Department of Justice

STATEMENT

OF

GREGORY G. KATSAS
PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING

“S. 310, NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2007"

PRESENTED ON

MAY 3, 2007

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Thank you, Mr. Chairman and Mr. Vice Chairman, for inviting me here today to comment on S. 310, the proposed Native Hawaiian Government Reorganization Act of 2007. I would like to begin by acknowledging that many native Hawaiians, like many Americans of various other backgrounds, place great importance on maintaining their ancestral culture. The Administration strongly supports that laudable goal. However, this bill raises the question whether Congress can and should pursue that goal by providing for a separate government to be organized by, and presumably run for, only individuals of a specified race and ancestry. The Administration strongly opposes that proposal because we think it wrong to balkanize the governing institutions of this country along racial and ancestral lines, and because doing so would give rise to constitutional questions recently described by the Supreme Court as "difficult" and "considerable."

I. POLICY CONCERNS

In July 2005, the Department of Justice conveyed to this Committee several concerns with S.147, a prior version of what is now S. 310. We recognize that S. 310, as revised, addresses many of our concerns. Specifically, we noted that the prior bill might have created sweeping new trust or mismanagement claims against the United States, interfered with important military operations in Hawaii, caused confusion from overlapping and possibly conflicting jurisdiction, and effectively overridden a state-law prohibition on gaming. The current bill addresses each of these concerns, and

we appreciate the Committee's efforts in this regard. Nonetheless, S. 310 continues to present the broader policy and constitutional concerns identified in our letters of June 13, 2005, and June 7, 2006. I will address the constitutional concerns below, and the policy concerns here.

After its hearing on the prior S. 147, the United States Commission on Civil Rights concluded that the bill, if enacted, "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 Native Hawaiian Government Reorganization Act of 2005, A Briefing Before the United States Commission on Civil Rights, Briefing Report* 15. The government-sponsored division of Americans into such "discrete subgroups" is contrary to the goals of this Administration and, indeed, contrary to the very principle reflected in our national motto *E Pluribus Unum*. As President Bush has stated, we must "honor the great American tradition of the melting pot, which has made us one nation out of many peoples." The White House, President George W. Bush, *President Bush Addresses the Nation on Immigration Reform*, May 15, 2006, http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html. By dividing government power along racial and ancestral lines, S. 310 would represent a significant step backwards in American history and would create far greater problems than those it might purport to solve. For these reasons, the Administration strongly opposes passage of S. 310.

Let me elaborate upon some of our policy concerns. First, in attempting to treat native Hawaiians as if they constituted an Indian tribe, the bill defines "Native Hawaiian," along explicitly racial and ancestral lines, to encompass a vast group of some 400,000 individuals scattered throughout the United States. Moreover, the bill does so regardless of whether such individuals have any connection at all to Hawaii, to other Hawaiians, to native Hawaiian culture, or to any

territory (Hawaiian or otherwise) remotely resembling an Indian reservation. Such an expansive definition is unlike any other previously used to describe a federally-recognized Indian tribe. In other instances, Congress has either allowed tribes to define their own membership or, alternatively, has itself specified a limited initial definition, thus ensuring that members maintain a strong connection to the tribal entity. This bill requires virtually no such connection between putative tribal members and any present or past tribal entity. Moreover, in determining who may participate in establishing the new government proposed by S. 310, the federal government would *itself* be discriminating based on race and ancestry, rather than based on any discernible nexus of individuals to a tribe-like entity. Such discrimination, in determining who may participate in the public function of creating a new government, should be highly disfavored.

Second, S. 310 would grant sweeping powers to the proposed Native Hawaiian governing entity, and to the proposed Native Hawaiian Council charged with creating that entity. Section 7(c)(2)(B)(iii) of the bill provides that the Council may conduct a referendum regarding (1) "the proposed criteria for citizenship of the Native Hawaiian governing entity," (2) "the proposed powers and authorities to be exercised by the native Hawaiian governing entity, as well as the proposed privileges and immunities of the Native American governing entity," (3) the "proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities of the Native Hawaiian governing entity," and (4) "other issues determined appropriate by the Council." In contrast, Indian tribes, by terms of the Indian Civil Rights Act, must generally respect the civil rights of their members as specified by Congress. *See* 25 U.S.C. §§ 1301-03. Even worse, the state Office of Hawaiian Affairs contends that this scheme would give native Hawaiians, as subjects of the new governing entity,

"their right to self-determination by selecting another form of government including free association or total independence." *See* State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, http://www.nativehawaiians.com/questions/SlideQuestions.html. For good reason, no other legislation has ever granted any state or Indian tribe – much less any broad group of citizens defined by race and ancestry – the right to declare their independence and secede from the United States. Indeed, the Nation endured a Civil War to prevent such secession.

