



September 16, 2013

Dear President Obama:

We write as four members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. We are writing to address media reports that you are considering implementing provisions of the Native Hawaiian Government Reorganization Act (known as the Akaka bill) through executive action.¹ The Commission held a hearing regarding the Akaka bill in 2006 and issued a report recommending against passage.² We are writing to reiterate the Commission's recommendation. We believe that provisions of the Akaka bill are both unwise and unconstitutional. Executive action implementing provisions of the Akaka bill would be at least as unwise and unconstitutional.

Neither Congress nor the President has to power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor do they have the power to reconstitute a tribe or other sovereign entity that has ceased to exist as a polity in the past. Tribes are "recognized," not created or reconstituted. The federal government may on appropriate occasions assist tribes in transforming their internal political structure, but they cannot bring into existence a tribe or other sovereign entity that has never existed or has ceased to exist as a separate polity.

Real tribes—the kind the Federal government may recognize—are defined by political structure and the maintenance of a separate society, not by bloodline.³ A mere shared blood quantum among the members of a group is not sufficient for the federal government to recognize an Indian tribe. The regulations governing the recognition of an Indian tribe focus on the cohesiveness of the group and evidence of a functioning polity of long duration.⁴ The regulations do not, for instance, establish what quantum of Indian blood must be possessed by each member of the tribe, although the rate of intermarriage

¹ Valerie Richardson, *Obama urged to use executive order to recognize Native Hawaiians*, WASH. TIMES, Aug. 22, 2013, <http://www.washingtontimes.com/news/2013/aug/22/obama-urged-to-use-executive-order-to-recognize-na/>.

² U.S. Commission on Civil Rights, *The Native Hawaiian Government Reorganization Act of 2005*, at 15 (Jan. 20, 2006), <http://www.usccr.gov/pubs/060531NatHawBriefReport.pdf>.

³ See 25 C.F.R. §§ 83.6-83.7.

⁴ 25 C.F.R. § 83.7:

The mandatory criteria [for recognition as an Indian tribe] are: (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 . . . (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a distinct community from historical times until the present. . . . (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.



with persons outside the group is a factor in determining the cohesiveness of the group and whether it is functioning as a separate polity.⁵

The efforts to obtain federal recognition of native Hawaiians as an Indian tribe or other sovereign entity are attempts to create a tribe out of a race.⁶ There is no native Hawaiian entity, let alone a governing body of such native Hawaiians, that has existed on anything approaching a continuous basis since 1900. There is no “present governing document including its membership criteria” because there is no tribe to govern.⁷ The Native Hawaiian Roll Commission had to be created by the Hawaii legislature to attempt to find native Hawaiians to register. The fact that this step was taken by state government, and was not a spontaneous effort of native Hawaiians themselves, demonstrates that native Hawaiians lack the cohesion and separate polity required for tribal status.

There is no political unit presently governing Native Hawaiians, and judging from the response thus far to the state-sponsored enrollment process, there may be far less interest in creating one than the country has been led to believe. Additionally, the very high percentage of people reporting mixed-race ancestry as opposed to pure Native Hawaiian ancestry⁸ indicates that a “predominant portion of the petitioning group” does *not* comprise a distinct community.⁹

The irony of the current demand to confer tribal sovereignty on members of the Native Hawaiian race is that the Kingdom of Hawaii, which is now pointed to as evidence that this racial group once functioned as a distinct and separate Native Hawaiian polity, was actually an impressively modern multi-racial society in which immigrants were not only welcome, they were sought after. The Hawaiian monarchs ruled over anyone who was a member of their political community, not merely Native Hawaiians.¹⁰ Long before the overthrow of the monarchy, starting in the early 1800s, the Hawaiian royal family intermarried with British and American immigrants, and both immigrants and their mixed-race children held high positions in Hawaiian society. Non-native people began to serve in the King’s cabinet and western-style parliament as early as the 1840s, including Keoni Ana, who was half-British and served as Kuhina Nui (co-regent)¹¹ beginning in

⁵ 25 C.F.R. § 83.7(b)(i).

⁶ As Justice Kennedy has noted, such ancestral classifications are a proxy for racial classifications and implicate the same constitutional concerns. *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000).

⁷ 25 C.F.R. § 83.7(d).

⁸ Only 80,337 people reported Native Hawaiian ancestry alone, as opposed to 209,633 reporting mixed ancestry that includes Native Hawaiian ancestry.

