

May 14, 2007

MEMORANDUM

FROM NEAL KATYAL

RE: Analysis of testimony of Gregory G. Katsas, Principal Deputy Associate Attorney General, U.S. Department of Justice, concerning “S. 310, Native Hawaiian Government Reorganization Act of 2007,” on May 3, 2007

This memorandum, prepared at the request of the Office of Hawaiian Affairs, analyzes the testimony of Gregory G. Katsas, Principal Deputy Associate Attorney General, U.S. Department of Justice, concerning “S. 310, Native Hawaiian Government Reorganization Act of 2007,” on May 3, 2007 (hereinafter “Katsas Testimony”).¹ In my judgment, the Katsas Testimony raises no truly significant legal objection to S. 310. Rather, the Testimony provides a hodgepodge of policy arguments against S. 310 that are well within the purview of the nation’s legislature to reject. As an attorney who specializes in constitutional law, I cannot speak to the policy wisdom of S. 310, but I believe that the Katsas Testimony identifies no significant legal objection should the Congress of the United States decide to enact this bill into law.

The Katsas Testimony begins, as it must, by recognizing that the language of S. 310 was changed to accommodate many of the Justice Department’s previous objections to S. 147. But after that point, the Testimony descends into a Cassandra-like warning that the bill would create a “balkaniz[ation] ...along racial and ancestral lines” (p.1); that the bill is a “significant step backwards,” (p.2); that it “would grant sweeping powers to the proposed Native Hawaiian governing entity,” (p.3); that S. 310 enacts a “race-based government offensive to our Nation’s commitment to equal justice,” (p.7); and so on. None of these adjectives is developed with sufficient precision; some are even baldly wrong on their face. The Katsas

¹ I previously co-authored, along with Viet Dinh and Christopher Bartolomucci, a paper that analyzed the constitutional issues surrounding S. 310. That paper, *The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity*, Feb. 26, 2007, is available at <http://www.nativehawaiians.com/pdf/NHGRA070226.pdf>.

Testimony lacks much of the indicia of reliability upon which the Justice Department has traditionally insisted upon in past testimony to Congress. So while there are undoubtedly legal arguments that can be voiced against the bill, the Katsas Testimony presents an overly-exaggerated view of them, which reduces the Testimony's own credibility and significance. Such exaggeration may serve a policy objective, but that type of strident advocacy does not advance the legal analysis much, if at all.

I proceed through the Katsas Testimony point-by-point, identifying several of its many shortcomings.

1. S. 310's "division of Americans into... 'discrete subgroups' is contrary to the goals of this Administration and, indeed, contrary to the very principle reflected in our national motto *E Pluribus Unum*." (p.2).

This claim suffers from a number of problems. First of all, it disregards the Supreme Court's repeated exhortation that when Congress deals with entities it considers Native Americans, such classifications are "political rather than racial in nature." *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974). The Supreme Court has repeatedly reaffirmed this principle:

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

United States v. Antelope, 430 U.S. 641, 645 (1977).

For this reason, the Supreme Court has held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). Far from insisting upon any sort of continuity requirement, *Lara* specifically recognized Congress' power to *restore* previously extinguished sovereign relations with Indian tribes. The Court observed that "Congress has restored previously extinguished tribal status – by re-recognizing a Tribe whose tribal existence

it previously had terminated.” *Id.* at 203. (citing Congress’ restoration of the Menominee tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress’ power “to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State.” *Id.*² Indeed, the Court went so far as to hold that it is not for the federal judiciary to “*second-guess the political branches’ own determinations*” in such circumstances. *Id.* at 205. (emphasis added).

In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court held that Congress has the authority to recognize and deal with Native groups pursuant to its Indian affairs power, and furthermore that courts possess only a very limited role in reviewing the exercise of such congressional authority. The exercise of this power is not contrary to *E Pluribus Unum* – but rather is a recognition of the special obligation of the United States to the Native population. *Sandoval* rejected the claim that Congress lacked authority to treat the Pueblos of New Mexico as Indians and that the Pueblos were “beyond the range of congressional power under the Constitution.” *Id.* at 49.

Sandoval first observed:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

Id. at 45-46. The Court went on to say that, although “it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe,” nevertheless, “the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and

² Thus, when it comes to the sovereignty of Indian tribes or other “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), the Constitution does not “prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes’ status.” *Lara*, 541 U.S. at 205.

protection of the United States are to be determined by Congress, and not by the courts.” *Id.* at 46. Applying those principles, the Supreme Court concluded that Congress’ “assertion of guardianship over [the Pueblos] cannot be said to be arbitrary, but must be regarded as both authorized and controlling.” *Id.* at 47.

