec. 714-715, § 836(h), 102 Stat. 3048, 3161 (1988)	Authorizes grants to nursing schools, loan repayment incentives to encourage work with Native Hawaiians, Indians, or in rural areas, and scholarship grants to nursing schools whose students serve two years at an Indian Heath Service facility or a Native Hawaiian health center.
Handicapped Programs Technical Amendments Act of 1988	Pub. L. No. 100-630, sec. 102, § 616, 102 Stat. 3289, 3296 (1988)	Amends the Education of the Handicapped Act which provides handicapped Native Hawaiian (and other native Pacific basin) children with a free appropriate public education.
Business Opportunity Development Reform Act of 1988 Small Business	Pub. L. No. 100-656, sec. 207, § 8(a), 102 Stat. 3853, 3861 (1988)	Amends the Small Business Act by including economically-disadvantaged Native Hawaiian organizations as socially and economically disadvantaged small business concerns.
Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988	Pub. L. No. 100-690, sec. 2022, § 1912A, 102 Stat. 4181, 4194 (1988)	Amends the Public Health Service Act by establishing the formula to fund comprehensive substance abuse and treatment programs for Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Indian Health Care Amendments of 1988	Pub. L. No. 100-713, sec. 106, § 338J, 102 Stat. 4784, 4787 (1988)	Amends the Public Health Service Act by creating a Native Hawaiian Health Professions Scholarship program.
Department of Health and Human Services Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1166 (1989)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Department of Education Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1179 (1989)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.
National Museum of the American Indian Act	Pub. L. No. 101-185, 103 Stat. 1336 (1989)	Establishes the National Museum of the American Indian which will study Native Americans, collect, preserve, and exhibit Native American objects, provide a Native American research and study program, and authorizes the return of Smithsonian-held Native American human remains and funerary objects; Native Americans includes Native Hawaiians.
Department of Housing and Urban Development Reform Act of 1989	Pub. L. No. 101-235, §§ 601-605, 103 Stat. 1987, 2052 (1989)	Establishes commission to study and propose solutions to Indian, Alaska Native, and Native Hawaiian housing problems.
Veterans' Benefits Amendments of 1989	Pub. L. No. 101-237, sec. 312, § 3102, 103 Stat. 2062 (1989)	Authorizes the study of Native Hawaiian veterans' and other Native American veterans' participation in Veterans Affairs' home loan guaranty program.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Dire Emergency Supplemental Appropriation for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and Other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990	Pub. L. No. 101-302, 104 Stat. 213, 239 (1990)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian housing and provides grant money to Indian and Hawaiian Native youth for the Drug-Free Schools and Communities Act.
Native American Languages Act	Pub. L. No. 101-477, §§ 101-104, 104 Stat. 1152, 1154 (1990)	Adopts the policy to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages; Native Americans include Native Hawaiians.
Department of Health and Human Services Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Disadvantaged Minority Health Improvement Act of 1990	Pub. L. No. 101-527, sec. 4, § 782, 104 Stat. 2311, 2321 (1990)	Authorizes grants to health profession schools to assist programs of excellence for Native Hawaiians, other Native Americans, and specified ethnic groups.
Native American Graves Protection and Repatriation Act	Pub. L. No. 101-601, 104 Stat. 3048 (1990)	Provides for the protection of Native American graves and repatriation of funerary objects, human remains, and objects of cultural patrimony; Native Americans include Native Hawaiians.
Cranston-Gonzalez National Affordable Housing Act	Pub. L. No. 101-625, sec. 917, § 109, 104 Stat. 4079, 4398 (1990)	Authorizes appropriations for the Neighborhood Reinvestment Corporation which serves rural communities, Native Americans, Native Hawaiians, and other communities in need.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 401, § 338J(a), 104 Stat. 4662, 4668 (1990)	Amends the Public Health Service Act by providing scholarship assistance to Native Hawaiian students.
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 501-502, §§ 1507, 1510, 104 Stat. 4662, 4668 (1990)	Amends the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act by allowing interest and earnings to be used to carry out the Institute's responsibilities.
National Dropout Prevention Act of 1991	Pub. L. No. 102-103, sec. 311, § 103(b), 105 Stat. 497, 505 (1991)	Amends the Carl D. Perkins Vocational and Applied Technology Education Act by providing stipends to Native Hawaiian vocational students.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992	Pub. L. No. 102-139, 105 Stat. 736 (1991)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing.
Department of Health and Human Services Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Department of Education Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.
Department of Defense Appropriations Act 1992	Pub. L. No. 102-172, 105 Stat. 1150 (1991)	Amends the National Defense Authorization Act so that a disadvantaged small business concern includes a small business concern owned and controlled by socially and economically disadvantaged individuals, an Indian tribe, a Native Hawaiian organization, or an organization employing the severely disabled.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Dec. 11, 1991	Pub. L. No. 102-218, sec. 1, § 317, 105 Stat. 1671 (1991)	Amends title 38 (Veterans' Benefits) to designate the Chief Minority Affairs Officer as an adviser on the effect of policies, regulations, and programs on Native Hawaiians, other Native Americans, women, and minority groups.
ADAMHA Reorganization Act (Alcohol, Drug Abuse, and Mental Health Administration)	Pub. L. No. 102-321, sec. 203, § 1953, 106 Stat. 323, 409 (1992)	Amends the Public Health Services Act by requiring the State of Hawaī to contract with organizations which plan, conduct, and administer comprehensive substance abuse and treatment programs for Native Hawaiians.
Higher Education Amendments of 1992	Pub. L. No. 102-325, sec. 305, §§ 357(b)(7), 1406, 106 Stat. 448, 479, 818 (1992)	Amends the Higher Education Amendments of 1965 by authorizing Federal repayment of loan for nurses working in a Native Hawaiian Health Center (also in Indian Health Service); gives preference to Teacher Corps applicants intending to teach on Indian reservations or in Alaska Native villages or in areas with high concentrations of Native Hawaiians; also, authorizes biennial education survey on Native Hawaiians, other Native Americans, and other groups including the disabled, disadvantaged, and minority students.
Higher Education Facilities Act of 1992	Pub. L. No. 102-325, sec. 422, § 428J(a), 106 Stat. 448, 541 (1992)	Amends the Higher Education Act of 1965 by authorizing grants and fellowships to promote higher education of Indians, Alaska Natives, and Native Hawaiians, along with specified ethnic groups.
Job Training Reform Amendments of 1992	Pub. L. No. 102-367, sec. 401, § 401, 106 Stat. 1021, 1074 (1992)	Authorizes employment and recruitment preference for Native Hawaiians, Indians, and Alaska Natives for a new office that will administer Native American programs; also creates a Native American Employment and Training Council with membership of Indians, Alaska Natives, and Native Hawaiians that will solicit views on issues program operation and administration.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Older Americans Act Amendment of 1992	Pub. L. No. 102-375, sec. 201, § 201(c)(3), 106 Stat. 1195, 1203 (1992)	Amends the Older Americans Act Amendment of 1965 by creating an advocate for older Indians, Alaskan Natives, and Native Hawaiians to promote enhanced delivery of services and grants, and authorizes appropriations for these activities.
Native American Programs Act Amendments of 1992	Pub. L. No. 102-375, sec. 811, 822, §§ 803A, 811A, 106 Stat. 1195, 1295, 1296 (1992)	Amends Native American Programs Act by requiring the filing of annual report on the social and economic conditions of American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives, and authorizes appropriations for the Native American programs.
Department of the Interior and Related Agencies Appropriations Act, 1993	Pub. L. No. 102-381, 106 Stat. 1374 (1993)	Authorizes appropriations for the Alaska Native Culture and Arts Development Act which also provides funds for Native Hawaiians.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993	Pub. L. No. 102-389, 106 Stat. 1571 (1992)	Provides for appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing in carrying out functions under the Department of Housing and Urban Development Reform Act of 1989.
Department of Health and Human Services Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Specifies funding guidelines for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.
Department of Defense Appropriations Act, 1993	Pub. L. No. 102-396, 106 Stat. 1876 (1993)	Amends the Native Hawaiian Health Care Act of 1988 by establishing health goals for Native Hawaiians and scholarships for Native Hawaiian health students.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai‘i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 102-398, 106 Stat. 1953 (1992)	Agrees to the adoption of amendments enacted by the State of Hawai‘i to the Hawaiian Homes Commission Act of 1920.
Veterans' Medical Programs Amendments of 1992	Pub. L. No. 102-405, § 123, 106 Stat. 1972, 1982 (1992)	Requires development of a plan to treat veterans' post-traumatic stress disorder, especially the needs of Native Hawaiians, other Native Americans, women, and ethnic minorities.
Health Professions Education Extension Amendments of 1992	Pub. L. No. 102-408, sec. 102, § 739, 106 Stat. 1992, 2055 (1992)	Amends the Public Health Services Act by authorizing grants to health professions schools to support programs of excellence in health professions education for Native Hawaiians, other Native Americans, and minority individuals.
Nurse Education and Practice Improvement Amendments of 1992.	Pub. L. No. 102-408, sec. 102, § 846, 106 Stat. 1992, 2031 (1992)	Amends the Public Health Service Act by authorizing the repayment of school loans for nurses who work two years in an Indian Health Service health center, in a Native Hawaiian health center, in a public hospital, in a migrant health center, in a community health center, in a rural health clinic, or in a public or nonprofit private health facility.
Veterans' Home Loan Program Amendments of 1992	Pub. L. No. 102-547, sec. 8, §§ 3761-3764, 106 Stat. 3633, 3639 (1992)	Amends Title 38 by providing direct housing loans to Native American veterans (including Native Hawaiians) and includes the Department of Hawaiian Homelands in the definition of "tribal organization."
Housing and Community Development Act of 1992	Pub. L. No. 102-550, sec. 128, § 605, 106 Stat. 3672 (1992)	Authorizes appropriations for National Commission on American Indians, Alaska Natives, and Native Hawaiian housing.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Hawaii Tropical Forest Recovery Act.	Pub. L. No. 102-574, § 4, 106 Stat. 4593, 4597 (1992)	Establishes the Hawaii Tropical Forest Recovery Task Force which will make recommendations for rejuvenating Hawaii's tropical forests, including the traditional practices, uses, and needs of Native Hawaiians in tropical forests.
National Historic Preservation Act Amendments of 1992	Pub. L. No. 102-575, sec. 4002, 4006, §§ 2, 101, 106 Stat. 4600, 4753 (1992)	Amends the National Historic Preservation Act to protect Native Hawaiian, Indian, and Alaska Native religious and cultural sites, including authorizing direct grants to Indian tribes and Native Hawaiian organizations to preserve, stabilize, restore, or rehabilitate religious properties.
Veterans Health Care Act of 1992	Pub. L. No. 102-585, sec. 602, § 340B, 106 Stat. 4943, 4967 (1992)	Authorizes Native Hawaiian Health centers to purchase pharmaceuticals at the Federal government-negotiated price.
Department of Health and Human Services Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
100th Anniversary of the Overthrow of the Hawaiian Kingdom	Pub. L. No. 103-150, 107 Stat. 1510 (1993)	Acknowledges and apologizes for the United States' role in the overthrow of the Kingdom of Hawaii .
Goals 2000: Educate America Act	Pub. L. No. 103-227, sec. 2-3, 108 Stat. 125, 129 (1994)	Establishes National Education Goals for schools and students from diverse backgrounds, including Indians, Alaska Natives, and Native Hawaiians, the disabled, and limited English-speakers.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
School-to-Work Opportunities Act of 1994	Pub. L. No. 103-239, sec. 3-4, 108 Stat. 568, 572 (1994)	Establishes school-to-work activities to improve the knowledge and skills of youths from various backgrounds and circumstances, including disadvantaged students, students with diverse racial, ethnic, or cultural backgrounds, American Indians, Alaska Natives, Native Hawaiians, students with disabilities, students with limited-English proficiency, migrant children, school dropouts, and academically talented students.
Alaska Native Culture and Arts Development Act	Pub. L. No. 103-239, sec. 721, § 1521, 108 Stat. 568, 572 (1994)	Amends the Higher Education Act of 1986 by authorizing grants to organizations that primarily serve and represent Native Hawaiians or Alaska Natives to support Native culture and art programs.
Department of Health and Human Services Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian health.
Department of Education Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian education.
Department of Defense Appropriations Act, 1995	Pub. L. No. 103-335, 108 Stat. 2599 (1994)	Authorizes preference to Native Hawaiian contractors restoring Kahoʻolawe's environment.
Safe and Drug-Free Schools and Communities Act of 1994	Pub. L. No. 103-382, sec. 101, §§ 4004, 4011, 4118, 108 Stat. 3518, 3674, 3674, 3685 (1994)	Authorizes grants for Native Hawaiian-serving institutions to plan, conduct, and administer violence and drug prevention programs.
Native Hawaiian Education Act	Pub. L. No. 103-382, sec. 101, § 9201-9212, 108 Stat. 3518, 3794 (1994)	Recognizes that Native Hawaiians are indigenous people and authorizes, among other things, grants to assist Native Hawaiians in achieving national education goals.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Jacob K. Javits Gifted and Talented Students Education Act of 1994	Pub. L. No. 103-382, sec. 101, § 10201, 108 Stat. 3518, 3820 (1994)	Authorizes grants and/or contracts to Native Hawaiian organizations and Indian tribes to assist in carrying out programs or projects for gifted/talented students.
Improving America's Schools Act of 1994	Pub. L. No. 103-382, sec. 101, § 13102, 108 Stat. 3518, 3878 (1994)	Provides support, training, assistance to grant recipients to improve the quality of education for immigrants, migrants, the poor, American Indians, Alaska Natives, and Native Hawaiians.
Bilingual Education Act	Pub. L. No. 103-382, sec. 101, §§ 7101, 7104, 7136, 108 Stat. 3518, 3716, 3718, 3732 (1994)	Authorizes grants to implement new comprehensive bilingual education programs for Native American and Native Hawaiian languages.
Improving America's Schools Act of 1994 (Part E)	Pub. L. No. 103-382, sec. 101, § 7501, 108 Stat. 3518, 3745 (1994)	Authorizes subgrants from State and local governments to implement a bilingual education program for the ancestral languages of American Indians, Alaska Natives, and Native Hawaiians.
Native American Veterans' Memorial Establishment Act of 1994	Pub. L. No. 103-384, § 2, 108 Stat. 4067, 4067 (1994)	Establishes memorial to recognize contributions of Native American Veterans (American Indians, Native Alaskans, and Native Hawaiians).
Veterans' Benefits Improvements Act of 1994	Pub. L. No. 103-446, sec. 510, § 544, 108 stat. 4645, 4669 (1994)	Authorizes creation of a Center for Minority Veterans and Advisory Committee on Minority Veterans to be more responsive to the needs of Native Hawaiian, American Indian, Alaska Native, and ethnic minority veterans.
Hawaiian Home Lands Recovery Act	Pub. L. No. 104-42, §§ 201-06, 109 Stat. 353, 357 (1995)	Settles Department of Hawaiian Home Lands claims against the Federal government for the value of the lost use of lands by Native Hawaiians.
The Balanced Budget Down payment Act	Pub. L. No. 104-99, § 115, 110 Stat. 26, 29 (1996)	Authorizes appropriations to cover termination of Native Hawaiian and Alaska Native Cultural Arts
National Defense Authorization Act for FY 1996	Pub. L. No. 104-106, § 524, 110 Stat. 186 (1996)	Authorizes upgrading the Distinguished Service Cross to the Medal of Honor for World War II Native American Pacific Islander veterans (including Native Hawaiians).

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Child Care and Development Block Grant Amendment of 1996	Pub. L. No. 104-193, sec. 614, § 658P, 110 Stat. 2105, 2287 (1996)	Amends the Child Care and Development Block Grant Act of 1990 by authorizing Native Hawaiian organizations to apply for grants or enter into contracts with the Health and Human Services Secretary to improve child care, increase the availability of early childhood development, and increase before and after school care services.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997	Pub. L. No. 104-204, sec. 213, § 282, 110 Stat. 2874, 2904 (1996)	Authorizes the Housing Secretary to waive anti-discrimination provisions of the Cranston-Gonzalez National Affordable Housing Act for lands set aside under the Hawaiian Homes Commission Act, 1920.
Department of Health and Human Services Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988 and Older Americans Act of 1965.
Department of Education Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
National Museum of the American Indian Act Amendments of 1996	Pub. L. No. 104-278, sec. 4, § 11A, 110 Stat. 3355, 3356 (1996)	Amends National Museum of the American Indian Act by authorizing repatriation of Indian and Native Hawaiian sacred or funerary objects and cultural patrimony objects.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai‘i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 105-21, 111 Stat. 235 (1997)	Agrees to the adoption of amendments enacted by the State of Hawai‘i to the Hawaiian Homes Commission Act of 1920.
Department of Transportation and Related Agencies Appropriations Act, 1998	Pub. L. No. 105-66, 111 Stat. 1425 (1997)	Waives repayment of airport funds that were diverted for the betterment of American Indians, Alaska Natives, and Native Hawaiians.
Department of Health and Human Services Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for the Native Hawaiian Health Care Act and Older Americans Act of 1965.
Department of Education Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Museum and Library Services Technical and Conforming Amendments of 1997	Pub. L. No. 105-128, sec. 6, § 262, 111 Stat. 2548, 2549 (1997)	Amends Museum and Library Services Act by authorizing Hawaiian organizations eligible to receive grants (along with American Indian tribes) to electronically link libraries with education, social, or information services.
Workforce Investment Act of 1998	Pub. L. No. 105-220, § 166, 112 Stat. 936, 1021 (1998)	Authorizes grants to Indian Tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations, and Native Hawaiian organizations for employment and training activities.
Rehabilitation Act Amendments of 1998	Pub. L. No. 105-220, sec. 404, § 101 112 Stat. 936, 1163 (1998)	Amends the Rehabilitation Act of 1973 by requiring State agencies to consult with Indian Tribes, tribal organizations, and Native Hawaiian organizations before adopting any policies for vocational rehabilitation services.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Higher Education Amendments of 1998	Pub. L. No. 105-244, sec. 303, § 1001, 112 Stat. 1581, 1638 (1998)	Amends the Higher Education Act of 1965 by authorizing grants to improve education institutions' ability to serve Alaska Natives and Native Hawaiians.
Act of October 14, 1998	Pub. L. No. 105-256, sec. 12, § 10(b)(1), 112 Stat. 1896, 1899 (1998)	Amends the Native Hawaiian Health Care Improvement Act by requiring recipients of the Native Hawaiian Health Scholarship Program to work in the Native Hawaiian Health Care System.
Department of Health and Human Services Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations to carry out the Native Hawaiian Heath Care Act of 1988 and the Older Americans Act.
Department of Education Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Head Start Amendments of 1998	Pub. L. No. 105-285, sec. 117, § 650, 112 Stat. 2702, 2727 (1998)	Amends the Head Start Act by requiring the Secretary of Health and Human Services to prepare and submit a report concerning the condition, location, and ownership of facilities used, or available to be used, by Native Hawaiian Head Start agencies.
Assets for Independence Act	Pub. L. No. 105-285, §§ 401-416, 112 Stat. 2702, 2759 (1998)	Authorizes Native Hawaiian organizations (and State, local, and tribal governments) to conduct demonstration projects to evaluate the effects of savings, microenterprise, and home ownership on families and the community
Carl D. Perkins Vocational and Technical Education Act of 1998	Pub. L. No. 105-332, sec. 1, § 116, 112 Stat. 3076, 3095 (1998)	Authorizes grants to plan, conduct, and administer vocational programs for Native Hawaiians and other Native Americans.
Native American Programs Act Amendments of 1997	Pub. L. No. 105-361, sec. 3, § 803A, 112 Stat. 3278, 3278 (1998)	Amends the Native Hawaiian Revolving Loan fund to include a loan guarantee.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
National Park Service Concessions Management Improvement Act of 1998	Pub. L. No. 105-391, § 416, 112 Stat. 3497, 3516 (1998)	Promotes the sale of authentic American Indian, Alaska Native, and Native Hawaiian handicrafts and makes those revenues exempt from franchise fees.
Health Professions Education Partnerships Act of 1998	Pub. L. No. 105-392, sec. 101, § 736, 112 Stat. 3524, 3525 (1998)	Authorizes grants to assist schools with health professions education programs for Native Hawaiians, American Indians, Alaska Natives, and under-represented minorities.
Hawaiian Homelands Homeownership Act of 2000	Pub. L. No. 106-568, Sec. 201, 25 U.S.C. 4101 et seq.	Authorizes grants for affordable housing activities on Hawaiian Home Lands and loan guarantees for such housing
No Child Left Behind Act of 2001	Pub.L. No. 107-110, Sec. 701, 4117, 5521, 7201, 20 U.S.C. 7511	Authorizes grants for preservation and maintenacne of Native Hawaiian language

APPENDIX TO THE STATEMENT OF THE HONORABLE MARK BENNETT: "THE AUTHORITY OF CONGRESS TO ESTABLISH A PROCESS FOR RECOGNIZING A RECONSTITUTED NATIVE HAWAIIAN GOVERNING ENTITY," BY VIET D. DINH, GEORGETOWN UNIVERSITY LAW CENTER AND BANCROFT ASSOCIATES PLLC

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

Prepared for

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This memorandum addresses Congress' authority to enact S. 147, the proposed Native Hawaiian Government Reorganization Act of 2005 ("NHGRA"), which establishes a process for reconstituting and recognizing the Native Hawaiian governing entity. We conclude that Congress has the constitutional authority to enact the Native Hawaiian Government Reorganization Act of 2005.

Congress possesses plenary and exclusive power under the Constitution to enact special legislation to deal with Native Americans. This authority, inherent in the Constitution and explicit in the Indian Commerce Clause, art. I, § 8, cl. 3, and Treaty Clause, art. II, § 2, cl. 2, extends to dealings with Native Hawaiians, especially given the particular moral and legal obligations the United States assumed for its role in effecting a forcible end to the Kingdom of Hawaii in 1893.

Rice v. *Cayetano*, 528 U.S. 495 (2000), is not to the contrary. The Supreme Court there 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." *Id.* at 518. The conclusion that granting Native Hawaiians special voting rights in connection with the election of a state governmental official violates the Equal Protection Clause does not speak to whether Congress has the authority 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).

I. The Native Hawaiian Government Reorganization Act.

The stated purpose of the NHGRA is "to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the 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 prepare 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:

> (A) an individual who is one 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 (B) an individual who is one 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(8).

Through the preparation and maintenance of the roll of Native Hawaiians, the Commission 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. 147 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, especially given the moral and legal obligations the United States acquired for overthrowing the then-sovereign Kingdom of Hawaii in 1893.

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 explained recently, "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 authority 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). Other sources of constitutional authority include the Debt Clause, art. I, § 8, cl. 1, *see United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397 (1980); *see also Pope* v. *United States*, 323 U.S. 1, 9 (1944) ("The power of Congress to provide for the payment of debts, conferred by 8

of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary."); and the Property Clause, art. IV, § 3, cl. 2, *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 of Congress 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 power that this Court has described as 'necessary concomitants of nationality.' " *Lara*, 124 S. Ct. at 1634 (citing, *inter alia*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). *See also Morton* v. *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.") (emphasis added).

Plenary congressional authority to recognize Indian tribes extends to the restoration and reorganization of tribal sovereignty. In *Lara*, the Court held that Congress' broad authority with respect to Indians includes the power to enact

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1/ As discussed herein, *see infra* at 16-17, Congress in 1921 set aside 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' set aside.

legislation designed to "relax restrictions" on "tribal sovereign authority." 124 S. Ct. 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," and it is not for the federal judiciary to "second-guess the political branches' own determinations" in that regard. *Lara*, 124 S. Ct. at 205.

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 reorganization 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 elect 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. 147. 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 NHGRA 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." *Id.* § 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." *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).

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.) (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 concluded that it has such authority. *See* 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"); 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."). We conclude that courts will likely affirm these assertions of congressional authority. 2/

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 have 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

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2/ *Rice* v. *Cayetano* did not decide the issue. On the contrary, the Supreme Court in *Rice* expressly declined to answer the questions 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.

that the Pueblos were "beyond the range of congressional power under the Constitution." *Id.* at 49.

The Court first observed that "[n]ot 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. 3/

It cannot be said that the NHGRA is an arbitrary exercise of Congress' power to recognize and deal with this Nation's native peoples. Congress has expressly found, in the NHGRA and other statutes, 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

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"); *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."); *cf. Alaska* v. *Native Village of Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified is a question entirely for Congress.").

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").

Congress' authority to treat Native Hawaiians as American Indians is 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; Hawaiian Homelands Homeownership Act, 25 U.S.C. §§ 4221-4243; 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). No court has struck down any of these numerous legislative actions as unconstitutional.

That Congress has power to enact special legislation for Native Hawaiians is made clear by congressional action dealing with Native Alaskans, who -- like Native Hawaiians -- differ from American Indian tribes anthropologically, historically, and culturally. In 1971, Congress adopted the Alaska Native Claims Settlement Act ("ANSCA"), 43 U.S.C. §§ 1601-1629h, which is predicated on the view that Congressional power to deal with Native Alaskans 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 legislation. *See Alaska* v. *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

Native Alaskans, it follows that Congress has the same authority with respect to Native Hawaiians.

Finally, the history of the Hawaiian people confirms that the story of the Hawaiian people, although unique in some respects, 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. King Kamehameha had united the islands and "reasserted suzerainty over all lands." *Id.*

The Nineteenth Century is "a story of increasing involvement of westerners in the economic and political affairs of the Kingdom." *Id.* During this period, 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.

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 instrument of annexation, the so-called 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. *See id.* 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 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 brought decimation of the native population through foreign diseases; 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 it has the coterminous power to deal with the Native Hawaiian community as it has 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."). 4/

4/ In *Montoya* v. *United States*, 180 U.S. 261, 266 (1901), the Supreme Court stated that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular through sometimes ill-defined territory." In so stating, the Court in *Montoya* did not intend to, and did not, circumscribe Congress' authority to recognize Indian tribes. In any event, the community of Native Hawaiian people fit within the *Montoya* definition of a tribe: Native Hawaiians were, and are, of a "same or similar" race, had a unitary governmental system prior to is overthrow, and have inhabited the Hawaiian Islands.

Finally, Congress has found that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past; have never abandoned their claim to be a sovereign people; and have maintained a distinct cultural and social identity. *See* NHGRA § 2(13) ("[T]he Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum."); *id.* § 2(15) ("Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions"); *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); *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) (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").

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." *Rice*, 528 U.S. 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.

