Testimony of Hawaii Attorney General Mark J. Bennett
before the U.S. Senate Committee on Indian Affairs,
Thursday, May 3, 2007, 9:30 a.m., on S.310, the
Native Hawaiian Government Reorganization Act of 2007.

Good morning Chairman Dorgan, Vice-Chairman Thomas, and members of the United States Senate Committee on Indian Affairs. Thank you for giving me the opportunity to address this very important bill.

This legislation, which I will refer to as the "Akaka Bill," in honor of its chief author and this body's only Native Hawaiian Senator, simply put, provides long overdue federal recognition to Native Hawaiians, a recognition that has been extended for decades to other Native Americans and Alaska Natives. It provides Native Hawaiians with a limited self-governing structure designed to restore a small measure of self-determination. American Indians and Alaska Natives have long maintained a significant degree of self-governing power over their affairs, and the Akaka Bill simply extends that long overdue privilege to Native Hawaiians.

The notion of critics that S.310 creates some sort of unique race-based government at odds with our constitutional and congressional heritage contradicts Congress's longstanding recognition of other native peoples, including American Indians, and Alaska Natives, and the Supreme Court's virtually complete deference to Congress's decisions on such matters. It is for this Congress to exercise its best judgment on matters of recognition of native peoples. Although some have expressed constitutional concerns, those fears are unjustified. Congress should not let unwarranted fears of judicial overreaching curb its desire, and responsibility, to fulfill its unique obligation to this country's native peoples.

Native Hawaiians are not asking for privileged treatment--they are simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress has recognized the great suffering American Indians and Alaska Natives have endured upon losing control of their native lands, and has, as a consequence, provided formal recognition to those native peoples. Native Hawaiians are simply asking for similar recognition, as the native indigenous peoples of the Hawaiian Islands who have suffered comparable hardships, and who today continue to be at the bottom in most socioeconomic statistics.

The Constitution gives Congress broad latitude to recognize native groups, and the Supreme Court has declared that it is for Congress, and not the courts, to decide which native peoples will be recognized, and to what extent. The only limitation is that Congress may not act "arbitrarily" in recognizing an Indian tribe. United States v. Sandoval.[1] Because Native Hawaiians, like other Native Americans and Alaska Natives, are the indigenous aboriginal people of land ultimately subsumed within the expanding U.S. frontier, it cannot possibly be arbitrary to provide recognition to Native Hawaiians. Indeed, because Native Hawaiians are not only indigenous, but also share with other Native Americans a similar history of dispossession, cultural disruption, and loss of full self-determination, it would be "arbitrary," in a logical sense, to not recognize Native Hawaiians.

The Supreme Court has never in its history struck down any decision by the Congress to recognize a native people. And the Akaka Bill certainly gives the Court no reason to depart from that uniform jurisprudential deference to Congress's decisions over Indian affairs. The Supreme Court long ago stated that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be," United States v. McGowan,[2] "whether within its original territory or territory subsequently acquired." Sandoval, 231 U.S. at 46.

Critics, including some in the Justice Department,[3] wrongly contend that the Akaka Bill creates a race-based

---

[1] 231 U.S. 28, 46 (1913).

[2] 302 U.S. 535, 539 (1938).

[3] The Justice Department had other "non-constitutional" objections to or concerns with a previous draft of the bill, which were expressed in a July 13, 2005 letter from Assistant Attorney General William Moschella to Senator John McCain. Among the objections and concerns were that the then-bill did not include language explicitly precluding certain claims, that the bill needed to make clear that military facilities and military readiness would not be affected, that the bill need to specify the entity or entities that would have certain criminal jurisdiction, and that the bill needed to explicitly state that the Indian Gaming Regulatory Act would not apply and that the Native Hawaiian Governing Entity would not have gaming rights. Through negotiations which included the Indian Affairs Committee, Hawaii's Senators, the White House, the Justice

government. In fact, the fundamental criterion for participation in the Native Hawaiian Governing Entity is being a descendant of the native indigenous people of the Hawaiian Islands, a status Congress has itself characterized as being non-racial. For example, Congress has expressly stated that in establishing the many existing benefit programs for Native Hawaiians it was "not extend[ing] services to Native Hawaiians because of their race, but because of their unique status as the indigenous people . . . as to whom the United States has established a trust relationship."[4] Thus, Congress does not view programs for Native Hawaiians as being "race-based" at all. Accordingly, a Native Hawaiian Governing Entity by and for Native Hawaiians would similarly not constitute a "race-based" government.

