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July 19, 2005

Chairman Steve Chabot
Subcommittee on the Constitution
House Judiciary Committee
U.S. Capitol
Washington, D.C. 20510

Dear Chairman Chabot:

Thank you for chairing an oversight hearing on the constitutionality of S. 147 and H.R. 309, the Native Hawaiian Government Reorganization Act. This is important and troubling legislation that deserves far more scrutiny than it has thus far received.

I also appreciate the opportunity to offer my views on this subject, as I have been following this legislation closely for several years. On June 22, 2005, the Senate Republican Policy Committee ("RPC") — which I chair — released a policy paper, *Why Congress Must Reject Race-Based Government for Native Hawaiians*. I have enclosed that policy paper for your consideration, as it best expresses my views on the constitutional and public policy deficiencies of this legislation.

On July 16, 2005, the Governor of Hawaii and her Attorney General released a formal response to that RPC Paper, titled *Response Of Hawaii Governor Linda Lingle and Hawaii Attorney General Mark J. Bennett to the U.S. Senate Republican Policy Committee's Opposition to S. 147 (the "Akaka Bill")* ("the Response"). The Response argues that S. 147 is a quest for justice and fairness, and brushes aside the substantial constitutional and public policy concerns regarding the bill. I have included the Response in the interest of completeness.

The Governor and Attorney General's Response leaves many questions unanswered, as I have detailed below. The policy and constitutional concerns raised in the RPC Paper, and elsewhere, deserve greater elaboration and examination, and the rights of all Hawaiians deserve better protection than S. 147 currently provides. After having reviewed the Response and the written testimony of your witnesses today, I offer the following reply to the Governor and Attorney General's Response.

I. The Governor and Attorney General's Response Fails to Resolve Important Constitutional and Policy Concerns Posed by this Legislation.

The Governor and Attorney General's Response leaves unanswered many questions that have been raised about this legislation.

A. The Response In No Way Alters the Conclusion that S. 147 is Racially-Driven and Contrary to Conventional Practices for the Recognition of Indian Tribes.

The Response protests that the bill does not "set[] up a race-based separate government in Hawaii." It is disappointing to hear this incorrect characterization of S. 147, because the bill's text is clear on this point. The bill states that **only** Native Hawaiians can participate in the creation of the new entity, and defines a Native Hawaiian as:

> 1 of the **indigenous, native people** of Hawaii *and* who is a direct lineal descendant of the **aboriginal, indigenous, native people** who (I) resided in the Hawaiian Islands on or before January 1, 1893; and (II) exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii.[1]

No matter how many times S. 147's supporters *say* that the bill is not race-based, or that the new political entity that the bill seeks to create will not be race-based, the definition above demonstrates the inextricably racial nature of the bill. Moreover — unlike with Indian tribes, which have the right to determine their own membership, in ways essentially unreviewable by federal courts — the bill requires the federal government itself to apply this racial test by hiring federal employees in the Department of Interior on the exclusive basis of the above racial test. Those federal employees then must police the racial definition for future participants.[2] Such a scheme is contrary to the basic principles of the United States Constitution.

B. The Response Does Not Establish that Congress Has the Power to Create an Indian Tribe Where None Exists and Fails to Address the Equal Protection and 15th Amendment Infirmities of S. 147.

The Response argues that it is "impossible" not to conclude that the Supreme Court strongly supports the constitutionality of this legislation. (Response at 3.)[3] In making this expansive claim, the Response cites *United States v. Lara*, 541 U.S. 193 (2004); but that case merely held that Congress may adjust the criminal jurisdiction of *existing Indian tribes.* It says nothing about granting sovereign authority to an entity that does not *already have* sovereignty. *Lara* upheld Congress's "broad general powers to legislate in respect to Indian tribes," 541 U.S. at 500, but *did not* address any right to *create* Indian tribes. Nothing in *Lara*, or any other Supreme Court decision, recognizes the right of Congress simply to identify a group of Americans, define them by racial background, carve out a separate government not subject to the Constitution's Bill of Rights, and grant the resulting entity governmental powers.

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[1] See S. 147, section 3(10) (emphasis added). The same section provides an alternate definition: any individual who is one of the "indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual" is also included. That Act defined "Native Hawaiian" as anybody with 1/2 Native Hawaiian blood.