Notably, the Court reached this holding despite the fact that the Pueblos differed in some respects from other Indians: They were not “nomadic in their inclinations”; they were “disposed to peace”; they “liv[ed] in separate and isolated communities”; their lands were “held in communal, fee-simple ownership under grants from the King of Spain”; and they possibly had become citizens of the United States. *Id.* at 39.³ *Sandoval* thus holds, first, that Congress, in exercising its constitutional authority to deal with Indian tribes, may determine whether a “community or body of people” is amenable to that authority, and, second, that unless Congress acts “arbitrarily,” courts do not second-guess Congress’ determination. The courts have employed this approach in a number of other cases. *See United States v. Holliday*, 3 Wall. 407, 419 (1866) (“If by [the political branches] those Indians are recognized as a tribe, this court must do the same.”) After all, recognition has extended to a variety of entities:

some federally recognized tribes are legal entities only.... Or tribes may confederate for political purposes, forming governmental entities such as the Minnesota Chippewa Tribes or the Central Council of the Tlingit & Haida Indian Tribes, which have received federal recognition, in addition to their constituent tribes.

³ The fact that sovereignty and political structures might have been different from other Natives is not, by itself, a reason to preclude Congress from recognizing Native Hawaiians. After all, the American Indian and Alaska Native groups that have already been recognized as dependent sovereigns had a wide range of political structures prior to the arrival of whites, and that fact has never been deemed to have any bearing on congressional power to recognize their sovereignty or tribal status. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 664 & n.5 (1979) (“[S]ome bands of Indians . . . had little or no tribal organization Indeed, the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties.”).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3.02[2], at 137 (2005 ed.). Indeed, the Katsas Testimony curiously does not even mention the recent concurrence of five judges on the Ninth Circuit in *Doe v. Kamehameha Schools*, 470 F.3d 827, 851-52 (9th Cir. 2006) (en banc) (Fletcher, J., concurring), which argued that Native Hawaiians were currently entitled to the more permissive review standard under *Mancari*:

In other contexts, the Supreme Court has not insisted on continuous tribal membership, or tribal membership at all, as a justification for special treatment of Indians....

For its part, Congress has repeatedly provided special treatment, including distribution of funds, based on broad definitions of the terms "Indian," "native," "Native American," and "tribal organization" that encompass Indians who are not members of federally recognized tribes....

We observe "the time-honored presumption" that the passage of the many federal statutes benefiting Native Hawaiians, Alaska Natives, and American Indians "is a 'constitutional exercise of legislative power.'" The basis for this exercise of power is Congress' conclusion that "Native Hawaiian," like "Alaska Native" and "Indian," is a political classification subject to the special relationship doctrine. Unless we were to hold that Congress cannot legislate for the special benefit of Native Hawaiians, thereby striking down the enormous swaths of the United States Code enacted pursuant to the special relationship doctrine, we must conclude that the doctrine permits Congress to provide special benefits to Native Hawaiians.

Id. (citations omitted). The reasoning in this concurrence was rejected by the dissent, but notably all of the opinions were arguing about the *current* status of Native Hawaiians, and not the enhanced status that would follow from the enactment of S. 310.

In sum, the Katsas Testimony advances a generic policy claim about *E Pluribus Unum* without sufficient attention to the unique power possessed by the federal government in this arena. The Testimony's cramped view of federal power does not describe current federal law in this realm. To the contrary, the Supreme Court has repeatedly reaffirmed the breadth of

Congress' power – a power so broad that it even extends to re-recognizing a Tribe whose recognition had previously been extinguished by Congress.

2. “[T]he bill defines ‘Native Hawaiian,’ along explicitly racial and ancestral lines, to encompass a vast group of some 400,000 individuals scattered throughout the United States.” (p.2). “Section 3(10) of the bill defines the term ‘Native Hawaiian,’ as ‘the indigenous, native people of Hawaii’ who are the ‘direct lineal descendant[s] of the aboriginal, indigenous, native people who...resided in the lands that now comprise the State of Hawaii on or before January 1, 1893.’....In short, the bill classifies people not based on a political relationship like citizenship in a foreign country, or membership in a quasi-sovereign Indian tribe, but rather based purely on race and ancestry.” (p.7).

The statement by Mr. Katsas is not at all accurate. It is worth looking at the *entire* definition in the section of S. 310 that Mr. Katsas cites. That provision defines the term “Native Hawaiian” as:

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who (I) resided in the 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...

