Comments of Paul M. Sullivan on Regulation Identifier Number 1090-AB05, Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community

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I. Introduction

My name is Paul M. Sullivan. From 1982 until 2008 I lived in Hawai'i where I practiced law, taught on the adjunct faculty of the University of Hawai'i School of Law, and served in 2007 on the Hawai'i State Advisory Committee to the U.S. Commission on Civil Rights. I have had the opportunity to examine various claims by Native Hawaiian groups and individuals for privileged access to political power and public resources, and I have published a number of academic articles on these matters. Those most pertinent to the issues raised by the ANPRM are listed at the end of these comments with links to their full texts on the Internet.

The following comments are my own, and do not necessarily reflect the views or policies of any of my former employers or of any organization to which I have belonged.

II. Summary

The advance notice of proposed rulemaking (ANPRM) expressly seeks comments on five specific questions identified as "threshold", and only on those questions (79 Fed.Reg. 35296, 35297 (June 26, 2014), although comments are also invited on nineteen supplementary questions listed at the end of the ANPRM.

These questions can all be addressed with one overall comment. The Department of the Interior (DoI) may not and should not support any effort by any Native Hawaiian group to obtain recognition as an Indian tribe or any other sort of governing entity.

- It may not, under the Constitution, because any such action would constitute granting special political privileges on account of race. Such a grant would either be flatly barred by the 15th Amendment or would fail to meet other stringent limitations imposed by the Constitution on race-conscious actions by governmental actors.
- It should not, because the effort to provide some or all persons of Hawaiian ancestry--and only such persons--with preferential race-based political status and other governmental benefits on grounds of race is divisive of the population of Hawai'i and the United States, and will continue to be divisive until it is forever set aside as simply wrong. It will eventually fail because it cannot survive U.S. Supreme Court review, but when it fails, it will not simply go away; instead, as we know from past experience, there will be even more years of anger and bitterness.

DoI should therefore reject any proposal which would give any direct or indirect support to any effort to segregate Hawai'i's citizens along racial lines.

III. Preliminary issues related to the phrase "reestablishing a government-to-government relationship with the Native Hawaiian community"

While the five questions on which DoI seeks comment are termed "threshold," there are other issues raised by the core language of the ANPRM which must be addressed even before DoI's threshold questions can be addressed. An analysis of these issues will show that DoI's authority does not extend to any of the actions upon which comments are requested by the ANPRM. Specifically:

A. There is no "Native Hawaiian community" which could meet constitutional prerequisites for a government-to-government relationship with the United States, with or without DoI or State of Hawai'i support, and none could be created within the scope of the alternatives suggested in the ANPRM, or otherwise within the U.S. Constitution..

Throughout the ANPRM there are references to a "Native Hawaiian community." The term is not defined in the ANPRM. The ANPRM itself acknowledges that it does not refer to the sort of organized body characteristic of an Indian tribe. It could be argued from context that it refers to all persons of Hawaiian ancestry (that is, persons with at least one ancestor living in the Hawaiian islands before the arrival of Westerners in 1778[1]), or perhaps more narrowly to a subgroup of that racially defined class which might be interested in forming the entity suggested in the ANPRM. There is no suggestion that it refers to, or is limited to, the Hawaiian Homes Commission and its beneficiaries, the Office of Hawaiian Affairs and its constituencies of Hawaiians and Native Hawaiians, or any of the other existing organizations which seek to advance the interests of persons of Hawaiian ancestry. There is also no suggestion that it refers to all persons now alive who were born in Hawai'i or who are currently citizens of the state, even though such references would be well within a common meaning of "native" as applied to residents of the United States or one of its states.

In spite of this definitional vacuum, the ANPRM appears to assume that some sort of "Native Hawaiian community" could, perhaps with U.S. or State of Hawai'i assistance, function and be recognized as a "government" like that of a Federally-recognized Indian tribe.

This assumption is unjustified, and contrary to the facts.

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[1] In Rice v. Cayetano, 528 U.S. 495, 514-515 (2000), the U.S. Supreme Court held that such a classification in a Hawai'i state law was racial.

The ANPRM itself notes that unlike true American Indian tribes, the Native Hawaiian "community" lacks a distinguishing governmental character, which has long been a requirement for Federal acknowledgment. It states at page 35302 of the Federal Register notice:

> The [Part 83] regulations [concerning acknowledgment of Indian tribes] require evidence of community—such as shared cultural or social activities, residence in a defined geographic area, marriages within the group, shared language, kinship systems, or ceremonies, and significant social relationships among members—and evidence of political influence, such as widespread knowledge and involvement in political processes, and leaders who take action on matters that most of the membership consider important. *Id.* 83.7(b) and (c). If these and other mandatory criteria are met, tribal existence is acknowledged. *Id.* 83.6(c) and 83.10(m). . . . Here, however, the Native Hawaiian community lacks an organized governing body, a constitution, settled membership criteria, and a complete membership list, which petitioners under part 83 have. . . . The mandatory criteria in part 83 help clarify what constitutes a political community.

