

**Supplemental Testimony of  
Gail Heriot  
Member, United States Commission on Civil Rights  
Before The House Committee on Natural Resources  
on H.R. 2314  
“The Native Hawaiian Government Reorganization Act of 2009”  
Hearing Date: June 11, 2009**

At the request of Representative Neil Abercrombie, I hereby submit this supplemental testimony.

***H.R. 2314's Constitutionality:*** Mr. Abercrombie requested me to reflect, among other things, upon what could be done to improve the likelihood that H.R. 2314 will pass constitutional muster in the courts. Here are my preliminary thoughts on that issue:

As currently drafted, the bill is premised on the argument that “the aboriginal, indigenous, native people ... who resided in ... Hawaii ... on or before January 1, 1893” were wrongfully divested of “their inherent sovereignty” by the overthrow of Queen Liliuokalani a few weeks after that date. As the Supreme Court has already decided in *Rice v. Cayetano*, 528 U.S. 495 (2000), this is a racial group. Congress may attempt to transform it into a tribal group, but until it does so, it is a racial group.

It is also a vastly under-inclusive group if the purpose of H.R. 2314 is to remedy the alleged wrong of the overthrow. If there was any “people” who exercised sovereignty in the Kingdom of Hawaii in 1893, it was a much larger group than the “aboriginal, indigenous, native people.”<sup>1</sup>

The Kingdom of Hawaii was a multi-racial, cosmopolitan society that welcomed immigrants from China, Germany, Great Britain, Japan, Portugal, the United States as well as other lands. Many of the members of its legislature and its royal ministers were non-ethnic

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An alternative way to look at it is that it was that sovereignty was not vested in a group but in a single individual—the Queen. This perspective has the virtue of having been explicitly endorsed by the highest court in the Kingdom. See *Rex v. Booth*, 2 Haw. 616 (1863) (rejecting the notion of popular sovereignty and stating that “[t]he Hawaiian Government was not established by the people” and that instead “King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty”). The 1864 Constitution states, “The King is Sovereign of all the Chiefs and of all the People; the Kingdom is His.” Haw. Const. art. 34 (1864). Similarly, the 1887 Constitution states, “The King is Sovereign of all the Chiefs and of all the People.” Haw. Const. art. 34 (1887). Under this view it was not the people of the Kingdom of Hawaii who were wronged by the overthrow, but the Queen herself and arguably any designated heir.

Hawaiian. Even the husband of the Queen was a non-ethnic Hawaiian. Anyone who swore allegiance to the monarch became a Hawaiian subject. In addition, just as in the United States, anyone born on the islands was a subject. By 1893, ethnic Hawaiians were a population minority in Hawaii. And although they were not yet quite a minority among actual subjects of the Queen (as opposed to resident aliens), given immigration, birth and death rates, ethnic Hawaiians would have become a minority of the Queen's subjects within a handful of years.<sup>2</sup>

Like all nations of the world in the 19<sup>th</sup> century, the Kingdom of Hawaii did not operate under a rule of universal adult suffrage. Women, for example, could not vote. Many men could not either. For example, article 62 of the 1864 Constitution contained no racial requirements at all, but it did contain property and income requirements and a literacy requirement. It read:

“Every male subject of the Kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall be possessed of Real Property in this Kingdom, to the value over and above all incumbrances of One Hundred and Fifty Dollars or of a Lease-hold property on which the rent is Twenty-five Dollars per year—or of an income of not less than Seventy-five Dollars per year, derived from any property or some lawful employment, and shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters of his District as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that District ....”

Haw. Const. art. 62 (1864). This meant that ethnic Hawaiians (as well as Hawaiian subjects of other races) who did not qualify could not vote.

The 1887 Constitution or so-called “Bayonet Constitution” enhanced the property qualifications for voting for the Legislature’s upper house (which previously had been appointed by the King) and eliminated such qualifications for voting for the lower house. It also effectively disenfranchised those of Asian descent and liberalized the literacy requirements imposed on voters born after 1840. See Hawaii Const. of 1887, art. 59 & 62.

According to historian Ralph Simpson Kuykendall, by the time of the overthrow, approximately 75% of ethnic Hawaiians were without the right to vote owing to gender, age, property or literacy requirements. Many of European or American descent were also disenfranchised. Nevertheless, while the descendants of Portuguese, Britons, Germans and Americans were a strong majority of those voting in the elections for the House of Nobles, ethnic Hawaiians formed the majority of the electorate for the House of Representatives. Very large numbers of non-ethnic Hawaiians also voted in the House elections. See Ralph Simpson Kuykendall, III *Hawaiian Kingdom: The Kalakaua Dynasty* 453 (1967).