[2] See S. 147, section 7.

[3] "Indeed, it is *impossible* to read [the Supreme Court's 2004 decision in *United States v.*] *Lara* without concluding that it provides very strong support for S. 147's constitutionality." Response at 3.

1. The Response Does Not Show that Congress Has the Power to Invent Indian Tribes.

The Response itself offers little constitutional argument other the citation to *Lara*, noted above, but it does refer to a separate "Position Statement" by the Hawaii Attorney General which argues that Congress has the power to create Indian tribes.[4] This Position Statement points to no historical precedent for the path that S. 147 takes. Instead, it argues that Congress's decision to create an Indian tribe from non-Indians is constitutionally unreviewable (pp. 14-16) and attempts to rewrite the Constitution to eliminate the requirement that groups of Indians be, in fact, "tribes" before they can be recognized as such (pp. 16-27).

As the RPC Paper made clear with extensive citation to past practices, settled legal and administrative standards, and Supreme Court precedents, there is a long history of tribal recognition that relies on a group of Indians having a separate and distinct community and some form of political organization. As early as 1900, the Supreme Court defined an "Indian tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[5] Later, the Court held that Congress may not "bring[] a community or body of people within the range of this [Congressional] power by arbitrarily calling them an Indian tribe."[6]

The Position Statement's suggestion that a separate and distinct community of Native Hawaiians exists in Hawaii — a claim that never mentions the high intermarriage rate for Native Hawaiians[7] or the day-to-day intermingling of cultures and communities discussed in the RPC Paper (at pp. 6-7) — is directly at odds with the definition of Native Hawaiians in S. 147. If the S. 147 drafters were trying to conform to settled constitutional principles, they would have limited the definition to the exceedingly small number of *Hawaiian* individuals who live in separate communities *in Hawaii*.[8] Instead, the definition encompasses as many as 400,000 persons with "one drop" of Native blood, living in all 50 states. It defies common sense to argue, for example, that persons with 1/32 "Native Hawaiian" blood living in the Northeastern United States who have never lived in Hawaii should be considered Native Hawaiian "tribal Indians." As Justice Breyer wrote in his concurrence in *Rice v. Cayetano*, an excessively broad definition of "Indian" raises independent constitutional concerns.[9]

2. The Response Ignores the Equal Protection Infirmities in the Bill.

Neither the Response nor the Position Statement explains how S. 147 passes muster under the Constitution's Equal Protection Clause — an issue implicitly raised by the Department of

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[4] See Position Statement of the Attorney General of the State of Hawaii, *S. 147 (the Akaka Bill) is Constitutional* (undated but presumed to be 2005) (hereinafter "Position Statement"). The Position Statement is on file with Senate Republican Policy Committee.

[5] *Montoya v. United States*, 180 U.S. 261, 266 (1900).

[6] *United States v. Felipe Sandoval*, 251 U.S. 28, 46 (1913).

[7] See Table 2, Hawaii Marriage Certificate Data for 1994, in Zuanning Fu & Tim B. Heaton, *Status Exchange in Intermarriage*, Journal of Comparative Family Studies, January 2000.

[8] It is unclear if that restriction would be enough to satisfy the Constitution given the complete lack of any tribal political entity, as the RPC Paper discusses at pp. 5-8, but it would certainly be a closer call than the current definition.

[9] 528 U.S. 498, 524-527 (2000) (Breyer, J., concurring).

Justice on July 13, 2005, presumably before the Response was drafted.[10] In its letter regarding the pending legislation, the Department of Justice noted that requiring the Secretary of the Interior to appoint a "nine-member Commission" composed only of Native Hawaiians (as defined racially in section 3(10)) "raises a constitutional concern."[11] The "concern" is that Congress would be mandating that the Secretary violate the Constitution by using race as an express precondition for the hiring of federal employees. Moreover, that racially-defined Commission would in turn police the racial bona fides of participants in the formation of the new entity,[12] which is yet another equal protection violation.

