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In the summer of 2006, The United States Senate considered a bill which aimed to bring parity and justice to Native Hawaiians, an indigenous group which, due to its unique history, does not share the same government-to-government relationship with the United States as 562 other federally recognized tribal governments. Senate Bill 147 (“Bill”) sought to initiate a process by which Native Hawaiians could begin to make affirmative steps toward self determination over their assets and resources within the greater federal framework. The proposed legislation sought to right the historical injustices wrought by the overthrow of the Hawaiian monarchy in 1893. It was an effort to initiate the necessary approval of the federal government to facilitate the reactivation of certain of the inherent sovereign powers that the Native Hawaiian people once possessed. A Congressional determination to afford such recognition, while presenting its own unique considerations, fits squarely within the constructs of federal law. While the historical case for granting such recognition is compelling, a misguided discourse on racial politics infected debates on the Bill within the Senate. Specifically, the opponents contend that the Bill would amount to an unconstitutional racial preference resulting in a polarization of Hawaiian citizens and the nation at large, arguments that ultimately led to the Bill’s rejection.

1 Vermont Law School, JD/MSEL ‘07. I would like to thank Prof. N. Bruce Duthu for his guidance and support in my academic pursuits these past three years.
This note seeks to detail emerging concerns that underscored the difficulty of obtaining federal recognition of tribal status in the 109th Congress. The example of the Native Hawaiians illustrates that there are fundamental misunderstandings and unnecessary fears in the halls of Congress when it comes to addressing the question of tribal sovereignty. Reference to both past and current Supreme Court language will illustrate how such matters have been evaluated by the judiciary and what the future may hold for such claims. I suggest that politics of racial conflict are presenting considerable obstacles to obtaining a legislative solution to the historical injustices wrought upon our nation’s first sovereigns. In addition, the arguments of the opposition, if not challenged and soundly rejected, foreshadow a potential resurgence of an anti-sovereignty agenda, masked by characterizing legislation intended to benefit our nation’s indigenous peoples as impermissibly ‘race based’ in a nation where all should be ‘equal under the law’.

Historical Context

In many ways, the story of the Native Hawaiian people parallels the experience of other indigenous groups that Europeans encountered during the age of exploration. White Europeans ‘discovered’ an area that had been populated for hundreds, if not thousands, of years before their arrival. The unspoiled paradise they found, they sought for their own. As their numbers increased, the newcomers began the process of exploiting this natural capital by asserting title and acquiring the lands for themselves to the exclusion of its original occupants. Over the generations the native inhabitants’ numbers would dramatically decrease from exposure to western disease, vice, and violence. At first, the ‘discoverers’ respected these people by recognizing their independence and engaged them diplomatically in order to peacefully coexist. Eventually, however, foreign guile and military strength would wrest the last strands of autonomy from these once sovereign people.

The story of what became of the once sovereign Po‘e kahiko at the hands of the haole undoubtedly shares similarities with the fate of mainland Indian tribes. However, there were several key distinctions which are critical in the current debate

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4The purpose of this note is not to recount in detail the political developments over the past two hundred years which bring the State of Hawaii and its people to their current relationship with the federal government for this has been sufficiently accomplished by many scholars and respected jurists. See generally L. Fuchs, Hawai‘i Pono: An Ethnic and Political History (1961); Hon. Samuel B. King, Hawaiian Sovereignty, 3 JUL Haw. B.J. 6 (1999); Sally Engel Merry, Colonizing Hawai‘i (2000).
over Congress recognizing a Native Hawaiian entity.\(^5\) When
Captain Cook arrived in 1778, the Hawaiian people had a complex
system of political order and land tenure in place. Each of the
eight islands was divided into separate kingdoms with a
hierarchical structure of chiefdoms that controlled the substantial
portions of the land base while still providing plots for the
common people.\(^6\) By 1810, Kamehameha I had succeeded in
uniting the various chiefdoms to form a single monarchy. This
sovereign monarchy would be formally recognized by the various
foreign powers that vied for control over the islands and its natural
bounty until 1893. However, the pressure of haole advisors would
eventually lead the monarchy to disestablish the former land tenure
system in favor of one which they would eventually be able to
exploit due to their possessing the capital and skills to make the
land far more productive than the native Hawaiians could
accomplish on their own. As will be detailed below, the power and
influence of these haole planters and missionaries would grow
considerably over the last few decades of the kingdom.\(^7\) Their
desire to claim the islands totally for their own enrichment would
eventually lead some of them to plan and eventually overthrow the
monarchy. Because Congress would eventually become complicit
in this takeover by annexing the sham ‘provisional government’
and its successor, the Republic of Hawaii, it is now Congress’
responsibility to right this injustice by beginning a process to
restore some semblance of sovereignty to a Native Hawaiian
entity.

I. The Case for Recognizing a Native Hawaiian Entity

Before presenting the legal argument which supports the
recognition of a Native Hawaiian entity, it is important to briefly
examine exactly what the Bill would and would not do. Simply
put, the Bill is about fairness and justice. It is a matter of
fundamental fairness that descendants of those who inhabited the
islands before western contact are treated on an equal footing as
similarly situated indigenous peoples on the mainland continent. It
is a matter of justice to atone for the ambitions and zealous
conspiring of a handful of well-connected sugar planters,
missionaries, and entrepreneurs over one hundred years ago. The
underhanded manner in which the Kingdom of Hawaii was

\(^5\) See Niklaus R. Schweizer, Turning Tide: The Ebb and Flow of Hawaiian Nationality xxii, xxi (1999) (In the Native Hawaiian language, po’e kahiko translates to ‘people of the olden times’ while haole translates to ‘foreigner’).
\(^7\) Id. at 367-369.
disposed is hardly a matter of debate and was re-affirmed by Congress in the Apology Resolution of 1993.\(^8\) As explained by Sen. Akaka (D-HI), the Bill’s sponsor, its fundamental objective is to “authorize a process so that the federal policy of self-governance and self-determination, a policy formally extended to American Indians and Alaska Natives, can be extended to Native Hawaiians, thereby creating parity in the way the United States treats its indigenous peoples.”\(^9\)

First, it would establish an Office for Native Hawaiian Relations within the Secretary of Interior.\(^10\) Second, the Bill reaffirms the political relationship with that entity, details a process by which that entity determines its roll for membership, organizes an initial governing council, and provides for the creation of organic governing documents.\(^11\) Those who are to be considered eligible for the roll must meet specific criteria as defined in the Bill and determined by the council.\(^12\) Lastly, the bill provides for a process whereby the entity may begin negotiations with the federal government regarding the following matters: the transfer and protection of existing rights with respect to lands, natural resources, and other assets, the exercise of authority with respect to said transfers, the exercise of civil and criminal jurisdiction, and the delegation of governmental authorities by the United States and the State of Hawaii.\(^13\) It is important to note that the Bush administration’s substantive and policy concerns with respect to these last points led to a series of negotiations with the Department of Justice and resulted in what would have been a substitute amendment, S.364. Senator Akaka formally requested that the negotiated language of this substitute be considered the original text for the July 7\(^{th}\) and 8\(^{th}\), 2006, debates to no avail.\(^14\)