⁹ 25 C.F.R. § 83.7(b).

¹⁰ Gail Heriot and Peter Kirsanow, *Congress Tries to Break Hawaii in Two*, WALL ST. J., Feb. 28, 2010, <http://online.wsj.com/article/SB10001424052748703411304575093180795586118.html>.

¹¹ See “Kuhina Nui, 1819-1864,” Hawai’i State Archives, <http://ags.hawaii.gov/archives/centennial-exhibit/kuhina-nui-1819-1864/>.



1845.¹² Hawaiian monarchs were hardly resistant to Western values; beginning fairly early in the century they were themselves Christians and tried to spread Christian and Western traditions to all those on the Islands.¹³ Encouraging immigration from countries as diverse as China, Japan, Norway and Portugal was among their top priorities. King Kalakaua toured the world in large part to attract immigration to his Kingdom.¹⁴

If the Kingdom of Hawaii had been a kinship-based tribe rather than a modern multi-racial society, the Hawaiian monarchs would have had few people to rule by the time the monarchy was overthrown in 1893, and it is unlikely they would have been able to rule the entirety of the Hawaiian Islands. Native Hawaiians were a minority in 1893,¹⁵ and in 1919 only numbered 22,600.¹⁶ To reiterate, many members of the non-Hawaiian majority who lived in Hawaii were full members of the society governed by the monarchy. Hence, whatever the perceived or actual wrongs that were done to native Hawaiian rulers in the late nineteenth century, there was not then a distinct “tribe” of native Hawaiians living separately from the rest of society, and there certainly has not been any in the 120 years since.

As we have noted before,¹⁷ the efforts to create a tribe are in large part an effort to preserve unconstitutional race-based privileges for Native Hawaiians in the wake of *Cayetano v. Rice*. The theory is that if Native Hawaiians can be transformed into a tribe, these privileges can be preserved under *Morton v. Mancari*.¹⁸ This is mistaken. Conferring tribal status on a racial group is itself a violation of the equal protection guarantees of the Constitution. As the Supreme Court recently reiterated in *Fisher v. University of Texas at Austin*, “‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,’ and therefore ‘are contrary to our traditions and hence constitutionally suspect [citations omitted].’”¹⁹ This is especially the case in our increasingly mixed-race society, of which Hawaii is a prime example. It can only sow bitterness and division for otherwise indistinguishable neighbors living

¹² See “Keoni Ana,” Hawai‘i State Archives, <http://ags.hawaii.gov/archives/centennial-exhibit/keoni-ana/>. Keoni Ana’s niece Emma later became Queen Consort to King Kamehameha IV and Queen Liliuokalani married an American.

¹³ See generally Hawaiian Constitution of 1840, available at <http://ags.hawaii.gov/wp-content/uploads/2012/09/1840E.pdf> (enshrining Christian and Western principles of government in the Constitution).

¹⁴ See, e.g., Ralph S. Kuykendall, II *The Hawaiian Kingdom 1854-1874: Twenty Critical Years 177-96* (1953); Ralph S. Kuykendall, III *The Hawaiian Kingdom 1874-1893: The Kalakaua Dynasty 116-85* (1967).

¹⁵ Heriot and Kirsanow, *supra* note 10.

¹⁶ 20 U.S.C. § 7512(7).

¹⁷ *Id.*

¹⁸ 417 U.S. 535 (1974).

¹⁹ 133 S.Ct. 2411, 2418 (2013).



side-by-side to be subject to different laws and different privileges because one has “one drop” of Native Hawaiian blood and the other does not.²⁰

Rewriting history to create a tribe out of the Native Hawaiian race would open a Pandora’s box for other groups to seek tribal status. Cajuns are an identifiable ethnic group in Louisiana who have had a continuous presence there for over two hundred years. Their ancestors may have been none too pleased when Napoleon sold the lands of the Louisiana Purchase to America, and they had no opportunity to assert sovereignty. Should Cajuns be allowed to seek tribal status? Should the Amish of Pennsylvania or the Hasidic Jews of New York be allowed to seek tribal status? Both groups have far more separation from mainstream society, much lower rates of intermarriage,²¹ and all-encompassing rules governing the lives of members than do Native Hawaiians.²² Both groups also have histories stretching far back.