3. The Response Ignores the 15th Amendment Deficiencies in the Bill.

The Response also does not explain how the bill could survive a 15th Amendment challenge. S. 147 requires an instrumentality of the Department of Interior, the "nine-member Commission," to conduct an election in which only those who meet section 3(10)'s racial definition would be eligible to vote. The 15th Amendment expressly prohibits the federal government from conducting such a race-based election:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Yet that is exactly what S. 147 requires the Department of Interior to do. As the Supreme Court explained in *Rice v. Cayetano*, the decision striking down the State of Hawaii's attempt to create Native-Hawaiian-only elections under state law:

> One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[13]

The same considerations apply here, yet the Response does not address this constitutional defect in S. 147. It is even more puzzling that, even with a provision that allows *only* Native Hawaiians to vote in these elections, the Response insists that the bill "does not treat Native Hawaiians specially." (Response at 2.)

C. The Response is Evasive Regarding Gambling on "Native Hawaiian" Lands.

The Response states that there is "no basis for fears that Hawaii will be overrun by gambling interests." (Response at 8.) But all S. 147 guarantees is that the bill "shall not be construed to authorize the Native Hawaiian governing entity to conduct gaming activities under the authority of

[10] See Letter from Assistant Attorney General William Moschella to Indian Affairs Committee Chairman John McCain, July 13, 2005 (hereinafter "DOJ Letter") (on file with Senate Republican Policy Committee).

[11] DOJ Letter at 2.

[12] See S. 147, section 7.

[13] *Rice v. Cayetano*, 528 U.S. 498, 517 (2000).

the Indian Gaming Regulatory Act ["IGRA"]."[14] Contrary to the belief of some, IGRA is *not* a federal licensing scheme that *creates* authority to operate a casino; rather, IGRA regulates *pre-existing tribal authority* to engage in gambling. Prior to IGRA's enactment, several courts recognized that because "[t]here is a presumption against state jurisdiction in Indian country," tribes can permit gambling that would not be allowed under state law.[15] Tribes thus operated gambling businesses as an "exercis[e] [of] their inherent sovereign governmental authority."[16] Given this legal background, this legislation's effect is only to ensure that gaming will not be *limited* by the regulations in IGRA. It leaves open the possibility that the Native Hawaiian entity will exercise the "inherent" right to conduct gambling activities free from state or federal interference. Moreover, Section 8(b) of S. 147 gives the new Native Hawaiian entity the power to negotiate the extent of their gaming rights with the State of Hawaii and the federal government.

The RPC Paper is not alone in raising this concern. The Department of Justice recently warned that the language of S. 147 may be inadequate to protect against expansion of gambling in Hawaii, stating clearly: "the legislation should clearly provide that the Indian Gaming Regulatory Act will not apply to the native Hawaiian governing entity, *and that the governing entity will not have gaming rights*."[17] Clearly the Department of Justice does not believe that the existing language is sufficient.

It is important not to minimize the risk that this legislation, amended or not, will become a vehicle for future gambling expansion in Hawaii. After all, there is ongoing political pressure in Hawaii to legalize gambling in different forms. As but one example, former Democratic Governor Ben Cayetano has supported limited legalization of gambling on (and among) the Hawaiian Islands.[18] The existence of a Native Hawaiian entity will only increase the likelihood that gambling will be legalized and later expanded in Hawaii. That is because, if treated as a tribe under federal and state law (as proponents wish to make possible), the proposed Native Hawaiian entity will be able to petition the Department of Interior to take lands "into trust" — the first step towards creating "Indian lands" that can support Indian gambling. One would then expect the Native Hawaiian entity to ask that it be treated "the same as other Indians" — precisely the argument being made today.

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[14] See S. 147, section 9.

[15] *Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 976 (10th Cir. 1987).

[16] *Id.* at 982; see also *Wisconsin Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613, 616 n.3 (7th Cir. 1985) (holding that tribe rather than State "regulates bingo games conducted by the tribe on the Winnebago reservation because Wisconsin's bingo law * * * is inapplicable to games conducted on Indian reservations"); *Mashantucket Pequot Tribe v. McGuigan*, 626 F.Supp. 245, 247, 249 (D. Conn. 1986) (because "States are generally precluded from exercising jurisdiction over Indians in Indian county * * * * Connecticut's bingo law[s] * * * are found not to be enforceable").

[17] See DOJ Letter at 2 (emphasis added).