This is not just clever word play, but is rooted in decades of consistent United States Supreme Court precedent. The key difference between the category Native Hawaiians and other racial groups, is that Native Hawaiians, like Native Americans and Alaska Natives, are the aboriginal indigenous people of their geographic region. All other racial groups in this country are simply not native to this country. And because of their native indigenous status, and the power granted the Congress under the Indian Commerce Clause, Native Hawaiians, like Native Americans and Alaska Natives, have been recognized by Congress as having a special political relationship with the United States.

Those who contend that the Supreme Court in Rice v. Cayetano[5] found the category consisting of Native Hawaiians to be "race-based" under the Fourteenth Amendment and unconstitutional are simply wrong. The Supreme Court's decision was confined to the limited and special context of Fifteenth Amendment voting rights, and made no distinction whatsoever between Native Hawaiians and other Native Americans.

Department, the Defense Department, and the State of Hawaii, all of these "non-constitutional" objections and concerns were resolved by new language which is preserved in S.310.

[4] See, e.g., Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(B).

[5] 528 U.S. 495 (2000).

Furthermore, Congress has already recognized Native Hawaiians to a large degree, by not only repeatedly singling out Native Hawaiians for special treatment, either uniquely, or in concert with other Native Americans, but by acknowledging on many occasions a "special relationship" with, and trust obligation to, Native Hawaiians. In fact, Congress has already expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians."[6] The Akaka Bill simply takes this recognition one step further, by providing Native Hawaiians with the means to reorganize a formal self-governing entity, something Native Americans and Native Alaskans have had for decades.

Importantly, when Congress admitted Hawaii to the Union in 1959, it expressly imposed upon the State of Hawaii as a condition of its admission two separate obligations to native Hawaiians. First, it required that Hawaii adopt as part of its Constitution the federal Hawaiian Homes Commission Act, providing homesteads (for a nominal rent) to native Hawaiians.[7] Second, Congress required that the public lands therein granted to the State of Hawaii be held in public trust for five purposes, including "the betterment of the conditions of native Hawaiians."[8] In admitting Hawaii on such terms, Congress obviously did not believe it was creating an improper racial state government, in violation of the Fourteenth Amendment, or any other constitutional command. Likewise, Congress should have no constitutional concern as to this bill, which simply (but importantly) formalizes the United States's longstanding special political relationship with the Native Hawaiian people.

---

[6] See, e.g., Native Hawaiian Education Act, 20 U.S.C. § 7512(D); Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, Section 202(13)(D).

[7] The Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), Section 4.

[8] Id., Section 5.

Some opponents of the bill have noted that Native Hawaiians no longer have an existing governmental structure with which to engage in a formal government-to-government relationship with the United States. That objection is not only misguided and self-contradictory, but directly refuted by the Supreme Court's Lara decision[9] just 3 years ago. It is misguided because Native Hawaiians do not have a self-governing structure today only because the United States participated in the elimination of that governing entity, by helping to facilitate the overthrow of the Hawaiian Kingdom, and later annexing the Hawaiian Islands. Unlike other Native Americans who were allowed to retain some measure of sovereignty, Congress did not leave Native Hawaiians with any sovereignty whatsoever. It cannot be that the United States's complete destruction of Hawaiian self-governance would be the reason Congress would be precluded from ameliorating the consequences of its own actions by trying to restore a small measure of sovereignty to the Native Hawaiian people.

The objection is also self-contradictory because one of the very purposes and objects of the Akaka Bill is to allow Native Hawaiians to re-form the governmental structure they earlier lost. Thus, once the bill is passed, and the Native Hawaiian Governing Entity formed, the United States would be able to have a government-to-government relationship with that entity.