\(^10\)S.147 § 5.
\(^11\)See id. § 7 (a-c).
\(^12\)Id. §§ 3 (10). The Bill defines ‘Native Hawaiian’ as:
(i) an individual who is one 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 islands that now comprise the State of Hawaii on or before January 1, 1893; and
(II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or
(ii) an 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 (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.
\(^13\)See id. § 8 (b)(1)(a-d).
Senators Akaka and Inouye (D-HI) repeatedly attempted to call this to the attention of their colleagues from across the aisle, it fell upon deaf ears.\(^{15}\)

Indigenous self-determination is the essence of this whole debate. It reflects the view that Native Hawaiians, not the federal or state governments, should exercise primacy in making the decisions regarding allocation of their resources and shaping the direction of their future. This sentiment was wonderfully captured in the statement of Ms. Jade Danner, Director of Government Affairs and Community Consultation of the Council for Native Hawaiian Advancement at a hearing before the Senate Indian Affairs Committee on March 1, 2005. “We need self governance to formulate and implement our own solutions,” she said, “and to hold ourselves accountable to those results. We need it because we do not exist anywhere else. If we are denied self-determination and self-governance in Hawaii...we are sure to go the way of so many other Natives indigenous to these shores and now extinct.”\(^{16}\)

Turning to some of the deepest fears suggested by the Bill’s opposition, it is also important to consider what the bill will not do. Section 9 of the Bill lays out a list of arrangements that would in no way be affected by or be applicable to any Native Hawaiian government. The entity would not be authorized to conduct any form of gaming as pursuant to the Indian Gaming Regulatory Act.\(^{17}\) The Bill would not deem the entity to be eligible for programs designed to benefit mainland Indian tribes or Alaska Natives.\(^{18}\) It would not lead to secession or any of the other fears suggested by the opposition.

These suggestions are ignorant of the underlying principles of the trust relationship between the federal government and indigenous peoples and the limited sovereignty which flows therefrom. Far from leading our country to becoming “more of a United Nations than a United States,” as Senator Alexander (R-TN) would suggest, such foundational principles of federal Indian jurisprudence dictate that Congressional actions aimed at benefiting this nation’s indigenous peoples are not premised on any impermissible racial classifications.\(^{19}\) As Senator Inouye

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\(^{15}\) See 152 CONG. REC. S5557, 5570-5572, 5634, 5639(daily ed. June 7-8, 2006) (statements of Senators Akaka and Inouye).


\(^{17}\) See S.147 §9 (a).

\(^{18}\) See id. §9 (b).

\(^{19}\) 152 CONG. REC. S5554-5556 (daily ed. June 7, 2006) (statement of Sen. Alexander);
pointed out—and what should have been obvious to any astute politician—it is inconceivable that the entire Hawaiian Congressional delegation, Republican Governor Lingle, and the overwhelming majority of the Hawaiian state legislature would be so adamantly in support of a measure that would racially polarize their electorate.20

The resolution of this issue comes down to a basic examination of Congress’ power to adopt legislation affecting the indigenous peoples who inhabited the areas which eventually would become the United States. Subsequently, the current debate over recognition of a Native Hawaiian entity asks whether this power can be extended to reaffirm a government to government relationship with this once sovereign people. The answer to both these questions is yes. First, let us consider Congress’ authority to legislate with respect to this country’s indigenous peoples. While the Native Hawaiian’s particular situation can not fit soundly within contemporary administrative procedures for obtaining federal recognition, the following discussion suggests that acknowledging such a group does not raise any Constitutional concerns.21

Let us first examine the concept of an “Indian tribe” and what it has meant throughout our nation’s history. Upon consideration of how Congress and the Supreme Court have viewed this continent’s indigenous people from our nation’s inception to the ‘discovery’ of the Hawaiian islands up until today, it is clear that the Native Hawaiian people squarely fall into an analogous category as the indigenous peoples of the mainland despite possessing different social, political, and cultural histories.

As “every American school boy knows,” the reason this continent’s indigenous peoples have always been referred to as “Indians” is because of Christopher Columbus’ erroneous assumption that he had reached India when he made landfall in the Carribean.22 Although the founders of our nations clearly knew that this land was not the south Asian nation of India, it was the common parlance of the time to continue calling the first

See Morton v. Mancari, 417 U.S. 535, 554 (1974) (“The [Native American hiring] preference, as applied, is granted to Indians not as a discreet racial group, but, rather, as members of quasi-sovereign tribal entities...”).


21 See 25 C.F.R. § 83.3 (a) (2000) (The Department of Interior’s criteria for gaining federal recognition dictates, among other things, that the process is only available to American Indian groups “indigenous to the continental United States.”).

22 Tee-Hit-Ton v. U.S., 348 U.S. 272, 289-290 (1959) (Justice Reed describing how the “savage tribes of this continent were deprived of their ancestral ranges by force.”).
inhabitants “Indians.” As we can still see today, the name stuck despite having any grounding in historical or geographical accuracy. It was simply the common term often used interchangeably with “savage”, “native”, or aboriginal.”23 With nearly three hundred years of this seven-letter word taking root in the linguistic subconscious of the western mind, it is of little surprise that Captain Cook and his crew referred to the inhabitants of the islands they discovered as “Indians” in 1778.24 Deconstructing the word “tribe” in a similar fashion shows that this was simply a term picked to describe “a distinct body of people as divided by family or fortune, or any other characteristic.”25 At the turn of the 20th century, even the Supreme Court did not conceive of a “tribe” having to meet any strict definition but characterized the demographic broadly claiming that “by a tribe, we understand 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.”26 Given the historical generality of these terms, to suggest that Native Hawaiians could never be considered an “Indian tribe” for the purposes of Congress using its plenary power to legislate with respect to such peoples both ignores the several examples where Congress has essentially done just that and places an unfounded absolutism on invented western terms that have had little basis in reality from the beginning.

This plenary authority also grants Congress the ability to reestablish the tribal-federal relationship, whether it is in the context of non-recognized tribes or those who relationship was previously extinguished.27 Congress’ authority to restore recognition to tribes that were previously terminated in former eras of federal Indian policy presents another analogy to the Native Hawaiian situation. During the termination era of the 1950's and 1960's, Congress envisioned that the 1930's-era Indian Reorganization Act model and its role of federal involvement were preventing Indians from becoming more assimilated into mainstream society. In the words of Senator Arthur Watkins of Utah, one of termination’s greatest proponents and chairman of the

24 See COHEN’s at 364, n.1309 (citing references made by Cook and his crew in their logs and diaries).
25 Roberts’ Brief at 28-29 citing THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d. ed. 1789).
27 COHEN’s at 168.
Indian Affairs Subcommittee at the time: “we do not want the Government still in the [Indian] business by any implication whatsoever...We must sever the cord that binds us to the Indians or the Indians to us, we want it completely severed, and not just a little strand left.”28 As a result of such sentiments, Congress terminated the government-to-government relationship with approximately 110 tribes during this era.29 Considering the example of the Menominee Tribe of Wisconsin’s termination, it is important to realize that it is in no way unprecedented for Congress to restore recognition to an indigenous group that had its sovereignty extinguished during antiquated policy eras.