The breadth of S. 310 is particularly problematic given the distinctive history of Hawaii itself. The Ninth Circuit has explained that "Congress has evidenced an intent to treat Hawaiian natives differently from other indigenous groups," because "the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States until the governance over internal affairs was entirely assumed by the United States, is fundamentally different from that of indigenous groups and federally-recognized Indian Tribes in the continental United States." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281-82 (9th Cir. 2004).

Moreover, S. 310 effectively seeks to undo the political bargain through which Hawaii secured its admission into the Union in 1959. On November 7, 1950, *all* citizens of the Hawaiian Territory – including native Hawaiians – voted to seek admission to the United States. *See, e.g.*, Pub. L. No. 86-3, 73 Stat. 4. By a decisive 2-1 margin, native Hawaiians themselves voted for statehood, thus voluntarily and democratically relinquishing any residual sovereignty to the United States. *See* Slade Gorton & Hank Brown, Wall Street J., A-16 (Aug. 16, 2005); S. 147/H.R. 309: Process for Federal Recognition of a Native Hawaiian Governmental Entity, CRS Report for Congress, at CRS-25 n.111 (Sept. 27, 2005). And when Hawaii became a state in 1959, there was a broad nationwide consensus that native Hawaiians would *not* be treated as a separate racial group or

transformed into an Indian tribe. Indeed, far from creating any guardian-ward relationship between the federal government and native Hawaiians, the 1959 Admission Act eliminated federal ownership over lands subject to the Hawaii Homes Commission Act of 1920, and it ceded other lands to Hawaii for the benefit of *all* of its citizens. *See* Pub. L. No. 86-3, § 5, 73 Stat. 4. Thus, the push to establish a native Hawaiian tribe as a distinct political entity is of recent historical vintage. There was no such effort even at the time of annexation in 1898, much less at the time of statehood in 1959.

To the contrary, during the extensive statehood debates of the 1950s, advocates repeatedly emphasized that the Hawaiian Territory was a "melting pot" without significant racial divisiveness. For example, Senator Herbert Lehman (D-NY) noted that "Hawaii is America in a microcosm – a melting pot of many racial and national origins, from which has been produced a common nationality, a common patriotism, a common faith in freedom and in the institutions of America." Congressional Record at 4325 (Apr. 1, 1954). Senator Wallace Bennett (R-UT) recognized that, "[w]hile it was originally inhabited by Polynesians, and its present population contains substantial numbers of citizens of oriental ancestry, the economy of the islands began 100 years ago to develop in the American pattern, and the government of the islands took on an actual American form 50 years ago. Therefore, today Hawaii is literally an American outpost in the Pacific, completely reflecting the American scene, with its religious variations, its cultural, business, and agricultural customs, and its politics." Congressional Record at 2983 (Mar. 10, 1954). And Senator Clair Engle (D-CA) stated that, "[t]here is no mistaking the American culture and philosophy that dominates the lives of Hawaii's polyglot mixture." Testimony, Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs (Feb. 25, 1959).

These statements confirm that Hawaiians sought and obtained statehood as a single people determined to become citizens, not of any racially isolated government for "Native Hawaiians," but of the United States. S. 310 inappropriately seeks to undo the specific political arrangements secured with respect to statehood — to say nothing of the broader national ideal that, by virtue of the American melting pot, the United States should become one Nation from many, not many nations from one.

Third, for many of the reasons already discussed, S. 310 would encourage other indigenous groups to seek favorable treatment by attempting to reconstitute themselves as Indian tribes – and thereby to segregate themselves, at least in part, from the United States and its government. Under the logic of this bill, favored treatment as an "Indian tribe" would become potentially available to groups that, although defined by race and ancient ancestry, might today consist of racially and culturally diverse persons with no single distinct community, no distinct territory under control of that group, and no distinct leadership or government – a combination of features that sets native Hawaiians apart from traditional Indian tribes and native Alaskan groups. This new template could potentially be used by several other indigenous groups living in the United States, such as the native Tejano community in Texas, the native Californio community of California, or the Acadians of Louisiana — all of which could argue that they are entitled to preferential treatment and even a separatist government, no matter how integrated they have become into the American mainstream. *See Amicus curiae* brief, Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation, filed in *Rice v. Cayetano*, No. 98-818, at 19-25 (available at 1999 WL 374577). Indeed, one such Mexican-American organization, the Movimiento Estudiantil Chicano de Aztlan (MEChA), even seeks to reclaim Aztlan land from nine

western states. *See* Statement of Bruce Fein on the Constitutionality of Creating a Race-Based Native Hawaiian Government (H.R. 309) Before the House Judiciary Subcommittee on the Constitution (July 19, 2005). Whatever might be said about past injustices, generations of Americans have fought and died to achieve a single, indivisible country that respects the freedom, equality, and heritage of all of its citizens. Congress should avoid a path that will lead to its balkanization.