Finally, and perhaps most importantly, the objection violates the Supreme Court's recent Lara decision, in which the Court acknowledged Congress' ability to "restore[] previously extinguished tribal status--by re-recognizing a Tribe whose tribal existence it previously had terminated."[10] Indeed, Lara single-handedly eliminates this constitutional objection to the Akaka Bill, by recognizing Congress's ability to restore tribal status to a people who had been entirely stripped of their self-governing structure.

---

[9] United States v. Lara, 541 U.S. 193 (2004).

[10] 541 U.S. at 203.

Those who say that Native Hawaiians do not fall within Congress's power to deal specially with "Indian Tribes" because Native Hawaiians are not "Indian Tribes," are simply wrong. For the term "Indian," at the time of the framing of the Constitution, simply referred to the aboriginal "inhabitants of our Frontiers."[11] And the term "tribe" at that time simply meant "a distinct body of people as divided by family or fortune, or any other characteristic."[12] Native Hawaiians easily fit within both definitions.[13]

Finally, some opponents of the bill contend that because the government of the Kingdom of Hawaii was itself not racially exclusive, that it would be inappropriate to recognize a governing entity limited to Native Hawaiians. This objection is absurd. The fact that Native Hawaiians over one hundred years ago, whether by choice or coercion, maintained a government that was open to participation by non-Hawaiians, should not deprive Native Hawaiians today of the recognition they deserve. Indeed, it is quite ironic that those who oppose the Akaka Bill because they believe it contradicts our nation's

---

[11] Declaration of Independence paragraph 29 (1776); see also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955)(1789) (referring to Indians as "aboriginal inhabitants of America"). Indeed, Captain Cook and his crew called the Hawaiian Islanders who greeted their ships in 1778 "Indians." See 1 Ralph S. Kuykendall, The Hawaiian Kingdom at 14 (1968) (quoting officer journal).

[12] Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789).

[13] Some opponents of the Akaka Bill argue that including all Native Hawaiians, regardless of blood quantum, is unconstitutional, citing the concurring opinion of Justices Breyer and Souter in Rice v. Cayetano. 528 U.S. at 524. But that opinion did not find constitutional fault with including all Native Hawaiians of any blood quantum provided that was the choice of the tribe, and not the state. Id. at 527. Because the Akaka Bill gives Native Hawaiians the ability to select for themselves the membership criteria for "citizenship" within the Native Hawaiian government, no constitutional problem arises.

commitment to equal rights and racial harmony would use the historical inclusiveness of the Kingdom of Hawaii, allowing non-Hawaiians to participate in their government, as a reason to deny Native Hawaiians the recognition other native groups receive.[14]

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

The Akaka Bill, under any reasonable reading of the Constitution and decisions of the Supreme Court, is constitutional, just as is the Alaska Native Claims Settlement Act for Alaska Natives, and the Indian Reorganization Act for American Indian tribes--both of which assured their respective native peoples some degree of self-governance. The Supreme Court, as noted earlier, has made clear that Congress's power to recognize native peoples is virtually unreviewable.

At the very least, Congress should not refrain from exercising its authority and obligation to recognize native people because of a mere theoretical possibility the judicial branch could cast aside centuries of uniform precedent to assert judicial supremacy. Congress ought to act when it believes that what it is doing is just and right and within its constitutional authority. It should not allow unfounded fears of judicial activism to hamstring its responsibility to do the right thing.

---

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

And so I emphasize and repeat, that Native Hawaiians are not asking for privileged treatment--they are simply asking to be treated the same way all other native indigenous Americans are treated in this country. Congress long ago afforded American Indians and Alaska Natives formal recognition. The Akaka Bill would simply provide Native Hawaiians comparable recognition, as the indigenous peoples of the Hawaiian Islands. Formal recognition will help preserve the language, identity, and culture of Native Hawaiians, just as it has for American Indians throughout the past century, and Alaska Natives for decades. To use the poignant words Justice Jackson employed 60 years ago: "The generations of [Native people] who suffered the privations, indignities, and brutalities of the westward march . . . have gone . . ., and nothing that we can do can square the account with them. Whatever survives is a moral obligation . . . to do for the descendants of the [Native people] what in the conditions of this twentieth century is the decent thing."[15]

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

As the Attorney General of Hawaii, I humbly and respectfully ask that you support this important legislation.

---

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