**TESTIMONY OF U.S. CIVIL RIGHTS COMMISSIONER MICHAEL YAKI**
**BEFORE THE HOUSE INDIAN AFFAIRS SUBCOMMITTEE**
**HEARING ON HR 2314, THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT**
**JUNE 11, 2009**

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

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

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

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

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

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

First, let me deal with the Commission report. The Commission, as you know, was founded by President Eisenhower in 1957 and subsequently reauthorized by Congress over the years. Presently it is comprised of 8 appointees – four by the President, four by the Congress, for six year staggered terms. At its inception, the role of the Commission was to engage in vigorous, in-depth fact-finding to create the factual predicate for action by the Executive and Legislative branches. Typically, the Commission would engage in an inquiry on a perceived injustice or violation of a civil right, relying on hundreds of hours of testimony and thousands of hours of staff time reviewing documents and interviewing witnesses. The report that would be produced would take similar amounts of time to formulate and analyze. But the end products were magnificent. The Commission's report on discrimination and Jim

Crow laws resulted in the passage of the 1964 Civil Rights Act. The Commission's report on rampant voter discrimination gave Congress the means necessary to justify the 1965 Civil Rights Act. But I would be hesitant to say that the integrity and thoroughness of those years has been replicated in the three years that I have served on the Commission.

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

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

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

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

The convergence of a truncated hearing, the deliberate exclusion of relevant evidence, the failure to include prior activities not only of the Hawai'i State Advisory Committee but the Congress and the Departments of Justice and Interior, compounded by faulty legal analysis, led to the extraordinary step by the Commission of stripping the report of all findings and all recommendations. The embarrassment of poor scholarship, a paucity of outreach, and deliberate exclusion of previous Congressional and Executive action on this issue, in my opinion, was too much for even my most adamant colleagues to endure. In sum, the briefing and the report were exposed for the sham/kangaroo court that it was. As

such, this Committee should give no credence at all to its sole recommendation, since it had factual or analytical basis.

All that remained in the report was a single, generic recommendation that could apply to a variety of prescriptive and proscriptive government actions – that the Commission opposed "any legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

The latter half of my testimony is to explain my why colleagues were dead wrong in applying this general principle to the Legislation at hand.

**THE CONSTITUTIONALITY OF THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT**

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

The Native Hawaiian Government Reorganization Act does not purport to discriminate on the basis of race or national origin, or "subdivide" (whatever that term means) the American people into subgroups. That is because the Native Hawaiian Government Reorganization Act is not legislation based on the 5th or 14th Amendments of the United States Constitution. It is, as the United States Supreme Court said in U.S. vs. Lara in 1954, well-settled that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes' powers that we have consistently described as plenary and exclusive."

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

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

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

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

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

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

“Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government towards the Indians would be jeopardized.

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

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

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

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

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

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

Native Americans, then the Commission majority has chosen to ignore the constitutionality of the proposed law.

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

**CONCLUSION**

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

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

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

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

Thank you for the privilege of testifying today.

ATTACHMENT TO WRITTEN STATEMENT:

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

**Preface**

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

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

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

Second, aside from ignoring the volumes of research and testimony that lie elsewhere and easily available to the Commission, we ignored soliciting advice and comment from our own State Advisory Commission of Hawai'i. Over the past two decades, the Hawai'i Advisory Committee to the United States Commission on Civil Rights ("HISAC") has examined issues relating to federal and state relations with Native Hawaiians. As early as 1991, HISAC recommended legislation confirming federal recognition of Native Hawaiians. A mere five years ago, the HISAC found that "the lack of federal recognition for native Hawaiians appears to constitute a clear case of discrimination among the native peoples found within the borders of this nation."[3] The HISAC concluded "[a]bsent explicit recognition of a Native Hawaiian governing entity, or at least a process for ultimate recognition thereof, it is clear that the civil and political rights of Native Hawaiians will continue to erode."[4] The HISAC found that "the denial of Native

[1] Commisioner Arlan Melendez joined in the dissenting statement.
[2] My grandfather was born in Hana, Maui, and placed in an orphanage. The story passed down was that he was the product of a Japanese laborer on the islands and a Native Hawaiian. The orphanage records burned down some time ago, so we are unable to verify for sure whether he was half-native Hawaiian or not, but for anyone who knew or saw my grandfather, he had many Polynesian physical characteristics.
[3] Hawaii Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians*, at ix (June 2001).
[4] *Id*. at 49.

Hawaiian self-determination and self-governance to be a serious erosion of this group's equal protection and human rights."[5] Echoing recommendations by the United States Departments of Justice and Interior, the HISAC "strongly recommend[ed]" that the federal government "accelerate efforts to formalize the political relationship between Native Hawaiians and the United States."[6] The HISAC's long-standing position of support for legislation like S. 147 to protect the civil rights of native Hawaiians belies recent assertions that such legislation discriminates on the basis of race and causes further racial divide.

