

The Authority of Congress to Establish
a Process for Recognizing a Reconstituted
Native Hawaiian Governing Entity

Prepared for

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This memorandum addresses Congress' authority to enact S. 147, the proposed Native Hawaiian Government Reorganization Act of 2005 ("NHGRA"), which establishes a process for reconstituting and recognizing the Native Hawaiian governing entity. We conclude that Congress has the constitutional authority to enact the Native Hawaiian Government Reorganization Act of 2005.

Congress possesses plenary and exclusive power under the Constitution to enact special legislation to deal with Native Americans. This authority, inherent in the Constitution and explicit in the Indian Commerce Clause, art. I, § 8, cl. 3, and Treaty Clause, art. II, § 2, cl. 2, extends to dealings with Native Hawaiians, especially given the particular moral and legal obligations the United States assumed for its role in effecting a forcible end to the Kingdom of Hawaii in 1893.

Rice v. Cayetano, 528 U.S. 495 (2000), is not to the contrary. The Supreme Court there expressly declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518. The conclusion that granting Native Hawaiians special voting rights in connection with the election of a state governmental official violates the Equal Protection Clause does not speak to whether Congress has the authority to reaffirm the status of Native Hawaiians as an indigenous, self-governing people and reestablish a government-to-government relationship:

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).

I. The Native Hawaiian Government Reorganization Act.

The stated purpose of the NHGRA is “to provide a process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.” NHGRA § 4(b). To that end, 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. *Id.* § 7(b). For the purpose of establishing the roll, the NHGRA defines the term “Native Hawaiian” as:

(A) 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 (B) 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.

Id. § 3(8).

Through the preparation and maintenance of the roll of Native Hawaiians, the Commission will set up a Native Hawaiian Interim Governing Council called for by the NHGRA. *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 structure; and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

The NHGRA provides that the Council may conduct a referendum among enrolled Native Hawaiians “for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity.” *Id.* § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id.* § 7(c)(2)(B)(iii)(IV).

II. Congress’ Authority to Enact the NHGRA.

Congressional authority to enact S. 147 encompasses two subordinate questions: First, would Congress have the power to adopt such legislation for members of a Native American tribe in the contiguous 48 states? Second, does such power extend to Native Hawaiians? The answer to both questions is yes, especially given the moral and legal obligations the United States acquired for overthrowing the then-sovereign Kingdom of Hawaii in 1893.

A. Congress' Broad Power to Deal with Indians Includes the Power to Restore Sovereignty to, and Reorganize the Government of, Indian Tribes.

There is little question that Congress has the power to recognize Indian tribes. As the Supreme Court explained recently, “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). *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian affairs”); *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 531 n.6 (1998) (same); 20 U.S.C. § 4101(3) (finding that the Constitution “invests the Congress with plenary power over the field of Indian affairs”). The NHGRA expressly recites and invokes this constitutional authority. *See* NHGRA § 2(1) (“The Constitution vests Congress with the authority to address the conditions of the indigenous native people of the United States.”); *id.* § 4(a)(3).

This broad congressional power derives from a number of constitutional provisions, including the Indian Commerce Clause, art. I, § 8, cl. 3, which grants Congress the power to “regulate Commerce * * * with the Indian Tribes,” as well as the Treaty Clause, art. II, § 2, cl. 2. *See Lara*, 541 U.S. at 200-201; *Morton v. Mancari*, 417 U.S. 535, 552 (1974). Other sources of constitutional authority include the Debt Clause, art. I, § 8, cl. 1, *see United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980); *see also Pope v. United States*, 323 U.S. 1, 9 (1944) (“The power of Congress to provide for the payment of debts, conferred by § 8

of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary.”); and the Property Clause, art. IV, § 3, cl. 2, *see Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-88 (1918); *see also Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam) (“The power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation.”) (internal quotation marks omitted). ^{1/}

Congress’ legislative authority with respect to Indians also rests in part “upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely power that this Court has described as ‘necessary concomitants of nationality.’” *Lara*, 124 S. Ct. at 1634 (citing, *inter alia*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). *See also Morton v. Mancari*, 417 U.S. at 551-552 (“The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly *and implicitly* from the Constitution itself.”) (emphasis added).