In 1954, Congress passed The Menominee Indian Termination Act which, among other things, aimed to “provide for orderly termination of Federal supervision over the property and members of the tribe.”30 When Congress rejected termination era legislation and philosophy beginning in the 1970's, it recognized that the former policy had “brought the Menominee people to the brink of economic, social, and cultural disaster.”31 In response, specific legislation was passed to repeal the Menominee termination statute and restore the government-to-government relationship with the tribe.32 When this Congressional restoration was affected, courts held that it was a full restoration of the tribe’s inherent, not federally delegated, powers that it possessed prior to termination.33 Given Congress’ demonstrated ability to restore government-to-government relationships with native entities that it has terminated during policy periods that are now rejected, to do so for a similar Native Hawaiian entity should present no major concern. The case is made stronger when one considers the fact that the kingdom of Hawaii was never unilaterally “terminated” by Congress in the same sense as mainland tribes. The actions of those that conspired to overthrow the kingdom absent any Congressional authority were far more insidious.

32 See 25 U.S.C. § 903(a)
Just as the federal government found it sound policy at the time to terminate its relationship with the Menominee, the fate of the Hawaiian kingdom would eventually find itself to be considered a legitimate policy decision. As detailed above, the Kingdom of Hawaii was recognized around the world as a sovereign monarchy up until 1893. The events setting the stage for the insurrection, however, began a few years earlier in 1887. At that time, King Kalakaua signed, at the urging of the haole planter elites with their military backing, what became known as the “bayonet constitution” which considerably increased their own power and disenfranchised most Native Hawaiians. By January of 1893, a group of wealthy non-Hawaiian conspirators, including U.S. citizens, became concerned by the proposed limits to be placed on their power and influence under Queen Liliuokalani’s new constitution. Backed by the U.S. Minister and his military support, this cabal, now calling themselves the “Committee of Safety”, proclaimed that the Queen’s ‘revolutionary acts’ were a ‘menace to public safety’, positioned U.S. Marines near the palace, and forced the Queen to sign an abdication of her throne. This group then established themselves as the “provisional government.” While their tentative goal was to seek annexation by the U.S., President Cleveland initially declined to take the annexation treaty forward, acknowledging the unlawful intervention of this group and its lack of support by the native Hawaiians. However, it would only take another five years for Congress to pass a joint resolution approving the annexation of the “Republic.”

Under the terms of the resolution, all “public, Government, or Crown lands,” were to be ceded with the provision that proceeds from these cessions were to be used “solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” Additionally, the resolution unilaterally conferred upon all Native Hawaiians and former subjects of the crown status as United States citizens.

34 COHEN’S at 368; STEPHEN KINZER, OVERTHROW: AMERICA’S CENTURY OF REGIME CHANGE FROM HAWAI’I TO IRAQ 15 (2006).
35 See KINZER at 29-30 (In her abdication statement, the Queen “solemnly protested against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government,” and accordingly signed only “to avoid any collision of armed forces and perhaps loss of life…”).
36 For a detailed discussion of the intrigue surrounding the final days of Queen Liliuokalani, see generally KINZER at 14-30.
38 Id. at 369 citing J.RES 55, 30 Stat 750 (1898).
39 Id.
40 Id.
As previously mentioned, Congress officially recognized the series of events leading to Hawaii’s current political status in the Apology Resolution of 1993.\textsuperscript{41} In this contemporary acknowledgment of the injustice of long abandoned policy, Congress used the term “illegal overthrow” four times to describe the events leading to Hawaii’s becoming incorporated into the Union.\textsuperscript{42} Likening these Congressional actions of over a century ago to a “termination” of a peoples’ former sovereign status takes no stretch of the imagination. That being said, the question remains why some find it so difficult to conceive that Congress, one hundred years later, has the ability to recognize the injustice of colonialist policies and act to remedy the past by re-affirming certain sovereign powers of a Native Hawaiian entity.

In addressing the question of Congress’ authority to legislate with regard to Native Americans, the Supreme Court has recently described, in keeping with historical precedent, that “the Constitution grants Congress broad general powers to legislate in respect to Indians tribes, powers that we have consistently described as ‘plenary and exclusive.’”\textsuperscript{43} Throughout the years, they have sanctioned a wide variety of methods by which a group can gain recognition.\textsuperscript{44} These powers derive from its trust obligations, a doctrine first coined in the early years of the Supreme Court to describe the obligations of conquering nations toward now dependent native peoples.\textsuperscript{45} Throughout more than 160 statutes designed over the years to specifically address issues affecting Native Hawaiians, Congress has repeatedly reaffirmed that the trust obligation extends to this group and that Native Hawaiians are to be considered on par with other Native American and Alaskan groups.\textsuperscript{46} The case for recognizing a Native Hawaiian entity presents no unique challenge that cannot be squared with Supreme Court precedent in light of Congress’ broad authority. Cases where the Court upheld recognition for a particular group

\begin{footnotes}
\item[41] \textit{See Apology Resolution, supra} note 8.
\item[42] \textit{Id.}\n\item[43] \textit{United States v. Lara}, 541 U.S. 193, 200 (2004); \textit{See also} South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (“Congress possess plenary power over Indian affairs.”).
\item[44] \textit{See COHEN’s at} 143 (citing determinations by legislative, administrative, and judicial bodies).
\item[45] \textit{See id.} at 419-420 (describing the development of the trust doctrine and its role in the evolution of judicial interpretation of federal Indian policy).
\end{footnotes}
despite the unique circumstances that distinguished them from other tribes are most on point for consideration of these issues.

In the *Lara* decision cited above, the Court acknowledged Congress’ ability to re-recognize a tribal status and sovereignty in a group from which it had previously been extinguished.\(^47\) The Court recognized that the changing realities that this nation faced as it expanded would “fluctuate dramatically as the needs of the Nation and those of the tribes changed over time…Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty.”\(^48\) Similarly, the Court in *U.S. v. Sandoval* affirmed Congress’ authority to recognize the Pueblo, a group with its own unique historical relationship with the federal government, and recognized a limited role in judicial review of such Congressional action.\(^49\) The Court rejected the notion that such recognition of the Pueblo was an act of “arbitrarily calling them an Indian tribe,” but that the key consideration was “whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States [and that such questions] are to be determined by Congress, and not by the courts.”\(^50\) Other examples abound reflecting Congress’ broad authority to recognize groups that present unique historical and practical issues in a consideration for recognition.\(^51\) Such Congressional determinations have been afforded substantial deference and will only be overturned if they are clearly arbitrary. These precedents indicate that to extend similar recognition to a Native Hawaiian entity would by no means be novel. Native Hawaiians clearly fall within *Sandoval’s* characterization of a group that has been dealt with over time as a dependent ‘tribe’ requiring the guardianship and protection of the federal government.

Another case which remains central to the Native Hawaiian debate is *Rice v. Cayetano*.\(^52\) At issue in the case was whether the state’s voting eligibility requirements for the Office of Hawaiian Affairs’ (‘OHA’) trustees violated the Fifteenth Amendment by restricting the franchise to only those who were descendants of


\(^{48}\) Id. at 202.