[18] See Associated Press, *Governor backs cruise ship gambling*, Honolulu Star-Bulletin, December 18, 2001 (noting also that former Gov. Cayetano supported limited gambling on the islands themselves), available at http://starbulletin.com/2001/12/18/news/story1.html.

D. The Response Provides No Legal Assurances that the Native Hawaiian Entity Would be Subject to the Bill of Rights, Nor that Non-Members Will be Safe From Future Constitutional Deprivations.

The Response offers no assurances that the Bill of Rights will apply to the proposed Native Hawaiian entity. It simply states, as the RPC paper did, that the Secretary of the Interior will have the duty to evaluate whether civil rights of entity members are protected after "negotiations" are completed. (Response at 7.) Here, the Response completely misses the point. Fundamental civil liberties and Bill of Rights protections should not be "up for negotiation" by politicians. No Native Hawaiian should be subject to the kinds of legal deprivations that some reservation Indians face today.

If S. 147 is to become law, it should first be amended to both (1) guarantee that *all* provisions of the Bill of Rights apply to the Native Hawaiian entity, and (2) guarantee that the Native Hawaiian entity is not able to hide behind "tribal sovereign immunity" to avoid liability for any deprivations that it imposes on members or non-members of the entity. Consider but one example of the kinds of civil rights deprivations that Native Hawaiians *and/or* non-Native Hawaiians could suffer if Congress does not demand that they be protected:

> Christie O'Donnell sued ousted Tampa Seminole Tribal Chairman James Billie in federal court for sexual harassment. In May [2001], the 39-year-old O'Donnell filed her suit charging Billie got her pregnant and then forced her to have an abortion. She claims after the abortion he fired her, paying her off with $100,000 in tribal funds. The suit didn't get that far. In October [2001], a federal judge kicked it out, claiming the court didn't have jurisdiction over tribes in this matter. Billie, who has maintained his innocence, didn't have to answer the charges in court.[19]

This fact-pattern is a feature of tribal sovereign immunity. The civil rights of American citizens who may find themselves in similar or worse straits in their interactions with the Native Hawaiian entity should not be put into the same jeopardy. None of the anomalies of federal Indian law that allow injustices such as the above story to occur should be extended to any Native Hawaiian entity.

E. The Response Offers No Solution to S. 147's Failure to Protect Native Hawaiians' Rights to Democratic Self-Government.

The Response offers no assurances that the proposed Native Hawaiian entity will be democratic in nature or that it will take a form that will avoid the conflicts of interest and cronyism that characterize governments without appropriate checks and balances and separation of powers. Instead, the Response simply states that "there is no reason to believe that Native Hawaiians will not" organize themselves in an "essentially democratic" way. This claim illustrates the extent to which S. 147 puts the Native Hawaiian people at the whim of politicians. The Response states that Congress can simply refuse to afford Native Hawaiians "any further rights" if the entity is non-democratic, but this question should not be left to later Congresses. Just as basic civil rights should

[19] Melvin Claxton and Mark Puls, *Tribes use sovereignty to skirt legal judgments*, Detroit News, December 30, 2001, available at http://www.detnews.com/specialreports/2001/chippewa/1230skirt/1230skirt.htm.

not be subject to "negotiations," neither should Congress allow the new Native Hawaiian entity to be anything other than fully democratic, with all the components that are necessary to ensure that the rights of its members are protected.

F. The Response Does Not Assuage Concerns that Indian Funding Will, in the Long Run, be Impacted by the Native Hawaiian "Indian Tribe."

The Response correctly notes that S. 147 does not take any current funding away from existing Indian tribes, but does not foreclose future efforts by the proposed Native Hawaiian entity to participate in those Indian programs. In fact, the Response suggests quite the contrary, claiming that "it is offensive to suggest that Native Hawaiians should be denied benefits other native communities are provided … ." (Response at 9.) The RPC paper made no such suggestion, but merely noted what any casual political observer knows to be true: that "it is highly likely that future Congresses will rationalize the programs and lump Indian and Hawaiian funding together."[20]

The Response does not deny this likelihood; in fact, it implicitly suggests that this result is inevitable, and that anything less would be "offensive." (Response at 9.) The RPC paper merely points out the practical political reality, *i.e.*, that Native American tribes would then be "competing with 400,000 Native Hawaiians for federal resources."[21] After all, if the core argument for S. 147 is that Native Hawaiians should be treated "just like Indians," then future Congresses will find it difficult to resist efforts to combine the funding system.