Plenary congressional authority to recognize Indian tribes extends to the restoration and reorganization of tribal sovereignty. In *Lara*, the Court held that Congress’ broad authority with respect to Indians includes the power to enact

^{1/} As discussed herein, *see infra* at 16-17, Congress in 1921 set aside some 200,000 acres of public land for the benefit of Native Hawaiians. The NHGRA is related to, and would help to realize the purpose of, that exercise of the Property Clause power by commencing a process that would result in the identification of the proper beneficiaries of Congress’ set aside.

legislation designed to “relax restrictions” on “tribal sovereign authority.” 124 S. Ct. at 196, 202. “From the Nation’s beginning,” the Court said, “Congress’ need for such legislative power would have seemed obvious.” *Id.* at 202. The Court explained that “the Government’s Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time,” and “[s]uch major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty.” *Id.* The Court noted that today congressional policy “seeks greater tribal autonomy within the framework of a ‘government-to-government’ relationship with federal agencies.” *Id.* (quoting 59 Fed. Reg. 22,951 (1994)).

Of particular significance to the present analysis, the Court in *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.* (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.* 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," and it is not for the federal judiciary to "second-guess the political branches' own determinations" in that regard. *Lara*, 124 S. Ct. at 205.

United States v. John, 437 U.S. 634 (1978), further supports congressional authority to recognize reconstituted tribal governments and to re-establish sovereign relations with them. There, Congress' power to legislate with respect to the Choctaw Indians of Mississippi was challenged on grounds that "since 1830 the Choctaw residing in Mississippi have become fully assimilated into the political and social life of the State" and that "the Federal Government long ago abandoned its supervisory authority over these Indians." *Id.* at 652. It was thus urged that to "recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary." *Id.* The Court unanimously rejected the argument. "[W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaw than with the affairs of other Indian groups." *Id.* at 652-653. The "fact that federal supervision over them has not been continuous," according to the Court, does not "destroy[] the federal power to deal with them." *Id.* at 653.

Congress exercised this established authority to restore the government-to-government relationship with the Menominee Indian tribe of Wisconsin, *see Lara*, 541 U.S. at 203-204, and it can do the same here. Indeed, the NHGRA government reorganization process closely resembles that prescribed by the Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

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).

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 elect 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. 147. 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 NHGRA 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 structure; and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

The Menominee Restoration Act provided that, following the election of the Menominee Restoration Committee, and at the Committee’s request, the Secretary was to conduct an election “for the purpose of determining the tribe’s constitution and bylaws.” *Id.* § 903c(a). After the adoption of such documents, the Committee was to hold an election “for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws.” *Id.* § 903c(c). Likewise, the NHGRA provides that the Native Hawaiian Interim Governing Council may conduct a referendum among enrolled Native Hawaiians “for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity.” *Id.* § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id.* § 7(c)(2)(B)(iii)(IV).

The courts have approved the process set forth in the Menominee Restoration Act to restore sovereignty to the Menominee Indians. *See Lara*, 541 U.S. at 203 (citing the Restoration Act as an example where Congress “restored previously extinguished tribal rights”); *United States v. Long*, 324 F.3d 475, 483 (7th Cir.) (concluding that Congress had the power to “restor[e] to the Menominee the inherent sovereign power that it took from them in 1954”), *cert. denied*, 540 U.S.

822 (2003). The teachings of these cases would apply to validate the similar process set forth in NHGRA.