\(^{50}\) Id. at 46.

\(^{51}\) See *U.S. v. John*, 437 U.S. 634, 652-653 (1978) (affirming Congress’ power to legislate with respect to recognizing the Mississippi Choctaw, despite their full assimilation into political and social life of state and the fact of the Federal government long ago abandoning its supervisory authority).

people inhabiting the islands in 1778. The Court ultimately held that for the state to place such restrictions upon voter eligibility ran afoul of the Fifteenth Amendment’s prohibition against denying the right to vote on account of one’s race. As will be discussed below, opponents of legislation that would recognize a Native Hawaiian entity rely heavily on portions of the opinion which struck down the voting scheme.

Rather than selectively choosing the strong language of Justice Kennedy, if the opposition were to examine what the Rice opinion actually said, it would be clear that it is inappropriate to rely on its holdings to argue that recognizing a Native Hawaiian entity would run afoul of the Constitution. While the Court did indicate that the voting scheme for OHA trustees contained impermissible racial criteria for eligibility, it was Congress’ authorization of the state to carry out this policy which ran afoul of the Constitution, not any notion that it was impermissible for Congress to recognize any special status for the Native Hawaiians ab initio. Quite to the contrary, the Court deferred on the issue entirely: claiming that whether or not Congress could treat Native Hawaiians similar to mainland tribes was “a matter of some dispute,” and that they would “stay far off that difficult terrain.”

Such ‘difficult terrain’ presents the challenging political questions that Congress alone is qualified to address: a responsibility that the opposing Senator’s chose to ignore in favor of pandering to the fears of establishing impermissible racial preferences through legislation aimed to benefit this nation’s indigenous groups.

It is also important to examine the Court’s evaluation of established precedent recognizing the legitimacy of statutory schemes designed to afford preference to Native Americans. In Morton v. Mancari, the Court upheld a BIA policy which granted a hiring and internal promotion preference to members of federally recognized tribes. Such a preference was proper because the preference was a political rather than racial one that could both “be tied rationally to the fulfillment of Congress’ unique obligation toward the Indian, [and] rationally designed to further Indian self government.” Answering Hawaii’s claim that the OHA voting criterion fits into the Mancari exception, the Court in Rice explained that if it were to accept such an analogy, it would look to determine if Congress had treated Native Hawaiians in the same

53 Rice, 528 U.S. at 499.
54 Id. at 495.
55 Id. at 519.
56 Id. at 518-19.
57 See Sandoval, 231 U.S. at 46.
59 Id.
manner as it has treated Indian tribes over time. Ultimately rejecting this contention, the Court was unwilling to extend *Mancari* to apply to state voting eligibility criteria because it was unable to view the Native Hawaiians as sharing the same quasi-sovereign status as members of federally recognized tribes seeking the employment preference at issue in *Mancari*. Because there was no analogous political status to be recognized with regards to Native Hawaiians, the *Mancari* exception falls short of being applicable in this context. It is, therefore, disingenuous for the opposition to construe *Rice* as somehow limiting Congress’ powers to establish formal political relations with an indigenous group. As the case law clearly establishes, Congress alone is the body with the ability to grant the Native Hawaiians the quasi-sovereign, political status that the *Rice* Court found absent.

Finally, it is worth considering the misleading references made by the opposition regarding the arguments of the State of Hawaii and its counsel John Roberts, now Chief Justice, during the *Rice* litigation. Most notably, it is entirely inaccurate to credit any assertion of the historical impropriety in analogizing Native Hawaiians and mainland tribes to the current Chief Justice as if to suggest the infallibility of such a proposition. At no point in his brief or during oral argument before the Supreme Court did Roberts make such a statement. The true context of the often cited assertion that “the tribal concept has no place in the history of Hawaii,” came instead from a discussion of *Mancari* in the state’s brief in opposition to certiorari penned by Hawaii’s former Attorney and Deputy Attorneys General. As a matter of policy,

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60 *Rice*, 528 U.S. at 518-519.
61 *Id.* at 520.
64 Respondent’s Brief in Opposition to a Petition for Certiorari to the Court of Appeals for the Ninth Circuit at 18, Rice v. Cayetano, 528 U.S. 495 (1999) (No. 98-818) at 17-19. (Challenging Petitioner’s narrow reading of Indian preference precedent that would impose a strict *tribal* requirement upon Native Hawaiians in order for the OHA election criteria to be upheld under *Mancari*, the State of Hawaii explained that the emphasis of *Mancari* was that these preferential schemes are designed to promote Indian self government and are valid because they are premised upon the political rather than racial status of the beneficiary. For mainland Indians who are members of federally recognized tribes, the formerly independent governing body that now has this political status was and is the tribe. For Native Hawaiians, on the other hand, this former sovereign governing body was never any specific tribal entity but a kingdom. Thus, it is inaccurate to conceive of that political structure and its centrality to the pre-existing sovereignty of Native Hawaiians in ‘tribal’ terms. The OHA voting
taking arguments out of context from legal briefs is shaky ground upon which to legislate, let alone an adequate substitute for applying actual precedent and principles of federal Indian law when considering the question of re-recognizing the inherent sovereignty of indigenous groups. Even if one were to accept the position that such a strategy is appropriate, it is only fair to accurately represent the arguments of the position one is proffering. In this instance, had the opposing Senators actually read Roberts’ brief, they would have seen a detailed analysis of why the Congressional recognition of a special status for Native Hawaiians and government bodies designed to assist them is consistent with case law, federal Indian law principles, and prior legislation. As this next section will detail, the opponents arguments can hardly be squared with the case supporting a reaffirmation of a Native Hawaiian entity.

II. The Opposition

When the motion to proceed to S.147 was invoked on the afternoon of June 7, 2006, Sen. Alexander, one of the Bill’s most vocal opponents, kicked off the debate by characterizing the Bill as “an assault on one of the most important values in our country.” Instead of discussing more pressing matters such as the war in Iraq, high gas prices, or affordable health care, the Senators would now be turning their attention to the consideration of a Bill that would “for the first time in our country’s history...create a new, separate, sovereign government within our country, based on race, putting us on a path of becoming more of a United Nations than a United States of America...[thus setting] a precedent for the breakup of our country along racial lines.” It would be through this lens that the Bill’s opponents would frame the debate. Sen. Alexander’s tone would be echoed by his Republican colleagues up until the defeating vote the following afternoon. In this section, I will present these Senators’ arguments in their own words and discuss the factual support they relied upon to make their case.

Throughout the debate, the opposing Senators expressed a fear that the “state-sanctioned racial separatism” to be permitted by the passage of S.147 would “create a slippery slope that could lead...
to a host of pernicious possibilities for our future as a unified Nation.”

By creating a sovereign entity “out of thin air,” the precedent set by S.147 could lead to a host of other groups with a historical claim of injustice desiring their own sovereign status within our nation. Senators Alexander and Sessions (R-AL) indicated that African Americans, Mormons, Hasidic Jews, the Amish, the French who held Louisiana territory before the Louisiana purchase, or Hispanics that lived in Texas before it became a republic in 1836 would be examples of groups that might seek an independent sovereign status under such a precedent. To permit such an outcome, Senator Cornyn (R-TX) argued, would undermine the melting pot concept which so defines our nation as consisting of many different cultures where all are equal under the law.