C. The Responsibility of the U.S. Government for Contributing to the Overthrow of the Hawaiian Kingdom Reinforces Congress' Moral and Legal Authority to Enact the NHGRA.

Congress' 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 the U.S. Minister to Hawaii, 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, the U.S. Minister to the sovereign and independent Kingdom of Hawaii 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, U.S. Minister 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 the orders of the U.S. Minister, "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.* In 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," *Morton* v. *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 (emphasis added). *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 Indians -- a native people who were overcome by force -- and that this obligation carries with it the authority to legislate with the welfare of Indians 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 deposition 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. 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).

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

The principal objection to the NHGRA -- that it classifies U.S. citizens on the basis of race, in violation of the constitutional guarantee of equal protection, *cf. Rice* v. *Cayetano, supra* 5/ -- misses the mark. Because the NHGRA is an exercise of Congress' Indian affairs powers, this legislation is "political rather than racial in nature." *Morton* v. *Mancari*, 417 U.S. at 553 n.24. 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 * * *

5/ *Rice* does not support this objection. There, the Court held that the Fifteenth Amendment to the Constitution -- which states that the right of U.S. citizens to vote shall not be denied or abridged by the United States or by any state on account of race or color -- did not allow the State of Hawaii to limit to Native Hawaiians eligibility to vote in elections to elect trustees for the Office of Hawaiian Affairs, a state governmental agency. *See Rice*, 528 U.S. at 523-524. *Rice* is inapposite because the reorganized Native Hawaiian governing entity will be neither a United States nor a Hawaiian governmental entity, but rather the governing entity of a sovereign native people.

> 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 *Morton* v. *Mancari*, 417 U.S. at 551-552).

In *Morton* v. *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. In rejecting that claim, 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), and 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, the NHGRA can be "rationally tied" to Congress discharge of its duty with respect to the native people of Hawaii.

In any event, 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).

* * *

The Supreme Court has confirmed that Congress has broad, plenary constitutional authority to recognize indigenous governments and to help restore

and restructure 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.

POSITION STATEMENT OF THE ATTORNEY GENERAL OF THE STATE OF HAWAII

H.R. 309/S. 147 (THE "AKAKA BILL") IS CONSTITUTIONAL

I. Introduction

From our Nation's founding, Congress and the Supreme Court have recognized a special obligation to America's first inhabitants and their descendants -- over whose aboriginal homelands the Nation has extended its domain -- and the Court has held that Congress is empowered to honor that obligation as it sees fit. Congress has recognized that this obligation extends not only to the indigenous people of the lower 48 states, but also to Alaska Natives, even though they are historically and culturally distinct from American Indians, and until recently were not formally recognized as "Indian tribes." And Congress has expressly "affirm[ed] the trust relationship between the United States and Native Hawaiians" -- the "indigenous people with a historical continuity to the original inhabitants of [Hawaii] whose society was organized as a Nation prior to . . . 1778." 42 U.S.C. § 11701(1), (13).

Congress is now considering important legislation (S. 147) that would formally recognize the special status of Native Hawaiians already recognized in numerous prior enactments. Congress may honor, and has honored, the special obligation to indigenous Hawaiians, just as Congress and many states have for centuries attempted to do with respect to America's other indigenous people. Indeed, it would be discriminatory to hold that indigenous Hawaiians may -- or, as some have argued, must -- be treated differently from all other indigenous people.

As discussed below, there is no basis in the Constitution to establish such an unequal regime, and to compound the legitimate, congressionally recognized grievances of Hawaiians by according them second-class status among the Nation's indigenous people. We are aware of no court that has ever invalidated Congress's exercise of its plenary power to recognize special trust relationships with indigenous people of America, and there is no reason to believe any court would reach a different result as to Native Hawaiians. 1/

II. Historical Background

To understand why indigenous Hawaiians should be accorded the same treatment as other indigenous peoples, it is helpful to understand their history. While in some respects unique, the history of the indigenous people of Hawaii fits the same basic pattern of events that mark the history of America's other aboriginal people. Westerners "discovered" the land centuries after humans had first arrived there and organized a society; the newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and

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1/ Rice v. Cayetano, 528 U.S. 495 (2000), did not disturb Congress' findings regarding Native Hawaiians or address Congress' power to recognize a Native Hawaiian governing entity or a trust relationship between the United States and Native Hawaiians. That case addressed a different issue -- whether the Fifteenth Amendment barred the State of Hawaii ("State") from limiting to Native Hawaiians the franchise for trustees of the Office of Hawaiian Affairs ("OHA"). The Court held that because OHA is a state agency, and election of its trustees cannot be characterized as "the internal affair of a quasi-sovereign," the Fifteenth Amendment prohibited the challenged franchise restriction (and would have prohibited an equivalent one for tribal Indians). Id. at 522. The Court expressly declined to decide whether Congress has recognized a trust relationship between the United States and Native Hawaiians, and did not address whether Congress has the power to grant such recognition. Id. at 520.

there eventually came an acknowledgment on the part of the new sovereign -- the United States -- that with the exercise of dominion over a land that others had once known as theirs came a special obligation to and relationship with those once-sovereign, indigenous people. Rice, 528 U.S. at 500-08.

It is believed that Hawaii's first inhabitants migrated here from other islands in the South Pacific, or perhaps even from the Americas, more than a millennium ago. See id. at 500; 1 Ralph S. Kuykendall, The Hawaiian Kingdom 3 (1968); Thor Heyerdahl, American Indians in the Pacific 161-68 (1952). They "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion," and were "organized as a Nation." 42 U.S.C. § 11701(1), (4); accord 20 U.S.C. § 7902(1). The first recorded Western contact with this society occurred in 1778, when Captain James Cook happened upon Islanders whom he and his crew called "Indians." See 1 Kuykendall, supra, at 3-28; Rice, 528 U.S. at 500.

Like the second-comers to the American mainland, Cook and his followers wrought radical changes in the aboriginal society. From 1795 to 1810, Kamehameha I brought the Islands under his control, and established the Kingdom of Hawaii. See id. at 501. Over the following decades, the communal land tenure system was dismantled, and the Islands' four million acres of land divvied up. Id. at 502. The King set aside 1.5 million acres for the Island chiefs and people, known as "Government lands," and kept a million acres for himself and his heirs, known as "Crown lands." The remaining 1.5 million acres were conveyed separately to the Island chiefs. Foreigners not only acquired large tracts of now "private" land, but

gained great economic and political influence; meanwhile, the population and general condition of indigenous Hawaiians declined rapidly. See Neil M. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 848-61 (1975); Lawrence H. Fuchs, Hawaii Pono: A Social History 251 (1961). The United States recognized the Kingdom as a sovereign and independent country, and entered into treaties with it. See Rice, 528 U.S. at 504; Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993).

In 1893, the Kingdom was overthrown by American merchants. Rice, 528 U.S. at 504-05. In furtherance of this coup d'etat, the U.S. Minister to Hawaii, John L. Stevens, caused U.S. Marines to land in Honolulu and position themselves near Iolani Palace. This had the desired effect and, on January 17, 1893, Queen Liliuokalani relinquished her authority -- under protest -- to the United States. See id. at 505. The revolutionaries formed the Republic of Hawaii and sought annexation to the United States. Id. But, in Washington, President Cleveland refused to recognize the new Republic, and denounced -- as did Congress a century later -- the role of United States agents in overthrowing the monarchy, which he likened to an " 'act of war, committed . . . without authority of Congress,' " and called a " 'substantial wrong.' " 107 Stat. at 1511 (quoting address); see Rice, 528 U.S. at 505; 42 U.S.C. § 11701(7)-(9).

The Republic claimed title to the Government and Crown lands, without compensating the Queen or anyone else. See Levy, 63 Cal. L. Rev. at 863. On July 7, 1898, the Republic realized its goal of annexation under the Newlands Joint Resolution. See Rice, 528 U.S. at 505. As part of the annexation, the

Republic "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign," to the United States. 107 Stat. at 1512; see Rice, 528 U.S. at 505. As Congress has recognized, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States." 107 Stat. at 1512. Indeed, they were given no say in the matter.

The Territory of Hawaii was established in 1900. Rice, 528 U.S. at 505. The Organic Act reaffirmed the cession of Government and Crown lands to the United States, and put the lands "in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress." Organic Act, § 91, 31 Stat. 141 (1900); see Rice, 528 U.S. at 505. It did not address -- let alone attempt to resolve -- the land claims of indigenous Hawaiians. Hawaii remained a Territory until 1959, when it entered the Union. Id. at 508.

By the time the Stars and Stripes was raised over Hawaii in 1898, the era of treaty-making with the indigenous people of the American continent had come to an end. As a result -- and as is true with respect to Alaska Natives -- the United States never entered into treaties with indigenous Hawaiians after 1898. Similarly, Congress never formally recognized or dealt with Hawaiians as "Indian tribes" under current statutory or executive definitions of that term, or attempted to sequester them on reservations. Yet -- as is true with respect to Alaska Natives -- Congress has in numerous enactments recognized that it has a special relationship

with indigenous Hawaiians that is, for purposes of Congress' constitutional power to deal with "Indian tribes," the same as its relationship with formally recognized tribes. See infra, Section VI.

In 1921 Congress passed the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). The HHCA placed about 200,000 acres of the lands that the Republic ceded to the United States in 1898 under the jurisdiction of the Hawaiian Homes Commission -- an arm of the Territorial Government -- to provide residential and agricultural lots for Native Hawaiians with 50% or more Hawaiian blood. HHCA § 203. Congress found support for the HHCA "in previous enactments granting Indians . . . special privileges in obtaining and using the public lands," H.R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920), and has since found that the HHCA "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13). Accord 20 U.S.C. § 7902(8). 2/

Congress took a more elaborate approach in the Admission Act. First, it conveyed to the State the 200,000 acres of Hawaiian Home Lands set aside for the benefit of the Native Hawaiians under the HHCA and -- "[a]s a compact with the United States relating to the management and disposition of [those] lands" -- required the State to adopt the HHCA as part of its own constitution. Admission

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2/ Testifying in support of the HHCA, Secretary of the Interior Franklin D. Lane analogized Native Hawaiians to American Indians. See Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii, 66th Cong. 129-30 (1920) (basis for special preference to Native Hawaiians is "an extension of the same idea" relied upon to grant such preferences to American Indians); H.R. Rep. No. 839, supra, at 4 ("the natives of the islands . . . are our wards . . . for whom in a sense we are trustees").

Act, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959) ("Admission Act"). Second, it conveyed to the State the bulk of the other lands that the Republic ceded to the United States in 1898 (the so-called "section 5(f) lands"), but required the State to hold these lands "as a public trust" for, inter alia, "the betterment of the conditions of native Hawaiians, as defined in the [HHCA], . . . in such a manner as the constitution and laws of . . . [Hawaii] may provide." Admission Act, § 5(b), (f); see Rice, 528 US. at 507-08. Congress left with the federal government the ultimate authority to enforce this trust by authorizing the United States to bring suit against the State for any "breach of [the] trust." Admission Act, § 5(f).

Congress did not stop there. "In recognition of the special relationship which exists between the United States and the Native Hawaiian people, [it] 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). Thus, Congress has expressly included Native Hawaiians in scores of statutory programs benefiting indigenous people generally. See 42 U.S.C. § 11701(19)-(20) (listing statutes); 20 U.S.C. § 7902(13)-(16) (same); Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol. Rev. 95, 106 n.67 (1998). 3/

In 1993, Congress passed a Joint Resolution signed into law "apologiz[ing] to Native Hawaiians" for the United States' role in the coup, and "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at

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3/ See, e.g., 20 U.S.C. §§ 80q(8), 80q-11; id. §§ 4401, 4441; id. § 7117; id. §§ 7511-17; 25 U.S.C. §§ 2902(1), 2903; id. § 3002; 42 U.S.C. § 254s; id. § 2911a; id. § 3057h; Apology Bill, 107 Stat. at 1513.

1513. The law specifically acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to . . . the land," that land was taken from Hawaiians without their consent or compensation, and that indigenous Hawaiians have "never directly relinquished their claims . . . over their national lands." Id. In other recent acts, Congress has expressly affirmed the "special" -- and "trust" -- relationship between the United States and Hawaiians, and has specifically recognized Hawaiians as "a distinct and unique indigenous people." 42 U.S.C. § 11701(1), (13), (15), (16), (18); accord 20 U.S.C. § 7902(1), (10). For example, when it recently reenacted the Native Hawaiian Education Act ("NHEA"), 115 Stat. 1425, 1934 (2002), 20 U.S.C. §§ 7511-17, Congress stated that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship," id. § 7512(12)(B), and expressly found that the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives." Id. § 7512(12)(D); accord Hawaiian Homelands Homeownership Act of 2000 ("HHHA"), Pub. L. No. 106-568, § 202(13)(B), 114 Stat. 2872 (2000). 4/

4/ A court would give deference to these Congressional findings. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). In addition, they are independently supported by the testimony of experts, including in recent and pending litigation. See, e.g., Office of Hawaiian Affairs Defendants' Submission of Corrected Declarations of Davianna Pomaika'i McGregor at 25-38 ("McGregor Decl.") and of Jon K. Matsuoka ("Matsuoka Decl."), Arakaki v. Lingle, U.S. Dist. Ct. for the Dist. of Haw., Civ. No. 01-00139 SOM-KSC (filed May 14, 2003).

III. Congress Has Plenary Power to Recognize a "Special Trust Relationship" with Any of the Indigenous Peoples of America

Congress has "plenary power over Indian affairs." S. Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). As explained below, that power extends to Congressional recognition of the United States' special trust relationship with indigenous Hawaiians. The power is, in fact, so broad, that we have been unable to identify any case in which a court declared invalid Congress' exercise of it. See also Felix Cohen, Handbook of Federal Indian Law 3-5 (1982) ("No congressional or executive determination of tribal status has been overturned by the courts . . . .").

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." Morton v. Mancari, 417 U.S. 535, 551-52 (1974). It derives from the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3), e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 531 n.6 (1998); the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); the Property Clause (U.S. Const. art. IV, § 3, cl. 2), e.g., United States v. Kagama, 118 U.S. 375, 379-80 (1886); the Debt Clause (U.S. Const. art. I, § 8, cl. 1), e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980); see Pope v. United States, 323 U.S. 1, 9 (1944); and the Foreign Commerce Clause (U.S. Const. art. I, § 8, cl. 3), which authorizes Congress to legislate on account of the separate "Nation" that Hawaiians comprised both before and after 1778. 42 U.S.C. § 11701(1).

This authority is not limited by the words "Indian tribes" in the Indian Commerce Clause. In empowering Congress with the authority to single out

and deal with the indigenous societies they knew as "Indians" or "tribes," the Framers did not intend to restrict Congress' authority to deal with the extension of sovereignty over indigenous groups of which they may never have heard, but which would pose the same basic issues as the Indians occupying the 1789 frontier. During colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789). That is whom Columbus thought he came upon when he discovered America. The Framers -- and generations before them -- of course knew that Columbus had not reached India, but they used "Indian" to refer to "the inhabitants of our Frontiers." Declaration of Independence ¶ 29 (1776). 5/ It is not surprising, then, that Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Kuykendall, supra, at 14 (quoting officer journal).

The meaning of the word "tribe" also demonstrates that Congress was given broad powers to recognize and deal with all indigenous people that might inhabit the frontiers of the expanding nation. At the founding, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Sheridan, supra. 6/ That is -- perhaps not coincidentally -- how Congress has

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5/ See also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"); Roger Williams, A Key into the Language of America 84 (1643) (aboriginals were "Natives, Savages, Indians, Wild-men," etc.); The First Three English Books on America 242 (Edward Arber ed. 1835) ("Indians" were " 'all nations of the new founded lands.' ") (quoting Gonzalo Fernandez de Oveido y Valdez, De La Natural Hystoria de Las Indias (1526)).

6/ See II Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) (same); John Walker, A Critical Pronouncing Dictionary and Expositor of the

described Hawaiians, and fittingly so. See 42 U.S.C. § 11701(1); 20 U.S.C. § 7902(1). That "tribe" may mean something else today -- in either legal or lay terms -- should not circumscribe the authority conferred upon Congress to deal with distinct groups of indigenous people by those who ratified the Constitution in 1789.

Congress has historically exercised its Indian affairs power over indigenous people not organized into tribes (at least under then-prevailing definitions), or whose tribal status had been terminated -- and the Supreme Court has upheld that exercise of authority. See Cohen, supra, at 6 ("Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages. . . . Where no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties."). Thus, for most of our history (until 1993), most Alaska Native Villages have not been recognized by the Bureau of Indian Affairs ("BIA") as "Indian tribes," see Hynes v. Grimes Packing Co., 337 U.S. 86, 110 n.32 (1949) ("Indian tribes do not exist in Alaska in the same sense as in [the] continental United States." (quotation marks omitted)); yet the Supreme Court has never questioned Congress' authority to single out and deal with Alaska Natives as such.

English Language (1791) (same); William Perry, The Royal Standard English Dictionary 515 (1788) (defining "tribe" as "a certain generation of people"). These definitions are consistent with the way in which Chief Justice Marshall referred to Indian tribes in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). He analogized them to "nations" and explained that "[t]he very term 'nation,' so generally applied to [Indian tribes], means 'a people distinct from others.' " Id. at 561. As discussed below, Hawaiians were not only a "Nation," but were and remain a "distinct and unique indigenous people." 42 U.S.C. § 11701(1).

See, e.g., Native Village of Venetie, 522 U.S. at 523-24 (discussing the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-27 ("ANCSA")); see generally David S. Case, Alaska Natives and American Laws 195-222 (1984) (discussing federal programs for Alaska Natives).

The same goes for Congress' efforts with respect to Pueblos. In United States v. Joseph, 94 U.S. 614, 617 (1876), the Supreme Court held that "pueblo Indians, if, indeed, they can be called Indians," could not "be classed with the Indian tribes for whom the intercourse acts were made." Yet in United States v. Sandoval, 231 U.S. 28 (1913), the Court rejected the argument that Congress therefore lacked the authority to deal with Pueblos as Indians or tribes. The Court recognized that Pueblos were different from other Indians -- they were citizens, held title to their lands, and lived in "separate and isolated communities." Id. at 39, 47-48. But "[b]e this as it may," Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." Id. at 39. And -- as long as it "cannot be said to be arbitrary" -- Congress' assertion of such a "guardianship" relationship "must be regarded as both authorized and controlling." Id. at 47.

In United States v. John, 437 U.S. 634 (1978), the Court affirmed Congress' power to subject Indians remaining in Mississippi to different criminal laws -- even if they did not belong to formal tribes in the statutory sense. "Neither the fact that [the Indians] are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." Id. at 653. Nor

did the fact that the Executive had previously taken the position that the Indians could not "be regarded as a tribe." Id. at 650 n.20. See also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85, 88 (1977) (upholding Congressional decision to exclude group of Delaware Indians and their descendants from distribution of certain funds, but noting without disapproval a previous enactment in which Congress had included that group even though they were "not a recognized tribal entity, but . . . simply individual Indians with no vested rights in any tribal property"); United States v. McGowan, 302 U.S. at 537 (Congress' authority to single out Indians for special treatment extends to "colony" established for Indians previously "scattered" about Nevada lacking any independent tribal status).

This Congressional power depends not on any particular group's formal designation as a tribe, but derives from the special relationship that the United States has assumed with Native Americans. 7/ Chief Justice Marshall

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7/ Other cases discuss the meaning of the word "tribe" in statutes, see Montoya, 180 U.S. at 264 (discussing statutory definition for purposes of whether Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (addressing whether tribe was subject to equal protection guarantee of the Indian Civil Rights Act), or merely describe particular Indian tribes in other unrelated contexts, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (discussing treatment of Indians under federal statutes in context of limiting state's power to legislate in respect of Indians); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 19 (1831) (describing Cherokee nation in context of deciding that it is not a "foreign state" for purposes of Supreme Court jurisdiction over controversies "between a state or citizens thereof and a foreign state"); Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) (whether Alaskan village had sovereign immunity); United States v. Kagama, 118 U.S. 375, 383 (1886) (whether federal courts have jurisdiction over murder of one Indian by another on reservation). To the extent that many of these cases preceded the Court's later broad construction of Congress' power in this area, see Sandoval, 231 U.S. at 46 (Congress' power limited only by the condition that it not act "arbitrarily"); Yankton Sioux Tribe, 522 U.S. at 343 (Congress' power is

recognized this relationship in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), when he analogized the relationship between Native Americans and the United States to that of a "ward to his guardian." Id. at 17. In subsequent cases, the Court has acknowledged that this relationship stems in part from the fact that, in expanding westward with the frontier, the Federal Government "took possession of [Indians'] lands, sometimes by force, leaving them . . . needing protection." Bd. of Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943). See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); United States v. Kagama, 118 U.S. at 384. See also Morton v. Ruiz, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.").

IV. Courts Review an Exercise of Congress' Power to Deal with Native Americans Under a Deferential Standard

"It is for [Congress], and not for the courts," to determine when the United States should assume such a relationship with an indigenous people, and to decide "when the true interests of the Indian require his release from such condition of tutelage." United States v. Candelaria, 271 U.S. 432, 439 (1926) (quotation omitted). Accord United States v. Chavez, 290 U.S. 357, 363 (1933); United States v. Nice, 241 U.S. 591, 597 (1916). Likewise, the Constitution gives Congress -- not the

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"plenary"), of course they should not be construed as narrowing that power. More to the point, these cases do not even purport to limit Congress' constitutional authority to recognize a trust relationship with an Indian tribe. They simply do not address the scope of that power at all.

courts -- authority to acknowledge and extinguish claims based on aboriginal status. Congress may exercise that power based upon its judgment. Even when there is "no legal obligation[ ]" to redress such wrongs, Congress may make such amends as "its judgment dictates." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 358 (1945) (Jackson, J., concurring). "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization," and Congress may address such acts "as a matter of grace, not because of legal liability." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-82 (1955); see Blackfeather v. United States, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Indeed, many Supreme Court decisions -- including recent ones like Native Village of Venetie, 522 U.S. at 534 -- treat the exercise of Congress' authority over Indian affairs as something at least akin to a "political question." See id. ("Whether the concept of Indian country should be modified is a question entirely for Congress." (emphasis added)).

A court thus would review with great deference Congress' decision to recognize the United States' special trust relationship with Native Hawaiians. As the Court said in Sandoval, "the Constitution expressly authorize[s] Congress to regulate commerce with the Indian tribes," and thus "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the

courts." 231 U.S. at 45-46 (emphasis added). A court will not strike down such a congressional decision unless it is "arbitrary." Id. at 47. To our knowledge, no court has done so. See also Cohen, supra, at 3-5. As discussed below, Congress' decision to recognize Native Hawaiians as sufficiently similar to Native Americans easily passes this deferential test.

V. The Constitution Does Not Require Congress to Treat Indigenous Hawaiians Differently from Other Indigenous Groups

It would be wrong to relegate Hawaiians to second-class status among America's indigenous people by denying Congress the authority to address the wrongs it and the Supreme Court already have recognized have been inflicted upon Hawaiians. See 107 Stat. at 1511-13; Rice, 528 U.S. at 505-06. Indeed, Congress has expressly found that "[its] authority . . . under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17) (emphasis supplied). That finding, and the recognition of a Native Hawaiian governing entity proposed in S. 147, more than satisfies the deferential standard set forth in Sandoval, for it is certainly not arbitrary for Congress to conclude that Hawaiians are a "distinctly Indian community."

The Hawaiian people, just like the Indians, are native indigenous people, whose lands were taken "by force, leaving them a . . . people, needing protection against the selfishness of others." Mancari, 417 U.S. at 552. First, it is

beyond serious dispute that Hawaiians are a distinct and indigenous people. 8/ And, as discussed above, Hawaiians had their lands and sovereignty taken from them by force, leaving them vulnerable. See Apology Resolution, 107 Stat. at 1512-73; HHHA § 202(13)(A) (Hawaiians "never relinquished [their] claim to sovereignty or their sovereign lands"); Rice, 528 U.S. at 505.

Even today, Native Hawaiians remain remarkably distinct as a people, particularly considering a history characterized by unceasing outside pressure to accommodate European and American interests. See U.S. Dep'ts of Justice & Interior, From Mauka to Makai: The River of Justice Must Flow Freely 4 (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000) (finding based on reconciliation process mandated by Public Law Number 103-150 (1993) 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"); OHA v. HCDCH, Civ. No. 94-0-4207 (SSM) (Haw. 1st Cir. Dec. 5, 2002), slip op. at 45 ("The

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8/ See HHHA, § 202(13)(B) (Hawaiians are "the indigenous people of a once sovereign nation"); Rice, 528 U.S. at 500 ("[T]he first Hawaiian people . . . were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. When England's Captain Cook 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."); 107 Stat. at 1512 (referring to "the indigenous Hawaiian people"); Naliielua v. Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States."), aff'd, 940 F.2d 1535 (9th Cir. 1991); 20 U.S.C. § 7902(1) ("Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago . . . ."); 42 U.S.C. § 11701(1) (same); McGregor Decl., supra, at 25-38; Matsuoka Decl., supra.

Native Hawaiian People continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices, and institutions."); 20 U.S.C. § 7512(20) (Native Hawaiians "are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions."); McGregor Decl., supra, at 25-38 (generally discussing Native Hawaiians' enduring cultural distinctness and resistance to assimilation, particularly in rural areas); Matsuoka Decl., supra.

In Montoya v. United States, 180 U.S. 261 (1901), the Supreme Court defined "tribe" for statutory purposes as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Id. at 266. That definition did not purport to restrict Congress' constitutional power to recognize an indigenous group; it merely provided a statutory definition of "tribe" that was limited to the purposes of the statute at issue: whether the Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians belonging to "a band, tribe, or nation in amity with the United States." Id. at 264. But a court that applied even this narrow definition would find that Native Hawaiians meet all three of its prongs.

First, because Native Hawaiians are descended from common ancestors who settled the Hawaiian islands centuries before European contact, they are of the same or similar "race," at least as the Court in 1901 would have understood that word. See Rice, 528 U.S. at 514-15 (citing shared "ethnic

backgrounds" and "physical characteristics" of "Native Hawaiians). Second, Native Hawaiians certainly inhabit a particular territory, the Hawaiian Islands. In fact, the territory they inhabit, and the more specific claim they have to particular territory -- the 200,000 acres of Hawaiian Homelands and the 1,800,000 acres of section 5(f) lands -- are more precisely defined than those of many Indian tribes. 9/

Third, Native Hawaiians lived in a self-governing community until Western conquest wrested that community and their sovereignty from them. See 107 Stat. at 1510, 1512 ("prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion"); Rice, 528 U.S. at 500. In recent years the Native Hawaiian community has taken steps to reorganize itself as a sovereign government. 10/ Indeed,

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9/ Cf. Encyclopedia of North American Indians – Cherokee ("At the time of European contact, the Cherokees . . . controlled more than forty thousand square miles of land" in "parts of eight present states"), available at http://college.hmco.com/history/readerscomp/naind/html/na_006500_cherokee.htm; Encyclopedia of North American Indians – Ojibwa (noting that Ojibwas "are spread over a thousand miles of territory" and, although "classed as one people," are "divided into about one hundred separate bands or reservation communities"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026100_ojibwa.htm.