Id. § 3(10) (emphasis added).⁴ It is simply impossible to contend, as Mr. Katsas does, that this definition imposes a classification “based purely on race and ancestry.” After all, the Act *itself* requires not simply race and ancestry, but also that the individuals resided on the islands on or before January 1, 1893 *and* “occupied and exercised sovereignty.” The Katsas Testimony simply misreads the text of the bill, endeavoring to create a constitutional problem where none exists.

⁴ There is a separate definition of Native Hawaiians in Section 3(10) that relates to the Hawaiian Homes Commission Act. That definition is not criticized in the Katsas Testimony.

The 1893 date specified in S. 310, incidentally, continues an earlier effort made by Congress to apologize to the Hawaiian people. In 1993, a century after the Kingdom of Hawaii was replaced with the active involvement of the U.S. Minister and the American military, “Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people.” *Rice v. Cayetano*, 528 U.S. 495, 505 (2000).; see Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In the Apology Resolution, Congress both “acknowledge[d] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people” and issued a formal apology to Native Hawaiians “for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.” *Id.* §§ 1, 3, 107 Stat. 1513.⁵ The proposed language of S. 310 tracks this part of the Apology Resolution.

Nor does the fact that some of the beneficiaries of recognition reside outside of Hawaii change the legal analysis. Congress has repeatedly recognized Tribes even when their members’ residence spills beyond particular areas:

Other federally recognized entities represent fragments of previously unified peoples. The great Sioux nation, for example, was divided by federal law into geographically separated and independently recognized tribes in order to weaken the Sioux militarily. Other groups, such as the Oneida, the Cherokee, and the Choctaw, are recognized as multiple separate nations, because some members moved to new

⁵ The Katsas Testimony attempts to claim that Hawaiians are not comparable to an Indian Tribe and that a Congressional determination to the contrary would be arbitrary. But by the time Captain Cook, the first white traveler to Hawaii, “made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion.” *Rice*, 528 U.S. at 500. Hawaiian society, the Court noted, was one “with its own identity, its own cohesive forces, its own history.” *Id.* As late as 1810, “the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I.” *Id.* at 501. It is difficult to understand how S. 310, in light of this history--which the Supreme Court has previously provided and which Congress has explicitly invoked in the Act, could lead to a finding of arbitrariness. That is particularly so since, as explained above, Congress has repeatedly recognized Tribes even when they have been geographically dispersed.

territories as part of the federal removal process in the nineteenth century and others refused to leave ancestral homelands.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3.02[2], at 137 (footnote omitted).

For these reasons, I believe that the current definition of “Native Hawaiians” in S. 310 is constitutional. If, out of an abundance of caution, further change is desired, then perhaps the best approach would be to emulate the definition of “Native Hawaiian” that is used in most current federal statutes dealing with Native Hawaiians. (Even as early as 1921, Congress defined Native Hawaiians as “not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” Act of July 9, 1921, Sec. 207(1), 42 Stat. 108.) Were such a definition to be employed in S. 310, it would define that part of the class as something like the following: individuals who are “direct lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii prior to western contact in 1778.”

A variety of mechanisms to prove membership in this 1778 group could be legislatively specified, as OHA has previously suggested. OHA's full proposal for the definition of Native Hawaiian is to define them as:

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who—

(I) resided in the islands that now comprise the State of Hawaii prior to western contact in 1778 as evidenced by:

- (a) birth certificates;
- (b) marriage certificates;
- (c) death certificates;
- (d) genealogical research;
- (e) certification from registries reviewing documents, including but not limited to:

(A) the Department of Hawaiian Home Lands;

(B) the Kamehameha Schools

- (C) the Operation ‘Ohana program and the Hawaiian Registry program of the Office of Hawaiian Affairs; or
- (f) other legally sufficient methods, including court orders; 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 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who—
 - (I) resided in the 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
- (iii) an individual who is 1 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.

Letter to Sen. Akaka from Chairperson Haunani Apoliona, Office of Hawaiian Affairs, Jan. 19, 2007. While changing the definition from the current one employed in S. 310 to the 1778 criteria is not strictly necessary, it is a prudential change that the Senate may wish to consider.

3. “S. 310 would grant sweeping powers to the proposed Native Hawaiian governing entity, and to the proposed Native Hawaiian Council charged with creating that entity.” (p.3).

This curious claim is backed by no analysis. And there is simply no warrant for the claim. S. 310 does not grant “sweeping powers” to the governing entity; it actually grants no powers at all beyond that which any other recognized entity would have. *See* Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) (“In this legislation, as Hawaiians, we seek only what long ago was granted this nation’s other indigenous peoples.”) (prepared text).