The United States surely has no interest in perpetuating the effects of the Kingdom’s disenfranchisement of Asians, of women, or of illiterate or propertyless subjects. At the same time, it should have no interest in pretending that subjects of the Queen who were clearly

Consequently, if the bill were constructed so as to apply not to a racial group, but to the group that was arguably wronged by the overthrow of Queen Liliuokalani, the bill's chances might be improved. That group would have to include the descendants of all subjects of Queen Liliuokalani, not just those who are descended from "the aboriginal, indigenous, native people."

It is no more appropriate to say that only the "aboriginal, indigenous, native people" had a right of sovereignty in the Kingdom of Hawaii in 1893, than it is to say only descendants of the peoples who inhabited the United States in 1776 have a right of sovereignty that could be violated today. The United States has welcomed immigrants from around the world for hundreds of years. Many become citizens at their first opportunity. Their children, born on U.S. soil, are citizens from birth. The Kingdom of Hawaii was no different. The notion that only ethnic Hawaiians could have been divested of their inherent sovereignty is not correct. It is the application of a narrowly racial lens to a situation that was far more complex and nuanced.

The Kingdom of Hawaii should be given its due in the history of nations. Despite numerous hardships, Hawaiians created a multi-racial society of remarkable modernity for its time.<sup>3</sup> It does them no honor to suggest otherwise.

One could object to this proposed modification of H.R. 2314 on the ground that it could empower the descendants of the white Hawaiians who were responsible for the overthrow of the Queen.<sup>4</sup> While this may be regarded as less-than-optimal by some, it is defect not just of the proposed modification, but of H.R. 2314 in its present form. The Office of Hawaiian Affairs reports that as of 1984 only 3.95% of ethnic Hawaiians had a "blood quantum" level that is "100% Hawaiian." Intermarriage between ethnic Hawaiians and persons of American or European extraction has been common for over 150 years. Given the length of time over which

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enfranchised were not. If H.R. 2314 is to pass, the most promising way out of the racial difficulty would be to permit descendants of all subjects of the Kingdom of Hawaii to join the tribal entity contemplated in the proposal. While such an approach will not necessarily remedy all the constitutional defects of H.R. 2314, and may raise some issues, it is somewhat more likely to pass constitutional muster than the current version of the bill.

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In addition to its geographic isolation (and as a result of it), Hawaii had the problem that ethnic Hawaiians had little resistance to diseases that had plagued much of the rest of the world for millennia. Yet Hawaii's leaders remained welcoming to the outside world.

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One possible solution to this problem would be to limit membership in the new tribe to those who could prove descent from a loyal subject of the Queen. But to use race as a proxy for loyalty would be violation of the Constitution. It is for good reason that the Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1944), suffers from a poor reputation.

such intermarriage could occur, it stands to reason that those responsible for the overthrow are especially likely to have ethnic Hawaiian descendants.<sup>5</sup>

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A second constitutional objection to the bill as currently drafted is that Congress lacks the authority to create (or re-create) a tribe with sovereign powers as opposed to the authority recognize a group with a long and continuous history of sovereignty. This is a difficult objection to overcome, but arguably if the bill were to take a more modest approach by disavowing the notion that the new entity will have sovereign power, its chances could improve. Under those circumstances, the tribal entity, if it were to have any powers that cannot be exercised by ordinary voluntary associations, must acquire those powers as the result of Congressional delegation. Congress, of course, cannot delegate powers that it does not have. Consequently, any governing entity would be governed to the same extent as the federal government by the Bill of Rights, including the Establishment Clause of the First Amendment and Takings Clause of the Fifth Amendment. H.R. 2314, as currently drafted, is arguably not so limited.

Two points that bear responding to came up during the hearing that relate to the authority of Congress to create (or re-create) a tribe that has not had a continuous history of sovereignty. First, one witness cited to *United States v. Lara*, 541 U.S. 193, 200 (2004) for the proposition that Congressional authority to legislate with respect to Indian tribes is “plenary and exclusive.” I note that Presidential power with respect to foreign relations is also broad. But that power does not give the President the right to designate a portion of New Jersey or its population as a foreign nation. Neither does Congressional power over Indian tribes give it the authority to create a tribe out of a group of citizens of the State of Hawaii who have not maintained a continuous political existence outside of the mainstream of state and national politics.