10/ In 1978, the Hawaiian people through a Constitutional Convention created, in OHA, a mechanism for gaining greater political independence and control over their affairs. OHA provided for "accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people." I Proceedings of the Const. Convention of Hawaii of 1978 (Stand. Comm. Rep. No. 59) at 646. The Convention recognized "the right of native Hawaiians to govern themselves and their assets," id., and expressly "look[ed] to the precedent of other native peoples" who "have traditionally enjoyed self-determination and self-government . . . . Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of

advancing that process is a core purpose of S. 147. See S. 147, 109th Cong. (May 16, 2005), §§ 2(19), 4(b), 7. The Constitution does not limit Congress' Indian affairs power to groups with a particular governmental structure. See Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) ("Some bands of Indians, for example, had little or no tribal organization, while others . . . were highly organized" (footnote omitted)); see Cohen, supra, at 6. That is logical, because American conquest and dominion have meant that no Indian tribe remained fully sovereign. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 n.9 (1st Cir. 1975) ("test of tribal existence" does not turn on "whether a given tribe has retained sovereignty in [an] absolute sense"). Since it is well-accepted that Congress has "plenary authority" to "eliminate the powers of local self-government which the tribes otherwise possess," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978), it may deal with "Indians upon a tribal basis," even after their "tribal relation[s] ha[ve] been dissolved." Chippewa Indians of Minnesota v. United States, 307 U.S. 1, 4 (1939).

This is similar to Congress' approach to Alaska Natives. In ANCSA Congress gave Alaska Natives fee ownership over certain aboriginal lands -- rather

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regulation over their internal and social problems." I Proceedings, supra (Comm. of the Whole Rep. No. 13) at 1018. "The establishment of the Office of Hawaiian Affairs," the Convention explained, "is intended to grant similar rights to Hawaiians." Id. Congress has recognized that the "constitution and statutes of the State of Hawaii . . . acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust," and "reaffirm and protect the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language." 42 U.S.C. § 11701(3)(B); see 20 U.S.C. § 7902(21).

than subjecting such lands to the federal superintendence that denotes "Indian country" -- but Congress has continued the federal guardianship over Alaska Natives in other respects. See Native Village of Venetie, 522 U.S. at 533-34. With respect to Hawaii, Congress has recognized that the once-sovereign Hawaiians were deprived of their right to self-determination. It may constitutionally determine, as it has in the past and as S. 147 would continue to do, that they should remain subject to a special relationship with the United States.

It would be perverse for a court to hold that Congress was precluded from exercising its authority to recognize Native Hawaiians as having a status similar to Native Americans and Alaska Natives on the grounds that the conquest of Native Hawaiians was so complete that they ceased to be a self-governing community. See Rice, 528 U.S. at 524 ("the culture and way of life of [the Hawaiian] people [were] all but engulfed by a history beyond their control"). In its Supreme Court amicus brief in Rice, the United States agreed with us on this point: "It would be extraordinarily ironic if the very reasons that the United States has a trust responsibility to the indigenous people of Hawaii served as an obstacle to the fulfillment of that responsibility. Fortunately, the Constitution is not so self-defeating. Congress may fulfill its trust responsibilities to indigenous peoples, whether or not they currently have a tribal government as such." Brief for the United States as Amicus Curiae, Rice v. Cayetano, 1999 WL 569475, at *18 (1999). Indeed, it is precisely those indigenous groups that have lost their sovereignty and the means to govern themselves for whom the United States acquires a heightened trust responsibility. See Seber, 318 U.S. at 715 (once the United States overcame

the Indians and took possession of their lands, it "assumed the duty of furnishing . . . protection, and with it the authority to do all that was required to perform that obligation"); Sandoval, 231 U.S. at 45-46 (United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities"); Kagama, 118 U.S. at 384 (through its course of dealings with Indian Tribes, the United States acquired a "duty of protection" for the "remnants" of once sovereign nations).

Indeed, Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992), although not directly pertinent to the question of Congress' power to recognize a special trust relationship, is instructive on this issue. There, an Alaskan village argued that it was a tribe for purposes of sovereign immunity. That question did not give the court occasion to address whether Congress had the power to recognize the village as a tribe. Rather, the court merely noted "certain factors that may be considered in determining whether an Alaskan village constitutes a tribe" and stated that "we have required that the group claiming tribal status show that they are 'the modern-day successors' to a historical sovereign entity that exercised at least the minimal functions of a governing body." Id. at 635 (citation omitted). Nonetheless, Native Hawaiians satisfy even that differently geared test because, as a group, they are the "modern-day successors" to the sovereign Hawaiian Kingdom. And, to the extent that the Hawaiian people today do not exercise "functions of a governing body," that is no accident -- it is so precisely because their sovereignty was destroyed by the forced act of annexation perpetrated by the United States a century ago. See 107 Stat. at 1511; 42 U.S.C. § 11701(7)-(9).

For these reasons, Congress' recognition of the wrongs inflicted upon Hawaiians, see Apology Bill; 42 U.S.C. § 11701(8)-(11), and efforts to redress such wrongs -- including by according Hawaiians the same special treatment accorded American Indians -- are a constitutional and honorable attempt to do "what in the conditions of this twentieth century is the decent thing." Northwestern Bands of Shoshone Indians, 324 U.S. at 355 (Jackson, J., concurring).

That Congress granted indigenous Hawaiians citizenship and subjected them to the same laws as other citizens does not alter the special legal and political status that Hawaiians occupy under federal law. Congress treated Alaska Natives in a similar fashion, see Metlakatla Indian Cmty. v. Egan, 369 U.S. at 51, and "the extension of citizenship status to Indians does not, in itself, end the powers given to Congress to deal with them." John, 437 U.S. at 653-54; see Nice, 241 U.S. at 598 ("Citizenship is not incompatible with tribal existence or continued guardianship . . . ."). If it did, Congress would not have the power to deal with any Indians, because all of them were granted citizenship in 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

The fact that since 1778 Hawaiian society has included nonindigenous people also does not defeat Congress' plenary power to recognize a special trust relationship with Native Hawaiians. Cf. United States v. S. Dakota, 665 F.2d 837, 841 (8th Cir. 1981) (housing project was a "dependent Indian community" within meaning of federal statute although residents included non-Indians, had "social and economic connections" with the city, and relied on the city for all vital services); United States v. Mound, 477 F. Supp. 156, 159 (D.S.D. 1979) (similar);

Encyclopedia of North American Indians – Osage (noting presence of "many non-Indians" living "among the Osages before the tribal lands were allotted in 1906"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026800_osage.htm. It would be a gross distortion of the policy underlying the American trust responsibility to bar Congress from recognizing a trust relationship with an indigenous group on the ground that the group was too open and inclusive, while permitting such recognition with respect to more exclusive, discriminatory societies. Further, participation of non-Hawaiians in the government of the Hawaiian Kingdom was a direct result of pressure and conquest by Europeans and Americans. See Rice, 528 U.S. at 504 ("the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general" and "Westerners forced the resignation of the Prime Minister" in 1887); id. at 504-05 (describing coup); 107 Stat. at 1511 (same). The unfortunate history of Western influence over the sovereign affairs of the Hawaiians heightens, rather than lessens, Congress's trust obligation.

Similarly, the fact that Native Hawaiians are dispersed throughout the Hawaiian Islands does not make them any less eligible for special recognition by Congress than Indian tribes who may be confined to smaller geographic areas. See United States v. Pelican, 232 U.S. 442, 450 (1914) ("[T]he territorial jurisdiction of the United States [does not] depend upon the size of the particular areas which are held for Federal purposes." (citation omitted)). The Islands comprise an area that is no more than one-fifth the size of the aboriginal lands of other groups that Congress has recognized as tribes. Compare State of Hawaii Data Book: A

Statistical Abstract 1993-1994 (total land area of the eight inhabited major Islands is 4.1 million acres), with United States v. Dann, 865 F.2d 1528, 1534 (9th Cir. 1989) (noting that aboriginal Western Shoshone land comprised 22 million acres in Nevada) and Encyclopedia of North American Indians – Cherokee, supra (forty thousand square miles). Further, many tribes are confined to a smaller area only because the United States government required them to live on reservations. Concentration on a reservation is not a prerequisite to Congressional recognition of an indigenous group's special status in relation to the United States, particularly where the group shares a common language, history and culture. See United States v. Wright, 53 F.2d 300, 306 (4th Cir. 1931) ("The fact that the Eastern Band of Cherokee Indians had surrendered the right of their tribal lands, had separated themselves from their tribe, and had become subject to the laws of North Carolina, did not destroy the right or duty of guardianship on the part of the federal government."). And the fact that many Native Hawaiians are integrated in their communities and have leadership roles as citizens or public officials does not set them apart from, for example, many Alaska Natives. See Metlakatla Indian Community, 369 U.S. at 50-51 (describing how the "Indians of southeastern Alaska . . . have very substantially adopted and been adopted by the white man's civilization").

Congress' power in this regard also is not defeated by the breadth or narrowness of the definition of "Native Hawaiian" used prior to recognition, in

S. 147, of the Native Hawaiian governing entity. 11/ Other federal legislation -- including, but by no means limited to, the numerous statutes that include "Hawaiians" among the indigenous groups benefited -- recognizes the special status of lineal descendants of indigenous people without a blood quantum requirement. See, e.g., Weeks, 430 U.S. at 88 (citing federal statute distributing funds to "all lineal descendants of the tribe as it existed in 1818"); Thomas v. United States, 180 F.3d 662, 665 (7th Cir. 1999) (noting proposal in tribal election to "redefin[e] tribal membership in terms of lineal descendancy rather than blood quantums"); Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997) (because the "trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation," United States had trust responsibility to lineal descendants of tribe (internal punctuation and citation omitted)). Clearly, then, this definition is within Congress' "plenary" power to decide which groups to recognize as dependent tribes. See Sandoval, 417 U.S. at 46. In any event, the pre-recognition definition has little practical consequence in S. 147, because the legislation provides that the Native Hawaiians themselves, like

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11/ S. 147 defines "Native Hawaiian" to mean "(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." S. 147 § 3(10)(A).

virtually every Indian tribe, will define membership in their group for themselves. See S. 147 § 7(c)(2) and (4). 12/

All these reasons help to explain why courts consistently recognize that indigenous Hawaiians are entitled to the same treatment under federal law as the Nation's other indigenous people. See Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169 (Haw. 1982); Naliielua, 795 F. Supp. at 1012-13; Pai 'Ohana v. United States, 875 F. Supp. 680, 697 n.35 (D. Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996). They also explain why Congress has reached the same conclusion in dozens of enactments spanning several presidential administrations. That conclusion, and the steps S. 147 would legislate to effectuate Congress' decision, lie comfortably within the broad scope of Congress' power to regulate Indian affairs.

12/ Although Justice Breyer's concurring opinion in Rice questioned whether a state may define tribal membership as broadly as Hawaii defines "Hawaiian," Rice, 528 U.S. at 526 (Breyer, J., concurring), he also stated that a tribe defining its own membership would have more latitude because "a Native American tribe has broad authority to define its membership." Id. Further, S. 147 limits Native Hawaiian status to descendants of "indigenous, native people" who resided in Hawaii as of January 1, 1893, see S. 147 § 3(10)(A), bringing the definition into line with definitions established by federally recognized tribes that include as members those descended from tribal members as of a date approximately that distant in the past. See, e.g., Rice, 528 U.S. at 526 (Breyer, J., concurring) (citing Choctaw tribal definition that includes "persons on final rolls approved in 1906 and their lineal descendants" (citation omitted)); Encyclopedia of North American Indians – Cherokee, supra, ("Membership in the Cherokee Nation of Oklahoma requires proof of descent from an ancestor on the 1906 Dawes Commission roll. There is no minimum blood quantum requirement."). That is, in fact, the apparent intent of S. 147, which refers to the descendants of aboriginal Native Hawaiians who "resided in the islands . . . on or before January 1, 1893." S. 147 § 3(10)(A).

VI. Existing Federal Statutes that Benefit Native Hawaiians Give Effect to the Special Relationship with Native Hawaiians and Are Constitutional

In fulfillment of the United States' special obligation to indigenous Hawaiians, during the past 80 years Congress already has enacted numerous statutes that provide assistance to Native Hawaiians in areas such as education, health, housing and labor. Those statutes constitute an appropriate exercise of Congress' power to discharge the responsibility it has assumed for the well-being of the nation's indigenous people. As the Supreme Court has held, extending benefits to native groups in this way is not racial discrimination -- to the contrary, it would be discriminatory to deny to Hawaiians the same consideration the Constitution affords to every other indigenous American group.

Because federal legislation for the benefit of Native Hawaiians fulfills the United States' trust obligation to a group with which Congress has determined the United States has a special trust obligation, a court would review these laws under the standard set forth in Morton v. Mancari, supra. In Mancari, the Court upheld a preference for members of an Indian tribe because its purpose was "to further the Government's trust obligation toward the Indian tribes." 417 U.S. at 541-42. The Court held that such legislation should not be subject to the same level of scrutiny under the Fifth Amendment Due Process Clause as a racial classification because of "the unique legal status of Indian tribes under federal law" and Congress' "plenary" power to legislate on their behalf. Id. at 551. As the Court explained:

> 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 . . . . 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 and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .

Id. at 552 (quoting Seber, 318 U.S. at 715). Because "[l]iterally every piece of legislation dealing with Indian tribes" provides "special treatment" to Indians, the Court noted that "[i]f these laws . . . 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 toward the Indians would be jeopardized." Id.

The Court thus held that the program at issue, an employment preference for Indians at the BIA, "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." Id. at 553. In such cases, "[a]s 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. at 555.

Because the deferential "tied rationally" standard in Mancari is a consequence of Congress' "plenary" power under the Indian Commerce Clause and other constitutional provisions to deal with "Indian tribes," id. at 551-52, courts apply the Mancari standard to legislation dealing with any "Indian tribe" as that term is broadly understood under the Indian Commerce Clause. See Alaska

Chapter, Assoc. Gen. Contractors of America, Inc. v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982) (holding Mancari standard applied where beneficiaries of statute included Alaska natives). As explained above, the Constitution vests Congress with virtually unreviewable power to recognize a special relationship with any of the indigenous people that inhabited the American frontier, regardless of when the frontier was encountered. That constitutional power extends to all non-"arbitrary" congressional recognition of distinctly Indian communities, Sandoval, 231 U.S. at 47, and is not limited by fluctuating criteria for formal recognition as a tribe. See supra, Section III.

In its enactments, Congress could not have been more clear that the government's special obligations to Native Hawaiians place legislation benefiting that group squarely within the reach of the Mancari standard. Specifically, Congress has expressly found that a "special relationship . . . exists between the United States and the Native Hawaiian people." See, e.g., 20 U.S.C. § 7902(13); id. § 7902(14) (same), and recently wrote into law that Hawaiians have a "unique status as [a] people . . . to whom the United States has established a trust relationship." HHHA, § 202(13)(B).

If, after these pronouncements, any doubt could have remained about the applicability of the Mancari standard to Native Hawaiians, Congress removed all doubt in its most recent enactments. In those recent statutes, Congress explicitly stated that "Congress does not extend 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." HHHA,

§ 202(13)(B). Further, perhaps mindful of Mancari's observation that the classification there was "political," not racial, Congress expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians." HHHA, § 202(13)(D); see 20 U.S.C. § 7512(12)(B) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship"). In addition, Congress expressly equated its relationship with native Hawaiians and its relationship with Indian tribes. 25 U.S.C. § 3010 ("This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations . . ."); 20 U.S.C. § 7512(12)(D) (the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives"). 13/ As these enactments show, for over eighty years Congress consistently has recognized that the United States has

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13/ This recognition is not new. It dates back to the early years of Hawaii's status as a territory. Thus, the HHCA in 1921 "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13); see Ahuna v. Dep't of Haw. Home Lands, 640 P.2d 1161, 1168 (Haw. 1982) (in the HHCA, "the federal government . . . undert[ook] a trust obligation benefiting the aboriginal people"); see also H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (creating Hawaiian home lands because "the natives of the islands who are our wards . . . and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty"). And the Admission Act conveyed federal ceded lands to Hawaii to hold "as a public trust" for, among other things, "the betterment of the conditions of native Hawaiians." Admission Act § 5(f); see Keaukaha—Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993) (same); 42 U.S.C. § 11701(16) (same).

the kind of relationship with Native Hawaiians that fits squarely within the Mancari doctrine.

Under Mancari, the standard for reviewing legislation that benefits an indigenous group with which the government has recognized a "trust obligation" is quite different than the standard for reviewing alleged race discrimination under the Constitution. Such legislation will be upheld if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Mancari, 471 U.S. at 555. Congress' enactments benefiting Native Hawaiians plainly meet that standard.

The federal statutes that extend benefits to Native Hawaiians address, among other things, the educational, health, housing, labor and other social, economic and cultural needs of that community. 14/ See 20 U.S.C. § 7902(14) (identifying areas of legislation). As Congress has found, Hawaiians as a group, like many Indians, continue to lag far behind the rest of the population in these areas. Certainly, there is no basis for disputing the Congressional findings supporting rationality of these measures. And this is precisely the kind of beneficial legislation that fulfills Congress' obligation to honor its "special relationship" with indigenous groups. See Mancari, 417 U.S. at 552 (the United States left Indians "an uneducated, helpless and dependent people, needing

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14/ See, e.g., Admission Act § 5(f), 73 Stat. 4; HHCA, 42 Stat. 108 ; HHHA, 114 Stat. 2872; 20 U.S.C. § 7901 et seq.; 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441; id. § 7118; 42 U.S.C.§ 254s; id. § 3057 et seq. See also 42 U.S.C. § 2991 et seq.; id. § 1996; 20 U.S.C. § 80q et seq.; 25 U.S.C. § 3001 et seq.; 16 U.S.C. § 470 et seq.; 25 U.S.C. § 2901 et seq.; 42 U.S.C. §3011.

protection against the selfishness of others" and assumed the duty "to do all that was required to perform the obligation" (internal quotation marks and citation omitted)); Pierce, 694 F.2d at 1167-68 (Mancari applies to legislation reaching a "broad[ ]" range of benefits). Accordingly, a court reviewing any of the numerous federal statutes that provide benefits to Native Hawaiians would easily find that they are constitutional because they are "tied rationally" to the special obligation Congress has recognized it has toward that group.

No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,
v.
BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

The Campaign for a Color-Blind America ("CCBA") is a nationwide legal and educational organization, headquartered in Houston, Texas and dedicated to the cause of educating the public about the injustice of racial preferences in public policy.[1] Since its inception in 1993,

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in

CCBA has actively facilitated and participated in legal challenges to race-conscious public policies, including challenges to race-based admissions policies of educational institutions, racial set-asides in public contracting, and race-conscious voting schemes. CCBA assists potential plaintiffs in these cases by, among other things, finding legal representation and locating expert witnesses. When an important issue affecting its charter comes before this Court, CCBA also appears as *amicus curiae* to assist the Court in deciding the case before it. *See Piscataway Township Board of Educ. v. Taxman*, No. 96-670, Brief *Amici Curiae* of the Institute for Justice and Campaign for a Color-Blind America (filed Oct. 8, 1997), *writ dismissed*, 118 S. Ct. 595 (1997).

Amici Americans Against Discrimination and Preferences ("AADAP") and the United States Justice Foundation ("USJF") are both California-based non-profit organizations dedicated to the preservation and promotion of equal protection of the laws. AADAP is a non-profit public benefit corporation dedicated to disseminating to the public information regarding civil rights guaranteed by the United States Constitution and otherwise to educate the public about the effects of discrimination and preferential treatment on American society. Similarly, USJF is a non-profit foundation dedicated to the promotion and preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to analyze important public policy matters affecting constitutional rights. Further, USJF routinely

whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to *amici*'s filing in letters of consent on file with the Office of the Clerk of this Court.

files, or joins, friend of the court briefs to promote and protect the civil rights of all U.S. citizens.

Amici respectfully submit this brief to share with the Court their views on the proper application of the Fifteenth Amendment to the challenged Hawaiian voting scheme and to demonstrate the potential dangers of affirming the Ninth Circuit's decision in this case. Despite respondent State of Hawaii's ("Hawaii") characterization of this dispute as "unique to Hawaii," Respondent's Brief in Opposition at 12 ("Resp. Opp."), *amici* and their members believe that this Court's adoption of the Ninth Circuit's rationale would have potentially widespread ramifications beyond the Hawaiian Islands and could, in fact, be used by other States to deprive the elective franchise to large segments of society and otherwise to justify the very invidious racially-discriminatory state action that the Civil War Amendments were adopted to eliminate. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) ("central purpose" of Civil War Amendments "was to eliminate racial discrimination emanating from official sources in the States").

SUMMARY OF ARGUMENT

" 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . .' " *Shaw v. Reno*, 509 U.S. 533, 555 (1964) (citation omitted). In order to guarantee that right to all races, the States ratified in 1870 the Fifteenth Amendment to the Constitution, which provides that no State may "den[y] or abridge[]" the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. That Amendment, "by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections . . . , clearly shows that the

right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States." *Ex Parte Yarborough*, 110 U.S. 651, 664 (1884). As a result, this Court has interpreted the Fifteenth Amendment as a *per se* rule against racial discrimination in voting.

The Hawaiian voting scheme challenged in this case is facially inconsistent with the clear prohibition contained in the Fifteenth Amendment. The Hawaiian statute that defines eligible voters for the Office of Hawaiian Affairs ("OHA") contains on its face a racial restriction, limiting qualified electors to "Hawaiians," as defined by race. "[A] more direct and obvious" violation of the plain language of the Fifteenth Amendment can hardly be imagined. *Cf. Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (invalidating under Fourteenth Amendment race-based voting restriction contained in state statute). Moreover, none of the State's justifications for the racial classification contained in the statute overcome the Fifteenth Amendment's prohibition against race-based voting systems—a prohibition that is both absolute and self-executing. *See, e.g., Neal v. Delaware*, 103 U.S. (13 Otto.) 370, 389 (1880) (invalidating race-based voting restriction contained in state constitution).

The Ninth Circuit's recognition of Hawaii's race-based justification for the discriminatory voting scheme turns the Fifteenth Amendment on its head and would permit broad-based racial discrimination by any number of other States. Simply by declaring an "historical trust relationship" with a native population, as defined by race, States could justify the very invidious voting schemes that the Fifteenth Amendment was designed to condemn. If the Ninth Circuit's rationale is affirmed by this Court, States such as Texas, California and Louisiana—States that could equally

demonstrate an historical trust relationship with a native racial group—could deprive the franchise to the vast majority of their citizens, all in the name of promoting that unique relationship. The Fifteenth Amendment does not permit the exclusive grant of the franchise to a favored race. Consequently, under this Court's jurisprudence, the racial limitation on eligible voters for the OHA is invalid.

ARGUMENT

I. THE CHALLENGED HAWAIIAN VOTING SCHEME VIOLATES THE FIFTEENTH AMENDMENT

A. The OHA Election Scheme Is *Per Se* Invalid Under the Fifteenth Amendment.

The Fifteenth Amendment's proscription against racial discrimination in state voting laws is as clear as it is absolute: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend XV, § 1. "[T]he command of the Amendment [is] self-executing and reache[s] without legislative action the conditions of discrimination against which it was aimed. . . ." *Guinn v. United States*, 238 U.S. 347, 363 (1915); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966). Consequently, any state statutory or constitutional provision that denies to any citizen of the United States the right to vote on account of race or color is "destroyed by the self-operative force of the Amendment." *Guinn*, 238 U.S. at 364. Under this Amendment, the challenged Hawaiian voting scheme, which on its face denies the elective franchise in elections for board members of the OHA to *all* but a narrow, racially defined class of "Hawaiians," *see* Haw. Const. Art. XII, § 5; Haw. Rev. Stat. §§ 10-2, 13D-3, is *per se* invalid.

Although the Fourteenth and Fifteenth Amendments are often treated by litigants as co-extensive when applied to racially discriminatory voting schemes, a close examination of this Court's jurisprudence demonstrates that the Fifteenth Amendment even more stringently protects the franchise from race-based classifications. The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See, e.g., Shaw v. Reno*, 509 U.S. at 642 ("Express racial classifications are immediately suspect. . . ."); *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a *compelling* governmental interest, and must be *narrowly tailored* to further that interest." *Adarand Constructors*, 515 U.S. at 235 (emphasis added).

While this standard admittedly presents a significant hurdle to upholding a facially racial statutory classification,[2] the Fifteenth Amendment is even more demanding.

[2] This Court has only identified one "compelling governmental interest" that satisfies the strict scrutiny standard: the remedying of "'pervasive, systematic, and obstinate discriminatory conduct.'" *Adarand*, 515 U.S. at 237 (citation omitted). Even there, the Court has demanded that a State do more than rely on "an amorphous claim that there has been past discrimination in a particular" field of conduct. *J.A. Croson Co.*, 488 U.S. at 469.

Where state voting legislation runs afoul of the plain terms of the Fifteenth Amendment, it is *per se* invalid, *regardless of the interest served by the racial classification or the scope of application of the classification*: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *see also Katzenbach*, 383 U.S. at 325 (Fifteenth Amendment "has repeatedly been construed, without further legislative speculation, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."). The difference in scrutiny lies in the fundamental nature of the right protected by the Fifteenth Amendment, a right that this Court has described as the very "essence of a democratic society." *Shaw v. Reno*, 509 U.S. at 639 (internal quotations omitted; citation omitted).

Thus, the analysis under the Fifteenth Amendment is simple. The Court asks a single question: "Does the challenged statute, on its face or in its effect, deny any U.S. citizen the right to vote 'on account of race, color, or previous condition of servitude'?" If the answer is "yes," the inquiry is complete, and the discriminatory terms of the statute are struck as invalid. *See Ex parte Yarborough*, 110 U.S. at 665.