Among the other practical concerns that would follow the Bill’s passage would be an unacceptable patchwork of jurisdictional conflict throughout the United States. By allowing for the creation of Hawaiian “tribes in every state,” Senator Sessions noted, “...sporadic pockets of people in almost every State would be governed differently than their neighbors and would be immune from State and Federal laws and taxes...[thus resulting in] a chaotic intermixing of different rules and regulations throughout the entire country.”

Taken to the extreme, Senator Sessions warned, “the Bill could conceivably lead to complete secession from the United States.”

Invoking references to the Civil War, he emphasized that any ideas of secession had been settled “for all time,” and that “[w]e are one Nation and will not be separated—whether by secession of a state or a racial group.”

Some Senators even questioned whether any Native Hawaiian group had ever exercised inherent sovereignty over the Hawaiian Islands. According to this argument, there is no ‘Native Hawaiian tribal government’ to restore. The fact that the Hawaiian monarchy, prior to 1893, had a practice of naturalizing subjects of all descents and employing nonnatives in all levels of government undermines the claim that there was any distinct group exercising inherent sovereignty.

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72 Id.
73 Id.
74 Id.
authority over the islands.\textsuperscript{75} Due to this historical fact, “it would be impossible,” Senator Sessions argued, “to ‘restore’ the ‘Native Hawaiian’ government of 1893–as the Bill purports to do–because no such racially-exclusive government–or nation–ever existed.”\textsuperscript{76} This fact of not having a distinct, pre-existing political organization, the Senator acknowledged, is a fatal flaw to gaining recognition under the established Bureau of Indian Affairs (‘BIA’) process to be discussed in further detail below.

Factual Support

One of the most frequently cited sources of the Bill’s opponents was a one sentence recommendation from the official report detailing a briefing held before The United States Commission on Civil Rights (‘Commission’) in January of 2006.\textsuperscript{77} While the report contains lengthy debate regarding the merits and concerns surrounding the Bill, the language which got the most play during the floor debate reads as follows: “The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 2005 (S.147) as reported out of committee on May 16, 2005 or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege.”\textsuperscript{78}

On January 20, 2006, the Commission met in order to solicit the opinions of a panel of experts regarding S.147. The Commission ultimately reached their conclusion based upon the assertions of two panelists, Mr. William Burgess of the Grassroot Institute of Hawaii and Ms. Gail Heriot.\textsuperscript{79} The central themes of

\textsuperscript{75}Senator Sessions noted the presence of Americans, Chinese, Japanese, Koreans, Samoans, Portuguese, Scandinavians, Scots, Germans, Russians, Puerto Ricans, and Greeks as examples of ‘naturalized’ foreigners that were recognized under the monarchy. 152 CONG. REC. S5565 (daily ed. June 7, 2006) (statement of Sen. Sessions).

\textsuperscript{76}Id.

\textsuperscript{77}The United States Commission on Civil Rights is an “independent, bipartisan agency established by Congress in 1957,” which has among its stated purposes to “appraise federal laws and policies with respect to discrimination or denial of equal protection of the law because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice [and]...submit reports, findings, and recommendations to the President and Congress.” U.S. COMM’N ON CIVIL RIGHTS, THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005, at ii (2006) [hereinafter COMMISSION REPORT].

\textsuperscript{78}Id. at 15.

\textsuperscript{79}The Grassroot Institute of Hawaii is a non-profit organization which has gained prominence for its intense lobbying against the Akaka Bill. Mr. Burgess has personally been involved in several legal challenges to the constitutionality of the Office of Hawaiian Affairs.; See generally COMMISSION REPORT at 45, 66.
their statements were that recognizing a Native Hawaiian entity would grant privileges solely upon the basis of race, that it was inappropriate to analogize any such entity as equivalent to a tribe, and that precedents of federal Indian law neither warrant such recognition nor even give Congress the authority to do so.  

Additionally, the Commission received sixteen public comments where “[m]ost of [the] commentators wrote to express their opposition...on the ground that, in their view, [the legislation would] formalize racially discriminatory practices.” Excerpts from four out of 16 of these letters penned by ordinary Hawaiian citizens were referenced in the report. Consequently, these same excerpts were repeated on several occasions during the Senate debates in order to evidence the true concern of the Hawaiian people. A detailed analysis concerning the credibility of the Commission’s report will be detailed below.

In addition to the Commission’s report, the Senators often referred to the Supreme Court’s decision in Rice and the arguments made by the State of Hawaii in that case. Key to their argument was Justice Kennedy’s reasoning that, in this instance, the state’s ancestry requirement for voting eligibility was being used “as a racial definition and for a racial purpose,” and that making such distinction is forbidden because, “it demeans a person’s dignity and worth to be judged by ancestry instead of his or her own merit and essential qualities.” Noting the state’s past and current efforts to treat the “early Hawaiians as a distinct people,” the voting eligibility requirements impermissibly used “ancestry as a proxy for race.” By harkening on this judicially crafted notion, the Senators reasoned that any recognition to be granted by S.147 would be another example of granting race-based privileges which the Rice Court’s holding expressly precludes.

As discussed previously, the Senators also took the opportunity to point out arguments made by the State of Hawaii in Rice. In one of the state’s briefs, there was a one sentence assertion which was repeatedly referenced during the debate: “The tribal concept has no place in the history of Hawaii.” This was referenced to suggest that this newly proposed Native Hawaiian

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80 Id. at 3-6.
81 Id. at 12.
82 Id. at 13-14.
84 Id. at 515, 496.
85 Id. 514.
86 Respondent’s Brief in Opposition to a Petition for Certiorari to the Court of Appeals for the Ninth Circuit at 18, Rice v. Cayetano, 528 U.S. 495 (U.S. 1999) (No. 98-818).
government could not pass muster under the formal BIA process for acknowledging tribes as sovereign bodies. To bolster the weight to be afforded to this suggestion, Senator Alexander remarked that “it would be difficult to argue that Hawaii was not well represented in that debate because the current Chief Justice of the U.S. Supreme Court, Justice Roberts, was the lawyer for the state of Hawaii in this argument before the Supreme Court and they said, ‘the tribal concept simply has no place in the context of Hawaiian history’.” As would be later pointed out by Senators from the other side of the aisle, Chief Justice Roberts’ actual argument in *Rice* paints quite a different picture.

The Senators also presented a letter written from Assistant Attorney General, William E. Moschella to former Senate Majority Leader Bill Frist representing the administration’s views. Citing the language of the Commission report and the *Rice* decision, the letter expressed the administration’s concern that this legislation would undermine this nation’s cherished melting pot tradition by “divid[ing] people by their race.” It indicated that such legislation raises the threshold constitutional questions, presumably equal protection concerns, “that arise anytime legislation seeks to separate American citizens into race-related classifications,” rather than by (quoting *Rice*) “their essential qualities.” The letter ends with an odd conclusion which would suggest that Congress not even attempt to address this question. Since the Supreme Court has indicated that whether or not Native Hawaiians could be considered a tribe is a “matter of dispute,” the administration argues, such ‘difficulty’ in conjunction with the unique historical situation of these people leads to the conclusion that recognition of Native Hawaiians was “inappropriate...and would still raise difficult constitutional issues.” While righting the historical wrongs which gave rise to this debate may indeed be difficult, the administration’s position, as reflected in this letter, indicates a mere parroting of misguided assumptions and questionable authority as directly applied to this case rather than informed analysis of precedent.