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

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

Substantively, the recommendation of the Commission cannot stand either.

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

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

Native Hawaiians are the indigenous people of Hawai'i, just as American Indians and Alaska Natives are the indigenous peoples of the remaining 49 states. Hawai'i is the homeland of Native Hawaiians. Over 1,200 years prior to the arrival of European explorer James Cook on the Hawaiian islands, Native Hawaiians determined their own form of governance, culture, way of life, priorities and economic system in order to cherish and protect their homelands, of which they are physically and spiritually a part. They did so continuously until the illegal overthrow of their government by agents and citizens of the U.S. government in 1893. In fact the U.S. engaged in several treaties and conventions with the Native Hawaiian government, including 1826, 1842, 1849, 1875 and 1887. Though deprived of their

[5] *Id*.
[6] *Id*.

inherent rights to self-determination as a direct result of the illegal overthrow, coupled with subsequent efforts to terminate Native Hawaiian language, leaders, institutions and government functions, Native Hawaiians persevered as best they could to perpetuate the distinct vestiges of their culture, institutions, homelands and government functions in order to maintain a distinct community, recognizable to each other.

Today, those living in Hawai'i recognize these aspects of the distinct, functioning Native Hawaiian political community easily. For example: the Royal Benevolent Societies established by Ali'i (Native Hawaiian chiefs and monarchs) continue to maintain certain Native Hawaiian government assigned and cultural functions; the private Ali'i Trusts, such as Kamehameha Schools, Queen Lili'uokalani Trust, Queen Emma Foundation and Lunalilo Home, joined by state government entities established for indigenous Hawaiians, including the Office of Hawaiian Affairs and the Department of Hawaiian Homelands, and Native Hawaiian Serving institutions such as Alu Like, Inc. and Queen Lili'uokalani Children's Center continue the Native Hawaiian government functions of caring for Native Hawaiian health, orphans and families, education, elders, housing economic development, governance, community wide communication and culture and arts; the resurgence of teaching and perpetuation of Native Hawaiian language and other cultural traditions; Native Hawaiian civic participation in matters important to the Native Hawaiian community are conducted extensively through Native Hawaiian organizations including the Association of Hawaiian Civic Clubs, the State Council of Hawaiian Homestead Associations, the Council for Native Hawaiian Advancement, Ka Lahui and various small groups pursuing independence; and Native Hawaiian family reunions where extended family members, young and old, gather to talk, eat, pass on family stories and history, sometimes sing and play Hawaiian music and dance hula and pass on genealogy.

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

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

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

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

[8] See 25 C.F.R. §83.

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

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

*I. Legal Authorities Establishing OHA/ Purpose of OHA*

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

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

The constitutional mandate for OHA was implemented in 1979 via the enactment of Chapter 10, Hawaii Revised Statutes. OHA's statutory purposes include "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians,'' conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a vehicle for reparations."[12] OHA administers funds derived for the most part from its statutory 20-percent share of revenues generated by the use of the public lands trust.[13]

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

[9] § 5 (f), 73 Stat. 6.

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

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

[12] HRS § 10-3 (4)-(6).

[13] HRS § 10-13.5.

that OHA's administration of its constitutional and statutory obligations to native Hawaiians and Hawaiians deprives all Hawaii's citizens of equal protection of law.

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

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

Roberts went on to say:

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

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

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

The tortured attempts by persons such as Mr. Burgess to distinguish Native Hawaiians from Native Americans ultimately fail by simple historical comparison. Like the Native Americans, the Native Hawaiians pre-dated the establishment of the United States. Like the Native Americans, the Native

[14] *See U.S. v. Lara*. 541 U.S. 193 (2004).

Hawaiians had their own culture, form of government, and distinct sense of identity. Like Native Americans, the United States stripped them of the ownership of their land and trampled over their sovereignty. The only distinction – one without a difference –- is that unlike the vast majority of Native American tribes, the Native Hawaiians were not shipped off, force-marched, and relocated to another area far from their original homelands.27[15]

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

**NHGRA is Constitutional**

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

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

All that NHGRA seeks is parity in U.S. policies towards the three indigenous, native people in the 50 states, American Indians, Alaska Natives and Native Hawaiians. Under the U.S. Constitution and Federal

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

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

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

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

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

The results of a scientific poll in Hawai'i showed 68 percent of those surveyed support the bill.[17] The statewide poll was taken Aug. 15-18 by Ward Research, a local public opinion firm. [18] The results are consistent with a 2003 poll.[19] While polls alone do not a mandate make, the consistency between the two polls shows that despite the best efforts of opponents such as Mr. Burgess, the multicultural, multiethnic residents of Hawaii support the recognition of Native Hawaiians and would allow them to take the first, tentative, steps toward recognition and sovereignty.

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

**Conclusion**

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

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

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

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

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

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

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

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