Finally, S. 310 would create a race-based government offensive to our Nation's commitment to equal justice and the elimination of racial distinctions in the law. Section 3(10) of the bill defines the term "Native Hawaiian" as "the indigenous, native people of Hawaii" who are the "direct lineal descendant[s] of the aboriginal, indigenous, native people who . . . resided in the islands that now comprise the State of Hawaii on or before January 1, 1893." That definition incorporates elements of two highly odious classifications — race (by reference to the "indigenous" Polynesian inhabitants of what is now Hawaii) and ancestry (by reference to the "lineal descendant[s]" of such individuals) — without any redeeming connection to any present or past political entity that even remotely resembles an Indian tribe. In short, the bill classifies people not based on a political relationship like citizenship in a foreign country, or membership in a quasi-sovereign Indian tribe, but rather based purely on race and ancestry.

The corrosive effect of S. 310 is particularly acute given the geographic dispersion of its favored class of "Native Hawaiians." As noted above, such individuals need not have any political, geographic, or cultural connection to Hawaii at all – and in fact live in each of the 50 states of the Union. Under this bill, throughout the United States, each of those favored persons would be afforded different rights and privileges from those afforded to his or her neighbors, based solely on

race and ancestry classifications. Such differential treatment can be expected to encourage significant litigation and, much worse, to tear at the very fabric that makes us one Nation.

II. CONSTITUTIONAL CONCERNS

Beyond these fundamental policy concerns, we note that S. 310 directly and unavoidably engages constitutional questions that the Supreme Court has described as being of "considerable moment and difficulty."

Unless S. 310 can be justified as an exercise of Congress's unique constitutional power with respect to Indian tribes, its creation of a separate governing body for native Hawaiians would be subject to (and would almost surely fail) strict scrutiny under the equal protection component of the Fifth Amendment, because it singles persons out for distinct treatment based on their ancestry and race. *See Rice v. Cayetano*, 528 U.S. 495, 512-20 (2000). The Supreme Court has already held that separate legal classifications for native Hawaiians can run afoul of constitutional constraints. In *Rice*, the Court considered a Hawaii provision that limited the right to vote to trustees of the state Office of Hawaiian Affairs (OHA) to descendents of people who inhabited the Hawaiian Islands in 1778. *Id*. at 499. The Court held that this provision was "a clear violation of the Fifteenth Amendment," which prohibits the federal and state governments from denying the right to vote on account of race. *Id*. In reaching this conclusion, the Court rejected Hawaii's argument that the restriction was not a suspect classification subject to strict scrutiny, explaining that "[a]ncestry can be a proxy for race [and] is that proxy here." *Id*. at 514.

In further seeking to avoid strict scrutiny, Hawaii sought to rely on a prior Supreme Court decision that permitted certain tribal classifications in federal law. In *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974), the Court rejected an equal protection challenge to an employment preference in

the Bureau of Indian Affairs for members of federally-recognized Indian tribes. The Court concluded that, in light of "the unique legal status of Indian tribes under federal law," such a provision would be sustained if it was "reasonably related to fulfillment of Congress's unique obligation to the Indians." *Id*. at 551, 555. The Court stressed that the preference at issue was "not directed towards a 'racial' group consisting of 'Indians,'" but rather "applie[d] only to members of 'federally recognized' tribes," and was therefore "political rather than racial in nature." *Id.* at 554, n.24. Congress's power with respect to groups appropriately regarded as Indian tribes includes the establishment of a mechanism for the tribe to assume a greater degree of self-government, as Congress did when it enacted the Indian Reorganization Act of 1934. *See* 25 U.S.C. § 461 *et seq*. The question concerning the constitutionality of S. 310 thus becomes whether Congress could permissibly recognize native Hawaiians as one of "the Indian Tribes" referred to in the Constitution.