Second, one of the witnesses argued that the Menominee Restoration Act, 25 U.S.C. sec. 903-903f, is precedent for the proposition that Congress has the authority to assist in the reconstitution of a tribe whose existence as political entity has not been continuous. The witness suggested that the Menominee tribe, like ethnic Hawaiians, had become so disorganized in the 1960s that it needed federal assistance to accomplish basic functions like the identification of its members and its leaders. This is simply untrue. The Menominee tribe (population approximately 4000) was ancient tribe that was recognized by the United States from an early date. For a brief time (1961 to 1973) in American history, it was not officially “recognized” as part of a short-lived federal plan to de-recognize all tribes and allow them to exist as voluntary associations under state law rather than as sovereign or semi-sovereign entities. Lack of recognition and lack of existence are not the same thing. During that period, the Menominee legally existed as Menominee Enterprises, Inc. Its members were shareholders and its leaders officers of the corporation. The witness argued that the Menominees must have lost track of their membership (much as ethnic Hawaiian could be said to have lost track of their members today) since the Menominee Restoration Act required them to re-open their tribal roll. Note, however, that the tribal roll is a list required by the federal government for federal purposes. Lack of an official roll is not the same thing as lack of ability to identify one’s members with reasonable accuracy. The United States doesn’t have a “national roll” either; nor does Italy or Canada. And yet when necessary they are able to identify their members with reasonable accuracy without assistance from other sovereigns. And they know exactly what territory is theirs, often down to the square



belong to the Hawaiians. We never gave it up." She was then asked, "And when the Akaka bill passes, will you sponsor a bill to transfer *all* the Ceded Lands to the Native Hawaiian Governing Entity?" Rep. Carroll responded, "You know, that's a question for all Hawaiians. I cannot speak for just one." While she acknowledged that non-ethnic Hawaiians would have to be involved too and that it would be difficult to go back, she nevertheless stated, "But, you know, as a Hawaiian myself, I believe we never gave it up."<sup>8</sup>

One thing is clear: The negotiations over the transfer of "land, resources and other assets" pursuant to Section 8 of H.R. 2314 are very likely to be rocky. Over a million acres of land are at stake in this bilateral monopoly transaction. Even before H.R. 2314 has passed and the negotiations have begun, the dispute has already reached the United States Supreme Court once. See *Hawaii v Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009)(rejecting OHA's position that the Apology Resolution prohibits Hawaii from transferring even a square inch of the Ceded Lands prior to resolution of Hawaiian land claims). The issue will not be resolved quickly.

***Popular Sentiment on H.R. 2314:*** During the hearing on June 11, 2009, my attention was drawn to a poll undertaken by the Office of Hawaiian Affairs in 2007. To the best of my recollection, I was unaware of this poll of 380 persons, which is now being touted as proof that most Hawaiians support H.R. 2314. I have now looked at it and found that it is in not inconsistent with my statements in my earlier written submission. The Office of Hawaiian Affairs first asked whether "Hawaiians should be *recognized* by the U.S. as a distinct indigenous group"? (Italics added.) It got a response similar to that in the previous Office of Hawaiian Affairs cited in my previous testimony: Seventy percent (70%) said yes. Everyone likes to be recognized. But when it asked the more relevant question: "There has been talk of creating a Hawaiian governing entity that would represent the Hawaiian people in their dealings with the state and the federal government. Do you agree or disagree that an entity of some kind should be formed?" This time only 51% of respondents agreed—well within the 5% margin for error.<sup>9</sup> Had the Office of Hawaiian Affairs stated (accurately) that this governing entity would not simply "represent" ethnic Hawaiians but would almost certainly *govern* them, just as the name implies by promulgating both civil and criminal laws and imposing and collecting taxes, there is no reason to suspect that the results would have been different from those obtained by the Grassroot Institute in its much larger (39,000 respondents) poll. The Grassroot Institute poll, conducted in 2005, found strong opposition to such a government. Congress, however, has no need to rely upon polls. It could request the State of Hawaii to hold a plebiscite on the matter—something opponents of the bill have advocated and proponents have repeatedly refused to do.

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See KBS Hawaii, Insights (recorded May 21, 2009), available at [http://www.pbshawaii.org/ourproductions/insights\\_programs/insights20090521\\_hawaiian.htm](http://www.pbshawaii.org/ourproductions/insights_programs/insights20090521_hawaiian.htm) (italics representing the emphasis supplied by original speakers).

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[http://www.oha.org/pdf/070904\\_Poll\\_Results.pdf](http://www.oha.org/pdf/070904_Poll_Results.pdf)

***The Report of the U.S. Commission on Civil Rights:*** As I discussed in my initial testimony, the U.S. Commission on Civil Rights has recommended against the passage of an earlier and substantially similar version of H.R. 2314. Specifically, the report stated:

Every deliberative body should have its dissenters, and in Commissioner Yaki, who appeared at the June 11, 2009 hearing alongside me, we at the Commission on Civil Rights certainly have ours. But his characteristically theatrical criticisms of the procedures used to produce the Commission's Report are wholly unfounded.