One final body of law that the Senators relied on is the formal recognition process administered under the Interior

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88 Id at S5555.
91 Id. (citing *Rice*, 528 U.S. at 517).
92 Id. (citing *Rice*, 528 U.S. at 518).
Department’s Office of Federal Acknowledgment (“OFA”). Since 1978, the OFA has maintained an extensive recognition process focusing on a set of seven criteria to which groups seeking federal recognition must comply and satisfy. The Senators pointed to several facts which would deem fatal any potential petition that could be filed by a Native Hawaiian group. In addition to the points raised above, Senator Sessions also pointed out that such a group would not be able to satisfy the criteria detailed in 25 C.F.R. §83.7 (b) that the predominating portion of the petitioning group comprises a distinct community and has existed as a community from historical times until present. “Native Hawaiians live in almost every state of the nation,” he noted, “and have fully integrated into American society. [Instead of being] a cohesive, autonomous group of people...they are fully immersed in all aspects of American life.” On a more basic level, the regulations explicitly state that the entire process is only available to American Indian groups “indigenous to the continental United States.” Consequently, any petition on behalf of a Native Hawaiian group would be rejected regardless of whether or not the §83.7 criteria could be met. The administrative recognition process would indeed be fatal and the opposition reference to this fact was not unwarranted. However, the case of the Native Hawaiians is a prime example of how historical realities do not often fit into the BIA’s rigid framework of granting recognition.

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93. Title 25 of the Code of Federal Regulations, §83.7 reads, in pertinent part, that any petitioner seeking federal recognition as a tribe must meet the following criteria:
(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900....
(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.
(d) A copy of the group's present governing document including its membership criteria....
(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe....
(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.


95. 25 C.F.R. §83.3 (a) (2000).
III. Misguided Rhetoric and Anecdotal Evidence

It is important to assess critically the claims that recognizing a Native Hawaiian governing entity would undermine any ‘melting pot’ notion that presumably defines our nation. Two essential prongs of this idea are that we, as Americans, must come to the conclusion in our collective conscience that these immigrants can and should become Americans and also that they possess the desire to become an American themselves. The opposing Senators went to great lengths to list the wide array of immigrant groups that came to this country and assimilated into one people, despite their diverse cultures and traditions, because their desire to share this American dream was greater than any desire to maintain their identities as a distinctly foreign group. What such an argument fails to realize is that the indigenous peoples that inhabited the lands that were to become the United States never sought to be added to any bubbling cauldron. With the obvious exception of African slaves, the groups that Senators Alexander and Sessions referenced came to these lands of their own free will to seek a better life than the Old World could provide. While it may be accurate to say that the melting pot ethos has certainly characterized various phases of federal policy, it is a far cry to suggest such a social phenomenon carries the weight of Constitutional doctrine for the purposes of denying the rights of this country’s indigenous peoples.

Such a framework may be appropriate for considering the various immigrant groups that have come to define our nation over time. However, applying the same reasoning to native peoples assumes the belief that “traditional American norms are preferable or superior,” for this American experiment was forced upon our lands’ indigenous inhabitants; they did not seek the American way of life out. One early missionary described the Native Hawaiian

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peoples as “exceedingly ignorant; stupid to all that is lovely, grand and awful in the works of God; low, naked, filthy, vile and sensual; covered with every abomination, stained with blood and black with crime.” By the middle of the 19th century, the Native Hawaiians found themselves surrounded by the various world powers, each jockeying for a competitive advantage over the other. The monarchy did eventually adopt some aspects of Western political organization and custom as a result of foreign contact primarily as an accommodating strategy to resist outright subjugation. This view reflects the fact that Native Hawaiian people governed themselves and their lands for centuries before Captain Cook’s ships first made landfall in 1778. In the first major series of cases to address the nature of the relationship between this country’s indigenous peoples and the federal and state governments, Chief Justice John Marshall described as a “settled doctrine of the law of nations..., that a weaker power does not surrender its independence–its right to self government, by associating with a stronger, and taking its protection.” Even if one accepted the analogy of Hawaiian overthrow to the weaker nation ‘associating’ with the stronger United States, such circumstances can not be viewed as “individuals abandoning their national character, and submitting as subjects to the laws of a master.” For modern day Senators to argue that our country’s native peoples, particularly a sovereign kingdom that was illegally overthrown, should be added to our ‘melting pot’ reeks of the cultural imperialism that one might have thought went out of vogue decades ago.

Suggesting that this Bill is an unprecedented move that would put “us on the path of becoming more of a United Nations than a United States,” is both unfounded and fundamentally ignorant of the concept of tribal sovereignty within our nation’s legal system. Pointing out the government-to-government relationship that exists with over 500 native governments, Senator Akaka noted that “the Federal policy of self-governance and self-determination allows for a government-to-government relationship between indigenous peoples...[and] The continued representation of this Bill as an unprecedented new action is just plain wrong.” The fear of the potential recognition of any of the other groups

100 See Kinzer at 12 (citing O.A. Bushnell, The Gifts of Civilization: Germs and Genocide in Hawaii 16 (1993)).
101 Merry at 13.
102 Worcester v. Georgia, 31 U.S. 515, 560-61 (1832)
103 Id. at 555.
mentioned by Senators Alexander and Sessions, to use Senator Inouye’s words, is simply “ridiculous.”\footnote{106

One of the fundamental principles underlying the authority of such relationships is the reality that it has been the policy of the federal government to recognize native entities as a result of their retained, inherent sovereignty which predates the Constitution.\footnote{107
\textit{COHEN’S} at 205.}

This authority for the federal government to recognize tribal entities as governments with a limited sovereignty comes primarily from the Commerce Clause’s reference to Congress’ authority to engage with tribes in the same context as other foreign nations.\footnote{108
\textit{U.S. CONST.} art. I, § 8, cl. 3.}

In \textit{Worcester v. Georgia}, Chief Justice John Marshall characterized the native groups which inhabited the lands that we appropriated as “distinct, independent political communities,” whose inherent sovereignty was limited but not \textit{abolished} as a result of coming under our “guardianship”.\footnote{109
\textit{Worcester}, 31 U.S. at 559 (1832).} It is well settled that this line of cases “provide[s] the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.”\footnote{110
\textit{COHEN’S} at 420.}

Congress has expressly affirmed that this trust relationship extends to Native Hawaiians.\footnote{111
See supra note 45, 46.}

Far from being a “dangerous precedent,” to use the words of Senator Alexander, recognition of a Native Hawaiian entity would by no means be novel, for “the constitutional recognition of tribes as sovereigns in a government-to-government relationship with the United States has remained a constant in federal Indian law.”\footnote{112
\textit{CONG. REC.} S5563 (daily ed. June 7, 2006) (statement of Sen. Alexander); \textit{COHEN’S} at 207.}