B. Congress’ Power to Enact Special Legislation with Respect to Indians Extends to Native Hawaiians.

The inquiry, therefore, turns to whether Congress has the same authority to deal with Native Hawaiians as it does with other Native Americans in the contiguous 48 states. Congress has concluded that it has such authority. *See* NHGRA § 4(a)(3) (finding that Congress “possesses the authority under the Constitution, including but not limited to Article I, section 8, clause 3, to enact legislation to address the conditions of Native Hawaiians”); 42 U.S.C. § 11701(17) (“The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.”). We conclude that courts will likely affirm these assertions of congressional authority. 2/

Under *United States v. Sandoval*, 231 U.S. 28 (1913), Congress has the authority to recognize and deal with native groups pursuant to its Indian affairs power, and courts have only a very limited role in reviewing the exercise of such congressional authority. In *Sandoval*, the Supreme Court rejected the argument that Congress lacked authority to treat the Pueblos of New Mexico as Indians and

2/ *Rice v. Cayetano* did not decide the issue. On the contrary, the Supreme Court in *Rice* expressly declined to answer the questions whether “native Hawaiians have a status like that of Indians in organized tribes” and “whether Congress may treat the native Hawaiians as it does the Indian tribes.” 528 U.S. at 518.

that the Pueblos were “beyond the range of congressional power under the Constitution.” *Id.* at 49.

The Court first observed that “[n]ot 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 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. And the Court so held even though the Pueblos differed (in the Court’s view) 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.

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. 3/

It cannot be said that the NHGRA is an arbitrary exercise of Congress’ power to recognize and deal with this Nation’s native peoples. Congress has expressly found, in the NHGRA and other statutes, that Native Hawaiians are like other Native Americans. *See* NHGRA § 2(2) (finding that Native Hawaiians “are indigenous, native people of the United States”); *id.* § 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

3/ *See also Lara*, 541 U.S. at 205 (federal judiciary should not “second-guess the political branches’ own determinations” with respect to “the metes and bounds of tribal autonomy”); *United States v. McGowan*, 302 U.S. 535, 538 (1938) (“Congress alone has the right to determine the manner in which this country’s guardianship over the Indians shall be carried out”); *Long*, 324 F.3d at 482 (“[W]hile we assume that Congress neither can nor would confer the status of a tribe onto a random group of people, we have no doubt about congressional power to recognize an ancient group of people for what they are.”); *cf. Alaska v. Native Village of Venetie*, 522 U.S. at 534 (“Whether the concept of Indian country should be modified is a question entirely for Congress.”).

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”).

Congress’ authority to treat Native Hawaiians as American Indians is supported by the numerous statutes Congress has enacted doing just that. *See, e.g.*, Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; Hawaiian Homelands Homeownership Act, 25 U.S.C. §§ 4221-4243; 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) (hereinafter, “Senate Indian

Affairs Committee Hearing on S. 147”); *cf.* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). No court has struck down any of these numerous legislative actions as unconstitutional.

That Congress has power to enact special legislation for Native Hawaiians is made clear by congressional action dealing with Native Alaskans, 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 Native Alaskans 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, supra; 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 applied in Alaska, includes Aleuts and Eskimos”). If Congress has authority to enact special legislation dealing with

Native Alaskans, it follows that Congress has the same authority with respect to Native Hawaiians.

Finally, the history of the Hawaiian people confirms that the story of the Hawaiian people, although unique in some respects, is in other ways very similar to the story of all Native Americans. 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. King Kamehameha had united the islands and “reasserted suzerainty over all lands.” *Id.*

The Nineteenth Century is “a story of increasing involvement of westerners in the economic and political affairs of the Kingdom.” *Id.* During this period, the United States established a government-to-government relationship with the Kingdom of Hawaii. Between 1826 and 1887, the two nations executed a number of treaties and conventions. *See id.* at 504.

In 1893, “a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the monarchy [of Queen Liliuokalani] with a

provisional government.” *Id.* at 505. In 1894, the U.S.-created provisional government then established the Republic of Hawaii. *See id.* In 1898, President McKinley signed the Newlands Resolution, which annexed Hawaii as a U.S. territory. *See id.*; *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 209-211 (1903) (discussing the annexation of Hawaii); *Lara*, 541 U.S. at 203-204 (citing the annexation of Hawaii as an example of Congress’ adjustment of the autonomous status of a dependent sovereign).