It is also worth responding here to something else that appears in the Katsas Testimony at this point. The Testimony also asserts the following: OHA “contends that this scheme would give native Hawaiians, as subjects of the new governing entity, ‘their right to self-determination by selecting another form of government including free association or total independence.’” (p.3-4) (citing State of Hawaii’s Office of Hawaiian Affairs, Questions and Answers, <http://www.nativehawaiians.com/questions/SlideQuestions.html>). It appears that this is an unsupported reading both of the text of the bill and what OHA has tacked onto a slideshow presentation on a website. Starting with the text of the act, there is no language in S. 310, and the Katsas Testimony tellingly points to none, that suggests that Native Hawaiians would have the ability to *secede* from the Union. The Katsas Testimony’s breathless claim that “the Nation endured a Civil War to prevent such secession,” is simply irrelevant.

Furthermore, OHA’s slideshow on its website does not argue that S. 310 provides a right of secession. In fact, that slideshow actually concerned a predecessor version of the bill, S. 344, introduced four years ago.⁶ And the Katsas Testimony disregards the many places in that slideshow when OHA made clear that it was not a bill about secession. For example, the slideshow states:

The bill articulates that Native Hawaiians have an inherent right of self-determination and have the right to reorganize a Native Hawaiian governing entity. S. 344 authorizes the process for the establishment and federal recognition of a Native Hawaiian governing entity for *the purpose of continuing a government-to-government relationship.*”

State of Hawaii’s Office of Hawaiian Affairs, Questions and Answers, <http://www.nativehawaiians.com/questions/SlideQuestions.html> (emphasis added). A “government-to-government relationship” is hardly the phrase of would-be secessionists. Whatever might be said, it is quite difficult to read that slide as a statement endorsing secession. Later language from the slideshow makes the point even clearer:

⁶ Indeed, OHA does not even provide a link to that slideshow on its webpage anymore since the slideshow is geared to address S. 344, not S. 310.

If the Akaka/Stevens bill is enacted and the Hawaiian people choose to gain federal recognition, nation-within-a-nation, the Native Hawaiian governing entity would then *work directly with the federal government* and the State of Hawai'i to protect Native Hawaiian lands and programs that affect Native Hawaiians.

Id. (emphasis added). The language quoted by the Katsas Testimony about “free association or total independence” does not mean complete independence from the federal government, but rather the same type of independence as other Native Americans have received – a “government-to-government relationship” in which they are a “nation-within-a-nation.” No one plausibly thinks that anything else is intended by S. 310 – and claims of secession should be met with caution when lawyers attempt to peddle them.

4. “The Ninth Circuit has explained that ‘Congress has evidenced an intent to treat Hawaiian natives differently from other indigenous groups’... *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281-82 (9th Cir. 2004).” (p.4).

It is undoubtedly true that this language appears in *Kahawaiolaa*. But the Katsas Testimony disregards the context of *Kahawaiolaa*, for the Court there was being asked to *force* the government to recognize Native Hawaiians. The language quoted by Mr. Katsas merely said that it was *rational* for the Government not to recognize Hawaiians. In case there was any doubt, *Kahawaiolaa* itself made clear its holding was limited, *see, e.g.*, 386 F. 3d at 1277 n.3 (“the issue is far from clear. A detailed factual analysis of the treaties, legislation and congressional findings applicable to native Hawaiians requires a more detailed review than we are equipped to handle on the present record.”); *id.* at 1283 (holding that “the result is less than satisfactory” and that the court would “have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis”). Quite simply, *Kahawaiolaa*’s decision that it is *rational* for the Government not to treat Hawaiians like other indigenous peoples does not forbid the Congress of the United States from deciding to treat Hawaiians similarly to these other peoples.

Furthermore, the Katsas Testimony never mentions the fact that *Kahawaiolaa*'s language has been recently cut back by the Ninth Circuit, *en banc*, in *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (*en banc*). That decision recognized a special relationship between the United States and Hawaii:

Beginning as early as 1920, Congress recognized that a special relationship existed between the United States and Hawaii. *See* Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921) (designating approximately 200,000 acres of ceded public lands to Native Hawaiians for homesteading). Over the years, Congress has reaffirmed the unique relationship that the United States has with Hawaii, as a result of the American involvement in the overthrow of the Hawaiian monarchy. *See, e.g.*, 20 U.S.C. § 7512(12), (13) (Native Hawaiian Education Act, 2002); 42 U.S.C. § 11701(13), (14), (19), (20) (Native Hawaiian Health Care Act of 1988).