Applying this simple but stringent standard here, the challenged Hawaiian voting scheme cannot withstand constitutional scrutiny. The Hawaii statute that sets the qualifications for voting for the OHA trustees contains on its face a racial limitation on electors: "No person shall be eligible to register as a voter for the election of board members unless the voter meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b). That is, in order to qualify as a voter for

the OHA elections, a person must be a "descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii." *Id.* § 10-2. In effect, the statute limits the right to vote to all but a limited class of native Hawaiians of Polynesian origin, who can trace their bloodline to the race of people that inhabited the island before Captain James Cook's "discovery" of the islands in 1778. *See* Ralph S. Kuykendall, *A History of Hawaii* 54 (1927). The statute's definition thus forbids *all other races*—black, white, Hispanic, or any other race that did not inhabit the Hawaiian Islands prior to 1778—from voting for OHA board members.[3] Because the statute differentiates among qualified and non-qualified voters "on account of race," U.S. Const. amend XV, § 1, it is invalid.

This *per se* rule of invalidity is demonstrated by a long line of cases beginning with *United States v. Reese*, 92

[3] The fact that non-Hawaiian Polynesians are excluded from the statute's preferred classification—and thus that all Polynesians are not benefited by the statute—does nothing to detract from the conclusion that the statute's scope is defined principally by race. While "Polynesians" may be regarded as a racial classification for purposes of the Fifteenth Amendment, the same is equally true of the narrower class of Polynesian Hawaiians that inhabitated the islands prior to arrival of "outsiders" from Europe, Asia and America beginning in 1778: "The Hawaiians as found by Captain Cook (1778) were already a people of mixed racial origin but they had been isolated for so long a time that they may be regarded as a people or stabilized race mixture and they had a stable social organization." Romanzo Adams, *Interracial Marriage in Hawaii* 69 (1937). "What we sometimes refer to as historic races, that is to say, races that have actually existed and had a history, are merely peoples who have acquired distinctive and distinguishing racial traits through long periods of isolation and continued inbreeding." *Id.* at vii. Thus, while its ultimate conclusion was erroneous, the Ninth Circuit's characterization of the Hawaiian statute as containing a racial classification on its face was correct.

U.S. 214 (1875). There, the Court explained the Fifteenth Amendment's absolute prohibition against race discrimination in voting, reasoning that the Amendment "prevents the States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Id.* at 217. Prior to adoption of the Amendment, this form of discrimination was permissible under the Constitution: "It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education." *Id.* at 217-18. As a result of adoption of the Amendment, however, "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." *Id.* at 218. "It follows," reasoned the Court, "that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination . . . on account of race, color, or previous condition of servitude." *Id.*; *see also United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

Shortly thereafter, the Court held that any racially discriminatory state statute or constitutional provision that pre-dated the adoption of the Fifteenth Amendment was automatically invalidated by the plain language of the Amendment, without regard to the purpose or interests served by the classification. *See Neal v. Delaware*, 103 U.S. (13 Otto.) 370. In *Neal*, the Court held that a provision of the Delaware state constitution that limited eligible state voters to "white males" was rendered invalid by the Fifteenth Amendment to the extent it contained the racial limitation: "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, the pro-

vision which restricts the right of suffrage to the white race." *Id.* at 389. The remedial effect of the statute, therefore, was to strike the word "white" from the state constitutional provision, permitting all races to enjoy equally the right to vote in Delaware elections. *Id.; see also Myers v. Anderson*, 238 U.S. 368, 376 (1915). The Court later noted that a facially discriminatory state election provision that post-dated the enactment of the Fifteenth Amendment would be equally invalid. *Ex parte Yarborough*, 110 U.S. at 665.[4]

It is difficult to understand, under these plain rules, how the challenged Hawaiian voting scheme, which contains no less invidious a racial classification than the Delaware constitutional provision struck down in *Neal*, could survive the pellucid prohibition of the Fifteenth Amendment. The Hawaiian law "singles out a readily isolated segment of a racial minority"—Hawaiians—"for special discriminatory treatment," *Gomillion*, 364 U.S. at 346—to the exclusion of all other eligible voters. Under the rule of *Neal* and *Yarborough*, the racial limitation contained in the Hawaiian voting statute must be struck as invalid under the Fifteenth Amendment.

[4] In *Yarborough*, the Court explained that, while the Fifteenth Amendment's protections were "mainly designed for citizens of African descent," 110 U.S. at 665, the protections of the Amendment extend to all races. "The principle . . . that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination." *Id.* Thus, in this case, because the Hawaiian voting scheme benefits one race to the exclusion of all others, the race of the plaintiff challenging the scheme is irrelevant.

B. The Ninth Circuit's Rationale for Upholding the Hawaiian Voting Scheme Is Inconsistent with This Court's Fifteenth Amendment Jurisprudence.

Despite its recognition that both the Hawaii constitutional and statutory provisions challenged here "contain a racial classification on their face," *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998)—an admission that effectively dooms the voting scheme at issue in this case—the Ninth Circuit held that the voting classification did not violate the Fifteenth Amendment. Held up to the light of this Court's Fifteenth Amendment jurisprudence, however, the Ninth Circuit's tortured rationale for upholding the voting scheme cannot survive.

1. The Fifteenth Amendment Applies to Elections for the Office of Hawaiian Affairs.

The Ninth Circuit's principal reason for holding that the Fifteenth Amendment was inapplicable in this case is that the OHA elections are not "a general election for government officials performing governmental functions of the sort that has previously triggered Fifteenth Amendment analysis." 146 F.3d at 1081. Because "[t]he special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity," *id.*, the court reasoned, the Fifteenth Amendment is not even implicated by the OHA voting scheme. The lower court's circumvention of the Fifteenth Amendment in this manner completely distorts this Court's jurisprudence.

This Court has *never* held that the Fifteenth Amendment applies only to "general" elections for state officials who perform "general governmental functions." "Clearly the Amendment includes *any election in which public issues are decided or public officials selected*." *Terry v.*

Adams, 345 U.S. 461, 468 (1953) (opinion of Black, J.) (emphasis added) (footnote omitted); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all phases of state elections*. . . .") (emphasis added); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (Fifteenth Amendment "specifically interdicts *any denial or abridgement* by a State of the right of citizens to vote on account of color") (emphasis added); *United States v. Mississippi*, 380 U.S. 128, 138 (1965) ("The Fifteenth Amendment protects the right to vote regardless of race against *any denial or abridgement* by the United States or by any State.") (emphasis added).

Indeed, a comparison of the plain language of the Fifteenth Amendment to that of Section Two of the Fourteenth Amendment, adopted just two years prior, confirms the expansive scope of the Fifteenth Amendment's prohibition. Section Two of the Fourteenth Amendment was a stopgap measure directed at voting discrimination, designed to penalize discriminating States by requiring the reduction in a State's proportionate congressional representation whenever the State "denie[s] to any of the male inhabitants of such State" the right to vote. U.S. Const. amend. XIV, § 2. However, Section Two specifically defines the scope of elections to which it applies, expressly limiting its application to "any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature thereof." *Id.* In stark contrast, the Fifteenth Amendment does not specifically limit its application to elections for any particular office, instead securing generally "[t]he right of citizens of the United States to vote." U.S. Const. amend. XV, § 1. In light of the Fourteenth Amendment

model, "the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States." John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 38 (1909). "It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer." *Id.* at 38 (footnote omitted). As one of the opponents of the Fifteenth Amendment complained during the debates leading up to its adoption:

> This amendment applies to the election of members of the Legislature and judges, comptrollers, justices of the peace, and constables; *it applies to all elections* . . . . If it were designed only to apply this provision to that which relates to the General Government, then it should be restricted and framed to refer only to elections for electors of President and Vice President and Representatives in Congress. It provides that the States shall *in no elections* disqualify any one on the ground of race, color, or former condition.

Cong. Globe, 40th Cong., 3d Sess., at 905 (1869) (remarks of Sen. Vickers) (emphasis added).

Further evidence of the Fifteenth Amendment's universal applicability to all elections is found in this Court's interpretation of the Amendment. In a pair of cases challenging Texas political party primaries in which eligible voters were limited to qualified white citizens, the Court held that a State may not circumvent the proscription of the Fifteenth Amendment by permitting a private

organization to discriminate in its selection of candidates. *Terry*, 345 U.S. at 466 (opinion of Black, J.); *Smith*, 321 U.S. at 664. In striking down the primary voting schemes, the Court did not attempt to confine the reach of the Amendment's prohibition to any particular state office, instead expressing its scope in broad language: "Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." *Smith*, 321 U.S. at 662. The State could no more accomplish this result indirectly—by permitting a political party that effectively decided the general election result to engage in discriminatory practices—than it could directly:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664 (citation omitted).

Later, in *Gomillion*, the Court held that the Fifteenth Amendment prevented the State of Alabama from redrawing the boundaries of the City of Tuskegee so as to remove all but "four or five of its 400 Negro voters." 364 U.S. at 341. Thus, the Court applied the Fifteenth Amendment to prohibit racial discrimination by the State in municipal elections. Taken together, *Smith*, *Terry*, and *Gomillion* confirm that the Fifteenth Amendment prohibition against race discrimination in voting applies to *any*

election for public office over which the State exercises control, whether it be a national, state or local office.

The electoral scheme challenged in this case clearly falls within the broad scope of the Fifteenth Amendment. As the Ninth Circuit explained, the OHA "is a state agency," *Rice*, 146 F.3d at 1078, established by the Hawaiian legislature and given broad authority over state funds. By statute, the Hawaiian legislature has delegated to the OHA several traditional governmental functions. *See* Haw. Rev. Stat. §§ 10-5, 10-6. OHA trustees "have [the] power to manage proceeds and income from whatever source for Native Hawaiians and Hawaiians . . . ; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs." *Rice*, 146 F.3d at 1080 n.14 (citing Haw. Rev. Stat. § 10-5). Similarly, the OHA board itself has several broad agency and intragovernmental functions: (1) "to develop a master plan for native Hawaiians and Hawaiians;" (2) "to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services;" (3) "to maintain an inventory of, and act as clearinghouse for, programs for Native Hawaiians and Hawaiians;" (4) to keep other agencies informed about native Hawaiian and Hawaiian programs;" (5) "and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians." *Id.*

Hawaii cannot overcome the Fifteenth Amendment's prohibition simply by arguing that the broad governmental functions of an elected state agency official are exercised

for the benefit of a small racial class of "Hawaiians and Native Hawaiians." Nevertheless, the Ninth Circuit's rationale suggests that such a violation of the Fourteenth Amendment Equal Protection Clause, in turn, justifies a violation of the Fifteenth Amendment. But the right to be free from racial discrimination in voting secured by the Fifteenth Amendment would be meaningless if it could be vitiated by the simple device of limiting the scope of an elected public official's functions to serving a particular racial group. As the Court noted in *Lane v. Wilson*, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." 307 U.S. 268, 275 (1939).

Consequently, the lower court's attempt to liken the OHA elections to "special purpose elections," upheld against Fourteenth Amendment equal protection challenges in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), must fail. Neither case can possibly be read for the extraordinary notion that the Fifteenth Amendment excepts from its scope an election targeted solely for the benefit of a particular racial class. Neither case even raised the issue of race discrimination, and thus neither implicated the Fifteenth Amendment. Instead, those cases stand for nothing more than the unexceptional principle that the "one person, one vote" concept embodied in the Fourteenth Amendment is not offended where a state limits eligibility to vote in a special purpose election to those landowners who are disproportionately affected by the election, *irrespective of their race*. *See Salyer*, 410 U.S. at 727. To extend the race-neutral principles of *Salyer* into a broad Fifteenth Amendment exception for "preferred race" elections is to destroy the very right guaranteed by the Amendment.

2. The Fifteenth Amendment Does Not Tolerate "Political" Justifications for Race-Based Voting Discrimination.

The Ninth Circuit also relied heavily on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), to support its conclusion that the Fifteenth Amendment was inapplicable to the challenged Hawaiian voting scheme. The lower court cited *Mancari* for the proposition that a State may justify a race-based voting preference by a "unique trust relationship" with a racial class. 146 F.3d at 1080-81. In short, the Ninth Circuit reasoned that such a trust relationship transforms a racial preference contained on the face of a voting statute into a permissible "political" classification. *Id.* at 1081. Because the Ninth Circuit's rationale so obviously distorts the holding of *Mancari*, which was grounded in the federal government's unique relationship with Indian tribes *qua quasi-sovereign governmental organizations*,[5] and because petitioner himself has so clearly demonstrated the limitations of the

[5] This Court has frequently recognized the unique *governmental* relationship between the United States and its Indian *tribes*, which are dependent *quasi*-sovereign governments in the federal system. "We have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *see Mancari*, 417 U.S. at 552 (relying on Indian Commerce Clause and Treaty Clause of Constitution as "the source of the Government's power to deal with the Indian *tribes*") (emphasis added). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Iowa Mut.*, 480 U.S. at 14 (citation omitted). This *quasi*-sovereignty extends to the "right of reservation Indians to make their own laws and be ruled by them." *Id. Mancari* simply recognized this special governmental relationship and the unique *quasi*-sovereignty enjoyed by the tribes *qua tribes* and thus approved federal preferences directed at "members of 'federally recognized' tribes." *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed toward a 'racial' group consisting of 'Indians' . . . .").

scope of *Mancari, see* Pet. at 17-20, *amici* will not belabor its analysis of the lower court's reasoning here. Nevertheless, the Ninth Circuit's reliance on the "political" justification for a racial classification bears special attention here. That "political" rationale is thoroughly inconsistent with this Court's prior holdings, which have refused to examine the justifications for facially discriminatory statutory provisions. *See* Lawrence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988) ("The Supreme Court has held that the fifteenth amendment prohibits state action which on its face discriminates against black voters.").

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. at 642. Once it is established, as in this case, that a voting scheme contains a racial limitation, no further inquiry into the asserted "political" rationale for that limitation is permitted under the Fifteenth Amendment. *Gomillion* demonstrates this principle. There, the Court held that a racial gerrymandering scheme could not be justified by a "political" desire to realign the boundaries of a municipality. In this regard, the State's political power over its subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment . . . , which forbids a State from passing any law which deprives a citizen of his vote because of his race." 364 U.S. at 345. Otherwise legitimate political objectives, the Court reasoned, were irrelevant when carried out by race-conscious methods:

> The opposite conclusion . . . would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Id. (citation omitted). Similarly, here, the State of Hawaii's political justification embraced by the Ninth Circuit—furthering a putative "trust relationship" with a native population—cannot justify the exclusion of *every other racial class in the State* from voting in a statewide election.

In sum, the Hawaiian voting scheme challenged in this case cannot withstand the scrutiny demanded by the Fifteenth Amendment. The governing statute contains on its face a *per se* unlawful racial classification. Under this Court's jurisprudence, that race preference alone dooms the voting scheme. None of the justifications relied upon by the Ninth Circuit or advanced by the respondent in this Court [6]—no matter how benignly characterized by the lower court—can save the OHA scheme from *per se* constitutional invalidity.

II. HAWAII'S RACE-CONSCIOUS JUSTIFICATION FOR ITS VOTING SCHEME WOULD PERMIT BOUNDLESS DEPRIVATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS BY NUMEROUS STATES.

Although respondent characterizes this dispute as "unique to Hawaii," Resp. Opp. at 12, the race-conscious "trust relationship" rationale relied upon by the Ninth Cir-

[6] Respondent asserts in the margin that the Fifteenth Amendment does not apply here because petitioner Rice did not "show the required discriminatory intent." Resp. Opp. at 29 n.12. However, the very authority relied upon by respondent for that proposition, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), rebuts that proposition where, as here, the racial discrimination is evident on the face of the statute. *City of Mobile*'s requirement of discriminatory purpose arises only where "action by a State . . . is racially neutral on its face. . . ." *Id.* at 62 (opinion of Stewart, J.).

cuit to evade the command of the Fifteenth Amendment has potentially broad ramifications in other States. Any number of States could claim an equally "unique" historical relationship of trust with a core, native population and seek to justify race-conscious preferences and voting schemes on the basis of that trust relationship.[7] By divorcing the holding of *Mancari* from the special *governmental* relationship between the United States and Indian tribes and extracting instead a race-conscious principle permitting state-sponsored discrimination on the mere showing of a "unique history" of trust between a State and a particular racial group, the Ninth Circuit's reasoning would permit numerous other States to engage in equally invidious behavior under the guise of an historically rooted obligation. While no other State currently limits its franchise in such a manner, affirmance of the Ninth Circuit's rationale could potentially open a Pandora's box of race-based state voter preferences.

Several States besides Hawaii can boast a "unique" historical relationship with some insular racial group. Three obvious, though not exclusive, parallels arise in Texas, California and Louisiana.

Prior to its admission to the Union, Texas, like Hawaii, enjoyed a history as an independent sovereign. *See generally* T.R. Fehrenbach, *Lone Star: A History of Texas and Texans* (1968). After the Mexican Revolution of 1821, Texas became a province of the New Mexican republic. *Id.* at 154. That marriage proved doomed, and in 1836, Texas declared its independence from Mexico

[7] The Ninth Circuit also relied upon Hawaii's trust relationship with Hawaiians to conclude that the OHA voting scheme would constitute a compelling governmental interest under the Fourteenth Amendment. *See Rice*, 146 F.3d at 1082. Thus, adoption of Hawaii's "trust relationship" argument would have equally broad ramifications in the equal protection context.

and won that independence at the Battle of San Jacinto. *Id.* at 219-46. For a short time ending with its admission to the Union in 1845, the Republic of Texas ruled as a sovereign nation. *Id.* at 247-67.

Although at the time of its admission to the Union, a majority of its citizens were of Anglo-Saxon descent, *id.* at 154-73, early Texas history shows a unique relationship between the governments in Texas and a people known as the "Tejanos." *See* Arnoldo De León, *The Tejano Community, 1836-1900* (1982); Fehrenbach, *supra*, at 56. These people were "the product of generations of *mestizaje*, that is, the interracial mixture of European Spaniards" and both Mexican and Texas Indians. *See* De León, *supra*, at 2. The *Tejanos* were recognized as citizens of both Spanish Texas and Mexico, respectively. *See* Fehrenbach, *supra*, at 53, 65. Indeed, upon Mexican secession from Spain, the very "idea of a Mexican nation was centered in the *mestizo* group." *Id.* at 156. But just as the native Hawaiians were "displace[d]" upon their incorporation into the United States, the Tejano people often "lost their lands through a number of subterfuges" when Texas subsequently declared its independence from Mexican rule. De León, *supra*, at 14, 17.

The relationship between early Texas and this racial and cultural group thus bears many of the earmarks relied upon by Hawaii to justify the discrimination in this case. First, the Tejanos have a "unique history" as a native people who preceded "American" migration into the territory. *See* Resp. Opp. at 16.[8] They were the

[8] The fact that the Tejano people were the result of interracial socialization between the Spanish settlers of the territory and the local Indian population does nothing to distinguish them from Native Hawaiians. *See* Adams, *supra*, at vii ("It is no longer a secret, even to the laymen, that there are not now and probably never have been . . . any pure races."). Although Hawaii deems

"former subjects of an independent sovereign nation"—Mexico—that was devoted to their prosperity. *Compare id. with* Fehrenbach, *supra,* at 156. When Texas declared its independence from Mexico, these native *Tejanos* were "displace[d]" and often "disadvantage[d]" by the citizens of the new republic. *See* Resp. Opp. at 16. Thus, all that is left in order to satisfy respondent's lax standard is the declaration of a "special trust relationship" by the State of Texas with this racial group. The Texas state government would not have to "concoct at will," *id.* at 17, this historical antecedent in order to pass muster under the Ninth Circuit's permissive standard.

The State of California could similarly declare a "trust" relationship to justify race-based state voting measures favoring the native Hispanic population. California, like Texas, was permanently settled as a Spanish mission in the 1760s. *See* Walton Bean & James Rawls, *California, An Interpretive History* 17 (1988); Andrew F. Rolle, *California, A History* 48 (4th ed. 1987). An early pre-American population followed—"descendants of the free settlers from Mexico and the soldiers of the garrisons and Missions," and the local Indian populations. Robert F. Heizer & Alan F. Almquist, *The Other Californians* 139-40 (1971). These native hispanicized Californians have been called by some historians "Californios." *Id.* at 139; *see also* Leonard Pitt, *The Decline of the Californios*

a special relationship with the Polynesian Hawaiians that inhabited the island prior to Captain Cook's arrival, the "Polynesians are not a pure race—all descended from the same ancestors. Like the English, the French, and the Americans, they are a mixed up race made up of men and women of different races who came from different places at different times." Kuykendall, *supra,* at 31 (1927). *See also* Adams, *supra,* at 69. Like the Polynesian Hawaiians, the Tejanos are an identifiable race derived from different origins. Indeed, their descendants are still found today in various regions of Texas, such as Nacogdoches. Fehrenbach, *supra,* at 69.

(1970). Upon Mexico's declaration of independence from Spain, "the Spanish nationals who remained in California automatically became Mexican citizens." Heizer & Almquist, *supra,* at 138. Thus, as in Texas, the native Californios were citizens of a sovereign nation prior to California's incorporation into the United States. *See* Bean & Rawls, *supra,* at 98, 126. However, following California's admission to the Union in 1850, the claims of American squatters and subsequent legal battles often resulted in the displacement of these native Californio landowners from their land. Rolle, *supra,* at 236-37. Again, under the Ninth Circuit's expansive rationale, this history might be sufficient to justify modern voting schemes that limit the vote to a racially-defined group of hispanic Californians.[9]

Louisiana's "special relationship" with the Acadians, or "Cajuns," who migrated to South Louisiana from Nova Scotia during Spanish rule of the Louisiana territory, similarly bears resemblance to the Hawaii-Hawaiians relationship. *See generally,* James Harvey Domengeaux, *Comment: Native-Born Acadians and the Equality Ideal,* 46 La. L. Rev. 1151 (1986); Carl A. Brasseaux, *Acadian to Cajun* (1992). Indeed, motivated by this special relationship, in 1968, Louisiana established a state agency, the Council for the Development of French in Louisiana, dedicated to the "preservation of the French language and Acadian culture." Domengeaux, *supra,* at 1155; *see* La. Rev. Stat. § 25:651-653. While the members of this

[9] Hawaii's reliance on the vague notion of "displacement and resulting disadvantage" of the native Hawaiian population as a result of their loss of sovereignty, *see* Resp. Opp. at 16, is squarely at odds with this Court's Fourteenth Amendment requirement that " 'specific instances of discrimination' " or "identified discrimination" are necessary to justify even assertedly "benign" racial classifications. *See J.A. Croson Co.,* 488 U.S. at 495, 497, 505.

organization are appointed by the governor, the Ninth Circuit's rationale could support their race-based election because of the relationship enjoyed between the State of Louisiana and its Cajun citizens.

These examples demonstrate the inherent unreliability of a "special trust relationship" exception to the Fifteenth Amendment's absolute prohibition of racial discrimination in voting. Of course, respondent may argue that dissimilarities in the history or culture of Hawaiians as compared to these other racial groups distinguish the rationale for the OHA voting scheme from these other States. But such an argument misses the point. When the rationale of *Mancari* is divorced from the distinctive governmental status of Indian tribes within our federal system and their equally distinctive relationship with the federal government, and instead used to justify a "special relationship" between a government and a particular race of people, there is, as Justice Powell noted in *Wygant v. Jackson Bd. of Educ.*, "no logical stopping point." 476 U.S. 267, 275-76 (1986). Loosed from the narrowly confined moorings of *Mancari*, the Ninth Circuit's theory, like the race-conscious rationale invalidated in *J.A. Croson Co.*, "could be used to 'justify' race-based decisionmaking essentially limitless in its scope and duration." 488 U.S. at 498 (opinion of O Connor, J.); *see also Wygant*, 476 U.S. at 276 (warning that, under city's theory, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Once race itself is used as a justification for race-based discrimination in voting, the very protections afforded by the Fifteenth Amendment are rendered meaningless. The result, illustrated by the OHA voting scheme in this case, is the wholesale deprivation by the State of the rights of its citizens to have a voice in conduct of their government. The Fifteenth Amendment, however, was adopted to secure this voice to all races. *See* Mathews, *supra*, at 21-22 (noting "widely held belief" leading to adoption of Fifteenth Amendment "that universal suffrage is the perfect antidote against all the moral and political ills to which society is subject") (footnote omitted). Because it denies the right to participate in the conduct of elected government to all but a small class of individuals, defined by their race, the OHA voting scheme cannot stand.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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No. 98-818

In The

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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1. Imposing a Tribal Requirement for *Morton* is Unjustified.

Petitioner wrongly narrows the scope of *Morton* to formally recognized tribes, Pet. at 17-20, by ignoring the critical portion of *Morton* that held that the primary reason the classification in *Morton* was political and not racial was not because of any tribal requirement, but rather, as stated by this Court:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

Morton, 417 U.S. at 554. Thus, the key reason the classification was not racial was not because of the formal tribal aspect but because the restriction was designed to further self-governance. While this Court did mention, in a footnote, 417 U.S. at 553 n.24, that the preference was given to only tribal Indians, and not all racial Indians, that actually supports the notion that the reason the restriction was political and not racial was because of the *self-governance* aspect. Why? Because the BIA positions for which the preference applied were those that "administ[ered] functions or services affecting any Indian *tribe*." *See* 417 U.S. at 537-38 (emphasis added). Thus, to give the preference to all racial Indians, even if they were not tribal Indians, would have actually undercut the self-

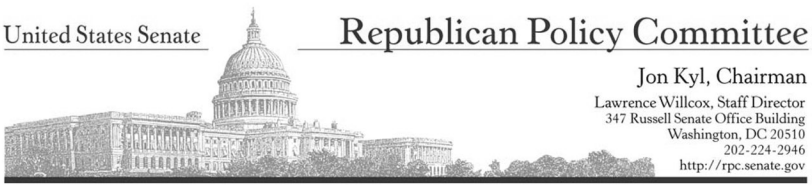
governance aspect that motivated *Morton*. That explains why this Court went on to say that the preference is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities *whose lives and activities are governed by the BIA* in a unique fashion." 417 U.S. at 554. In short, the tribal limitation was necessary because the BIA positions for which the preference applied governed *tribal* Indians. In this case, on the contrary, because OHA beneficiaries are *all* Hawaiians and native Hawaiians, without regard to any tribal classification, self-governance is promoted by allowing the voters to be all Hawaiians and native Hawaiians, regardless of any tribal status.