The ANPRM appears to suggest that because the "mandatory criteria" identify the tribes which may qualify for a government-to-government relationship with the U.S., and because Congress has stated in various contexts that it has a "special political and trust relationship" with Native Hawaiians similar to that which it has with Indian tribes, it may be appropriate for DoI (and perhaps the State of Hawai'i) to assist Native Hawaiians in creating the governmental characteristics of a true tribe so that Native Hawaiians, too, may enjoy a government-to-government relationship like true tribes. In other words, the ANPRM proposes that since Congress has already implied that Native Hawaiians are tribal, DoI and the State of Hawai'i should create a factual basis that would make it so.

The suggestion has it backwards. The test for tribal existence is factual. The constitutional basis for acknowledging the "special relationship" between the U.S. and a Federally-recognized tribe is explained in detail in *Morton v. Mancari*[2] and *U.S. v. Sandoval*[3] and was applied in the case of Hawaiians and native Hawaiians[4] under Hawai'i state law in *Rice v. Cayetano*[5]. The lack of current governmental character so candidly described in the ANPRM demonstrates that tribal character *does not exist* in the case of any group of persons of Hawaiian ancestry. Without a factual basis to support its position

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[2] 417 U.S. 435 (1974).

[3] 231 U.S. 28 (1913).

[4] As defined in HRS §10-2.

[5] 528 U.S. 495, 518-522 (2000).

neither Congress nor DoI has the constitutional authority to "acknowledge" the special relationship[6] with any tribe.

The U. S. Supreme Court in *Sandoval* explained why this is so. In that case the Court considered whether the Pueblo Indians could be brought by Congress within the "special relationship." It examined a variety of pertinent factors, some supporting such power in Congress and others indicating the contrary, and concluded that it was within the power of Congress to treat the Pueblos as an Indian tribe. The court emphasized, however, that "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, but only that in respect of distinctly Indian communities 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."[7]

That, of course, is why the term "recognition" is used to describe the Federal governmental prerequisite for affording special political status to tribal entities. Federal acknowledgment "recognizes" facts--governmental history, status and authority--which exist independently of Federal or state preferences or desires. For Congress, or DoI, or the State of Hawai'i to create (or assist in the creation) of a *new* governmental entity for Native Hawaiians would fall precisely within the clear prohibition in *Sandoval.* There is no "distinctly Indian community" (or indeed, any distinct community at all) of Native Hawaiians, and for DoI or Congress or the State of Hawai'i to participate in the creation of such a group and endow it with governmental powers would be arbitrary and unconstitutional. This would be so even if there were no racial criterion for members of the community. The racial classification which would apply in the case of a Native Hawaiian organization simply adds another constitutional objection to such an action.

Apart from the admission in the ANPRM itself, the testimony offered at the ANPRM hearings and posted on the DoI site amply illustrates that there is *no* group or organization with sufficient structure, resources, broadly accepted authority, coherence of purpose or other governmental attributes to constitute a "distinctly [Native Hawaiian] community." The vast variety of opinions offered on the ANPRM, the lack of any central authority to resolve these different views by fiat or consensus and the absence of any individual or group of individuals to whom most other persons of Hawaiian ancestry defer on Native Hawaiian issues all confirm the lack of any coherent community.

Over a generation ago, a Native Hawaiian scholar noted this lack of true tribal community among persons of Hawaiian ancestry:

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[6] This is particularly so when the views of Congress are set out in statutory preambles, which are not part of the associated statute and do not have the force of law (*See* Hawai'i v. OHA, No. 07-1372, 556 U.S. __ (2009)).

[7] *Id*. at 46.

> These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.
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> Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties.[8]

Mr. Kanahele's observations explain why the "society" of today's Native Hawaiians as the term appears in the ANPRM is fundamentally the "society" of the State of Hawai'i and the United States. Interracial and interethnic marriage and social mobility were accepted in Hawai'i from the earliest period of Western contact, and over the years, the tradition has extended to immigrants from other nations.[9]

Persons of Hawaiian ancestry are part of this intermingled society. They may be found throughout the state's social, economic and political fabric in positions of power and influence. They are not segregated by prejudice or tradition or language or religion. They have no government other than the Federal, state and municipal governments. In fact, "Native Hawaiians" as that term is used in the ANPRM are not a distinguishable "they" or "them" at all, except by the test of race. In every way that matters to the real world and the Constitution, "they" are "we"--citizens of the United States and of the State of Hawai'i.

So the only way for a "Native Hawaiian community" with governmental character to be separated out of this integrated and intermingled populace would be for the Federal or state government to create a new entity. The ANPRM offers several suggestions for

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[8] George S. Kanahele, *The New Hawaiians*, 29 Social Process in Hawai'i 21 (1982).

[9] *See* Rice v. Cayetano, 528 U.S. 495, 506-07 (2000)

doing this. Every one depends on a test for participation which, under *Rice*, is racial.[10] None of them can pass the constitutional tests of *Morton* and *Sandoval*. DoI should therefore abandon them all, and back away completely from any future effort in support of race-based tribalizing of persons of Hawaiian ancestry.

B. The phrase "reestablishment of a government-to-government relationship with the Native Hawaiian community" is inappropriate because a "government-to-government relationship" never existed between the U.S. and a "Native Hawaiian community."