Id. at 847-48. The Ninth Circuit also recently pointed out that Congress has repeatedly singled out Native Hawaiians to provide them with special benefits:

Congress has relied on the special relationship that the United States has with Native Hawaiians to provide specifically for their welfare in a number of different contexts. For example, in 1987, Congress amended the Native American Programs Act of 1974, Pub.L. No. 100-175, § 506, 101 Stat. 926 (1987), to provide federal funds for a state agency or “community-based Native Hawaiian organization” to “make loans to Native Hawaiian organizations and to individual Native Hawaiians for the purpose of promoting economic development in the state of Hawaii.” A year later, Congress enacted the Native Hawaiian Health Care Act of 1988, Pub.L. No. 100-579, § 11703(a), 102 Stat. 2916 (1988), “for the purpose of providing comprehensive health promotion and disease prevention services as well as primary health services to Native Hawaiians.”

Id. at 848.⁷ Of course, Congress has at times *chosen* to treat Native

⁷ The Katsas Testimony also selectively quotes *Kahawaiolaa*, ignoring the decision's

Hawaiians differently than other indigenous groups, but that has never been the metric to decide whether Congress *can* provide such recognition. Indeed, Congress has even reversed course and recognized a tribe whose recognition it had earlier decided to revoke. In 1954, Congress adopted the Menominee Indian Termination Act, 25 U.S.C. §§ 891-902, which terminated the government-to-government relationship with the tribe, ended federal supervision over it, closed its membership roll, and provided that “the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.” *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 407-410 (1968). In 1973, Congress reversed course and adopted the Menominee Restoration Act, which repealed the Termination Act, restored the sovereign relationship with the tribe, reinstated the tribe’s rights and privileges under federal law, and reopened its membership roll. 25 U.S.C. §§ 903a(b), 903b(c).⁸ It has done the same with other Tribes. See COHEN’S

language that is favorable to S. 310, such as the Ninth Circuit’s observation that the *Rice* case did not reach the issues in S. 310:

Rice explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes as explained in *Mancari*. The issue did not concern recognition of quasi-sovereign tribes. Instead, *Rice* concerned elections of the State of Hawaii to which the Fifteenth Amendment applied...at its core, *Rice* concerned the rights of individuals, not the legal relationship between political entities.

...While Congress may not authorize special treatment for a class of tribal Indians in a state election, Congress certainly has the authority to single out "a constituency of tribal Indians" in legislation "dealing with Indian tribes and reservations." *Rice*, 528 U.S. at 519-20.

Kahawaiolaa 386 F.3d at 1279.

⁸ The Menominee Restoration Act established a process for reconstituting the Menominee tribal leadership and organic documents under the direction of the Secretary of the Interior. The Restoration Act directed the Secretary (a) to announce the date of a general council meeting of the tribe to nominate candidates for election to a newly-created, nine-member Menominee Restoration Committee; (b) to hold an election to select the members of the Committee; and (c) to approve the Committee so elected if the Restoration Act’s nomination and election requirements were met. *Id.* § 903b(a). Just so with S. 310. The NHGRA authorizes the Secretary of the Interior to establish a Commission that will prepare and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. NHGRA § 7(b). The legislation also provides for the establishment of a Native Hawaiian Interim Governing Council. *Id.* § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council; determine the Council’s

HANDBOOK OF FEDERAL INDIAN LAW 3.02[8][c], at 168 (“Congress has the authority to reestablish the tribal-federal relationship with terminated tribes....The relationship need not be continuous. The relevant question is whether and to what extent Congress has chosen to exercise its authority with respect to a particular tribe. Congress has exercised its authority to restore the federal-tribal relationship with a number of terminated tribes.”) (footnote omitted).

Moreover, the Katsas’ criticism ignores the fact that the NHGRA itself rejects the conclusion he reaches, that Congress has not recognized Native Hawaiians. It is one thing to argue about the status of Native Hawaiians *before* the enactment of the NHGRA (as *Kahawaiolaa* does), quite another to do so after the NHGRA has been enacted. After all, the NHGRA expressly finds that Native Hawaiians “are indigenous, native people of the United States,” NHGRA § 2(2); that the United States recognized Hawaii’s sovereignty prior to 1893, *id.* § 2(4); that the United States participated in the overthrow of the Hawaiian government in 1893, *id.* § 2(13); and that “the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands,” *id.* The statute further finds that Native Hawaiians continue to reside on native lands set aside for them by the U.S. government, “to maintain other distinctly native areas in Hawaii,” and “to maintain their separate identity as a single distinct native community through cultural, social, and political institutions,” *id.* §§ 2(7), 2(11), 2(15); *see also* U.S. Department of Justice & U.S. Department of the Interior, *From Mauka to Makai: The River of Justice Must Flow Freely*, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians at 4 (2000) (finding that “the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions”). Finally, the NHGRA finds that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past. *See id.* § 2(22)(A) (“Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands”); *id.* § 2(22)(B).