G. The Response Dismisses the Department of Justice's Concern that S. 147 Increases Litigation Risk and Future Liabilities for the United States and Hawaii.

The Response dismisses the notion that "S. 147's passage will subject the State and the United States to greater liability" as "unsupported and unsupportable." (Response at 8.) The RPC Paper is not alone in expressing this concern, though. The Department of Justice has warned that S. 147 may increase future claims against the federal government and the State of Hawaii. The Department's concerns are worth quoting in full:

> [T]he legislation should include explicit language clearly precluding potential claims for equitable, monetary, or Administrative Procedure Act-based relief, whether asserting an alleged breach of trust, calling for an accounting, or seeking recovery of or compensation for lands once held by native Hawaiians. The absence of such language in the current legislation, especially in combination with the reference in section 2(21)(B) of S. 147 to "the lands that comprise the corpus of the trust" and the unusually long statute-of-limitations period for claims against the United States provided in for in section 8(c)(2), *could invite a flood of litigation and could create the prospect of enormous unanticipated liability for the United States and the State of Hawaii.* In addition, because there exist some legal theories that

[20] RPC Paper at 13. There are 2 million tribal Indians in the United States per the 2000 Census, and this legislation would authorize participation by as many as 400,000 persons with "one drop" of Native Hawaiian blood.

[21] RPC Paper at 13.

> might be construed to create potential claims that could not be precluded under an amended S. 147, the legislation should include a limitations period that is significantly shorter than the proposed 20-year period now contained in section 8(c)(2), and should bar courts from using the continuing-wrong and equitable-tolling doctrines, which are sometimes employed to expand statutes of limitations fixed by Congress.[22]

The Department of Justice's concerns receive no attention in the Response, the Position Statement, or the Attorney General's written testimony today.[23]

H. The Response Implicitly Denies All Hawaiians the Right to Decide if They Want a Race-Based Native Hawaiian Government in their State.

It is plain that S. 147 will have a profound effect not only on those who meet the bill's definition of "Native Hawaiians," but on all Hawaiians.[24] Yet the Response simply dismisses the suggestion that all Hawaiians should have any direct voice in how their state's sovereignty should be carved up, what kind of legal immunities they and their neighbors should have, and the scope of the new Native Hawaiian entity's jurisdiction over them. (Response at 7.) The Response just points to the state constitutional provisions adopted in 1978 (none of which provide any sovereignty to Native Hawaiians or create blanket exemptions from state laws) and the future involvement of state politicians as ample protection for Hawaiians.

There are several reasons for Congress to take extra care to protect the rights and interest of all citizens in Hawaii.

First, recent public opinion polling shows a deeply conflicted — if not outright antagonistic — Hawaii citizenry. A telephone survey of more than 20,000 Hawaiians, conducted on July 7, 2005, found that *a majority (52 percent) of Hawaiians oppose S. 147*, only 25 percent favor it, and 23 percent had no response.[25] These results are a far cry from the Response's blanket claim that the bill has broad support from both Democrats and Republicans. (Response at 1.)

Second, recent press reports suggest that purported support from the political establishment may not translate to actual support from the citizens. Consider this story from a Honolulu newspaper on July 17:

> State Sen. Sam Slom (R, Diamond Head-Hawaii Kai) said he opposed the resolution because he feels the current version of the Akaka Bill

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[22] DOJ Letter at 1 (emphasis added).

[23] See written testimony of Hawaii Attorney General Mark J. Bennett for the Oversight Hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* before the House Judiciary Subcommittee on the Constitution, July 19, 2005, also on file with the Senate Republican Policy Committee.

[24] The concerns obviously stretch far beyond Hawaii, as most Americans have grave concerns about racial and cultural balkanization. Moreover, it is important to remember that Native Hawaiians eligible to participate in the creation of the Native Hawaiian entity live in all 50 states. See RPC Paper at 2.

[25] Detailed poll results, conducted by ccAdvertising for the Grassroots Institute of Hawaii, are on file with the Senate Republican Policy Committee.