Another way to understand why there should be no artificial tribal requirement for Hawaiians is that for the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. Thus, because *Morton* turned upon the desire to promote Indian self-governance, it made sense to give the preference to only those Indians who were members of the formerly sovereign entity (i.e. the tribe), which meant only tribal Indians. Similarly, promoting Hawaiian self-governance is accomplished by giving the preference (here, the exclusive franchise in electing OHA trustees) to all those who were members of (or their descendants) the former sovereign nation. Because that former sovereign is the Kingdom of Hawaii, not any particular tribe or equivalent "political entity," all Hawaiians should qualify. The tribal concept simply has no place in the context of Hawaiian history.

And petitioner is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty

Clauses of the Constitution. Pet. at 19. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction. The Indian clauses simply *reflect* and *arise out of* the historical relationship; namely, the conquering of an aboriginal people who were the subjects of a formerly independent nation. The analogous historical relationship in the case of Hawaiians and native Hawaiians is reflected by the Annexation Act of 1898, the Organic Act of 1900, the Hawaiian Homes Commission Act of 1920, and the Admission Act of 1959. These Acts for Hawaiians and native Hawaiians are the equivalents of the Indian Commerce and Treaty Clauses for Indians discussed in *Morton*.

APPENDIX TO THE STATEMENT OF SHANNEN W. COFFIN: UNITED STATES SENATE, REPUBLICAN POLICY COMMITTEE, JON KYL, CHAIRMAN, "WHY CONGRESS MUST REJECT RACE-BASED GOVERNMENT FOR NATIVE HAWAIIANS"



June 22, 2005

S. 147 Offends Basic American Values

Why Congress Must Reject Race-Based Government for Native Hawaiians

Executive Summary

- Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for Native Hawaiians living throughout the United States.
- The bill does this by shoehorning the Native Hawaiian population, wherever located, into the federal Indian law system and calling the resulting government a "tribe."
- S. 147 advocates argue that the bill simply grants Native Hawaiians the same status as *some* American Indians and Alaska Natives, but this claim represents a serious distortion of the constitutional and historical standards for recognizing Indian tribes.
- The Supreme Court has held that Congress cannot simply create an Indian tribe. Only those groups of people who have long operated as an Indian tribe, live as a separate and distinct community (geographically and culturally), and have a preexisting political structure can be recognized as a tribe. Native Hawaiians do not satisfy any of these criteria.
- When Hawaii became a state in 1959, there was a broad consensus in Congress and in the nation that Native Hawaiians would not be treated as a separate racial group, and that they would not be transformed into an "Indian tribe."
- To create a race-based government would be offensive to our nation's commitment to equal justice and the elimination of racial distinctions in the law. The inevitable constitutional challenge to this bill almost certainly would reach the U.S. Supreme Court.
- S. 147 would lead the nation down a path to racial balkanization, with different legal codes being applied to persons of different races who live in the same communities.
- The bill also encourages increased litigation, including claims against private landowners and state and federal entities, which would heavily impact private and public resources.
- S. 147 represents a step backwards in American history and would create far more problems — cultural, practical, and constitutional — than it purports to solve. It must be rejected.

"To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. We are American." — Adarand Constuctors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

Introduction

Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for those with Native Hawaiian blood. The bill does this by shoehorning Native Hawaiians (who live in all 50 states) into the federal Indian law system, creating a new race-based entity, and calling it a "tribe." Advocates claim that this result will be fair and equitable because Native Hawaiians would have the same status as some American Indians and Alaska Natives. This deceptive argument ignores the radical transformation to American law that S. 147 threatens. That is because, unlike Indian tribes, this proposed Native Hawaiian government would be defined ***not*** by community, geography, and cultural cohesiveness, as every other Indian tribe is. Instead, the Native Hawaiian entity would be defined by the one distinction abhorrent to American law and civic culture — that of race.

Congress should not be in the business of granting special governmental powers to racial subsets of the American family. We are a nation grounded in equality under the law regardless of skin color or ancestry. Our most violent internal conflicts, whether in the 1860s or the 1960s, have revolved around efforts to eliminate the law's racial distinctions and to encourage a culture where all citizens become comfortable as part of the *American* race. That journey is by no means complete, but this bill halts progress and sends an entirely contrary message — a message of racial division and ethnic separatism, and of rejection of the American melting pot ideal. The bill is, therefore, profoundly counterproductive to the nation's efforts to develop a just, equitable, and color-blind society, and it must not become law.

A Brief Look at the Key Flaws in S. 147

S. 147 authorizes a racially-separate government of Native Hawaiians that will operate as an Indian tribe throughout the United States. The new "tribe" will have as many as 400,000 members nationwide,[1] including more than 20 percent of Hawaii's residents.[2] The new Native Hawaiian entity will have broad-ranging governmental powers and is likely to have jurisdiction over residents of all 50 states.[3] Moreover, if every eligible Native Hawaiian signs up, the new race-based government will be the nation's largest Indian tribe. The multi-step process to create the new government is described in sections 7 and 8 of the legislation, but the essential fact is this: the bill uses a race-based test to govern the organization of the Native Hawaiian entity.

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[1] U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2000* (Dec. 2001), at 8 (hereinafter "Census Report"), available at www.census.gov/prod/2001pubs/c2kbr01-14.pdf (noting 141,000 respondents reporting only Native Hawaiian ancestry and an additional 260,000 who reported Native Hawaiian and at least one other race).

[2] Census Report, Table 2.

[3] Census Report, Table 2.

How S. 147 Authorizes a Race-Based Government

The definition of "Native Hawaiian" is extremely broad, perhaps unconstitutionally so.[4] According to the bill, a "Native Hawaiian" is anyone who is one of the "indigenous, native people of Hawaii" *and* who is a "direct lineal descendant of the aboriginal, indigenous, native people who" resided in the Hawaiian Islands on or before January 1, 1893 *and* "exercised sovereignty" in the same region.[5] As will be discussed below, only one person, Queen Liliuokalani, actually exercised any "sovereignty" in 1893, as Hawaii was then a monarchy. Presumably, S. 147 assumes an ahistorical definition of "sovereignty," referring instead to all persons with "aboriginal, indigenous, native" blood in 1893.

This definition of "Native Hawaiian" focuses on race to the exclusion of all other potentially relevant factors. Nowhere in the definition of "Native Hawaiian" is there any requirement of residency in Hawaii (either presently or at any point in the person's life), any quantum for indigenous blood, any past participation or adoption of Native Hawaiian culture or language, or any documented involvement or interest in Hawaiian (much less Native Hawaiian) political affairs. All of these characteristics — so essential to the recognition of a traditional Indian tribe (as discussed below) — are absent from S. 147. Instead, this legislation relies solely and crudely on race itself, in what amounts to a one-drop racial definition.[6]

It is important to distinguish S. 147's racial test from those that Indian tribes often use to determine their membership. Indian tribes have the authority to determine the rules governing their membership *because they are sovereign entities*.[7] As such, the Equal Protection Clause does not apply to tribes' race-based decisions. In contrast, S. 147 would force the federal government itself to impose and enforce a racial test before any sovereign Native Hawaiian entity even exists (assuming, only for the sake of argument, that Congress has the power to "make" Indian tribal sovereigns through legislation). S. 147's racial test is, therefore, offensive to the Constitution.

Additional Problems in S. 147

Although S. 147's racial test for the new government is its most offensive feature, a few additional aspects of the bill deserve scrutiny.

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[4] In *Rice v. Cayetano*, 528 U.S. 495, 525, 524-527 (2000), Justices Breyer and Souter argued (while concurring in the result) that there is a constitutional limit to how extenuated the definition of a tribal member can be, and strongly suggested that a definition such as this one — membership based on one drop of Native American blood in 1893 — would not pass muster. The majority Justices did not address this argument.

[5] The bill provides an alternate definition as well. Any individual who is one of the "indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual" is also included. That Act defined "Native Hawaiian" as anybody with 1/2 Native Hawaiian blood.

[6] The steps to create the ultimate Native Hawaiian government are spelled out in sections 7 and 8. The procedures are clear that nobody except one with racial bona fides as defined in section 3(10) can participate in the creation of the new government. After the new government is created, it could theoretically restrict the membership to those with more Native Hawaiian blood, but it is difficult to imagine how it could do so from a political standpoint given that the initial definition in this bill is so broad.

[7] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (emphasizing that an Indian tribe is an "independent political community").

First, nothing in the bill guarantees that the ultimate race-based entity will be democratic in nature; in fact, advocates of S. 147 have publicly insisted that the government could take any form.[8] For example, the initial political actors who shape the entity could create a theocratic monarchy.

Second, the bill fails to guarantee that the Bill of Rights applies to the Native Hawaiian entity. Under federal law, the 1st, 5th, and 14th Amendments do not apply to Indian tribes. Those tribes are nonetheless bound by the Indian Civil Rights Act of 1968 ("ICRA"), which provides some, *but not all*, of the Bill of Rights protections (conspicuously excluding, for example, the Establishment Clause and the right to trial by jury in civil cases). In contrast, S. 147 does not apply ICRA to the new entity. Native Hawaiian members of the new entity are, therefore, unlikely to have the protections of key parts of the Bill of Rights when dealing with the new entity.[9]

Third, S. 147 provides no mechanism to enable Hawaiians — all Hawaiians, not just those with one drop of Native Hawaiian blood — to determine whether they want to authorize this race-based government in their midst. This omission is notable given the new entity's inevitable clashes with state law, as discussed below at pages 11-12.

Fourth, the bill empowers the new entity to "negotiate" with the state and federal government over lands and natural resources, the division and exercise of "civil and criminal jurisdiction," and the "delegation of governmental powers" from the United States and Hawaii to the governing entity. Any such negotiations will inevitably come at some price for federal and state taxpayers — not to mention personal liberty in the case of criminal jurisdiction.

S. 147's Core Rationale is Fundamentally Flawed

The major argument in favor of S. 147 is the notion that Congress should just create a Native Hawaiian "Indian tribe" in order to treat them "the same" as American Indians and Alaska Natives. But Congress cannot simply "create" an aboriginal Indian government. The tribal governments that exist on Indian reservations today were not created by the federal government; rather, they were preexisting when those areas were incorporated into the United States. The only exceptions are rare cases where the federal government has recognized an Indian tribe *after* statehood because the tribe could demonstrate that it operated as a sovereign for the past century, was a separate and distinct community, and had a preexisting political organization.[10] If the Native Hawaiians seeking their own government could meet these standards, then Indian law would provide a better fit.

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[8] See Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added), which explains that S. 147 does not restrict what kind of government the Native Hawaiian entity will be, and emphasizes that "total independence" is an option.

[9] The bill does include a provision in section 7(c)(4) requiring the Secretary of the Interior to certify that the civil rights of entity members are "protected," but provides no guidelines to shape the Secretary's discretion. Given that the Indian Civil Rights Act does not precisely mirror the Constitution's Bill of Rights, one cannot assume that the Secretary is bound to guarantee complete constitutional protections.

[10] For a summary of the settled standards for what constitutes an Indian tribe under federal law, see Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes* (March 25, 2005). The standards are derived from longstanding Supreme Court case law. See, e.g., *United States v. Felipe Sandoval*, 231 U.S. 28, 39-46 (1913) (holding that an Indian community must be "separate and isolated," and that Congress cannot arbitrarily designate a group of people as an Indian tribe even if the people are racially similar to Indians).

But advocates for S. 147 cannot demonstrate any of these characteristics. Instead, they focus on only one similarity between those groups and Native Hawaiians — the fact that their ancestors lived on lands now part of the United States. This is little more than a racial test, grounded purely in ancestry and wholly divorced from the standards that determine whether a group of indigenous peoples (or, more typically, their descendants) should be treated as a separate political community. Nor is the test "tailored" to address any purported "wrongs" committed against the Hawaiian people by the United States or other Westerners (or Asians, for that matter). This focus on race and bloodlines is contrary to the settled, court-approved rules for determining what an Indian tribe is, as discussed below. Moreover, it violates the implicit understanding of Congress when Hawaii was admitted to the Union — that Native Hawaiians would not be treated as Indians. As will become apparent, Native Hawaiians simply cannot be treated as an Indian tribe.

Native Hawaiians Cannot Meet Settled Rules for "Tribal" Recognition

The Department of the Interior has a settled process governing the recognition of Indian tribes. The Secretary has promulgated federal regulations, 25 C.F.R. §§ 83.6-83.7, which outline the factors the Secretary must consider before recognizing a tribe. The Congressional Research Service summarizes the main factors as follows:

- "Existence *as an Indian tribe* on a continuous basis since 1900. Evidence may include documents showing that governmental authorities — federal, state, or local — have identified it as an Indian group; identification by anthropologists and scholars; and evidence from newspapers and books.

- "*Existence predominantly as a community*. This may be established by *geographical residence* of 50% of the group; *marriage patterns*; kinship and language patterns; cultural patterns; and social or religious patterns.

- "*Political influence or authority over members as an autonomous entity from historical times until the present.* This may be established by showing evidence of leaders' ability to mobilize the group or settle disputes, inter-group communication links, and *active political processes*.

- "Evidence that the *membership descends from an historical tribe or tribes that combined and functioned together as a political entity*. This may be established by tribal rolls, federal or state records, church or school records, affidavits of leaders and members, and other records."[11]

Only after weighing factors such as these can the Secretary recognize a tribe.

Thus, there are two common threads in these requirements: (1) the group must be a separate and distinct community of Indians, and (2) a preexisting political entity must be present. S. 147 eschews these settled criteria in favor of race and ancestry alone. Indeed, it would be absolutely impossible for persons with Native Hawaiian blood to satisfy these settled criteria.

[11] Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes*, at 2 (emphasis added).

No Separate and Distinct Community

S. 147 repeatedly refers to a Native Hawaiian "people" or "community," but never establishes that such a people or community exists. Certainly there are many Americans who descend from indigenous Hawaiians, but blood alone does not make a "tribe." S. 147 seeks to include virtually every single person who has one drop of indigenous Hawaiian blood in its definition of "Native Hawaiian."[12] It is clear that Native Hawaiian "race" cannot be a proxy for "community," as the following facts demonstrate:

- Native Hawaiians are not geographically or culturally segregated in Hawaii. They live in the same neighborhoods, attend the same schools, worship at the same churches, and participate in the same civic activities as do all Hawaiians.

- Persons with Native Hawaiian blood live throughout the United States. There are more than 400,000 Americans who today claim at least some "Native Hawaiian" blood.[13] Moreover, Native Hawaiians live in all 50 states.[14]

- Native Hawaiians have intermarried with other ethnicities since as early as the 1820s,[15] and "high rates of intermarriage are a unique demographic characteristic of the people of Hawaii."[16]

- Intermarriages in the Native Hawaiian population today are not only common, but predominant. Data show that three-fourths of "only" Native Hawaiians marry outside the race, and more than one-half of "part" Native Hawaiians do the same.[17]

- It is also worth noting that nearly half of *all* marriages in Hawaii are interracial, showing that the culture there continues to be a "melting pot."[18] (Hawaii's racial intermarriage rate is therefore more than *ten times higher* than the 4.5 percent nationwide figure.[19])

- As a result of this intermarriage, some scholars estimate that there are no more than 7,000 "pure-blooded" Native Hawaiians today.[20]

The reality of modern Hawaii — and indeed, of all the United States — is that racial boundaries continue to break down.

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[12] See definition at section 3(10) of S. 147, as well as discussion above at pages 2-3.

[13] Census Report, at 8.

[14] Census Report, Table 2. Technically, the report refers to Native Hawaiians and "other Pacific Islanders," but the only others who fall into "Other Pacific Islander" are the relatively small populations of Fijian and Tongan background. Other major "Pacific Islander" groups such as Filipinos, Samoans, and Guamanians all have their own categories.

[15] Robert C. Schmitt, Foreword to Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at xvi ("Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820s"). Schmitt is identified as the State Statistician for the Hawaii Dep't of Business and Economic Development.

[16] Xuanning Fu & Tim B. Heaton, *Status Exchange in Intermarriage*, Journal of Comparative Family Studies (Jan. 2000), at 1.

[17] See Hawaii Marriage Certificate Data for 1994 cited in Fu & Heaton, Table 2.

[18] Fu & Heaton, Table 2.

[19] U.S. Census Bureau, *America's Families and Living Arrangements: 2003* (Nov. 2004), Table 9.

[20] Bradley E. Hope and Janette Harbottle Hope, *Native Hawaiian Health in Hawaii: Historical Highlights*, California Journal of Health Promotion (2003), at 1. However, fully 141,000 Americans self-reported as only "Native Hawaiian" on the 2000 Census. See Census Report, at 8.

It is apparent that there is no "separate and distinct community" of Native Hawaiians that the law can recognize, but only American citizens, scattered across the nation, who have some ancestry in Hawaii. Such a dispersed people are not what the law contemplates as an "Indian tribe."

No Political Entity

There is another reason why persons with Native Hawaiian blood alone cannot be considered a tribe: they fail the settled "political test" that determines whether a tribe should be recognized.

It is important to understand why there *is* a "political test" for granting tribal recognition. The Constitution does not speak to Native "peoples," but only to "Indian tribes."[21] As the Supreme Court has stated, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. * * * [They are] separate sovereigns pre-existing the Constitution."[22] Thus, Indian tribes are respected as legal entities with quasi-sovereign powers because they existed *prior* to the creation of state governments. Their lands and sovereignty were respected either through treaties entered into with the United States, or due to special reservations in statehood enabling acts. Where Indian communities — communities, not mere racial groups — have been recognized by government post-statehood, it has been due to the recognition that a community continued to exist, and that the community had a semblance of ongoing political cohesion.[23]

No political entity — whether active or dormant — exists in Hawaii that claims to exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed-upon leaders, no political organizations, and no "monarchs-in-waiting." Advocates of S. 147 freely admit this fact.[24] If normal procedures were followed and settled law respected, this failure would preclude the bill's consideration.

Instead, faced with these realities, S. 147's advocates rely upon a confused history of Hawaii to persuade Congress to ignore the normal procedures and settled law. The bill's findings (section 2) proclaim that "Native Hawaiians" exercised "sovereignty" over Hawaii prior to the fall of the monarchy of Queen Liliuokalani in 1893,[25] and that it is therefore appropriate for Native Hawaiians to exercise their "inherent sovereignty" again. This is simply not the case, for two simple reasons.

First, there *was no* race-based Hawaiian government in 1893, so there is no "Native Hawaiian government" to be restored. Since the early 19th century, the Hawaiian "people" included many native-born and naturalized subjects who were not "Native Hawaiians" in the sense of S. 147 — including Americans, Chinese, Japanese, Koreans, Samoans, Portuguese, Scandinavians,

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[21] See Art. I, § 8, cl. 3 (granting Congress power to regulate commerce with "Indian tribes").

[22] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 558, 8 L. Ed. 483 (1832)); see also *Morton v. Mancari*, 417 U.S. 535, 554 & 554 n.24 (1974) (emphasizing that government benefits given to Indian tribes do not constitute racial discrimination because the circumstances are "political rather than racial in nature").

[23] See 25 C.F.R. § 83.7 for political requirements.

[24] See legal argument of the State of Hawaii's Office of Hawaiian Affairs, *Treating Similarly Situated Peoples the Same*, available at http://www.nativehawaiians.com/legalbrief.html (explaining that "no vestiges of an official 'tribe' which purports to represent Native Hawaiians remains").

[25] The Queen yielded to a provisional government in 1893, leading to the creation of a Republic of Hawaii (1894-1898), followed by annexation to the United States in 1898. See discussion of Hawaiian history in *Rice v. Cayetano*, 528 U.S. 495 (2000); Merze Tate, *The United States and the Hawaiian Kingdom* (1965), at 155-193.

Scots, Germans, Russians, Puerto Ricans, and Greeks.[26] All were subjects of the monarch, not just those with aboriginal blood. Moreover, the Queen and her predecessor monarchs regularly employed non-Natives at high levels in their governments from as early as 1844, when an American was appointed by King Kamehameha III to be the kingdom's attorney general.[27] Whites regularly served in the legislature throughout the second half of the 19th Century, and the franchise was even expanded to non-citizen residents in 1887.[28] When the Queen's monarchy fell in 1893, the legislature was multi-racial and many of her Cabinet ministers were white.[29] To speak of "restoring" the "Native Hawaiian" government as of 1893 is to ignore the fact that no such racially-exclusive government — or nation — existed.

Second, Hawaii in 1893 was a monarchy, with "sovereignty" residing *only* in the Queen's person, *not* in the people — Native Hawaiian or otherwise. In no way did the "people" of Hawaii exercise sovereignty over those lands; only the Queen had sovereignty.[30] Thus, S. 147's findings are fundamentally flawed in their references to restoring "inherent sovereignty" because such sovereignty simply never existed. The only way that sovereignty could be restored to its 1893 status would be to reinstate a monarchy.

Given the above, it is apparent that those whom S. 147 calls "Native Hawaiians" (1) have no existing government or organization that could be called a "tribe," and (2) have never exercised "inherent sovereignty" as a "native, indigenous people." No "reorganization" is possible or appropriate because no earlier government existed. In the simplest terms, there is nothing to reorganize or restore.

S. 147 Contravenes the Political Understanding Reached at the Time of Statehood

As explained above, Indian tribes' sovereignty is a function of their existence as tribal organizations prior to their having been absorbed into the American system. Indian tribes that exist and are recognized have their sovereignty as a function of (a) statehood enabling laws, (b) treaties between tribal leadership and the U.S. government, and/or (c) later administrative or Congressional recognition that they are separate and distinct communities with some form of political structure. It is highly relevant for present purposes, then, to review what the understanding was at the time that Hawaii became a state in 1959.

It is not in dispute that, at the time Hawaii was admitted as a State, there was an implicit understanding that Hawaii's "native peoples" would ***not*** be treated as an Indian tribe with sovereign powers. There was no political effort in 1898 (at the time of annexation) — or in 1959 — to treat Native Hawaiians like Alaska Natives or as Indian tribes. To the contrary, during the extensive statehood debates of the 1950s, advocates repeatedly emphasized that the Hawaiian Territory was a post-racial "melting pot" without racial divisiveness. There was virtually no discussion of carving out separate sovereignty for "Native Hawaiians."

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[26] Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at 42-98.

[27] Nordyke, *The Peopling of Hawai'i*, at 42; see also Tate, *The United States and the Hawaiian Kingdom*, at 13-22 & 49.

[28] Tate, *The United States and the Hawaiian Kingdom*, at 52 & 53-111.

[29] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193.

[30] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193 (discussing the Queen's efforts to maintain sovereignty solely in her own person).

Consider, for example, the representative words of some of the key advocates for Hawaii statehood in the years leading up to statehood:

> "Hawaii is America in a microcosm — a melting pot of many racial and national origins, from which has been produced a common nationality, a common patriotism, a common faith in freedom and in the institutions of America." — *Senator Herbert Lehman (D-NY), April 1, 1954, Congressional Record, at 4325.*
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> "Hawaii is the furnace that is melting that melting pot. We are the light. We are showing a way to the American people that true brotherhood of man can be accomplished. We have the light, and we have the goal. And we can show that to the peoples of the world." — *Testimony of Frank Fasi, Democratic National Committeeman for Hawaii, before the Senate Committee on Interior and Insular Affairs, June 30, 1953.*
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> "While it was originally inhabited by Polynesians, and its present population contains substantial numbers of citizens of oriental ancestry, the economy of the islands began 100 years ago to develop in the American pattern, and the government of the islands took on an actual American form 50 years ago. Therefore, today Hawaii is literally an American outpost in the Pacific, completely reflecting the American scene, with its religious variations, its cultural, business, and agricultural customs, and its politics." — *Senator Wallace Bennett (R-UT), Congressional Record, March 10, 1954, at 2983.*
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> "Hawaii is living proof that people of all races, cultures and creeds can live together in harmony and well-being, and that democracy as advocated by the United States has in fact afforded a solution to some of the problems constantly plaguing the world." — *Testimony of John A. Burns, Delegate to Congress from the Territory of Hawaii, before the Senate Committee on the Interior and Insular Affairs, Apr. 1, 1957.*

These statements represent the repeated testimony and arguments that Congress considered prior to granting statehood. Hawaii's admission was granted with the straightforward understanding that the diverse and multiracial Hawaiian community would ***not*** be the fount of the racial separatism that S. 147 presents.[31] As such, this legislation is a significant step backwards. And from a legal

[31] The historical record leaves no room for doubt regarding the post-racial position of statehood advocates. See, for example, Testimony of Edward N. Sylva, Attorney General of Hawaii Territory, before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("we are not race conscious in Hawaii at all"); Testimony of Dr. Gregg Sinclair, President of the University of Hawaii, before the before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("there can be no doubt at all about [Native Hawaiians' and other Hawaiian ethnic groups'] true Americanism"); Testimony of Fred Seaton, Secretary of Interior, before the Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("The overwhelming majority of Hawaiians are native-born Americans; they know no other loyalty and acclaim their citizenship as proudly as you and I"); Statement of Senator Clair Engle (D-CA), Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("There is no mistaking the Americans culture and philosophy that dominates the lives of Hawaii's polyglot mixture"); Statement of Senator Frank Church (D-ID), Subcommittee on Territories and Insular Affairs of the Senate Committee on Interior and Insular Affairs, Feb. 25, 1959 (Hawaiian culture bears the "unmistakable stamp of the United States"); Letter from Interior Secretary Fred Seaton to Chairman James Murray, dated Feb. 4, 1959, collected in record to Statehood for Hawaii Hearing before the Senate Committee on the Interior and Insular Affairs, Mar. 5, 1959 ("Hawaii is truly American in every aspect of its life");

perspective, this history shows that there has been no question of the inapplicability of federal Indian law to Native Hawaiians.[32]

S. 147 Violates Core Constitutional Values

It is astonishing that Congress is considering creating a race-based government in Hawaii (or anywhere else) given the tremendous progress that the nation has made towards eliminating racial distinctions among its citizens. Presumptive color-blindness and race-neutrality is now at the core of our legal system and cultural environment, and represents one of the most important American achievements of the 20th Century. S. 147 is, therefore, profoundly retrograde — a challenge to settled constitutional understandings and a disturbing threat to growing cultural cohesion on matters of race.

As recently as 2000, the Supreme Court warned that any effort to treat Native Hawaiians as an Indian tribe would be constitutionally suspect, calling the subject "difficult terrain" and "a matter of some dispute."[33] The court made this statement when considering an earlier effort by Hawaii's politicians to create a race-based government made up of only of Native Hawaiians — an effort that forms both a legal and precipitating backdrop to the current efforts.