structure; and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

These findings track previous statutes, and indeed the bill itself makes explicit note of that fact as well. *See* NHGRA § 2(20)(B) (Congress “has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf”); *id.* § 4(a)(1); Native American Languages Act, 25 U.S.C. § 2902(1) (“The term ‘Native American’ means an Indian, Native Hawaiian, or Native American Pacific Islander”); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (declaring it to be the policy of the United States “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians”); 42 U.S.C. § 11701(1) (finding that “Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778”).⁹

⁹ Congress has repeatedly treated Native Hawaiians like American Indians. Indeed, the huge number of federal laws that are called into question by the Katsas Testimony is itself a good reason to discount its conclusions. “Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established.” *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883); *see also Reno v. Condon*, 528 U.S. 141, 148 (2000).

For examples of these statutes, *see, e.g.*, Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; Native Hawaiian Health Care Act, 42 U.S.C. § 11701(19) (noting Congress’ “enactment of federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities”); *see also* Statement of U.S. Representative Ed Case, Hearing Before the Senate Committee on Indian Affairs on S. 147, the Native Hawaiian Government Reorganization Act, at 2-3 (March 1, 2005) (“[O]ver 160 federal statutes have enacted programs to better the conditions of Native Hawaiians in areas such as Hawaiian homelands, health, education and economic development, all exercises of Congress’ plenary authority under our U.S. Constitution to address the conditions of indigenous peoples.”) (prepared text); The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 (authorizing “supplemental programs to meet the unique educational needs of Native Hawaiians” and federal grants to Native Hawaiian Educational Organizations to help increase educational attainment among Native Hawaiians), 20 U. S. C. §§ 4902-03, 4905 (1988). The Hawaiian Homelands Homeownership Act of 2000 provides governmental loan guarantees “to Native Hawaiian families who otherwise could not acquire housing financing.” Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000). Congress has also enacted legislation authorizing employment preferences for Native Hawaiians. *See, e.g.*, 1995 Department of Defense Appropriations Act, Pub. L. No. 103-

The Katsas Testimony also curiously omits the status of Alaska Natives, who – like Native Hawaiians – differ from American Indian tribes anthropologically, historically, and culturally. In 1971, Congress adopted the Alaska Native Claims Settlement Act (“ANCSA”), 43 U.S.C. §§ 1601-1629h, which is predicated on the view that congressional power to deal with Alaska Natives is coterminous with its plenary authority relating to American Indian tribes. See 43 U.S.C. § 1601(a) (finding a need for settlement of all claims “by Natives and Native groups of Alaska”); *id.* § 1602(b) (defining “Native” as a U.S. citizen “who is a person of one-fourth degree of more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof.”); *id.* § 1604(a) (directing the Secretary of the Interior to prepare a roll of all Alaskan Natives). The Supreme Court has never questioned the authority of Congress to enact such legislation. See *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 531 & n.6 (1998); *Morton v. Ruiz*, 415 U.S. 199, 212 (1974) (quoting passage of Brief for Petitioner the Secretary of the Interior referring to “Indians in Alaska and Oklahoma”); see also *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (when the term “Indians” appears in federal statutes, that word “as

335, 108 Stat. 2599, 2652 (1994) (“In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho’olawe Island . . . the Secretary of the Navy shall . . . give especial preference to businesses owned by Native Hawaiians.”). See also Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (involving grant applications aimed at combating drug abuse and providing: “The Secretary shall encourage the submission of and give special consideration to applications under this section to programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women, handicapped individuals, and families of drug abusers.”); Workforce Investment Act of 1998, 29 U.S.C. § 2911(a) (“The purpose of this section is to support employment and training activities for Indian, Alaska Native, and Native Hawaiian individuals”); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (“it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-92, 2991a (including Native Hawaiians in a variety of Native American financial and cultural benefit programs: “The purpose of this subchapter is to promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives.”).

applied in Alaska, includes Aleuts and Eskimos”). If Congress has authority to enact special legislation dealing with Alaska Natives, it follows that Congress has the same authority with respect to Native Hawaiians.

5. “S. 310 effectively seeks to undo the political bargain through which Hawaii secured its admission into the Union in 1959.” (p.4).