As the Court explained in *Rice*[11], and as other historical works describe in detail, from the unification of the island governments under Kamehameha I until the end of the monarchy, there was at any one time only one government for all the people of Hawai'i, native and immigrant alike. Participation in the monarchical government was never racially restricted to persons of Hawaiian descent (except for the monarch). Westerners had been trusted advisors of the monarchs from the time of Kamehameha I. As early as 1851, foreign-born subjects of the kingdom sat in the legislature[12] and held various

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[10] The U.S. Supreme Court in *Rice* held that the HHCA and OHA classifications, based in whole or in part on ancestry, are "racial." 528 U.S. 495, 516-517 (2000). The court pointed out that the classification is still racial even though additional factors, other than race, may preclude membership in the group by persons who might otherwise qualify under the racial test alone. The test is thus racial if the ancestral classification is required as an initial or parallel screening requirement, even though other (and perhaps race-neutral) tests must also be met. As racial tests, a governmental actor using any of the various criteria mentioned in the ANPRM to identify participants in forming some future governing entity must adhere to constitutional requirements. While there are circumstances where race-conscious criteria may be used in governmental decision-making, these are narrow and generally disfavored, and must meet the demanding constitutional test of strict scrutiny. *See generally* Adarand v. Federico Pena, 515 U.S. 200 (1995).

Beyond the issue of race, the creation of a group with special privileges based solely on the duration of residence or the accident of birth raises constitutional issues of due process, the privileges and immunities clause (*see* Saenz v. Roe, 526 U.S. 489 (1999), Zobel v. Williams, 457 U.S. 55 (1982)) and the anti-nobility clauses (*see, e.g.,* Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense And Titles Of Nobility*, 8 S. Cal. Interdisciplinary L.J. 577, 609 (1999) ("We should remember that the nobility clauses were adopted because the founders were concerned not only about the bestowal of titles but also about an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank, and political, cultural and economic privilege.")).

[11] *Id*. at 499-506.

[12] 3 KUYKENDALL, THE HAWAIIAN KINGDOM 191 (1967).

[13] *See, e.g., id*. at 401-402, 406-410, 448-455.

degrees of control during the monarchy period.[13] Westerners as well as natives sat as judges in the courts of the kingdom.[14]

During the time of the monarchy, intergovernmental dealings of the U.S. with the nation of Hawai'i were conducted with the monarch[15], in whose person resided the sovereignty of the kingdom, or his delegates. The subjects of the kingdom, native or not, had no part of the sovereignty except as the monarch might elect, on a revocable basis, to share it.[16] Thus there never was a time during the monarchy when the U.S. had a government-to-government relationship with the Native Hawaiian community, however that community might be defined.

By 1893, when the monarchy was replaced by a provisional government, natives and foreigners alike had long participated extensively in the political, social and economic life of the nation. They continued to do so under the revolutionary governments and, after annexation, the United States. Throughout all these changes, racial tension was often high, but there was only one government at a time for the Hawaiian islands, and it was not a government of or for Native Hawaiians.[17]

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[14] See, e.g., 2 KUYKENDALL, THE HAWAIIAN KINGDOM 241(1938).

[15] *See* Rice v. Cayetano, 528 U.S. 495, 504 (2000)

Sovereignty in the kingdom resided inherently in the monarch, not the people. In this respect, the monarchy differed in well-understood ways from a republic or democracy. This difference was clearly set out by the *Hawaiian kingdom's* supreme court in the case of *Rex v. Booth*.[16] A law of the kingdom had been challenged on grounds that the native subjects of the Kingdom had not granted the Legislature the authority to pass it. The court responded:

> The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty.

The court reviewed Kamehameha III's promulgation of the 1840 Constitution and its 1852 successor and explained that by these documents the king had voluntarily shared with the chiefs and people of the kingdom, to a limited degree, his previously absolute authority. The court explained:

> Not a particle of power was derived from the people. Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of the House of Representatives; and the members of that House are not mere delegates.

[17] See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967) ch. 19 - 20; Patrick W. Hanifin, *To Dwell on the Earth in Unity:* Rice, Arakaki, *and the Growth Of Citizenship And Voting Rights in Hawai'i*, 5 Haw. Bar J. (No. 13) 15 (2001).

Conclusion

The government-to-government relationship which the ANPRM suggests might be "reestablished" never existed, and there is no existing group of persons of Hawaiian ancestry which might be recognized or acknowledged as a government by the United States. If the U.S. were to seek to establish a government-to-government relationship with Native Hawaiians, the "government" would have to be newly created, and under the Constitution, that could not be done.

Thank you for your time and your consideration of these comments.

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PUBLICATIONS

Paul M. Sullivan, *Recognizing the Fifth Leg: The "Akaka Bill" Proposal to Create a Native Hawaiian Government in the Wake of* Rice v. Cayetano, 3 Asian-Pacific Law and Policy Journal 308 (July 2002). This journal is an on-line publication of the William S. Richardson School of Law at the University of Hawai'i. The listed article is available online at http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_03.2_sullivan.pdf

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