> has not been discussed thoroughly enough in public hearings. He added that Lingle's support of the bill also may have stifled opposition from her own party.
>
> "Because the governor was so tremendously popular 30 months ago and thereafter, there was not going to be anybody saying, 'Well, maybe the governor is acting too hastily,'" Slom said. "I've talked to a number of my Republican colleagues and they felt pressured at the time to go along and they felt it was supporting the governor to support Akaka.
>
> "I think there's a great deal of peer pressure, a great deal of political pressure not to appear that you are A, against the governor, or B, that if you took a position in opposition to the Akaka Bill that you were opposed to native Hawaiians, and of course that's not true."[26]

Third, leaders who claim to support S. 147 would prefer that it be radically changed to eliminate the governmental powers and features of sovereignty that S. 147 creates. Consider the following statement from former two-term Democratic Governor of Hawaii, Ben Cayetano:

> "The bill limits eligible voters (in the native Hawaiian governing entity) to those who could trace their genealogy prior to Captain Cook's discovery of the islands," former Gov. Ben Cayetano wrote in an e-mail to the Star-Bulletin.
>
> He noted the Supreme Court ruled that "genealogy can be a proxy for race," meaning that the process set up in the Akaka Bill could be considered race-based, and "the Akaka bill seems to violate this ruling."
>
> Despite those concerns about the constitutionality of the bill, Cayetano wrote, "I support it because if passed it may strengthen the legality of the existing Hawaiian Program such as Hawaiian Homes, etc.
>
> **"I do not support the bill being used to promote Hawaiian sovereignty."**[27]

That the Governor who lost the *Rice v. Cayetano* case believes S. 147 to be unconstitutional and does not support the bill insofar as it enables the creation of Native Hawaiian sovereign authority is certainly something worthy of note, and bolsters the case for a statewide referendum on the question.

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[26] B.J. Reyes, *The Battle for the Akaka Bill*, Honolulu Star-Bulletin, July 17, 2005, available at http://starbulletin.com/2005/07/17/news/index1.html.

[27] Id. (emphasis added).

It is, of course, possible that S. 147's supporters are correct and the public opinion polling and press reports are wrong and this legislation *does* have widespread support. The only way to know, and, importantly, to assure that all Hawaiians have had the opportunity to vote on this question is to require a referendum of all Hawaiians before the new Native Hawaiian entity is allowed to gain any powers, rights, or immunities. Such referenda are consistent with Hawaii's political culture. For example, in recent years, Hawaii voters have had the opportunity to vote on state authorization for the issuance of revenue bonds (1994), the length of terms for state judges (1994), the authorization of bonds to fund insurance coverage for hurricane relief (1996), the length of service for a state tax commission (2000), and bonds for private schools (2002).[28] Surely a state referendum to determine whether 20 percent of Hawaii's citizens could become subject to different laws would be at least as important as these earlier ballot propositions.

I. The Response Continues to Press Historically Inapt Notions of "Reorganizing" a Government that Did Not Exist.

The Response acknowledges that there is no "existing governmental structure" for government-to-government contact with the United States, that the Hawaiian government in 1893 was a "monarchy," and that Native Hawaiians never organized themselves as "tribes." (Response at 5.) These admissions, fatal as they are to any attempt to treat Native Hawaiians as "Indian tribes," are then followed by the irreconcilable statement that the purpose of S. 147 is to "allow Native Hawaiians to re-form and restore the governmental structure that the United States has since acknowledged it had a substantial hand in destroying." (Response at 5.)

This part of the Response surely must be in error. S. 147 backers presumably are not trying to "restore" the only "governmental structure" in existence in 1893 — a monarchy. Nor could S. 147 advocates be seeking to "restore" any "sovereignty," because the admission that the 1893 government was a "monarchy" — which is true — eliminates any claim to popular sovereignty at all. Moreover, the Attorney General also admits that Hawaii's monarchy in 1893 was "not racially exclusive,"[29] which renews the concern raised in the RPC Paper (at 7-8): that it is impossible to "restore" or "reorganize" a governmental structure or form that simply never existed.

