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 100th year commemoration of the overthrow of the Kingdom of Hawai'i. Public Law 103-50 also apologized to Native Hawaiians for the role of the U.S. Navy in facilitating the overthrow of Queen Liliuokalani. In essence, the U.S. government acknowledged the illegal overthrow in 1893, and called upon the President to engage in a policy of reconciliation with Native Hawaiians. To facilitate this mandate, the U.S. Departments of Justice and Interior facilitated hearings in 1999 on reconciliation. All this information – the Apology Resolution, the reconciliation hearings, and the reports produced at the time – were never made part of the analysis of the Commission report.

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

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

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