The Katsas Testimony does not explain why the failure (should one even exist) to recognize Native Hawaiians at the time of Hawaiian statehood should have any effect on congressional power to recognize them now. It is unclear whether the Testimony is attempting to make a legal or policy argument; regardless, the argument here, like many of its others, appears grounded in an improperly stunted view of congressional authority as to Native groups. Congress has repeatedly recognized Tribes that it has earlier terminated – and these recognitions have not been invalidated on the ground that they unravel earlier decisions. Furthermore, it is simply inaccurate to say no steps were taken in 1959 to recognize the separate existence of a Native Hawaiian people. After all, Hawaii agreed in connection with its admission to the Union to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution. *See* Hawaiian Homes Commission Act §§ 201, 203 (setting aside land to provide lots to Native Hawaiians with 50 percent or more Hawaiian blood). Furthermore, the United States transferred title to some 1.4 million acres of public lands in Hawaii to the new State as a public trust for the betterment of “Native Hawaiians.” Admission Act § 5(f). And the Admissions Act also required that statutory amendments that reduce benefits to Native Americans be enacted only with the consent of the United States. These actions constitute recognition of a continuing indigenous corpus.

Under *Sandoval, supra*, Congress has extraordinarily broad authority to decide who falls within its Indian affairs power; the logical concomitant of this authority is the power to decide who falls *outside* the groups it chooses to recognize. For this reason, a congressional decision on how to define “Native Hawaiian” would be reviewable only for arbitrariness. The NHGRA’s approach cannot be said to run afoul of this highly deferential standard. As the Supreme Court has noted, much of the nineteenth century foreign presence in Hawaii – both within Hawaiian government and in the broader polity – was unwanted and in fact actively resisted by Native Hawaiians. *See Rice v. Cayetano*, 528 U.S. 495, 504 (2000) (finding that there was “an anti-Western, pro-native bloc” in the Hawaiian government,

that in 1887 Westerners “forced . . . the adoption of a new Constitution” that gave the franchise to non-Hawaiians, and that the U.S.-led 1893 uprising was triggered in part by the queen’s attempt to promulgate a new constitution again limiting the franchise to Hawaiians). Furthermore, Congress has long distinguished between indigenous Hawaiians and others who may have lived in the Hawaiian Islands at the time of annexation. With all of these facts in mind, Congress could find that an initial definition of “Native Hawaiian” as limited to those with some Hawaiian blood is appropriate.¹⁰

6. “S. 310 would encourage other indigenous groups to seek favorable treatment by attempting to reconstitute themselves as Indian tribes” (p.6).

This “slippery slope” argument is not very plausible. While the Katsas Testimony discusses a range of far-flung hypotheticals, it presents no group as having the same history as Hawaiians. In addition to the unique history of Hawaii, it is hard to conceive of another group of people whose previous relationship with the Congress of the United States resembles that of Hawaiians. A glance at the 1993 apology resolution, some of the text of which has been discussed *supra*, makes clear that Native Hawaiians stand in a very different position from other groups. As Governor Lingle testified to Congress,

The United States is inhabited by three indigenous peoples – American Indians, Native Alaskans and Native Hawaiians. . . . Congress has given two of these three populations full self-governance rights. . . . To withhold recognition of the Native Hawaiian people therefore amounts to

¹⁰ In any event, of course, the congressional definition is preliminary – it defines only the roll of those who may participate in reconstituting the Native Hawaiian entity. Congress could rationally conclude that the initial definition of “Native Hawaiian” should be limited to indigenous Hawaiians and their descendants, while leaving the subsequent dependent sovereign entity some leeway to later determine – just as virtually every Native American tribe determines for itself – who else should be included in its ranks. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 3.03[3], at 176 (“Courts have consistently recognized that one of an Indian tribe’s most basic powers is the authority to determine questions of its own membership. A tribe has power to grant, deny, revoke, and qualify membership.”).

discrimination since it would continue to treat the nation's three groups of indigenous people differently. . . . [T]oday there is no one governmental entity able to speak for or represent Native Hawaiians. The [NHGRA] would finally allow the process to begin that would bring equal treatment to the Native Hawaiian people.

Testimony of Linda Lingle, Governor of the State of Hawaii, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) (prepared text). *See also* Statement of Sen. Byron Dorgan, Vice Chairman, Senate Indian Affairs Committee Hearing on S. 147, at 1 (March 1, 2005) (“[T]hrough this bill, the Native Hawaiian people simply seek a status under Federal law that is equal to that of America's other Native peoples – American Indians and Alaska Natives.”) (prepared text).