It is perhaps understandable that S. 147 advocates lack a consistent vision of how this bill fits into Hawaii history, because the State of Hawaii itself has argued recently that S. 147's effort to create an "Indian tribe" does not fit the historical facts. In 1998, the State of Hawaii argued before the Supreme Court:

[28] See records of the State of Hawaii Office of Elections, available at http://www.hawaii.gov/elections/results/.
[29] Bennett written testimony at 4.

> [F]or the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. …**The tribal concept simply has no place in the context of Hawaiian history.**[30]

In this vein, as Hawaii itself recognized in 1998, it is impossible to speak of "restoring" or "reorganizing" and Native Hawaiian "governmental structure" with any kind of "sovereignty."

J. The Response Contradicts the Office of Hawaiian Affairs's Own Internet Website's Claims Regarding S. 147 and Secession/Independence Efforts.

The Response states that any suggestion that S. 147 might lead to secession is "irresponsible," but the RPC Paper only noted this issue in response to the clear statement to the contrary found on the Office of Hawaiian Affairs's Internet website. That website, owned by the State of Hawaii, continues to include the following paragraph:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S. 344 [the bill number in the 108th Congress] creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people *may exercise their right to self-determination by selecting another form of government including free association or total independence.*[31]

It is understandable that the Response would deny any effort to facilitate independence or secession, but, given the vocal pro-independence movement in Hawaii,[32] it would be foolhardy to ignore the possibility that the State of Hawaii somehow intends to leave this question ambiguous with citizens who might see the Office of Hawaiian Affairs website and conclude otherwise. After all, the RPC Paper's citation to this Internet website clearly caught the eye of the Governor and Attorney General, yet the text above remains as of July 18, 2005.

K. The Response Claims that the Supreme Court May Not be able to Review Congress's Decision to Create the Native Hawaiian Entity.

In the event that any Members of Congress are relying on the Supreme Court simply to follow its precedent in *Rice v. Cayetano* and the Indian recognition cases[33] and strike down S. 147 as unconstitutional, one argument raised in the Response and the Position Statement should give them pause. The Response argues that "it is for Congress, *and not the courts*, to determine which native peoples will be recognized, and to what extent." (Response at 4.) In other words, the State

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[30] Brief in Opposition to Petition for Writ of Certiorari at p. 18, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) (on file with Senate Republican Policy Committee).

[31] Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added) (checked July 17, 2005).

[32] See www.hawaiiankingdom.info and regular discussion of indepedence movement in Honlolulu Advertiser and Honolulu Star-Bulletin.

[33] See RPC Paper at 6-8, 10-11.

of Hawaii is signaling a litigation position that courts may be precluded from second-guessing a congressional decision to recognize a group as an Indian tribe. Without addressing the merits of this argument at this time, it is important to note that, if this argument gains favor in the Supreme Court, the constitutional infirmities of S. 147 will not be addressed. No Member of Congress should proceed with any illusion that Supreme Court review is guaranteed.

II. More Analysis Has Emerged Since the RPC Policy Paper was Published.

Before concluding, I want to draw attention to a few items in the written testimony of your Subcommittee witnesses today.

- In his testimony, former Deputy Assistant Attorney General Shannen Coffin explains that this legislation is unconstitutional for similar reasons to those emphasized above. Mr. Coffin also raises prudential concerns, noting:

> [S]uch a race-conscious justification for a governmental organization would permit boundless deprivations of constitutionally protected rights by any number of states. It could be used by groups such as the native Tejano community in Texas, the native California community of California, or the Acadians of Louisiana – all racially distinct groups that have a special relationship and unique history in their communities – to demand special governmental privileges. While none of these groups may currently possess the political clout to accomplish this objective, who is to say that political persistence over time would not result in similar separatist government proposals?[34]

In addition, Mr. Coffin asks that "this Subcommittee [] not look only to the letter of the Constitution, which condemns the bill as unconstitutional, but to its spirit, in recommending that H.R. 309 not be adopted as federal law."[35]

- In his testimony, former Associate Deputy Attorney General Bruce Fein explains his constitutional and policy objections to this legislation, but also urges the Subcommittee to put the legislation in historical context. He explains:

> Hawaii has been the quintessential example of the American "melting pot", with intermarriage a salient feature of Hawaiian social life. Three fourths of Native Hawaiians have less than 50% of Native Hawaiian blood. King Lunalilo, on the day of his coronation in 1873, boasted: "This nation presents the most interesting example in history of the cordial co-operation of the native and foreign races in the administration of its government, and most happily, too, in all the relations of life there exists a feeling which every good man will

[34] Written testimony of Shannen Coffin before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 8-9, also on file with the Senate Republican Policy Committee.