Relying on *Mancari*, Hawaii argued in *Rice* that, because native Hawaiians constituted the legal equivalent of an Indian tribe, the voting restriction at issue should be subjected only to rational-basis review as a "political" classification. In framing that argument, the Court described as "a matter of some dispute" – and a question "of considerable moment and difficulty" – "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 519. The Court decided to "stay far off that difficult terrain." *Id.* at 519. Instead, it concluded that *Mancari* represents a "limited exception" to strict scrutiny of classifications based in part on race or ancestry, because the hiring preferences in *Mancari* involved the "political" status of recognized Indian Tribes and the "*sui generis*" nature of the BIA. *Id.* at 520. For these reasons, the Court explained that "sustain[ing]

Hawaii's [voting] restriction under *Mancari*" would "require[] [the Court] to accept some beginning premises not yet established in our case law." *Id.* at 518.

Ultimately, the majority in *Rice* concluded that, "even if we were to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as Tribes, Congress may not authorize a State to create a voting scheme of this sort." *Id.* at 519. In so doing, the Court stressed: "To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522. The Court likewise emphatically rejected Hawaii's contention that the franchise could be restricted to native Hawaiians on the theory that the state OHA addressed only the interests of native Hawaiians. In response, the Court concluded that Hawaii's position "rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Id*. at 523.

Justice Breyer, joined by Justice Souter, concurred in this result, but would have rejected Hawaii's argument in favor of the voting restriction at issue on the grounds that: "(1) there is no "trust" for native Hawaiians, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe." *Rice*, 528 U.S. at 525 (Breyer, J., concurring). On the latter point, Justice Breyer opined that, by including "individuals with less than 1/500th native Hawaiian blood," the State's definition of the restricted electorate was "not like any actual membership classification created by any actual tribe" and went "well beyond any reasonable limit" that could be imposed to define tribal membership. *Id*. at 526-27.

The present bill, which purports to recognize a certain group of native Hawaiians as the equivalent of a federally-recognized Indian tribe, directly implicates the "difficult" constitutional question that the Supreme Court identified in *Rice* — whether Congress may constitutionally recognize native Hawaiians as an Indian tribe, thus rendering strict scrutiny inapplicable to preferences benefiting that racial and ancestral group. The bill also raises the further constitutional question addressed in Justice Breyer's concurring opinion — whether Congress may create a sweeping definition of membership depending only on lineal descent over the course of centuries.

The Supreme Court has long recognized the unique legal status of Indian tribes under federal law and the "special relationship" between the federal government and the Indian tribes. *Mancari*, 417 U.S. at 551-52. The primary source of Congressional authority to recognize Indian tribes is the Indian Commerce Clause of the Constitution, which states that "Congress shall have the Power . . . To regulate Commerce with . . . the Indian Tribes," just as it has power to regulate commerce among the States and with foreign nations. *See, e.g., McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172, n.7 (1973.) The Court also has identified the Constitution's Treaty Clause, which authorizes the President, with the consent of the Senate, to enter into treaties, as a source of federal authority to recognize and deal with Tribes. *See id.* The federal government's authority in this area is thus grounded in two constitutional provisions that recognize "the Indian Tribes" as political entities capable of engaging in commerce and making treaties. Indeed, the Court has explained that federally-recognized Indian tribes are political entities that retain some of their original sovereignty over their internal affairs. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'") (citation omitted).

Although the Supreme Court has consistently acknowledged Congress's broad power to determine when and how to recognize and deal with Indian tribes, it has also observed that a predicate for the exercise of this power is the existence of a "distinctly Indian communit[y]." *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). Moreover, the Court has cautioned that Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe," *id.* at 46, and that the courts may strike down "any heedless extension of that label" as a "manifestly unauthorized exercise of that power," *Baker v. Carr*, 369 U.S. 186, 215-17 (1962).

The Supreme Court has looked to various factors in determining what constitutes an Indian Tribe within Congress's power to recognize. *Compare Worcester v. Georgia*, 31 U.S. 515, 557-59 (1832) (describing the "Indian nations" as distinct and self-governing political communities, "'a people distinct from others'"), *with Montoya v. United States*, 180 U.S. 261, 266 (1901) (describing a "Tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"). The decision in *Rice v. Cayetano*, moreover, makes it uncertain how the Supreme Court would analyze the particular context of Native Hawaiians. On such uncertain legal terrain, it is the Administration's position that it is ill-advised to proceed with this legislation — particularly where, as here, there are strong policy reasons for not doing so.

Given the substantial historical, structural and cultural differences between native Hawaiians as a group and recognized federal Indian tribes, the Administration believes that tribal recognition is inappropriate and unwise for native Hawaiians. We are strongly opposed to a bill that would formally divide governmental power along lines of race and ethnicity.