In *Rice v. Cayetano*, the Supreme Court addressed an effort by Hawaii to create a state-sanctioned, race-based entity composed solely of Native Hawaiians (defined solely based on race, similar to in S. 147) and limited the franchise to the Native Hawaiian "race." The Supreme Court found that this effort to create a race-based government in Hawaii violated the Constitution's Fifteenth Amendment, which forbids discrimination in voting based on race. In so doing, the Supreme Court stated:

> One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[34]

Thus, the Supreme Court concluded that the law could not be used as the "instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is

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Statement of Senator James Murray (D-MT), *Congressional Record*, Mar. 11, 1959, at 3854 (Hawaiians "no other loyalty than that to America"); Statement of Senator Alan Bible (D-NV), *Congressional Record*, Mar. 11, 1959, at 3857 ("American ideas, American liberty, American civilization prevail there"); Statement of Senator Gordon Allott (R-CO), Mar. 11, 1959, at 3858 (arguing that statehood shows to the world that Americans believe in "self-government and the equal treatment of all citizens, irrespective or race, color or creed"). The Senate floor debate of March 11, 1959 provides further evidence of Congress's disavowal of racial separatism for Hawaii's people.

[32] A small amount of acreage is set aside for some Native Hawaiian peoples through the Hawaiian Homes Commission Act (1920), ratified later in the Hawaiian Admission Act. Federal courts have repeatedly made clear that these laws did not create any "trust relationship" (akin to that which exists with Indian tribes) between the federal government and Native Hawaiians. *E.g.*, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1224 (9th Cir. 1978); *Han v. Dep't of Justice*, 824 F. Supp. 1480 (D. Haw. 1993) (finding no trust responsibility), *aff'd* 45 F.3d 333 (1995); *Na Iwi O Na Kupuna O Makupu v. Dalton*, 894 F. Supp. 1397, 1410 (D. Haw. 1995) (holding that "the federal government has no trust responsibility to Native Hawaiians").

[33] *Rice v. Cayetano*, 528 U.S. 495, 518-519 (2000).

[34] *Rice*, 528 U.S. at 517.

disclosed by their ethnic characteristics and cultural traditions."[35] To do so would be "odious to a free people whose institutions are founded upon the doctrine of equality."[36]

The Supreme Court's holding in *Rice*, although formally limited to the Fifteenth Amendment challenge, is likely to reach the race-based plans of S. 147. The bill's advocates believe that by cloaking their efforts in federal Indian law, they will be able to relax the standard of review in federal courts from "strict scrutiny," which applies to race-based governmental decisions,[37] to the more deferential "rational basis review," which applies to the sovereign-to-sovereign governmental interactions found in federal Indian law.[38] This argument will likely fail because the Supreme Court — in an earlier and unrelated case — has already held that Congress may not do what S. 147's advocates intend: to insulate a program from strict scrutiny by "bring[ing] a community or body of people within the range of this [Congressional] power by arbitrarily calling them an Indian tribe."[39] And as noted above, the Supreme Court has already registered its skepticism about the ability of Congress to recognize Native Hawaiians as a "tribe."[40]

Despite these signals from the Supreme Court, Congress should not be too sanguine about the Supreme Court doing its proverbial dirty work by striking down this bill if it were to become law. Challenges to S. 147 are likely to arise in the same courts — the District of Hawaii and the Ninth Circuit — that upheld the unconstitutional race-based voting system struck down in *Rice v. Cayetano*. Supreme Court jurisdiction would be discretionary, and the Court's composition is likely to be different at the time of the decision. Congress should not "punt;" it should instead exercise its independent obligation to "support and defend the Constitution" by refusing to pass this bill.

S. 147 Will Be Racially Divisive In Hawaii and Throughout the Nation

S. 147 advocates repeatedly claim that creating a racially-exclusive government will be a "unifying force,"[41] but the practical effects of the legislation do not square with these claims. This is because, by creating an "Indian tribe" out of some Native Hawaiians, Congress will be creating a path by which the new government gains the same privileges and immunities that other Indian tribes have — in particular, freedom from state taxation and regulation. But the new government will be operating in an environment that is completely different from that which other Indian tribes have dealt, because there will be no segregated space (reservations) or physical communities. As noted above, Native Hawaiians live in the same neighborhoods, attend the same schools, work for the same employers, and worship at the same churches as others in Hawaii and across the nation.

This assimilation will not prevent Native Hawaiians from insulating themselves from the state laws that their neighbors must obey. Because Native Hawaiians do not have segregated "reservation" lands, the natural way for the new entity to gain the privileges and immunities is to ask the Secretary of Interior to take land "into trust." Once land is taken "into trust," it cannot be taxed or regulated. The federal government has repeatedly taken very small amounts of land "into trust" upon petition by members of Indian tribes. One such case is a recent decision by the

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[35] *Rice*, 528 U.S. at 517.
[36] *Rice*, 528 U.S. at 517 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).
[37] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
[38] *Morton v. Mancari*, 417 U.S. 535, 554 (1974).
[39] *United States v. Felipe Sandoval*, 251 U.S. 28, 46 (1913).
[40] *Rice*, 528 U.S. at 518-519.
[41] See, e.g., Testimony of Linda Lingle, Governor of Hawaii, before the Senate Indian Affairs Committee, March 1, 2004, at 3.

Secretary to take into trust a three-acre parcel of land in Nebraska — a parcel which used to house a bar called "Dan's Lounge," but which soon will feature a casino. A federal district court allowed the Secretary to take the land into trust (and thereby insulate it from many state laws) despite its small size.[42] In Hawaii, it is likely that Native Hawaiians will attempt to use the same process to persuade the Secretary of the Interior to take some of their homes and businesses "into trust" on a wholesale or even piecemeal basis. The result will be different legal codes applying to different people living in the same communities depending on their race.

Finally, it is important to understand how this bill is being promoted in Hawaii. While some advocates are telling Senators that the legislation is a ticket to racial harmony, the State of Hawaii itself is telling Native Hawaiians that it is the path to greater independence. Consider this paragraph from an Internet website operated by the Office of Hawaiian Affairs, in a section titled, *How Will Federal Recognition Affect Me*:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S. 344 [the bill number in the 108th Congress] creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people *may exercise their right to self-determination by selecting another form of government including free association or total independence.*[43]

It is difficult to see how a bill touted in Hawaii as a potential path to "total independence" is going to help reconcile whatever racial divisions exist there. It goes without saying that Congress does not serve the nation's long-term interests by providing vehicles for its citizens to secede from the Union.

Additional Long-Term Issues Created by S. 147

Before concluding, it is important to highlight additional provisions of S. 147 that create challenges Congress will be forced to confront if this bill becomes law. For example:

- ***Future Taxpayer Liabilities.*** Section 8(c) of the bill provides a 20-year statute of limitations for new legal claims against the federal government by Native Hawaiians. Prominent among the potential claims are "*Cobell*-style litigation" — claims that the federal government has abused its "trust relationship" with Indians.[44] Other claims could include disputes over land title to Hawaiian lands owned by state and federal governments, *as well as* private citizens. For example, private landowners in the Northeast United States have been fighting claims of prior aboriginal title on their lands for the past 30 years. Moreover, the bill expressly states that no pending claims against the federal government shall be settled. Given the extent of the pending lawsuits filed

[42] See Memorandum and Order entered July 29, 2004, in *Santee Sioux Nation v. Norton*, No. 8:03CV133 (D. Nebraska), on file with the Senate Republican Policy Committee.

[43] Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added).

[44] For more information on *Cobell* litigation, see Congressional Research Service, *The Indian Trust Fund Litigation: An Overview of Cobell v. Norton* (February 25, 2005).

by Native American individuals and tribes, this lengthy statute of limitations period virtually guarantees additional federal financial burdens.

- ***Gambling.*** The question of gambling in Hawaii on Indian lands is not answered by S. 147. On the one hand, section 9 provides that the bill does not authorize gambling under the Indian Gaming Regulatory Act. On the other hand, section 8(b) ensures that the new Native Hawaiian entity would be free to negotiate gaming rights with the State of Hawaii and with the federal government.

- ***Effect on other Indian Funding.*** Under the bill, the current programs for the benefit of Native Hawaiians are presumed to continue, and Bureau of Indian Affairs, Indian Health Service, and other Indian-related monies are segregated for existing tribes. *However*, given that the primary rationale for S. 147 is that Native Hawaiians should be "just like Indians," it is highly likely that future Congresses will rationalize the programs and lump Indian and Hawaiian funding together. When current political compromises become little more than faint memories, there will be natural pressure to funnel monies to Native Hawaiians through the Indian law system. When that happens, Native Americans will be competing with 400,000 Native Hawaiians for federal resources. And, of course, that 400,000 figure will only grow over time.

- ***Authorization for Additional Appropriations.*** Section 11 contains an open-ended authorization for additional funds necessary to carry out the Act. In 2004, the Congressional Budge Office estimated that an earlier version of this bill would cost "nearly $1 million annually in fiscal years 2005-2007 and less than $500,000 in each subsequent year, assuming the availability of appropriated funds."[45]

Conclusion

Congress should not be in the business of creating governments for racial groups that are living in an integrated, largely assimilated society. If the Native Hawaiians lived as Indian tribes, with separate and distinct communities and with their own political entities, then the injury to the nation in recognizing them would be much less dramatic. But this is not the case. Federal Indian law should not be manipulated into a racial spoils system. If Congress can create a government based on blood alone, then the Constitution's commitment to equality under the law means very little. Rather than putting that constitutional question to the Supreme Court, Congress should answer the question itself and defeat this legislation.

[45] CBO Estimate for H.R. 4282, Sept. 22, 2004.

HI - AKAKA BILL - SURVEY - 2

KEY:

Y = YES
N = NO
? = UNDECIDED
S = SKIP
U = UNKNOWN (DNU MESSAGE PLAYS ONCE AND IF THERE IS NO INTELLIGIBLE RESPONSE THE CALL TERMINATES.)

DNU = DID NOT UNDERSTAND MESSAGE

 # = NEXT SEGMENT THAT DISPLAYS UPON RECEIVING A PARTICULAR RESPONSE. FOR EXAMPLE, Y = 3 MEANS ON YES GO TO SEGMENT 3.

1 Registered? - (YES, NO)

THIS IS FEC RESEARCH WITH A 45 SECOND PUBLIC SURVEY. ARE YOU REGISTERED TO VOTE IN HAWAII?

Y: 2
N: 2
U: 2
DNU1: 12

2 Support Excise Tax Increase of $450 per Year? - (YES, NO)

YOUR OPINIONS MATTER. PLEASE TAKE THE TIME TO ANSWER THE FOLLOWING 8 QUESTIONS. DO YOU SUPPORT THE PROPOSED INCREASE IN THE STATE EXCISE TAX THAT WILL COST THE AVERAGE HAWAII FAMILY AN ESTIMATED $450.00 PER YEAR?

Y: 3
N: 3
U: 3
DNU1: 12

3 Support Racial Preferences? - (YES, NO)

DO YOU SUPPORT LAWS THAT PROVIDE PREFERENCES FOR PEOPLE GROUPS BASED ON THEIR RACE?

Y: 4
N: 4
U: 4
DNU1: 12

4 Support Akaka Bill? - (YES, NO)

THE AKAKA BILL, NOW PENDING IN CONGRESS, WOULD ALLOW NATIVE HAWAIIANS TO CREATE THEIR OWN GOVERNMENT NOT SUBJECT TO ALL THE SAME LAWS, REGULATIONS AND TAXES THAT APPLY TO OTHER CITIZENS OF HAWAII. DO YOU WANT CONGRESS TO APPROVE THE AKAKA BILL?

Y: 5
N: 5
U: 5
DNU1: 12

5 Less Likely to Support Akaka Bill Supporter? - (YES, NO)

WOULD YOU BE LESS LIKELY TO VOTE FOR AN ELECTED OFFICIAL WHO SUPPORTS THE AKAKA BILL?

Y: 6
N: 6
U: 6
DNU1: 12
DNU2: 12

6 Native Hawaiian? - (YES, NO)

DO YOU CONSIDER YOURSELF TO BE A NATIVE HAWAIIAN?

Y: 7
N: 7
U: 0
DNU1: 13
DNU2: 14

7 Republican? - (YES, NO)

DO YOU CONSIDER YOURSELF TO BE A REPUBLICAN?

Y: 9
N: 8
U: 8

8 Democrat? - (YES, NO)

DO YOU CONSIDER YOURSELF TO BE A DEMOCRAT?

Y: 9
N: 9
U: 9

9 Male? - (YES, NO)

ARE YOU MALE?

Y: 10
N: 10
U: 10

10 50+ - (YES, NO)

ARE YOU 50 YEARS OF AGE OR OLDER?

Y: 11
N: 11
U: 11

11 Thank You. Goodbye - (PLAY ONLY)

THANK YOU FOR YOUR TIME AND VIEWS. THIS SURVEY WAS CONDUCTED BY FEC RESEARCH. GOODBYE. 703/857-2152

S: 0

12 DNU - (DNU PROMPT)

PLEASE SAY, YES, NO OR REPEAT, NOW.

13 DNU1 - (DNU PROMPT)

THIS SURVEY WILL END WITHOUT A YES, NO OR REPEAT NOW.

14 DNU2 - (DNU PROMPT)

THANK YOU FOR YOUR TIME AND VIEWS. THIS SURVEY WAS CONDUCTED BY FEC RESEARCH. GOODBYE. 703/857-2152

15 Ans-Device - (PLAY ONLY)

THIS WAS A POLITICAL SURVEY CALL. WE MAY CALL BACK LATER.

S: 0

HI - Akaka Bill - Survey - 2						
Segment	Total Ehvs	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Registered? = Yes						
Registered?	20,358	20,358	-	-	100.00%	0.00%
Support Excise Tax Increase of $450 per Year?	16,799	3,287	9,032	4,480	26.68%	73.32%
Support Racial Preferences?	14,604	2,130	9,677	2,797	18.04%	81.96%
Support Akaka Bill?	13,478	3,805	7,653	2,020	33.21%	66.79%
Less Likely to Support Akaka Bill Supporter?	13,002	5,187	6,366	1,449	44.90%	55.10%
Native Hawaiian?	12,641	2,168	9,074	1,399	19.28%	80.72%
Republican?	11,240	3,381	6,450	1,409	34.39%	65.61%
Democrat?	7,858	3,803	2,878	1,177	56.92%	43.08%
Male?	11,230	3,794	6,338	1,098	37.45%	62.55%
50+	11,214	5,754	3,377	2,083	63.02%	36.98%
Registered? = No						
Registered?	18,725	-	18,725	-	0.00%	100.00%
Support Excise Tax Increase of $450 per Year?	9,413	707	3,236	5,470	17.93%	82.07%
Support Racial Preferences?	6,682	689	2,856	3,137	19.44%	80.56%
Support Akaka Bill?	5,460	1,026	2,327	2,107	30.60%	69.40%
Less Likely to Support Akaka Bill Supporter?	4,975	1,530	1,834	1,611	45.48%	54.52%
Native Hawaiian?	4,709	736	2,436	1,537	23.20%	76.80%
Republican?	3,171	802	1,747	622	31.46%	68.54%
Democrat?	2,369	730	1,127	512	39.31%	60.69%
Male?	3,160	1,228	1,429	503	46.22%	53.78%
50+	3,147	699	1,697	751	29.17%	70.83%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Support Excise Tax Increase of $450 per Year? = Yes						
Registered?	4,242	3,287	707	248	82.30%	17.70%
Support Excise Tax Increase of $450 per Year?	4,242	4,242	-	-	100.00%	0.00%
Support Racial Preferences?	4,204	1,098	2,618	488	29.55%	70.45%
Support Akaka Bill?	3,954	1,617	1,970	367	45.08%	54.92%
Less Likely to Support Akaka Bill Supporter?	3,825	1,437	2,186	202	39.66%	60.34%
Native Hawaiian?	3,727	597	2,896	234	17.09%	82.91%
Republican?	3,492	943	2,177	372	30.22%	69.78%
Democrat?	2,549	1,253	992	304	55.81%	44.19%
Male?	3,492	1,484	1,725	283	46.24%	53.76%
50+	3,487	1,785	1,173	529	60.34%	39.66%
Support Excise Tax Increase of $450 per Year? = No						
Registered?	13,306	9,032	3,236	1,038	73.62%	26.38%
Support Excise Tax Increase of $450 per Year?	13,306	-	13,306	-	0.00%	100.00%
Support Racial Preferences?	13,093	1,562	9,632	1,899	13.95%	86.05%
Support Akaka Bill?	12,063	3,064	7,748	1,251	28.34%	71.66%
Less Likely to Support Akaka Bill Supporter?	11,624	5,160	5,685	779	47.58%	52.42%
Native Hawaiian?	11,285	2,187	8,304	794	20.85%	79.15%
Republican?	10,490	3,152	5,883	1,455	34.89%	65.11%
Democrat?	7,337	3,154	2,975	1,208	51.46%	48.54%
Male?	10,478	3,474	5,873	1,131	37.17%	62.83%
50+	10,461	4,573	3,815	2,073	54.52%	45.48%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Support Racial Preferences? = Yes						
Registered?	3,022	2,130	689	203	75.56%	24.44%
Support Excise Tax Increase of $450 per Year?	3,022	1,098	1,562	362	41.28%	58.72%
Support Racial Preferences?	3,022	3,022	-	-	100.00%	0.00%
Support Akaka Bill?	2,933	1,748	880	305	66.51%	33.49%
Less Likely to Support Akaka Bill Supporter?	2,820	818	1,840	162	30.78%	69.22%
Native Hawaiian?	2,750	873	1,685	192	34.13%	65.87%
Republican?	2,557	640	1,560	357	29.09%	70.91%
Democrat?	1,917	939	684	294	57.86%	42.14%
Male?	2,554	930	1,325	299	41.24%	58.76%
50+	2,550	983	1,092	475	47.37%	52.63%
Support Racial Preferences? = No						
Registered?	13,427	9,677	2,856	894	77.21%	22.79%
Support Excise Tax Increase of $450 per Year?	13,427	2,618	9,632	1,177	21.37%	78.63%
Support Racial Preferences?	13,427	-	13,427	-	0.00%	100.00%
Support Akaka Bill?	13,050	2,868	8,944	1,238	24.28%	75.72%
Less Likely to Support Akaka Bill Supporter?	12,625	5,832	6,019	774	49.21%	50.79%
Native Hawaiian?	12,252	1,930	9,560	762	16.80%	83.20%
Republican?	11,489	3,528	6,457	1,504	35.33%	64.67%
Democrat?	7,960	3,448	3,255	1,257	51.44%	48.56%
Male?	11,475	4,054	6,282	1,139	39.22%	60.78%
50+	11,456	5,368	3,906	2,182	57.88%	42.12%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Support Akaka Bill? = Yes						
Registered?	5,197	3,805	1,026	366	78.76%	21.24%
Support Excise Tax Increase of $450 per Year?	5,197	1,617	3,064	516	34.54%	65.46%
Support Racial Preferences?	5,197	1,748	2,868	581	37.87%	62.13%
Support Akaka Bill?	5,197	5,197	-	-	100.00%	0.00%
Less Likely to Support Akaka Bill Supporter?	5,148	1,111	3,817	220	22.54%	77.46%
Native Hawaiian?	5,050	1,518	3,225	307	32.01%	67.99%
Republican?	4,743	994	3,126	623	24.13%	75.87%
Democrat?	3,749	1,823	1,389	537	56.76%	43.24%
Male?	4,739	1,851	2,383	505	43.72%	56.28%
50+	4,730	2,062	1,824	844	53.06%	46.94%
Support Akaka Bill? = No						
Registered?	10,694	7,653	2,327	714	76.68%	23.32%
Support Excise Tax Increase of $450 per Year?	10,694	1,970	7,748	976	20.27%	79.73%
Support Racial Preferences?	10,694	880	8,944	870	8.96%	91.04%
Support Akaka Bill?	10,694	-	10,694	-	0.00%	100.00%
Less Likely to Support Akaka Bill Supporter?	10,592	5,744	4,282	566	57.29%	42.71%
Native Hawaiian?	10,310	1,375	8,253	682	14.28%	85.72%
Republican?	9,626	3,220	5,065	1,341	38.87%	61.13%
Democrat?	6,405	2,708	2,620	1,077	50.83%	49.17%
Male?	9,614	3,237	5,344	1,033	37.72%	62.28%
50+	9,602	4,386	3,268	1,948	57.30%	42.70%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Less Likely to Support Akaka Bill Supporter? = Yes						
Registered?	7,195	5,187	1,530	478	77.22%	22.78%
Support Excise Tax Increase of $450 per Year?	7,195	1,437	5,160	598	21.78%	78.22%
Support Racial Preferences?	7,195	818	5,832	545	12.30%	87.70%
Support Akaka Bill?	7,195	1,111	5,744	340	16.21%	83.79%
Less Likely to Support Akaka Bill Supporter?	7,195	7,195	-	-	100.00%	0.00%
Native Hawaiian?	7,121	1,270	5,407	444	19.02%	80.98%
Republican?	6,676	2,554	3,242	880	44.06%	55.94%
Democrat?	4,122	1,834	1,624	664	53.04%	46.96%
Male?	6,674	2,483	3,558	633	41.10%	58.90%
50+	6,668	3,108	2,346	1,214	56.99%	43.01%
Less Likely to Support Akaka Bill Supporter? = No						
Registered?	8,808	6,366	1,834	608	77.63%	22.37%
Support Excise Tax Increase of $450 per Year?	8,808	2,186	5,685	937	27.77%	72.23%
Support Racial Preferences?	8,808	1,840	6,019	949	23.41%	76.59%
Support Akaka Bill?	8,808	3,817	4,282	709	47.13%	52.87%
Less Likely to Support Akaka Bill Supporter?	8,808	-	8,808	-	0.00%	100.00%
Native Hawaiian?	8,683	1,743	6,330	610	21.59%	78.41%
Republican?	8,071	1,751	5,142	1,178	25.40%	74.60%
Democrat?	6,320	2,800	2,490	1,030	52.93%	47.07%
Male?	8,058	2,727	4,332	999	38.63%	61.37%
50+	8,044	3,467	2,867	1,710	54.74%	45.26%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Native Hawaiian? = Yes						
Registered?	3,176	2,168	736	272	74.66%	25.34%
Support Excise Tax Increase of $450 per Year?	3,176	597	2,187	392	21.44%	78.56%
Support Racial Preferences?	3,176	873	1,930	373	31.15%	68.85%
Support Akaka Bill?	3,176	1,518	1,375	283	52.47%	47.53%
Less Likely to Support Akaka Bill Supporter?	3,176	1,270	1,743	163	42.15%	57.85%
Native Hawaiian?	3,176	3,176	-	-	100.00%	0.00%
Republican?	3,175	929	1,610	636	36.59%	63.41%
Democrat?	2,245	991	765	489	56.44%	43.56%
Male?	3,166	1,025	1,620	521	38.75%	61.25%
50+	3,155	1,087	1,189	879	47.76%	52.24%
Native Hawaiian? = No						
Registered?	12,228	9,074	2,436	718	78.84%	21.16%
Support Excise Tax Increase of $450 per Year?	12,228	2,896	8,304	1,028	25.86%	74.14%
Support Racial Preferences?	12,228	1,685	9,560	983	14.98%	85.02%
Support Akaka Bill?	12,228	3,225	8,253	750	28.10%	71.90%
Less Likely to Support Akaka Bill Supporter?	12,228	5,407	6,330	491	46.07%	53.93%
Native Hawaiian?	12,228	-	12,228	-	0.00%	100.00%
Republican?	12,226	3,479	7,061	1,686	33.01%	66.99%
Democrat?	8,747	3,793	3,502	1,452	51.99%	48.01%
Male?	12,210	4,326	6,558	1,326	39.75%	60.25%
50+	12,187	5,686	4,173	2,328	57.67%	42.33%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Republican? = Yes						
Registered?	4,408	3,381	802	225	80.83%	19.17%
Support Excise Tax Increase of $450 per Year?	4,408	943	3,152	313	23.03%	76.97%
Support Racial Preferences?	4,408	640	3,528	240	15.36%	84.64%
Support Akaka Bill?	4,408	994	3,220	194	23.59%	76.41%
Less Likely to Support Akaka Bill Supporter?	4,408	2,554	1,751	103	59.33%	40.67%
Native Hawaiian?	4,408	929	3,479	-	21.08%	78.92%
Republican?	4,408	4,408	-	-	100.00%	0.00%
Male?	4,407	1,761	2,304	342	43.32%	56.68%
50+	4,406	2,022	1,670	714	54.77%	45.23%
Republican? = No						
Registered?	8,671	6,450	1,747	474	78.69%	21.31%
Support Excise Tax Increase of $450 per Year?	8,671	2,177	5,883	611	27.01%	72.99%
Support Racial Preferences?	8,671	1,560	6,457	654	19.46%	80.54%
Support Akaka Bill?	8,671	3,126	5,065	480	38.16%	61.84%
Less Likely to Support Akaka Bill Supporter?	8,671	3,242	5,142	287	38.67%	61.33%
Native Hawaiian?	8,671	1,610	7,061	-	18.57%	81.43%
Republican?	8,671	-	8,671	-	0.00%	100.00%
Democrat?	8,671	4,320	3,559	792	54.83%	45.17%
Male?	8,671	2,950	4,956	765	37.31%	62.69%
50+	8,667	4,040	3,056	1,571	56.93%	43.07%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Democrat? = Yes						
Registered?	4,784	3,803	730	251	83.90%	16.10%
Support Excise Tax Increase of $450 per Year?	4,784	1,253	3,154	377	28.43%	71.57%
Support Racial Preferences?	4,784	939	3,448	397	21.40%	78.60%
Support Akaka Bill?	4,784	1,823	2,708	253	40.23%	59.77%
Less Likely to Support Akaka Bill Supporter?	4,784	1,834	2,800	150	39.58%	60.42%
Native Hawaiian?	4,784	991	3,793	-	20.71%	79.29%
Republican?	4,784	-	4,320	464	0.00%	100.00%
Democrat?	4,784	4,784	-	-	100.00%	0.00%
Male?	4,784	1,441	2,917	426	33.07%	66.93%
50+	4,783	2,265	1,578	940	58.94%	41.06%
Democrat? = No						
Registered?	4,267	2,878	1,127	262	71.86%	28.14%
Support Excise Tax Increase of $450 per Year?	4,267	992	2,975	300	25.01%	74.99%
Support Racial Preferences?	4,267	684	3,255	328	17.36%	82.64%
Support Akaka Bill?	4,267	1,389	2,620	258	34.65%	65.35%
Less Likely to Support Akaka Bill Supporter?	4,267	1,624	2,490	153	39.47%	60.53%
Native Hawaiian?	4,267	765	3,502	-	17.93%	82.07%
Republican?	4,267	-	3,559	708	0.00%	100.00%
Democrat?	4,267	-	4,267	-	0.00%	100.00%
Male?	4,267	1,695	2,180	392	43.74%	56.26%
50+	4,267	1,924	1,614	729	54.38%	45.62%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
Male? = Yes						
Registered?	5,351	3,794	1,228	329	75.55%	24.45%
Support Excise Tax Increase of $450 per Year?	5,351	1,484	3,474	393	29.93%	70.07%
Support Racial Preferences?	5,351	930	4,054	367	18.66%	81.34%
Support Akaka Bill?	5,351	1,851	3,237	263	36.38%	63.62%
Less Likely to Support Akaka Bill Supporter?	5,351	2,483	2,727	141	47.66%	52.34%
Native Hawaiian?	5,351	1,025	4,326	-	19.16%	80.84%
Republican?	5,351	1,761	2,950	640	37.38%	62.62%
Democrat?	3,590	1,441	1,695	454	45.95%	54.05%
Male?	5,351	5,351	-	-	100.00%	0.00%
50+	5,351	2,533	1,946	872	56.55%	43.45%
Male? = No						
Registered?	8,178	6,338	1,429	411	81.60%	18.40%
Support Excise Tax Increase of $450 per Year?	8,178	1,725	5,873	580	22.70%	77.30%
Support Racial Preferences?	8,178	1,325	6,282	571	17.42%	82.58%
Support Akaka Bill?	8,178	2,383	5,344	451	30.84%	69.16%
Less Likely to Support Akaka Bill Supporter?	8,178	3,558	4,332	288	45.10%	54.90%
Native Hawaiian?	8,178	1,620	6,558	-	19.81%	80.19%
Republican?	8,178	2,304	4,956	918	31.74%	68.26%
Democrat?	5,874	2,917	2,180	777	57.23%	42.77%
Male?	8,178	-	8,178	-	0.00%	100.00%
50+	8,178	3,813	3,060	1,305	55.48%	44.52%

Segment	Total Plays	Yes	No	No Response	Responding Percent "Yes"	Responding Percent "No"
50+ = Yes						
Registered?	6,773	5,754	699	320	89.17%	10.83%
Support Excise Tax Increase of $450 per Year?	6,773	1,785	4,573	415	28.07%	71.93%
Support Racial Preferences?	6,773	983	5,368	422	15.48%	84.52%
Support Akaka Bill?	6,773	2,062	4,386	325	31.98%	68.02%
Less Likely to Support Akaka Bill Supporter?	6,773	3,108	3,467	198	47.27%	52.73%
Native Hawaiian?	6,773	1,087	5,686	-	16.05%	83.95%
Republican?	6,773	2,022	4,040	711	33.36%	66.64%
Democrat?	4,751	2,265	1,924	562	54.07%	45.93%
Male?	6,773	2,533	3,813	427	39.91%	60.09%
50+	6,773	6,773	-	-	100.00%	0.00%
50+ = No						
Registered?	5,362	3,377	1,697	288	66.55%	33.45%
Support Excise Tax Increase of $450 per Year?	5,362	1,173	3,815	374	23.52%	76.48%
Support Racial Preferences?	5,362	1,092	3,906	364	21.85%	78.15%
Support Akaka Bill?	5,362	1,824	3,268	270	35.82%	64.18%
Less Likely to Support Akaka Bill Supporter?	5,362	2,346	2,867	149	45.00%	55.00%
Native Hawaiian?	5,362	1,189	4,173	-	22.17%	77.83%
Republican?	5,362	1,670	3,056	636	35.34%	64.66%
Democrat?	3,692	1,578	1,614	500	49.44%	50.56%
Male?	5,362	1,946	3,060	356	38.87%	61.13%
50+	5,362	-	5,362	-	0.00%	100.00%

LETTER TO SENATOR JOHN MCCAIN FROM THE HONORABLE WILLIAM B. MOSCHELLA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 13 2005

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice is pleased to provide the views of the Administration on S. 147, the "Native Hawaiian Government Reorganization Act of 2005." The Department has identified four serious policy concerns raised by the proposed legislation that the Administration believes can and should be addressed and resolved by changes to the text of the bill.