Under the instrument of annexation, the so-called Newlands Resolution, the Republic of Hawaii ceded all public lands to the United States, and the revenue from such lands was to be “used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” *Rice*, 528 U.S. at 505. In 1921, concerned about the deteriorating conditions of the Native Hawaiian people, Congress passed the Hawaiian Homes Commission Act, “which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians.” *Id.* at 507.

In 1959, Hawaii became the 50th State of the United States. *See id.* In connection with its admission to the Union, Hawaii agreed to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution, and the United States adopted legislation transferring title to some 1.4 million acres of public lands in Hawaii to the new State, which lands and the revenues they generated were by law to be held “as a public trust” for, among other purposes, “the betterment of the

conditions of Native Hawaiians.” *Id.* (quoting Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 5, 6).

In short, the story of the Native Hawaiian people is the story of an indigenous people having a distinct culture, religion, and government. Contact with the West brought decimation of the native population through foreign diseases; a period of government-to-government treaty making with the United States; the involvement of the U.S. Government in overthrowing the Native Hawaiian government; the establishment of the public trust relationship between the U.S. Government and Native Hawaiians; and, finally, political union with the United States. Given the parallels between the history of Native Hawaiians and other Native Americans, Congress has ample basis to conclude that it has the coterminous power to deal with the Native Hawaiian community as it has to deal with American Indian tribes. *Cf. Long*, 324 F.3d at 482 (“This case does not involve a people unknown to history before Congress intervened. * * * [W]e have no doubt about congressional power to recognize an ancient group of people for what they are.”). 4/

4/ In *Montoya v. United States*, 180 U.S. 261, 266 (1901), the Supreme Court stated that “[b]y a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular through sometimes ill-defined territory.” In so stating, the Court in *Montoya* did not intend to, and did not, circumscribe Congress’ authority to recognize Indian tribes. In any event, the community of Native Hawaiian people fit within the *Montoya* definition of a tribe: Native Hawaiians were, and are, of a “same or similar” race, had a unitary governmental system prior to its overthrow, and have inhabited the Hawaiian Islands.

Finally, Congress has found that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past; have never abandoned their claim to be a sovereign people; and have maintained a distinct cultural and social identity. *See* NHGRA § 2(13) (“[T]he Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum.”); *id.* § 2(15) (“Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions”); *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); *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 (Oct. 23, 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”).

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*, 528 U.S. at 505. *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.

C. The Responsibility of the U.S. Government for Contributing to the Overthrow of the Hawaiian Kingdom Reinforces Congress’ Moral and Legal Authority to Enact the NHGRA.

Congress’ moral and legal authority to establish a process for the reorganization of the Native Hawaiian governing entity also derives from the role played by the United States -- in particular the U.S. Minister to Hawaii, John Stevens, aided by American military forces -- in bringing a forcible end to the Kingdom of Hawaii in 1893.

As Congress recounted in the Apology Resolution, the U.S. Minister to the sovereign and independent Kingdom of Hawaii in January 1893 “conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii.” 107 Stat. 1510. In pursuit of that objective, U.S. Minister Stevens “and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaii nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government.” *Id.* See also S. Rep. No.

108-85, 108th Cong., 2d Sess. 11 (2003) (on the orders of the U.S. Minister, “American soldiers marched through Honolulu, to a building known as Ali’iolani Hale, located near both the government building and the palace”); *Rice*, 528 U.S. at 504-505. The next day, the Queen issued a statement indicating that she would yield her authority “to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu.” 107 Stat. 1511. The United States, quite simply, effected regime change in Hawaii because “without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms.” *Id.* In December 18, 1893, President Cleveland described the Queen’s overthrow “as an ‘act of war,’ committed with the participation of a diplomatic representative of the United States and without the authority of Congress.” *Id.*