Mr. Michael Yaki, Commissioner, U.S. Commission on Civil Right, astutely responded to these charges by commenting that “if one accepts the Commission’s pronouncement against subdividing the country into ‘discrete subgroups accorded varying degrees of privilege,’ then the Commission should immediately call for an end to \textit{any} recognition of additional Indian tribes.”\footnote{113
\textit{COMMISSION REPORT} at 48 (Dissenting Statement of Mr. Michael Yaki, Commissioner, U.S. Commission on Civil Rights) (emphasis added).}

Any implication that the Bill warrants such reasoning flies in the face of settled precedent. Further examination of the Commission’s report reveals additional short comings.
The Briefing Report of U.S. Commission on Civil Rights

After referring to the four public comment letters referenced by the Commission, Sen. Sununu (R-NH) proclaimed that “[w]e shouldn’t make decisions in Congress or anywhere else based on just anecdotal information.”\(^{114}\) However, noteworthy flaws underlying the report make any reference to it suspect. The most telling condemnation comes from the independent, nonpartisan Government Accountability Office’s (“GAO”) May 2006 report to Congress on the credibility of the Commission and its practices.\(^{115}\) GAO was asked to assess “(1) the adequacy of the Commission’s policies for ensuring the quality of its reports and (2) the role of the state advisory committees.”\(^{116}\) Before detailing its findings and recommendations, the report noted that due to the lack of the Commission’s enforcement power, the necessary predicate for achieving its mission was its “credibility as an independent and impartial fact-finding and reporting organization.”\(^{117}\) However, the GAO investigation revealed that the Commission lacked “policies for ensuring the objectivity of its national office reports, briefings, and hearings and providing accountability for decisions made on its national office products.”\(^{118}\) Among the critical policies that would ensure objectivity in the Commission’s work products, the GAO made the following findings: [the Commission] “does not have a policy requiring varied and opposing perspectives in its national office reports, briefings or hearings”, “…lacks accountability for the decisions made on its products”, “…has also not incorporated the work of the state advisory committees into its strategic planning and decision-making processes” and, “…has not provided for independent oversight of its policies and practices for the state advisory committees.”\(^{119}\) These criticisms are directly applicable to the circumstances surrounding and “data” supporting the Commission’s briefing report on the Bill.

In his dissenting opinion to the Commission’s report, Commissioner Yaki openly acknowledged the substantive and procedural flaws that had pervaded the Commission’s consideration of the Bill. He prefaced his opinion with three such instances. Most notably, the report bases its conclusion upon the


\(^{116}\) Id. at 1-2.

\(^{117}\) Id. at 1.

\(^{118}\) Id. at 3.

\(^{119}\) Id. at 3-4.
oral testimony of four individuals and written letters from 16 more to the exclusion of numerous other state and federal reports and Congressional testimony. “The paucity of evidence adduced,” he remarked, “is hardly the stuff upon which to make recommendations or findings.”120 Pointing out the fact that the Commission intentionally did not include any findings for its final report, he posed the question “does that not itself lend strength and credence to the suggestion that the briefing was flawed from the inception? And if so flawed, how can the Commission opine so strongly upon a record that it could not even find supported now nonexistent findings?”121 Alarming as such criticism may seem, this was not the Commission’s only flaw.

Next, the Commissioner noted the Commission’s intentional neglect of input of Hawaii’s own State Advisory Commission. Despite the many years it had spent addressing federal and state relations with Native Hawaiians and the numerous recommendations made, they were not given a seat at the table in the final Commission review. The State Advisory Commission had concluded in 2001 that in “[absence of] explicit recognition of a Native Hawaiian governing entity, or at least a process for ultimate recognition thereof, it is clear that the civil and political rights of Native Hawaiians will continue to erode [and that] the denial of Native Hawaiian self-determination and self-governance to be a serious erosion of this group’s equal protection and human rights.”122 Deeply concerned with the State Advisory Commission absence from the official discourse, the Commissioner concluded that “to exclude them from the dialogue I believe was indefensible and a deliberate attempt to ensure that contrary views were not introduced into the record.”123 As a result of their lack of involvement in the proceedings leading up to the Commission’s report, the current and former chairpersons of the State Advisory Commission adopted a resolution of no confidence in regards to the Commission’s commitment to fulfilling statutory and regulatory duties to the State advisory committees on June 6, 2006.124

Lastly, the Commissioner likened the report, on account of its lack of findings or factual analysis, to an emperor with no

120 COMMISSION REPORT at 42 (Dissenting Statement of Mr. Michael Yaki, Commissioner, U.S. Commission on Civil Rights).
121 Id.
122 Id. (citing HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefitting Native Hawaiians, at ix (June 2001).
123 Id. at 43.
clothes. He noted that its recommendations excluded consideration of facts regarding the political status of Native Hawaiians, Native Hawaiian history and governance, or established legal precedent and U.S. policy toward Native Hawaiians. He viewed the majority’s reasoning and proclamations to be an “obvious attempt to treat Native Hawaiians unfairly in order to begin the process of destroying existing U.S. policy toward Native Americans.”

This is a significant charge from the Commissioner of a body whose purpose is to “appraise federal laws and policies with respect to discrimination or a denial of equal protection of the law.”

“The conclusion of the Commission,” he stated, “stands without support, without backing, and will be looked upon, I believe, as irrelevant to the debate.” Unfortunately, the Commissioner’s prediction did not become a reality.

As detailed above, the opposing Senators frequently cited the one sentence recommendation of the Commission’s report. Senator Akaka went to great lengths to explain the findings of the GAO report and the arguments made by Commissioner Yaki in his dissenting opinion. He also added the fact that one of the Commissioners had even filed an amicus brief in the Rice case without either disclosing this fact or recusing herself from the proceedings surrounding the Bill. Despite such glaring flaws, the only comment the opposition could reference to address these charges was a one page letter from Commissioner Kirsanow to Senator Cornyn which merely defended in plain terms the procedures used to reach its recommendation. Perhaps its greatest flaw, however, is the fact that the Commission’s report is addressed to S.147 not to the substitute amendment S.364 which was the product of lengthy negotiations with the administration to address certain policy concerns. Senator Akaka pointed out early in the debate that if the motion to proceed to S.147 passed, that a substitute would be presented that addressed the administration’s concerns regarding federal liability for land

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125 COMMISSION REPORT at 43.
126 Id. at ii.
127 Id.
128 The opposing Senators referenced the report recommendation eight times throughout the course of the floor debate. See 152 CONG. REC. S5554, 5556, 5635; 5564, 5587; 5566, 5631, 5637 (daily eds. June 7, 8 2006) (statements of Senators Alexander, Sessions, Craig, McConnell, and McCain, respectively).
claims, military readiness, gaming, and civil and criminal jurisdiction. Senator Inouye further addressed this fact, among others, in his critique of the letter of Assistant Attorney General Moschella.