First, the legislation should include explicit language clearly precluding potential claims for equitable, monetary, or Administrative Procedure Act-based relief, whether asserting an alleged breach of trust, calling for an accounting, or seeking the recovery of or compensation for lands once held by native Hawaiians. The absence of such language in the current legislation, especially in combination with the reference in section 2(21)(B) of S. 147 to the "the lands that comprise the corpus of the trust" and the unusually long statute-of-limitations period for claims against the United States provided for in section 8(c)(2), could invite a flood of litigation and could create the prospect of enormous unanticipated liability for the United States and the State of Hawaii. In addition, because there exist some legal theories that might be construed to create potential claims that could not be precluded under an amended S. 147, the legislation should include a limitations period that is significantly shorter than the proposed 20-year period now contained in section 8(c)(2), and should bar courts from using the continuing-wrong and equitable-tolling doctrines, which are sometimes employed to expand statutes of limitations fixed by Congress.

Second, S. 147 should be amended to make clear that the consultation process contemplated in sections 5(b) and 6(d) may not be applied so as to interfere in any way with the operation of U.S. military facilities on Hawaii or otherwise affect military readiness. The potential for such interference is well illustrated by litigation currently pending in the U.S. Court of Appeals for the Ninth Circuit (*Ilioulaokalani Coalition v. Rumsfeld*) challenging a proposed base expansion.

Third, the legislation should state clearly whether the federal Government, the State of Hawaii, or the native Hawaiian governing entity will have jurisdiction to enforce criminal laws on native Hawaiian lands. It is the Department's experience that a lack of clarity on this question can generate significant confusion and litigation. Similarly, the legislation should make clear that the proposed native Hawaiian governing entity will not be eligible to petition the Interior Department to take land into trust under the Indian Reorganization Act (which could have uncertain jurisdictional consequences, in addition to tax consequences for Hawaii).

Fourth, the legislation should clearly provide that the Indian Gaming Regulatory Act will not apply to the native Hawaiian governing entity, and that the governing entity will not have gaming rights.

As you know, there are also questions concerning the constitutionality of the legislation. There is a substantial, unresolved constitutional question "whether Congress may treat the native Hawaiians as it does the Indian tribes," *Rice v. Cayetano*, 528 U.S. 495, 518 (2000), and hence whether Congress may establish and recognize a native Hawaiian governing entity, as S. 147 would do. In *Rice*, the Supreme Court noted that whether native Hawaiians are eligible for tribal status is "a matter of some dispute" and "of considerable moment and difficulty." Also, we note that the proposed legislation would require the Secretary of the Interior to appoint only native Hawaiians to the nine-member Commission that would certify the roll of members of the native Hawaiian community. This appointment requirement also raises a constitutional concern, which could be remedied by instead requiring only that appointees have knowledge and expertise about Native Hawaiian issues.

The Administration stands ready to work with Congress on specific language to address and resolve each policy issue discussed above, as well as other technical issues raised by S. 147.

Thank you for your interest in our views on this legislation. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the President's program. If we can be of further assistance in this matter, please do not hesitate to contact this Office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Byron L. Dorgan
Vice Chairman

LETTER TO THE HONORABLE STEVE CHABOT FROM SENATOR JON KYL

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July 19, 2005

Chairman Steve Chabot
Subcommittee on the Constitution
House Judiciary Committee
U.S. Capitol
Washington, D.C. 20510

Dear Chairman Chabot:

Thank you for chairing an oversight hearing on the constitutionality of S. 147 and H.R. 309, the Native Hawaiian Government Reorganization Act. This is important and troubling legislation that deserves far more scrutiny than it has thus far received.

I also appreciate the opportunity to offer my views on this subject, as I have been following this legislation closely for several years. On July 22, 2005, the Senate Republican Policy Committee ("RPC") — which I chair — released a policy paper, *Why Congress Must Reject Race-Based Government for Native Hawaiians*. I have enclosed that policy paper for your consideration, as it best expresses my views on the constitutional and public policy deficiencies of this legislation.

On July 16, 2005, the Governor of Hawaii and her Attorney General released a formal response to that RPC Paper, titled *Response Of Hawaii Governor Linda Lingle and Hawaii Attorney General Mark J. Bennett to the U.S. Senate Republican Policy Committee's Opposition to S. 147 (the "Akaka Bill")* ("the Response"). The Response argues that S. 147 is a quest for justice and fairness, and brushes aside the substantial constitutional and public policy concerns regarding the bill. I have included the Response in the interest of completeness.

The Governor and Attorney General's Response leaves many questions unanswered, as I have detailed below. The policy and constitutional concerns raised in the RPC Paper, and elsewhere, deserve greater elaboration and examination, and the rights of all Hawaiians deserve better protection than S. 147 currently provides. After having reviewed the Response and the written testimony of your witnesses today, I offer the following reply to the Governor and Attorney General's Response.

I. The Governor and Attorney General's Response Fails to Resolve Important Constitutional and Policy Concerns Posed by this Legislation.

The Governor and Attorney General's Response leaves unanswered many questions that have been raised about this legislation.

A. The Response In No Way Alters the Conclusion that S. 147 is Racially-Driven and Contrary to Conventional Practices for the Recognition of Indian Tribes.

The Response protests that the bill does not "set[] up a race-based separate government in Hawaii." It is disappointing to hear this incorrect characterization of S. 147, because the bill's text is clear on this point. The bill states that **only** Native Hawaiians can participate in the creation of the new entity, and defines a Native Hawaiian as:

> 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 Hawaiian Islands on or before January 1, 1893; and (II) exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii.[1]

No matter how many times S. 147's supporters *say* that the bill is not race-based, or that the new political entity that the bill seeks to create will not be race-based, the definition above demonstrates the inextricably racial nature of the bill. Moreover — unlike with Indian tribes, which have the right to determine their own membership, in ways essentially unreviewable by federal courts — the bill requires the federal government itself to apply this racial test by hiring federal employees in the Department of Interior on the exclusive basis of the above racial test. Those federal employees then must police the racial definition for future participants.[2] Such a scheme is contrary to the basic principles of the United States Constitution.

B. The Response Does Not Establish that Congress Has the Power to Create an Indian Tribe Where None Exists and Fails to Address the Equal Protection and 15th Amendment Infirmities of S. 147.

The Response argues that it is "impossible" not to conclude that the Supreme Court strongly supports the constitutionality of this legislation. (Response at 3.)[3] In making this expansive claim, the Response cites *United States v. Lara*, 541 U.S. 193 (2004); but that case merely held that Congress may adjust the criminal jurisdiction of *existing Indian tribes*. It says nothing about granting sovereign authority to an entity that does not *already have* sovereignty. *Lara* upheld Congress's "broad general powers to legislate in respect to Indian tribes," 541 U.S. at 500, but *did not* address any right to *create* Indian tribes. Nothing in *Lara*, or any other Supreme Court decision, recognizes the right of Congress simply to identify a group of Americans, define them by racial background, carve out a separate government not subject to the Constitution's Bill of Rights, and grant the resulting entity governmental powers.

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[1] See S. 147, section 3(10) (emphasis added). The same section provides an alternate definition: any individual who is one of the "indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual" is also included. That Act defined "Native Hawaiian" as anybody with 1/2 Native Hawaiian blood.

[2] See S. 147, section 7.

[3] "Indeed, it is *impossible* to read [the Supreme Court's 2004 decision in *United States v.*] *Lara* without concluding that it provides very strong support for S. 147's constitutionality." Response at 3.

1. The Response Does Not Show that Congress Has the Power to Invent Indian Tribes.

The Response itself offers little constitutional argument other the citation to *Lara*, noted above, but it does refer to a separate "Position Statement" by the Hawaii Attorney General which argues that Congress has the power to create Indian tribes.[4] This Position Statement points to no historical precedent for the path that S. 147 takes. Instead, it argues that Congress's decision to create an Indian tribe from non-Indians is constitutionally unreviewable (pp. 14-16) and attempts to rewrite the Constitution to eliminate the requirement that groups of Indians be, in fact, "tribes" before they can be recognized as such (pp. 16-27).

As the RPC Paper made clear with extensive citation to past practices, settled legal and administrative standards, and Supreme Court precedents, there is a long history of tribal recognition that relies on a group of Indians having a separate and distinct community and some form of political organization. As early as 1900, the Supreme Court defined an "Indian tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[5] Later, the Court held that Congress may not "bring[] a community or body of people within the range of this [Congressional] power by arbitrarily calling them an Indian tribe."[6]

The Position Statement's suggestion that a separate and distinct community of Native Hawaiians exists in Hawaii — a claim that never mentions the high intermarriage rate for Native Hawaiians[7] or the day-to-day intermingling of cultures and communities discussed in the RPC Paper (at pp. 6-7) — is directly at odds with the definition of Native Hawaiians in S. 147. If the S. 147 drafters were trying to conform to settled constitutional principles, they would have limited the definition to the exceedingly small number of *Hawaiian* individuals who live in separate communities *in Hawaii*.[8] Instead, the definition encompasses as many as 400,000 persons with "one drop" of Native blood, living in all 50 states. It defies common sense to argue, for example, that persons with 1/32 "Native Hawaiian" blood living in the Northeastern United States who have never lived in Hawaii should be considered Native Hawaiian "tribal Indians." As Justice Breyer wrote in his concurrence in *Rice v. Cayetano*, an excessively broad definition of "Indian" raises independent constitutional concerns.[9]

2. The Response Ignores the Equal Protection Infirmities in the Bill.

Neither the Response nor the Position Statement explains how S. 147 passes muster under the Constitution's Equal Protection Clause — an issue implicitly raised by the Department of

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[4] See Position Statement of the Attorney General of the State of Hawaii, *S. 147 (the Akaka Bill) is Constitutional* (undated but presumed to be 2005) (hereinafter "Position Statement"). The Position Statement is on file with Senate Republican Policy Committee.

[5] *Montoya v. United States*, 180 U.S. 261, 266 (1900).

[6] *United States v. Felipe Sandoval*, 251 U.S. 28, 46 (1913).

[7] See Table 2, Hawaii Marriage Certificate Data for 1994, in Zuanning Fu & Tim B. Heaton, *Status Exchange in Intermarriage*, Journal of Comparative Family Studies, January 2000.

[8] It is unclear if that restriction would be enough to satisfy the Constitution given the complete lack of any tribal political entity, as the RPC Paper discusses at pp. 5-8, but it would certainly be a closer call than the current definition.

[9] 528 U.S. 498, 524-527 (2000) (Breyer, J., concurring).

Justice on July 13, 2005, presumably before the Response was drafted.[10] In its letter regarding the pending legislation, the Department of Justice noted that requiring the Secretary of the Interior to appoint a "nine-member Commission" composed only of Native Hawaiians (as defined racially in section 3(10)) "raises a constitutional concern."[11] The "concern" is that Congress would be mandating that the Secretary violate the Constitution by using race as an express precondition for the hiring of federal employees. Moreover, that racially-defined Commission would in turn police the racial bona fides of participants in the formation of the new entity,[12] which is yet another equal protection violation.

3. The Response Ignores the 15th Amendment Deficiencies in the Bill.

The Response also does not explain how the bill could survive a 15th Amendment challenge. S. 147 requires an instrumentality of the Department of Interior, the "nine-member Commission," to conduct an election in which only those who meet section 3(10)'s racial definition would be eligible to vote. The 15th Amendment expressly prohibits the federal government from conducting such a race-based election:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Yet that is exactly what S. 147 requires the Department of Interior to do. As the Supreme Court explained in *Rice v. Cayetano*, the decision striking down the State of Hawaii's attempt to create Native-Hawaiian-only elections under state law:

> One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[13]

The same considerations apply here, yet the Response does not address this constitutional defect in S. 147. It is even more puzzling that, even with a provision that allows *only* Native Hawaiians to vote in these elections, the Response insists that the bill "does not treat Native Hawaiians specially." (Response at 2.)

C. The Response is Evasive Regarding Gambling on "Native Hawaiian" Lands.

The Response states that there is "no basis for fears that Hawaii will be overrun by gambling interests." (Response at 8.) But all S. 147 guarantees is that the bill "shall not be construed to authorize the Native Hawaiian governing entity to conduct gaming activities under the authority of

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[10] See Letter from Assistant Attorney General William Moschella to Indian Affairs Committee Chairman John McCain, July 13, 2005 (hereinafter "DOJ Letter") (on file with Senate Republican Policy Committee).

[11] DOJ Letter at 2.

[12] See S. 147, section 7.

[13] *Rice v. Cayetano*, 528 U.S. 498, 517 (2000).

the Indian Gaming Regulatory Act ["IGRA"]."[14] Contrary to the belief of some, IGRA is *not* a federal licensing scheme that *creates* authority to operate a casino; rather, IGRA regulates *pre-existing tribal authority* to engage in gambling. Prior to IGRA's enactment, several courts recognized that because "[t]here is a presumption against state jurisdiction in Indian country," tribes can permit gambling that would not be allowed under state law.[15] Tribes thus operated gambling businesses as an "exercis[e] [of] their inherent sovereign governmental authority."[16] Given this legal background, this legislation's effect is only to ensure that gaming will not be *limited* by the regulations in IGRA. It leaves open the possibility that the Native Hawaiian entity will exercise the "inherent" right to conduct gambling activities free from state or federal interference. Moreover, Section 8(b) of S. 147 gives the new Native Hawaiian entity the power to negotiate the extent of their gaming rights with the State of Hawaii and the federal government.

The RPC Paper is not alone in raising this concern. The Department of Justice recently warned that the language of S. 147 may be inadequate to protect against expansion of gambling in Hawaii, stating clearly: "the legislation should clearly provide that the Indian Gaming Regulatory Act will not apply to the native Hawaiian governing entity, *and that the governing entity will not have gaming rights*."[17] Clearly the Department of Justice does not believe that the existing language is sufficient.

It is important not to minimize the risk that this legislation, amended or not, will become a vehicle for future gambling expansion in Hawaii. After all, there is ongoing political pressure in Hawaii to legalize gambling in different forms. As but one example, former Democratic Governor Ben Cayetano has supported limited legalization of gambling on (and among) the Hawaiian Islands.[18] The existence of a Native Hawaiian entity will only increase the likelihood that gambling will be legalized and later expanded in Hawaii. That is because, if treated as a tribe under federal and state law (as proponents wish to make possible), the proposed Native Hawaiian entity will be able to petition the Department of Interior to take lands "into trust" — the first step towards creating "Indian lands" that can support Indian gambling. One would then expect the Native Hawaiian entity to ask that it be treated "the same as other Indians" — precisely the argument being made today.

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[14] See S. 147, section 9.

[15] *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 976 (10th Cir. 1987).

[16] *Id.* at 982; see also *Wisconsin Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 616 n.3 (7th Cir. 1985) (holding that tribe rather than State "regulates bingo games conducted by the tribe on the Winnebago reservation because Wisconsin's bingo law * * * is inapplicable to games conducted on Indian reservations"); *Mashantucket Pequot Tribe v. McGuigan*, 626 F.Supp. 245, 247, 249 (D. Conn. 1986) (because "States are generally precluded from exercising jurisdiction over Indians in Indian county * * * * Connecticut's bingo law[s] * * * are found not to be enforceable").

[17] See DOJ Letter at 2 (emphasis added).

[18] See Associated Press, *Governor backs cruise ship gambling*, Honolulu Star-Bulletin, December 18, 2001 (noting also that former Gov. Cayetano supported limited gambling on the islands themselves), available at http://starbulletin.com/2001/12/18/news/story1.html.

D. The Response Provides No Legal Assurances that the Native Hawaiian Entity Would be Subject to the Bill of Rights, Nor that Non-Members Will be Safe From Future Constitutional Deprivations.

The Response offers no assurances that the Bill of Rights will apply to the proposed Native Hawaiian entity. It simply states, as the RPC paper did, that the Secretary of the Interior will have the duty to evaluate whether civil rights of entity members are protected after "negotiations" are completed. (Response at 7.) Here, the Response completely misses the point. Fundamental civil liberties and Bill of Rights protections should not be "up for negotiation" by politicians. No Native Hawaiian should be subject to the kinds of legal deprivations that some reservation Indians face today.

If S. 147 is to become law, it should first be amended to both (1) guarantee that *all* provisions of the Bill of Rights apply to the Native Hawaiian entity, and (2) guarantee that the Native Hawaiian entity is not able to hide behind "tribal sovereign immunity" to avoid liability for any deprivations that it imposes on members or non-members of the entity. Consider but one example of the kinds of civil rights deprivations that Native Hawaiians *and/or* non-Native Hawaiians could suffer if Congress does not demand that they be protected:

> Christie O'Donnell sued ousted Tampa Seminole Tribal Chairman James Billie in federal court for sexual harassment. In May [2001], the 39-year-old O'Donnell filed her suit charging Billie got her pregnant and then forced her to have an abortion. She claims after the abortion he fired her, paying her off with $100,000 in tribal funds. The suit didn't get that far. In October [2001], a federal judge kicked it out, claiming the court didn't have jurisdiction over tribes in this matter. Billie, who has maintained his innocence, didn't have to answer the charges in court.[19]

This fact-pattern is a feature of tribal sovereign immunity. The civil rights of American citizens who may find themselves in similar or worse straits in their interactions with the Native Hawaiian entity should not be put into the same jeopardy. None of the anomalies of federal Indian law that allow injustices such as the above story to occur should be extended to any Native Hawaiian entity.

E. The Response Offers No Solution to S. 147's Failure to Protect Native Hawaiians' Rights to Democratic Self-Government.

The Response offers no assurances that the proposed Native Hawaiian entity will be democratic in nature or that it will take a form that will avoid the conflicts of interest and cronyism that characterize governments without appropriate checks and balances and separation of powers. Instead, the Response simply states that "there is no reason to believe that Native Hawaiians will not" organize themselves in an "essentially democratic" way. This claim illustrates the extent to which S. 147 puts the Native Hawaiian people at the whim of politicians. The Response states that Congress can simply refuse to afford Native Hawaiians "any further rights" if the entity is non-democratic, but this question should not be left to later Congresses. Just as basic civil rights should

[19] Melvin Claxton and Mark Puls, *Tribes use sovereignty to skirt legal judgments*, Detroit News, December 30, 2001, available at http://www.detnews.com/specialreports/2001/chippewa/1230skirt/1230skirt.htm.

not be subject to "negotiations," neither should Congress allow the new Native Hawaiian entity to be anything other than fully democratic, with all the components that are necessary to ensure that the rights of its members are protected.

F. The Response Does Not Assuage Concerns that Indian Funding Will, in the Long Run, be Impacted by the Native Hawaiian "Indian Tribe."

The Response correctly notes that S. 147 does not take any current funding away from existing Indian tribes, but does not foreclose future efforts by the proposed Native Hawaiian entity to participate in those Indian programs. In fact, the Response suggests quite the contrary, claiming that "it is offensive to suggest that Native Hawaiians should be denied benefits other native communities are provided … ." (Response at 9.) The RPC paper made no such suggestion, but merely noted what any casual political observer knows to be true: that "it is highly likely that future Congresses will rationalize the programs and lump Indian and Hawaiian funding together."[20]

The Response does not deny this likelihood; in fact, it implicitly suggests that this result is inevitable, and that anything less would be "offensive." (Response at 9.) The RPC paper merely points out the practical political reality, *i.e.*, that Native American tribes would then be "competing with 400,000 Native Hawaiians for federal resources."[21] After all, if the core argument for S. 147 is that Native Hawaiians should be treated "just like Indians," then future Congresses will find it difficult to resist efforts to combine the funding system.

G. The Response Dismisses the Department of Justice's Concern that S. 147 Increases Litigation Risk and Future Liabilities for the United States and Hawaii.

The Response dismisses the notion that "S. 147's passage will subject the State and the United States to greater liability" as "unsupported and unsupportable." (Response at 8.) The RPC Paper is not alone in expressing this concern, though. The Department of Justice has warned that S. 147 may increase future claims against the federal government and the State of Hawaii. The Department's concerns are worth quoting in full:

> [T]he legislation should include explicit language clearly precluding potential claims for equitable, monetary, or Administrative Procedure Act-based relief, whether asserting an alleged breach of trust, calling for an accounting, or seeking recovery of or compensation for lands once held by native Hawaiians. The absence of such language in the current legislation, especially in combination with the reference in section 2(21)(B) of S. 147 to "the lands that comprise the corpus of the trust" and the unusually long statute-of-limitations period for claims against the United States provided in for in section 8(c)(2), *could invite a flood of litigation and could create the prospect of enormous unanticipated liability for the United States and the State of Hawaii*. In addition, because there exist some legal theories that

[20] RPC Paper at 13. There are 2 million tribal Indians in the United States per the 2000 Census, and this legislation would authorize participation by as many as 400,000 persons with "one drop" of Native Hawaiian blood.
[21] RPC Paper at 13.

> might be construed to create potential claims that could not be precluded under an amended S. 147, the legislation should include a limitations period that is significantly shorter than the proposed 20-year period now contained in section 8(c)(2), and should bar courts from using the continuing-wrong and equitable-tolling doctrines, which are sometimes employed to expand statutes of limitations fixed by Congress.[22]

The Department of Justice's concerns receive no attention in the Response, the Position Statement, or the Attorney General's written testimony today.[23]

H. The Response Implicitly Denies All Hawaiians the Right to Decide if They Want a Race-Based Native Hawaiian Government in their State.

It is plain that S. 147 will have a profound effect not only on those who meet the bill's definition of "Native Hawaiians," but on all Hawaiians.[24] Yet the Response simply dismisses the suggestion that all Hawaiians should have any direct voice in how their state's sovereignty should be carved up, what kind of legal immunities they and their neighbors should have, and the scope of the new Native Hawaiian entity's jurisdiction over them. (Response at 7.) The Response just points to the state constitutional provisions adopted in 1978 (none of which provide any sovereignty to Native Hawaiians or create blanket exemptions from state laws) and the future involvement of state politicians as ample protection for Hawaiians.

There are several reasons for Congress to take extra care to protect the rights and interest of all citizens in Hawaii.

First, recent public opinion polling shows a deeply conflicted — if not outright antagonistic — Hawaii citizenry. A telephone survey of more than 20,000 Hawaiians, conducted on July 7, 2005, found that *a majority (52 percent) of Hawaiians oppose S. 147*, only 25 percent favor it, and 23 percent had no response.[25] These results are a far cry from the Response's blanket claim that the bill has broad support from both Democrats and Republicans. (Response at 1.)

Second, recent press reports suggest that purported support from the political establishment may not translate to actual support from the citizens. Consider this story from a Honolulu newspaper on July 17:

> State Sen. Sam Slom (R, Diamond Head-Hawaii Kai) said he opposed the resolution because he feels the current version of the Akaka Bill

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[22] DOJ Letter at 1 (emphasis added).