[35] Coffin testimony at 10.

> strive to promote." Senator Daniel Inouye (D. Hawaii) echoed the King 121 years later in commemorating the 35th anniversary of Hawaii's statehood: "Hawaii remains one of the greatest examples of a multiethnic society living in relative peace."[36]

The RPC Paper also discusses this Hawaiian history, and especially the extent to which this legislation runs contrary to understandings at the time of Hawaii's admission to the nation. The history that Mr. Fein discusses deserves greater examination, especially insofar as conflicting historical understandings appear to be influencing this legislation.

- William Burgess, longtime Hawaii resident and retired attorney, outlines a litany of constitutional problems with S. 147 (beyond those identified here and in the RPC paper) — different ways in which fundamental principles of Equal Protection and equality before the law are violated in the implementation of this legislation.[37] I urge your Subcommittee to review carefully each of the constitutional concerns that Mr. Burgess raises. In addition, Mr. Burgess emphasizes the lack of Hawaiians' collective consent to this new system, noting:

> The Akaka bill does not require the consent of the citizens of Hawaii or of Congress or of the State of Hawaii legislature to the terms of the agreement. Under the bill, the only mention is that the parties **may** recommend amendments to implement the terms they have agreed to.[38]

It is my hope that this legislation can be amended to guarantee that all Hawaiians have the opportunity to speak directly to whether they want a race-based government in their midst.

Finally, I want to ensure that you are aware of an new legal analysis by former U.S. Attorney General Ed Meese and constitutional scholar Todd Gaziano.[39] In their article, published on July 15, 2005, Meese & Gaziano emphasized that "no government organized under the United States Constitution may create another government that is exempted from part of the Constitution." They further argue:

> [R]eal Indian tribes predate the Constitution, even if some of them have split or reorganized for various reasons. … But Congress simply

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[36] Written testimony of Bruce Fein before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 2, also on file with the Senate Republican Policy Committee.

[37] Written testimony of William Burgess before the House Judiciary Subcommittee on the Constitution hearing on *"Can Congress Create a Race-Based Government?: The Constitutionality of H.R. 309 and S. 147, the 'Native Hawaiian Government Reorganization Act of 2005,'"* July 19, 2005, at 3-5, also on file with the Senate Republican Policy Committee.

[38] Burgess testimony at 5 (emphasis in original).

[39] See Edwin Meese and Todd Gaziano, *The "Native Hawaiian" Bill: an Unconstitutional Approach in Furtherance of a Terrible Idea*, townhall.com, July 15, 2005, available at http://www.townhall.com/columnists/GuestColumns/MeeseGaziano20050715.shtml.

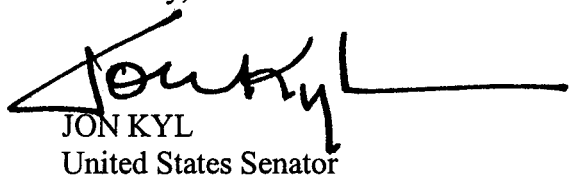
can't create new governments, new nations, or new tribes on its own, and then exempt them from portions of the Constitution.

Messe & Gaziano urge Congress to amend S. 147 to address its constitutional infirmities, and conclude that "we believe Members of Congress and the President are bound by the oath they took to support the Constitution not to give effect to measures that violate it." I have included the Meese article for your review as well.

III. Conclusion

The Response of the Governor and Attorney General did not adequately address the core problems with S. 147. Indeed, they have offered no amendments or even any acknowledgment that the legislation is anything other than perfect as-is. Congress has an obligation to all Americans, including but not limited to the residents of Hawaii, to demand more scrutiny of S. 147's provisions, to insist on amendments that correct or mitigate its deficiencies, and — barring a complete overhaul of the unconstitutional and otherwise objectionable provisions — to defeat the legislation outright and refuse to permit it to become law.

Sincerely,



JON KYL
United States Senator