Senator Inouye cautioned his colleagues about relying upon the letter as a source of reliable authority for the purposes of evaluating the piece of legislation that actually would have been discussed had the motion to proceed been successful. While Assistant Attorney General Moschella was certainly aware—“they helped us draft it,” Senator Inouye noted—of the results of the negotiations between the Department of Justice and Senators Akaka, Inouye, and Governor Lingle, his letter did not speak to the product of those negotiations. He also highlighted the letter’s reliance upon the Commission’s report despite all of the flaws noted above. The most glaring flaw, however, was the letter’s misapplication of *Rice* and ignorance of established Supreme Court precedent recognizing the authority of Congress, as opposed to the courts, to recognize a government-to-government relationship with a native government.

Without a doubt, there are several practical matters of history which would be fatal for any Native Hawaiian entity that would seek recognition under OFA’s formal administrative process. Primarily, they would be precluded from even seeking this avenue for recognition considering the regulations are only available to groups “indigenous to the continental United States.”

Even if this initial hurdle were gone, a Native Hawaiian entity could not meet the criteria that it “demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900.” This results from the fact that under Art. 101 of the Constitution of the Republic of Hawaii, would be voters had to swear an oath supporting the Republic, renouncing all ties or further support for the recently deposed monarchy. Additionally, it would be difficult to establish that “that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present,” or that “it has maintained political influence or authority over its members as an autonomous entity from historical times until the present,” in light of not meeting the first criteria. Despite these legitimate problems with the administrative process, Senator Sessions suggestion that a Native Hawaiian entity could

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134 *Id.*
135 25 C.F.R. §83.3 (a) (2000).
137 25 C.F.R. §83.7(b), (c) (2000).
not meet the criteria because they have become fully immersed into American society is irrelevant because it ignores a fundamental principle of federal Indian jurisprudence that “neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe’s status as a self-governing entity.”

What is most alarming about the discourse surrounding the Bill’s passage is not so much that there were those who disagreed with the legislation but the lack of any credible support or legitimate legal argument underlying their positions. At times, it was almost as if the opposing Senators were parroting a well-rehearsed script with almost no acknowledgment of the glaring flaws being pointed out by the Bill’s proponents. While some of their suggestions were utterly absurd, the fundamental misunderstanding of established precedents which define the federal government’s relationship with native peoples is indicative of a party in need of both a history lesson and primer in federal Indian law.

IV. Conclusion: An Uncertain Future

In December 2006, the 9th Circuit Court of Appeals revisited questions of Native Hawaiian preference in Doe v. Kamehameha Schools. In addressing the question of whether a private Hawaiian school’s admission policy of giving a preference to Native Hawaiians unconstitutionally denied admission to a student on account of race, a closely split en banc panel upheld the school’s policy. Citing the congressionally recognized imbalance of educational opportunities and success of Native Hawaiians, the majority found that the motivation behind the Kamehameha Schools admission policy was to “bring Native Hawaiian students into educational parity” with other groups and that, in light of other affirmative action precedent, such a policy was not prohibited by Title VII of the Civil Rights Act or 42 U.S.C. §1981. Judge Fletcher, joined by five others, went on to detail in his concurrence the litany of Congressional actions and statutes which acknowledge both the Native Hawaiian’s special trust relationship with federal government and their comparable political status to American Indian tribes and Native Alaskans. While this language is encouraging for proponents of Native Americans, it is unclear whether it will be sufficient to overcome the legal challenges that are sure to follow.

138COHEN’S at 206.
139Doe v. Kamehameha Schools, 470 F.3d. 827 (9th Circ. 2006) (8-7 decision).
140Kamehameha Schools, 470 F.3d at 841-843 (The Kamehameha schools are private institutions administered under a trust established by Princess Bishop in 1887 for the express purpose of educating Native Hawaiians).
141Id. at 850 (Fletcher, J., concurring).
Hawaiian sovereignty, the dissent argued that because Congress has yet to *formally* recognize a Native Hawaiian entity, such analogies are inadequate for squaring this issue under *Mancari* and that the policies of the Kamehameha schools’ admissions, although well intended, generate unconstitutional discrimination on the basis of race. Such a sharply divided opinion appears prime for Supreme Court review. Given the self-acknowledged “schizophrenic” nature of the Supreme Court’s tribal sovereignty jurisprudence, however, it is hard to predict where the current bench might fall absent a clear message from Congress.

With few exceptions, the ultimate vote which sealed the Bill’s fate in the 109th Congress fell along party lines. That the Bill, nor the substitute amendment, could not even receive enough votes to move to the floor for full and proper debate was a disappointment which reflected an emerging suspicion amongst the GOP of legislation intended to benefit our nation’s indigenous groups. At times, the affront to Senators Akaka and Inouye was embarrassing to behold as their colleagues from across the aisle waxed eloquent in their respect and admiration for the two Senators only then to lay the foundation for their opposition on arguments made of sand. Senator Akaka got it right when he accused the Bill’s opponents of only taking the time to “listen to characterizations of the bill and sound bites of perceived impact,” as opposed to actually reading the Bill and squaring it with established precedent. As the recent elections revealed, however, the Democratic party is now in control of the House and Senate in the 110th Congress. Whether the Native Hawaiian people will have another shot at gaining recognition remains to be seen at this point. However, just a few key votes in this past go around would have seen the Bill’s passage.

On January 17, 2007, the 114th anniversary of the illegal deposition of Queen Liliuokalani, Senator Akaka rose once again to reintroduce a legislative solution to the question of Native Hawaiian sovereignty. In this legislative session, the Senators will have the opportunity to consider this new bill, S.310, which represents the product of negotiations with the Bush administration: the same bill that was not given a full chance to be

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142 *Id.* at 881, 885 (Bybee, J., dissenting); Interestingly enough, Judge Bybee ventured a guess at the “difficult question” left open in *Rice* of whether “Congress may treat the Native Hawaiians as it does the Indian tribes,” *see* 528 US at 518-519, by “prospectively assuming that Congress has the power to formally recognize Native Hawaiians and to treat them as any other federally recognized tribe.” *Kamehameha Schools* at 882, n.21 (Bybee, J., dissenting).

143 *Lara,* 541 U.S. at 219 (Thomas, J., dissenting).


considered under the 109th Congress. Despite this fresh start with a slim majority of seats, the new bill’s proponents still face those from across the aisle that continue to trumpet the notion that this “dangerous piece of legislation” could lead to the unprecedented creation of “a new, race-based government within the borders of the United States.”\footnote{146}

Some suggest that this could be the new language of the neo-conservative GOP in their efforts to stifle all Indian legislation generally: categorizing legislation aimed to benefit this nation’s first sovereigns as “raced-based” and viewing such groups not as quasi-sovereign nations but as “special interests.”\footnote{147} As political pressure builds from well-funded constituencies that oppose such issues as tribal economic development via gaming or ‘antiquated land claims’, masking initiatives to empower these peoples as race-based in a nation where all should be equal under the law appears to give an anti-sovereignty agenda the moral high ground. The eventual re-recognition of a Native Hawaiian entity, a once sovereign people, can show that our moral obligations to afford justice for past wrongs will trump the politically expedient whims of the day. In the words of Justice Jackson, “the generations of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone...and nothing we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of whites to do for the descendants of the Indians what in the conditions of this twenty [first] century is the decent thing.”\footnote{148}