[23] See written testimony of Hawaii Attorney General Mark J. Bennett for the Oversight Hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* before the House Judiciary Subcommittee on the Constitution, July 19, 2005, also on file with the Senate Republican Policy Committee.

[24] The concerns obviously stretch far beyond Hawaii, as most Americans have grave concerns about racial and cultural balkanization. Moreover, it is important to remember that Native Hawaiians eligible to participate in the creation of the Native Hawaiian entity live in all 50 states. See RPC Paper at 2.

[25] Detailed poll results, conducted by ccAdvertising for the Grassroots Institute of Hawaii, are on file with the Senate Republican Policy Committee.

> has not been discussed thoroughly enough in public hearings. He added that Lingle's support of the bill also may have stifled opposition from her own party.
>
> "Because the governor was so tremendously popular 30 months ago and thereafter, there was not going to be anybody saying, 'Well, maybe the governor is acting too hastily,'" Slom said. "I've talked to a number of my Republican colleagues and they felt pressured at the time to go along and they felt it was supporting the governor to support Akaka.
>
> "I think there's a great deal of peer pressure, a great deal of political pressure not to appear that you are A, against the governor, or B, that if you took a position in opposition to the Akaka Bill that you were opposed to native Hawaiians, and of course that's not true."[26]

Third, leaders who claim to support S. 147 would prefer that it be radically changed to eliminate the governmental powers and features of sovereignty that S. 147 creates. Consider the following statement from former two-term Democratic Governor of Hawaii, Ben Cayetano:

> "The bill limits eligible voters (in the native Hawaiian governing entity) to those who could trace their genealogy prior to Captain Cook's discovery of the islands," former Gov. Ben Cayetano wrote in an e-mail to the Star-Bulletin.
>
> He noted the Supreme Court ruled that "genealogy can be a proxy for race," meaning that the process set up in the Akaka Bill could be considered race-based, and "the Akaka bill seems to violate this ruling."
>
> Despite those concerns about the constitutionality of the bill, Cayetano wrote, "I support it because if passed it may strengthen the legality of the existing Hawaiian Program such as Hawaiian Homes, etc.
>
> **"I do not support the bill being used to promote Hawaiian sovereignty."**[27]

That the Governor who lost the *Rice v. Cayetano* case believes S. 147 to be unconstitutional and does not support the bill insofar as it enables the creation of Native Hawaiian sovereign authority is certainly something worthy of note, and bolsters the case for a statewide referendum on the question.

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[26] B.J. Reyes, *The Battle for the Akaka Bill*, Honolulu Star-Bulletin, July 17, 2005, available at http://starbulletin.com/2005/07/17/news/index1.html.

[27] Id. (emphasis added).

It is, of course, possible that S. 147's supporters are correct and the public opinion polling and press reports are wrong and this legislation *does* have widespread support. The only way to know, and, importantly, to assure that all Hawaiians have had the opportunity to vote on this question is to require a referendum of all Hawaiians before the new Native Hawaiian entity is allowed to gain any powers, rights, or immunities. Such referenda are consistent with Hawaii's political culture. For example, in recent years, Hawaii voters have had the opportunity to vote on state authorization for the issuance of revenue bonds (1994), the length of terms for state judges (1994), the authorization of bonds to fund insurance coverage for hurricane relief (1996), the length of service for a state tax commission (2000), and bonds for private schools (2002).[28] Surely a state referendum to determine whether 20 percent of Hawaii's citizens could become subject to different laws would be at least as important as these earlier ballot propositions.

I. The Response Continues to Press Historically Inapt Notions of "Reorganizing" a Government that Did Not Exist.

The Response acknowledges that there is no "existing governmental structure" for government-to-government contact with the United States, that the Hawaiian government in 1893 was a "monarchy," and that Native Hawaiians never organized themselves as "tribes." (Response at 5.) These admissions, fatal as they are to any attempt to treat Native Hawaiians as "Indian tribes," are then followed by the irreconcilable statement that the purpose of S. 147 is to "allow Native Hawaiians to re-form and restore the governmental structure that the United States has since acknowledged it had a substantial hand in destroying." (Response at 5.)

This part of the Response surely must be in error. S. 147 backers presumably are not trying to "restore" the only "governmental structure" in existence in 1893 — a monarchy. Nor could S. 147 advocates be seeking to "restore" any "sovereignty," because the admission that the 1893 government was a "monarchy" — which is true — eliminates any claim to popular sovereignty at all. Moreover, the Attorney General also admits that Hawaii's monarchy in 1893 was "not racially exclusive,"[29] which renews the concern raised in the RPC Paper (at 7-8): that it is impossible to "restore" or "reorganize" a governmental structure or form that simply never existed.

It is perhaps understandable that S. 147 advocates lack a consistent vision of how this bill fits into Hawaii history, because the State of Hawaii itself has argued recently that S. 147's effort to create an "Indian tribe" does not fit the historical facts. In 1998, the State of Hawaii argued before the Supreme Court:

[28] See records of the State of Hawaii Office of Elections, available at http://www.hawaii.gov/elections/results/.
[29] Bennett written testimony at 4.

> [F]or the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. ...**The tribal concept simply has no place in the context of Hawaiian history.**[30]

In this vein, as Hawaii itself recognized in 1998, it is impossible to speak of "restoring" or "reorganizing" and Native Hawaiian "governmental structure" with any kind of "sovereignty."

J. The Response Contradicts the Office of Hawaiian Affairs's Own Internet Website's Claims Regarding S. 147 and Secession/Independence Efforts.

The Response states that any suggestion that S. 147 might lead to secession is "irresponsible," but the RPC Paper only noted this issue in response to the clear statement to the contrary found on the Office of Hawaiian Affairs's Internet website. That website, owned by the State of Hawaii, continues to include the following paragraph:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S. 344 [the bill number in the 108th Congress] creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people *may exercise their right to self-determination by selecting another form of government including free association or total independence.*[31]

It is understandable that the Response would deny any effort to facilitate independence or secession, but, given the vocal pro-independence movement in Hawaii,[32] it would be foolhardy to ignore the possibility that the State of Hawaii somehow intends to leave this question ambiguous with citizens who might see the Office of Hawaiian Affairs website and conclude otherwise. After all, the RPC Paper's citation to this Internet website clearly caught the eye of the Governor and Attorney General, yet the text above remains as of July 18, 2005.

K. The Response Claims that the Supreme Court May Not be able to Review Congress's Decision to Create the Native Hawaiian Entity.

In the event that any Members of Congress are relying on the Supreme Court simply to follow its precedent in *Rice v. Cayetano* and the Indian recognition cases[33] and strike down S. 147 as unconstitutional, one argument raised in the Response and the Position Statement should give them pause. The Response argues that "it is for Congress, *and not the courts*, to determine which native peoples will be recognized, and to what extent." (Response at 4.) In other words, the State

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[30] Brief in Opposition to Petition for Writ of Certiorari at p. 18, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) (on file with Senate Republican Policy Committee).

[31] Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added) (checked July 17, 2005).

[32] See www.hawaiiankingdom.info and regular discussion of indepedence movement in Honlolulu Advertiser and Honolulu Star-Bulletin.

[33] See RPC Paper at 6-8, 10-11.

of Hawaii is signaling a litigation position that courts may be precluded from second-guessing a congressional decision to recognize a group as an Indian tribe. Without addressing the merits of this argument at this time, it is important to note that, if this argument gains favor in the Supreme Court, the constitutional infirmities of S. 147 will not be addressed. No Member of Congress should proceed with any illusion that Supreme Court review is guaranteed.

II. More Analysis Has Emerged Since the RPC Policy Paper was Published.

Before concluding, I want to draw attention to a few items in the written testimony of your Subcommittee witnesses today.

- In his testimony, former Deputy Assistant Attorney General Shannen Coffin explains that this legislation is unconstitutional for similar reasons to those emphasized above. Mr. Coffin also raises prudential concerns, noting:

> [S]uch a race-conscious justification for a governmental organization would permit boundless deprivations of constitutionally protected rights by any number of states. It could be used by groups such as the native Tejano community in Texas, the native California community of California, or the Acadians of Louisiana – all racially distinct groups that have a special relationship and unique history in their communities – to demand special governmental privileges. While none of these groups may currently possess the political clout to accomplish this objective, who is to say that political persistence over time would not result in similar separatist government proposals?[34]

In addition, Mr. Coffin asks that "this Subcommittee [] not look only to the letter of the Constitution, which condemns the bill as unconstitutional, but to its spirit, in recommending that H.R. 309 not be adopted as federal law."[35]

- In his testimony, former Associate Deputy Attorney General Bruce Fein explains his constitutional and policy objections to this legislation, but also urges the Subcommittee to put the legislation in historical context. He explains:

> Hawaii has been the quintessential example of the American "melting pot", with intermarriage a salient feature of Hawaiian social life. Three fourths of Native Hawaiians have less than 50% of Native Hawaiian blood. King Lunalilo, on the day of his coronation in 1873, boasted: "This nation presents the most interesting example in history of the cordial co-operation of the native and foreign races in the administration of its government, and most happily, too, in all the relations of life there exists a feeling which every good man will

[34] Written testimony of Shannen Coffin before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 8-9, also on file with the Senate Republican Policy Committee.

[35] Coffin testimony at 10.

> strive to promote." Senator Daniel Inouye (D. Hawaii) echoed the King 121 years later in commemorating the 35th anniversary of Hawaii's statehood: "Hawaii remains one of the greatest examples of a multiethnic society living in relative peace."[36]

The RPC Paper also discusses this Hawaiian history, and especially the extent to which this legislation runs contrary to understandings at the time of Hawaii's admission to the nation. The history that Mr. Fein discusses deserves greater examination, especially insofar as conflicting historical understandings appear to be influencing this legislation.

- William Burgess, longtime Hawaii resident and retired attorney, outlines a litany of constitutional problems with S. 147 (beyond those identified here and in the RPC paper) — different ways in which fundamental principles of Equal Protection and equality before the law are violated in the implementation of this legislation.[37] I urge your Subcommittee to review carefully each of the constitutional concerns that Mr. Burgess raises. In addition, Mr. Burgess emphasizes the lack of Hawaiians' collective consent to this new system, noting:

> 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.[38]

It is my hope that this legislation can be amended to guarantee that all Hawaiians have the opportunity to speak directly to whether they want a race-based government in their midst.

Finally, I want to ensure that you are aware of an new legal analysis by former U.S. Attorney General Ed Meese and constitutional scholar Todd Gaziano.[39] In their article, published on July 15, 2005, Meese & Gaziano emphasized that "no government organized under the United States Constitution may create another government that is exempted from part of the Constitution." They further argue:

> [R]eal Indian tribes predate the Constitution, even if some of them have split or reorganized for various reasons. … But Congress simply

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[36] Written testimony of Bruce Fein before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 2, also on file with the Senate Republican Policy Committee.

[37] Written testimony of William Burgess before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 3-5, also on file with the Senate Republican Policy Committee.

[38] Burgess testimony at 5 (emphasis in original).

[39] See Edwin Meese and Todd Gaziano, *The "Native Hawaiian" Bill: an Unconstitutional Approach in Furtherance of a Terrible Idea*, townhall.com, July 15, 2005, available at http://www.townhall.com/columnists/GuestColumns/MeeseGaziano20050715.shtml.

> can't create new governments, new nations, or new tribes on its own, and then exempt them from portions of the Constitution.

Messe & Gaziano urge Congress to amend S. 147 to address its constitutional infirmities, and conclude that "we believe Members of Congress and the President are bound by the oath they took to support the Constitution not to give effect to measures that violate it." I have included the Meese article for your review as well.

III. Conclusion

The Response of the Governor and Attorney General did not adequately address the core problems with S. 147. Indeed, they have offered no amendments or even any acknowledgment that the legislation is anything other than perfect as-is. Congress has an obligation to all Americans, including but not limited to the residents of Hawaii, to demand more scrutiny of S. 147's provisions, to insist on amendments that correct or mitigate its deficiencies, and — barring a complete overhaul of the unconstitutional and otherwise objectionable provisions — to defeat the legislation outright and refuse to permit it to become law.

Sincerely,

JON KYL
United States Senator

RESPONSE OF HAWAII GOVERNOR LINDA LINGLE
AND HAWAII ATTORNEY GENERAL MARK J. BENNETT
TO THE U.S. SENATE REPUBLICAN POLICY COMMITTEE'S
OPPOSITION TO S. 147 (THE "AKAKA BILL")

The Akaka Bill--which affords Native Hawaiians the same type of recognition afforded American Indians and Alaska Natives -- neither further balkanizes the United States nor sets up a race-based separate government in Hawaii. It provides a simple measure of justice and fairness to Native Hawaiians.

The special status of Native Hawaiians as an indigenous people of the United States has been recognized by the Congress for almost 100 years. The organic document admitting Hawaii to the Union textually recognizes that status, as do scores of Acts of Congress. The Akaka Bill simply formalizes the relationship, and will help to protect the many current programs that benefit Native Hawaiians.

This type of recognition has helped preserve the language, identity, and culture of other indigenous peoples of America, and it will help do the same for Native Hawaiians. The Akaka Bill has the support of Republicans and Democrats in Hawaii; indeed, a 2005 Resolution supporting the bill passed the Hawaii Legislature with only one no vote.

Native Hawaiians have fought and died for this country in wars dating back almost 100 years. They fight today for this country in Iraq and Afghanistan. The Akaka Bill will not change

the patriotism or valor of Native Hawaiians or Hawaii's other citizens. It will not set up a foreign nation in Hawaii. It will, however, put Hawaii on an equal footing with its 49 sister states, and it will end the second class status of Hawaii's indigenous people -- Native Hawaiians. It is fair and just -- nothing more, and nothing less.

To the fair-minded people that we Americans pride ourselves on being, the Senate's Republican Policy Committee arguments against the passage of S. 147 are just plain wrong. The notions they advance -- that S. 147 "authorizes the creation of a race-based government," is "profoundly counterproductive to the nation's efforts to develop a just, equitable, and color-blind society," "represents a serious distortion of the constitutional and historical standards" Congress has used to recognize America's other indigenous people, and can only "lead the nation down a path to racial balkanization" -- simply are not supported by the Constitution, by history, by the language of S. 147, or by reality.

S. 147 does not treat Native Hawaiians specially, and Native Hawaiians are not asking for "special" treatment. Given their shared common experience of a severe loss of their lands and self-governance, and a wholesale disruption of their cultural practices, Native Hawaiians only want to be treated the same way all other native indigenous Americans have been

treated. They are simply asking Congress to accord them the same political status Congress has accorded the other native peoples of the United States.

The history and experiences of American Indians, Alaska Natives, and Native Hawaiians are in many ways indistinguishable, and thus there is no justification to argue against the passage of a bill that would extend similar treatment and political recognition to the last of these native groups. Indeed, because Native Hawaiians, Native Americans, and Alaska Natives share similar experiences, it would be grossly unfair and wholly arbitrary to treat one of them -- Native Hawaiians -- differently.

We enclose a full analysis of the clear constitutionality of S. 147. We believe there is no basis for the Policy Committee's suggestion that S. 147 is unconstitutional. This is especially so given the recent United States Supreme Court case of United States v. Lara, 541 U.S. 193 (2004), in which the Court confirmed the plenary power of Congress to legislate pursuant to the Indian Commerce Clause. Indeed, it is *impossible* to read Lara without concluding that it provides very strong support for S. 147's constitutionality. We thus believe that it is misleading, at best, to suggest that the United States Supreme Court has already determined that Congress cannot

constitutionally accord the same treatment to Hawaiians that it has accorded to America's other native people.

Congress's power to recognize America's native people is plenary, and the Supreme Court has declared that subject only to the limitation that Congress not act "arbitrarily," it is for Congress, and not the courts, to determine which native peoples will be recognized, and to what extent. In each instance, Congress alone sets the criteria and conditions for recognition. The arguments against recognition for Native Hawaiians because Hawaiians cannot satisfy the requirements Congress set out for the recognition of Native Americans (in the Indian Reorganization Act of 1934) are simply not relevant because Congress has not and need not include those conditions in S. 147. Native Hawaiians have always had to rely on a separate bill for recognition because the Indian Reorganization Act of 1934 was never intended to be the means of providing recognition for Native Hawaiians -- it literally only applies to the native people of the "*continental* United States." See 25 U.S.C. § 473; 25 C.F.R. § 83.3.

Similarly, because the Congress's power to recognize America's people is so extensive, the Policy Committee's argument that S. 147 is unjustifiable because "Congress cannot simply 'create' an aboriginal Indian government," and that the

existence of a "tribe" is a necessary prerequisite for recognition is not a worthy legal argument.

While it is true (1) Hawaiians no longer have an existing governmental structure with which to formally engage in government-to-government relations with the United States, (2) that Hawaiians' last form of government was a monarchy, and (3) that anthropologically, Hawaiians have not organized themselves in "tribes," Alaska Natives have never been so organized, and individual members of American Indian tribes do not exercise sovereignty directly. S. 147's very purpose is to allow Native Hawaiians to re-form and restore the governmental structure that the United States has since acknowledged it had a substantial hand in destroying. These circumstances make it particularly ironic to attack S. 147 on the grounds that Native Hawaiians have no "tribes" and are not presently constituted as a "sovereign entity."

The only reason Native Hawaiians have no sovereign entity today is because the United States aided in the extinguishment of Hawaiians' sovereignty.

It simply cannot be that the United States's *more* complete destruction of Hawaiian sovereignty prevents Congress from ameliorating the consequences of its own government's actions by restoring some measure of sovereignty to the Native Hawaiian people some one hundred years later. If nothing else, S. 147

represents all that is just and fair -- it is Congress' recognition that, because Americans were instrumental in destroying Native Hawaiian sovereignty in the past, it is incumbent upon Congress to use its powers to recognize America's native people to allow Native Hawaiians to regain some part of their sovereignty today. It is simply untrue that Congress cannot recognize Native Hawaiians, because Native Hawaiians lack the very sovereignty that S. 147 was written to give them.

The other attacks on S. 147 are also without merit. The claim that nothing in S. 147 guarantees that the governing entity the bill allows Native Hawaiians to form will be "democratic in nature," ignores the fact that the other native entities Congress has recognized -- the Alaska Native corporations and Native American tribes -- by definition, are permitted to govern themselves as they see fit. Their governments are, however, essentially democratic in nature, and there is no reason to believe Native Hawaiians will not similarly organize themselves. And should they organize themselves in a way unsatisfactory to Congress, Congress is in no way compelled to afford them any further rights, and S. 147 essentially conveys nothing beyond recognition itself -- no land, no resources, no territorial sovereignty.

The Policy Committee contradicts its own objection that the Bill of Rights is not guaranteed to apply to the Native Hawaiian

entity that is ultimately organized under S. 147, when it notes that the Secretary of the Interior must certify that the civil rights of entity members are "protected." If it has no confidence in the Secretary of the Interior to do this, then it should designate a different federal official to ensure this result.

The Policy Committee complains that S. 147 provides no mechanism to enable Hawaii's citizens to determine whether they want the new Native Hawaiian entity "in their midst." This ignores two realities: The citizens of Hawaii have already adopted provisions in their constitution and laws recognizing and according Hawaii's native people and culture a special place in the community; and S. 147 expressly ensures that the State will be involved as a co-equal in the negotiations that will take place between the State, the Hawaiian governing entity, and the United States.

The notion that S. 147 contravenes political understandings reached at the time of Hawaii's statehood is inaccurate. At statehood, both the federal government, in the Admission Act, and the people of Hawaii, through their Constitution, made provision for certain lands, and the income and proceeds from those lands, to be held as a public trust and used for the benefit of Hawaii's native people. And even if no quasi-sovereign entity was created at the time, nothing prevented

future recognition of such an entity. Indeed, in 1978, the people of Hawaii created the Office of Hawaiian Affairs in a clear attempt to provide some measure of self-determination for Native Hawaiians. Although OHA was a state entity, and not a quasi-sovereign entity immune from the strictures of the 14th Amendment, that surely does not in any way prevent the creation today of a truly quasi-sovereign entity for Native Hawaiians. S. 147 finishes the effort Hawaii's citizens started almost thirty years ago to restore a sense of place, some semblance of self-determination and self-governance, and identity to Hawaii's native people.

Assertions that state taxation and regulation of Native Hawaiian assets or behavior will be hampered by S. 147's passage are baseless speculation. Voicing specious claims that S. 147's enactment could lead to secession is simply irresponsible. Nothing in S. 147 authorizes or permits total independence for a Native Hawaiian nation. Claims that S. 147's passage will subject the State and the United States to additional litigation and expose them to greater liability are similarly unsupported and unsupportable. Native Hawaiians can and have sued, and nothing in S. 147 increases the number or enlarges the kinds of claims that can and have been brought. There is also no basis for fears that Hawaii will be overrun by gambling interests (the bill expressly makes the Indian Gaming Regulatory Act

unavailable to the Native Hawaiian entity), or that funding for other native groups and programs will be reduced. Nothing in S. 147 takes funding away from existing Native American tribes, and section 9(b) of the bill specifically provides that the bill provides no authorization of any kind "to participate in any Indian program or service to any individual or entity . . . ." Indeed, Native Americans and Alaska Natives fully support S. 147. More fundamentally, it is offensive to suggest that Native Hawaiians should be denied benefits other native communities are provided, and worse, to pit one native community against another.

Rather than crack the "melting pot" that is Hawaii (an outcome opponents of S. 147 purport to fear), passage of S. 147 will finally give official and long overdue recognition to the losses Hawaiians have suffered -- the blurring, if not diminution, of Hawaiians' native identity; the erosion of their confidence as a people; the destruction of any semblance of self-determination and self-governance; and, as the United States Supreme Court put it, the loss of a "culture and way of life." Finally, Native Hawaiians will have restored to them what they lost more than a hundred years ago -- status as a people and recognition of their roots.

If equality and justice among all of this Nation's people is to be achieved, then S. 147 must be enacted. The "American values" the Policy Committee touts demand no less.

PREPARED STATEMENT OF DAVID B. ROSEN, ESQ.

Testimony of David B. Rosen on the Akaka Bill (S.147)

Dear Members of Congress,

Before you vote on the Akaka Bill, please consider critically the information presented to you by our governmental officials who are supporting this Bill. Specifically, please demand that they, without equivocation and on the record, answer the following questions:

1) Why shouldn't the Akaka Bill be submitted to a popular vote/ referendum so that those effected can have a say in deciding whether a separate native-Hawaiian governance entity should be created and how it will be funded?

2) Where is the funding going to come from to support the governing entity that the Akaka Bill seeks to create? Is this entity going to be supported by just Hawaii's taxpayers or all of the citizens of the United States?

3) How much is it going to cost to create and support this new governing entity? Is the governing entity that the Akaka Bill seeks to create going to have the responsibility and power to tax its members?

4) Native-Hawaiians have held virtually every political position in Hawaii, including that of Governor, Lieutenant Governor, State Supreme Court Chief Justice, U.S Senator, and U.S. Congressman, and have achieved the highest levels of success in the private business sectors. Unlike native-American Indians and even African-Americans, Native-Hawaiians have never been the subject of governmental or societal discrimination in Hawaii or elsewhere. Given the level playing field provided to them, the success they have achieved as individuals and how well represented native-Hawaiians are in every facet of business, politics, and society in general in Hawaii, why is it necessary for native-Hawaiians to have their own governing entity?

5) There are approximately 240,000 individuals who identify themselves as being native-Hawaiians living in the State of Hawaii; this constitutes over twenty-percent of the State's total population. What is the resulting social and economic effect going to be in the State of Hawaii of granting one-fifth of the State's population: (i) special "entitlements" funded out of the State's general revenues, (ii) potential relief from having to pay State taxes, and (iii) a separate set of laws to govern themselves and potentially govern others?

6) Given the small and already densely developed geographic nature of the five major Hawaiian Islands, where would a native-Hawaiian governance entity reside? Would it preside over an as of yet unidentified contiguous parcel of land (which could require the ouster of non-Hawaiians in that area) or would it exist within non-contiguous pockets of land that would divide existing communities? What entity will be responsible for providing these areas with essential services?

7) Is the passage of the Akaka Bill really intended to bring to a conclusion the potential claims of native-Hawaiians, or create yet another basis for endless litigation, racial and social division, and reliance upon the hope of race-based governmental entitlements?

8) The sole asserted justification for the Akaka Bill is the need to redress the United State's supposed role in the overthrow of the Hawaiian Kingdom, which occurred (over three generations and more than 100 years ago) in 1893. Why then are non-native-Hawaiians who are descendants of citizens of the Kingdom of Hawaii excluded from participating in the governance entity proposed by the Akaka Bill? In other words, if the wrong being complained of is the overthrow of a sovereign nation, why are only the "indigenous, native" members of that formerly sovereign nation entitled to redress? Isn't limiting membership to only "indigenous, native people" unconstitutionally race-based discrimination?

If it is not obvious already, it should be clear that I oppose the Akaka Bill. Having been born and raised in Hawaii, I oppose this Bill as a Hawaiian. As a father of two young boys who are part Jewish and part Korean, I oppose this Bill as a moral obligation to the ancestors of my sons who suffered discrimination for no other reason than because of their race. Finally, as an attorney and an American, I oppose this Bill (and the numerous other discriminatory private and governmental programs in Hawaii)[1] as a violation of the Fourteenth Amendment to the Constitution of the United States of America.

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[1] Unlike any other State in the Union, the State of Hawaii has spent in excess of $100 million in State revenue and taxpayer funds on government-supported programs and institutions that discriminate against non-Hawaiians by providing benefits solely to Hawaiians. Those programs already provide native-Hawaiians health care, job training, housing (both rental and homesteads), education (from day-care and pre-school opportunities and financial assistance to college scholarships and tuition waivers), business loans and grant assistance, social services, etc. In addition, the State of Hawaii supports numerous private non-profit entities that exclude non-Hawaiians from their programs.

Despite the State of Hawaii and its Office of Hawaiian Affairs having spent millions of dollars in advertising to propagandize[2] and garner support for the Akaka Bill, the majority of Hawaii's citizens oppose this proposed legislation. Please help us!

Vote "no" on the Akaka Bill. At a minimum, please require the proponents of the Bill to answer the questions indicated above and amend the Bill to require the approval a majority of the citizens of the State of Hawaii in order to be implemented.

Thank you for this opportunity to testify.

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[2] Hawaii's Governmental officials have repeatedly argued that unless the Akaka Bill passes, Hawaii will lose tens of millions of dollars in federal funding.

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