While there was a time in the not-too-distant past that Commission procedures were not as solicitous of minority views as they should have been, that time is now past. In 2005, not long after Gerald Reynolds was appointed Chair, the Commission adopted procedures designed to lean over backwards to ensure fairness. Our internal regulations now require our staff to exert their best efforts to ensure that the witnesses who appear at briefings represent all significant perspectives on the issue under consideration. Since then, staff members have always been successful in securing witnesses that give a full airing of views at our briefings, including our briefing on the proposed Native Hawaiian Government Reorganization Act.<sup>10</sup> Two witnesses testified in favor of that bill and two against it, making for a far more balanced presentation than the five-to-one hearing conducted by the House Committee on Natural Resources in connection with this testimony. Moreover, contrary to the impression Commissioner Yaki may have left, the Commission's report was based not just on witness testimony, but upon a careful review of the literature, including a briefing book prepared by the Commission's staff as well as extensive independent research by Commission members and their special assistants. Members of Congress can rest assured that Commission members were not under-informed.

Commissioner Yaki's suggestion that because the Commission's report was completed in four months (a shorter period than is typical for Commission reports) that it is somehow tainted is also unfounded. The Commission would like to be able to complete all its reports in a similar time frame, but often it cannot. This report in particular was shepherded through somewhat

Even on those occasions on which witnesses whose views were expected to be congenial to Commissioner Yaki mysteriously withdrew at the last moment, we have been able to move forward with a diverse panel--more diverse than would have been the case prior to the new procedures.

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more quickly than average so that it could be issued before the time we were led to believe Congress would likely be voting on the matter. Under the circumstances, it would have been inappropriate not to move the report ahead. While Commissioner Yaki complains that the report was “stripped” of its findings and recommendations, what he really means is that proposed findings and recommendations that he may have wished to adopt were not in fact adopted by the Commission. Various recommendations were given due consideration; ultimately the Commission chose to adopt a report with one simple recommendation—that the proposed Native Hawaiian Government Reorganization Act not be adopted as law.

Like Commissioner Yaki’s criticisms of the Commission’s report, his criticisms of the Hawaii State Advisory Committee are both unfounded and further evidence that no effort by the Commission towards bipartisanship goes unpunished. Six of the Commission’s eight current members were appointed by President George W. Bush or by Republican leaders in Congress. A coalition of the Republicans and the Republican-appointed Independents on the Commission could dominate the state advisory committee chartering process if those members wanted to do so. They have the voting strength to appoint only those whose views are center or right of center. But these members haven’t wanted to dominate the process. In contrast to the practices of the Commission prior to their becoming the majority, the Commission’s rules, which to the best of my knowledge were supported by all the Republican-appointed members, now require the membership of state advisory committees to include a range of perspectives. Both the major political parties must be represented. Some members of our Commission remember all too well what it was like to be shut out of the process and they are determined that they will not behave in the same manner as their predecessors.

Under the new rules, the Hawaii State Advisory Committee was re-chartered in 2007. There was nothing exceptional or irregular about this process or its timing. Re-charters are supposed to occur every two years. Of the 17 members, seven are Democrats, seven are

Republicans and three are independent of either party.<sup>11</sup> In apparent contrast to the previous Hawaii State Advisory Committee, there is quite a bit of disagreement on the issues. Some members support S. 2314; others do not. Two Republican members have recently resigned. The only complaints that I am aware of in connection with the Hawaii State Advisory Committee came from members (from both political parties) who were concerned that Commissioner Yaki's no doubt heartfelt interest in the issues sometimes outstrips his dedication to proper decorum.

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I have no information on the political affiliations of the members of the previous Hawaii State Advisory Committee other than it had ten members when it unanimously adopted an otherwise controversial report entitled, "Reconciliation at a Crossroads: The Implication of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians. Its then-chair, Charles Kauluwehi Maxwell, Sr. (known to his radio audience as "Uncle Charlie") feels so strongly that what America has done to Hawaii "from the overthrow of the monarchy through annexation and statehood" was "despicable" that he refused to sing *God Bless America* at a Rotary Club luncheon to which he was invited to speak. See Walter Wright, Hawaiian "Warriors" Possible, Activist Says, Honolulu Advertiser (April 5, 2000). See also Charles K. Maxwell, Viewpoint: The People of Hawaii Should Rise Against Attack on Hawaiian Entitlements, The Maui News (June 26, 2002) ("If ... Hawaiians are removed from their entitlements, I predict that the Hawaiian people will rebel and take to the streets, causing Hawaii's economy to drop like a lead weight. This is not a threat, it's reality. We can be pushed only so far.") For good or ill, the Hawaii State Advisory Committee, as it is currently constituted, is unlikely to adopt any report on a controversial issue unanimously.