Lastly, it is worth mentioning that the proponents of Hawaiian statehood were at pains to stress the state’s multiracial character. Proponents emphasized that Hawaiians, regardless

²⁰ This is particularly important to take into account given that racial tensions over the private Kamehameha Schools admissions policy have previously led to violence and threats against the disfavored race, *see Doe v. Kamehameha Schools/Bernice Pauahai Estate*, 596 F.3d 1036, at 1040-42, 1044-45 (9th Cir. 2010) (discussing threats made toward Doe children and their attorney, and severe physical violence inflicted by Native Hawaiian children upon non-Native Hawaiian classmates because of the latter’s skin color), leading the U.S. Attorney for Hawaii to “[issue] a strongly-worded warning, reminding the public that threats based on race are a federal felony.”

²¹ *See* Joseph Berger, *Out of Enclaves, a Pressure to Accommodate Traditions*, N.Y. TIMES, Aug. 21, 2013, http://www.nytimes.com/2013/08/22/nyregion/hasidic-jews-turn-up-pressure-on-city-to-accommodate-their-traditions.html?pagewanted=all&_r=0:

The latest population survey by the UJA-Federation of New York counted roughly 330,000 ultra-orthodox Jews, or 30% of the city’s 1.1 million Jews, a figure that melds Hasidim with others who are as scrupulously observant but do not revere a particular grand rabbi. . . . [Eric Rassbach of the Becket Fund writes] “Because of differing birth and adherence rates, the future of Judaism in New York City increasingly appears to be Orthodox.”

See also Colton Totland, *Amish enjoy unexpected boom in numbers: High birthrate and decline in defections spur growth*, WASH. TIMES, Aug. 9, 2012, <http://www.washingtontimes.com/news/2012/aug/9/amish-enjoy-unexpected-boom-in-numbers/?page=all>:

A combination of high birthrates and falling defection rates among adults—more than 4 in 5 people raised in Amish homes now opt to stay within the community—has led demographers to predict that the number of Amish communities in the United States will double over the next 40 years.

²² Xuanning Fu and Tim B. Heaton, *Status Exchange in Intermarriage Among Hawaiians, Japanese, Filipinos and Caucasians in Hawaii: 1983-1994*, 31 J. COMP. FAMILY STUDIES 45, 58 (2000):

There are several important patterns of mate selection in Hawaii. First, ingroup marriage is the strongest norm, despite a long tradition of interracial marriage in the islands. . . . This tendency, however, is weaker for Hawaiians than for other groups of similar size, probably because Hawaiians (most of them Part-Hawaiians) have a family history of intermarriage



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of racial background, were Americans in spirit.²³ If native Hawaiians wished to receive tribal status, this was the time to raise the issue. Instead, 94.3 percent of all Hawaiians voted in favor of statehood—and they did so after their representatives rejected separate tribal enclaves in Hawaii that were being created at the same time in Alaska for the Inuit and other native Alaskans. Given the demographics of Hawaii at the time, “at least three-fifths of [Native Hawaiians] must also have voted for statehood with no separate rights for individuals of their ancestry.”²⁴

In closing, we must strongly advise against any attempt to recognize Native Hawaiian “tribal” claims via executive order. Congress might be granted somewhat more deference by the courts, but such action by Congress would also be unconstitutional. As unwise and as beyond the scope of Congress’s powers as it would be for Congress to attempt to organize Native Hawaiians as a tribe, we believe it would be doubly so for you to attempt to do so by executive action.

If you have any questions or if we can be of any assistance, please contact Commissioner Kirsanow’s special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

Abigail Thernstrom
Vice Chair

Peter Kirsanow
Commissioner

Gail Heriot
Commissioner

Todd Gaziano
Commissioner

Cc: The Honorable Maria Cantwell, Chairwoman, Committee on Indian Affairs
The Honorable John Barrasso, Vice Chairman, Committee on Indian Affairs
The Honorable Doc Hastings, Chairman, Committee on Natural Resources
The Honorable Peter DeFazio, Ranking Member, Committee on Natural Resources

²³ Erica Little and Todd F. Gaziano, *Abusing Hawaiian History: Hawaiians Knew Their History in 1959*, The Heritage Foundation, June 8, 2006, http://www.heritage.org/research/reports/2006/06/abusing-hawaiian-history-hawaiians-knew-their-history-in-1959#_ftn4.

²⁴ *Id.*