Given the role of United States agents in the overthrow of the Kingdom of Hawaii, Congress could conclude that its “unique obligation toward the Indians,” *Morton v. Mancari*, 417 U.S. at 555, extends to Native Hawaiians. Congress’ power to enact special legislation dealing with native people of America is derived from the Constitution, “both explicitly *and implicitly*.” *Id.* at 551 (emphasis added). *See Lara*, 541 U.S. at 201 (to the extent that, through the late 19th Century, Indian affairs were a feature of American military and foreign policy, “Congress’ legislative authority would rest in part * * * upon the Constitution’s adoption of

preconstitutional powers necessarily inherent in any Federal Government”). The Supreme Court has explained that the United States has a special obligation toward the Indians -- a native people who were overcome by force -- and that this obligation carries with it the authority to legislate with the welfare of Indians in mind. As the Court said in *Board of County Commissioners of Creek County v. Seber*, 318 U.S. 705 (1943):

From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation * * *.

Id. at 715 (citation omitted).

In the case of Native Hawaiians, the maneuverings of the U.S. Minister and the expression of U.S. military force contributed to the overthrow of the Kingdom of Hawaii and the deposition of her Queen. The events of 1893 cannot be undone; but their import extends to this day, imbuing congress with a special obligation and the inherent authority to restore some semblance of the self-determination then stripped from Native Hawaiians. In the words of Justice Jackson,

The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 355 (1945)

(concurring opinion).

IV. As an Exercise of Congress' Indian Affairs Powers, the NHGRA Is Not an Impermissible Classification Violative of Equal Protection.

The principal objection to the NHGRA -- that it classifies U.S. citizens on the basis of race, in violation of the constitutional guarantee of equal protection, *cf. Rice v. Cayetano, supra* 5/ -- misses the mark. Because the NHGRA is an exercise of Congress' Indian affairs powers, this legislation is "political rather than racial in nature." *Morton v. Mancari*, 417 U.S. at 553 n.24. As the Court explained,

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. * * * Federal regulation of Indian tribes * * *

5/ *Rice* does not support this objection. There, the Court held that the Fifteenth Amendment to the Constitution -- which states that the right of U.S. citizens to vote shall not be denied or abridged by the United States or by any state on account of race or color -- did not allow the State of Hawaii to limit to Native Hawaiians eligibility to vote in elections to elect trustees for the Office of Hawaiian Affairs, a state governmental agency. *See Rice*, 528 U.S. at 523-524. *Rice* is inapposite because the reorganized Native Hawaiian governing entity will be neither a United States nor a Hawaiian governmental entity, but rather the governing entity of a sovereign native people.

is governance of once-sovereign political communities; it is not to be viewed as legislation of a “ ‘racial’ group consisting of Indians” *Morton v. Mancari*, *supra*, at 553 n.24.

United States v. Antelope, 430 U.S. at 645-646 (footnote omitted); *see also* *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (“It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.”) (quoting *Morton v. Mancari*, 417 U.S. at 551-552).

In *Morton v. Mancari*, the Supreme Court rejected the claim that an Act of Congress according an employment preference for qualified Indians in the Bureau of Indian Affairs violated the Due Process Clause and federal anti-discrimination provisions. In rejecting that claim, the Court explained that “[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment,” 417 U.S. at 554 (citing cases involving, *inter alia*, the grant of tax immunity and tribal court jurisdiction), and the Court laid down the following rule with respect to Congress’ special treatment of Indians: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Id.* Clearly, the NHGRA can be “rationally tied” to Congress discharge of its duty with respect to the native people of Hawaii.

In any event, Native Hawaiians have been denied some of the self-governance authority long established for other indigenous populations in the United States. 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 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); 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).

* * *

The Supreme Court has confirmed that Congress has broad, plenary constitutional authority to recognize indigenous governments and to help restore

and restructure indigenous governments overtly terminated or effectively decimated in earlier eras. *See Lara*, 541 U.S. at 203 (affirming that the Constitution authorizes Congress “to enact legislation * * * recogniz[ing] * * * the existence of individual tribes” and “restor[ing] previously extinguished tribal status”). That authority extends to the Native Hawaiian people and permits Congress to adopt the NHGRA, which would recognize the Native Hawaiian governing entity and initiate a process for its restoration.