Testimony
of
The Honorable Gail Heriot
of the
United States Commission on Civil Rights
Before The House Committee on Natural Resources
on H.R. 2314
"The Native Hawaiian Government Reorganization Act of 2009"
June 11, 2009

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

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

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

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

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

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

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

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

Once the tribal roll is certified and published, the members, with ONHA's assistance, would establish an interim government, which would then draft organic governing documents and hold elections to establish the permanent government. Federal recognition will be "extended to the Native Hawaiian government as the representative governing body of the Native Hawaiian people" once these documents have been presented to the Secretary of the Interior and properly certified. (See Section 7.)

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

Only after this new political behemoth is created will the federal government "enter into negotiations" with it over such matters as "the exercise of civil and criminal jurisdiction," "the delegation of government powers and authorities ... by the United States or by the State of

Hawaii," "any residual responsibilities of the United States and the State of Hawaii," and "grievances regarding assertions of historic wrongs committed against Native Hawaiians by the United States or by the State of Hawaii." By then, of course, the balance of political power would have shifted decidedly in favor of the new government. It would be in a position to assert that it possesses inherent sovereignty and hence has powers quite apart from those delegated to it by the federal and state governments. Moreover, even if it were to concede that its powers derive solely from federal delegation, it will likely have the political clout to ensure that those powers are extensive.

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

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

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

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

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

Government was not established by the people" and that instead "King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty").

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

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

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

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

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

Supporters of the bill argue that these benefits are a perfectly legitimate continuation of

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

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

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

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

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

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

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

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

Some legal scholars are already arguing that special status ought to be broadly available to what have been called "dissident" communities of many types. See, e.g., Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and*

Indian Country: A Liberal Theory, 84 Va. L. Rev. 1053 (1998); Mark D. Rosen, *"Illiberal" Societal Cultures, Liberalism and American Constitutionalism*, 12 J. Contemp. Legal Issues 803 (2002). Who will say no to these (and other) groups?

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

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

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

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

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

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

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

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

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

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

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

> "The Akaka-Stevens bill proposes that Hawaiians be formally recognized as the indigenous people of Hawaii, giving them the same federal status as 560 Native

> American and Alaska Native tribes already recognized by the U.S. government. Do you think that Hawaiians should be recognized by the U.S. as a distinct group, similar to the special recognition given to Native Americans and Alaska Natives?"

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

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

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

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

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

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

But while bill opponents are eager for a referendum on the proposed legislation,

supporters are reluctant. That fact alone tells a story.

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

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