It is simply implausible to think that the other far-flung groups mentioned by the Katsas Testimony would be able to seek recognition on the basis of the Native Hawaiian precedent established by S. 310. To the contrary, the relevant question today should be whether Native Hawaiians resemble these far-flung groups more than they do the Menominee and Native Alaskans. For reasons that have been explained, the answer to that question is clear.

7. “Unless S. 310 can be justified as an exercise of Congress’s unique constitutional power with respect to Indian tribes, its creation of a separate governing body for native Hawaiians would be subject to (and would almost surely fail) strict scrutiny under the equal protection component of the Fifth Amendment.” (p.8).

S. 310 is justified as an exercise of Congress’ unique powers. If there are reasons why Congress does not have power in this area, the Katsas Testimony does not credibly present them.

8. “Relying on *Mancari*, Hawaii argued in *Rice* that, because native Hawaiians constituted the legal equivalent of an Indian tribe, the voting restriction at issue should be subjected only to rational basis review as a ‘political’ classification. In framing that argument, the Court described as ‘a matter of some dispute’ – and a question ‘of considerable moment

and difficulty’ – ‘whether Congress may treat the native Hawaiians as it does the Indian tribes.’ *Id.* at 519.” (p.9).

No one should mistake the Katsas Testimony’s words for what the Court actually said. The Testimony isolates three separate phrases from the Supreme Court opinion. Of those three, the one that was the most pointed – namely, “of considerable moment and difficulty” – was the very statement that applied not simply to the question of whether Congress *could* treat Hawaiians like Indian Tribes, but whether Congress *has* in fact already done so. That question would, of course, be put to rest by the enactment of S. 310.¹¹ The full statement from the Court is as follows:

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State-and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993-has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, *The Political Status of the Native Hawaiian People*, 17 *Yale L. & Pol'y Rev.* 95 (1998), with Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *Yale L.J.* 537 (1996). We can stay far off that difficult terrain, however.

528 U.S. at 518-19. I do not wish to make too much of these technical issues, except to simply note that the Katsas Testimony conveys the impression that the Court wrestled with the issue of whether Congress *could* recognize Native Hawaiians, when in fact the Court explicitly reserved that very question.

¹¹ Part of the confusion may also stem from the fact that the quotations Mr. Katsas isolates in his Testimony from the Supreme Court decision in *Rice* do not actually appear on the page of the United States Reports that he cites.

Instead, the Katsas Testimony makes it sound as if *Rice* itself raises critical questions about the legality of S. 310. It does not. The status of the Office of Hawaiian Affairs, an “arm of the State,” *Rice*, 528 U.S. at 521, is totally different from whether Congress may recognize Native Hawaiians. On the latter question, Congress is entitled to a wide berth of latitude, as this Memorandum has previously discussed.

9. “The bill also raises the further constitutional question addressed in Justice Breyer’s concurring opinion – whether Congress may create a sweeping definition of membership depending only on lineal descent over the course of centuries.” (p.11).

Again, the Katsas Testimony does not accurately describe the separate opinion in *Rice v. Cayetano* filed by Justice Breyer. In that opinion, Justice Breyer, joined only by Justice Souter, argued that “to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members-leaving some combination of luck and interest to determine which potential members become actual voters-goes well beyond any reasonable limit.” *Id.* at 527 (Breyer, J., concurring in the result).

The Katsas Testimony, however, makes it sound as if Justice Breyer was discussing whether *Congress* may create such a definition, when in actuality Justice Breyer was discussing a law of *Hawaii*, as his next words make clear: “It was not a tribe, but rather the State of Hawaii, that created this definition...” *Id.*¹² Now it might be that the Supreme Court would approach the issue the same way as between a federal and state classification, but there are plenty of reasons to think that they will not. *Cf.* Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245 (2002) (outlining the case for judicial deference to political branches but noting that deference to state governments raise different concerns). In any event, the question of whether the class is too diffuse has not sufficiently permeated law to be a strong objection at this point in time, and particularly not to a statute whose definition is backed by explicit Congressional findings and a detailed history. Congress is within its considerable power in this area to preliminarily define the group in ways that

¹² See also *Rice*, 528 U.S. at 527 (Breyer, J., concurring) (“[t]here must . . . be some limit on what is reasonable, *at the least when a State (which is not itself a tribe) creates the definition.*”) (citation omitted) (emphasis added).

include some and exclude others, just as it has done with other Native groups.

Conclusion

There may be good policy reasons to vote against the NHGRA, as that is an area outside of my expertise. However, my background in constitutional law leads me to believe that the Katsas Testimony does not muster a coherent and credible legal argument against the bill. It presents a caricatured view of the text of S. 310 and the governing law, and should not be considered an authoritative guide for resolving legal disputes in this area.