COMMISSIONERS' STATEMENTS

Statement of Commissioner Gail Heriot

This report should not be viewed as any sort of legal or policy analysis. It is more in the nature of a command political performance. A number of Members of Congress were familiar with a report the Commission did in 2003 when Mary Frances Berry was Chair of the Commission. With great dramatic flair, that report—entitled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*—charged the federal government with spending too little on benefits for Native American tribes. Several members, led by Derek Kilmer, who is Vice Ranking Member of the Committee on Appropriations, essentially asked for an encore performance of that report. With this one, the Commission is complying with that request, updating some of its statistics.

But here's the one problem: The Commission and its staff, as currently constituted, have precious little expertise in Indian law (which is the name ordinarily given to the body of law governing relations among the federal government, the fifty state governments and the various tribal governments).[1] That body of law requires a thorough knowledge of the constitutional law of federalism. It bears little resemblance to equal protection law and to the anti-discrimination statutes that are the core areas of our expertise.[2]

The report quotes a number of sentences from well-known Court decisions in an effort to sort out (or at least appear to be sorting out) the law in this area. But to my ear at least, it comes off like an occasional churchgoer reciting the Nicene Creed—oblivious to the degree of controversy and ambiguity, both historic and contemporary, that is packed into its phrases.

I tend to agree with Justice Clarence Thomas about Indian law: *It is in need of a careful re-examination.* As he stated in *United States v. Lara*, 541 U.S. 193, 214 (2004), "the time has come to reexamine the premises and logic of our tribal sovereignty cases." It is riddled with logical

[1] By contrast, "tribal law" is a name that is sometimes given to the internal laws of a particular Native American tribal government. See, e.g., Raymond Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance (2009)(discussing the laws of the Navajo Nation). The Commission has no expertise in any tribal law either.

[2] In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court made clear how different these areas of the law are. That case involved a strong hiring preference for tribal members for certain jobs at the Department of Interior's Bureau of Indian Affairs. The Court held that this was not "race" or "national origin" discrimination within the meaning of the Court's precedents dealing with the equal protection requirements of the 14th and 5th Amendments. Nor was it covered by any of the various anti-discrimination statutes that prohibit discrimination on the basis of race or national origin. This was permissible discrimination based on the employees' affiliation with a sovereign entity.

Note, however, that the *Mancari* decision may be a double-edged sword. If discrimination by the Bureau of Indian Affairs in favor of tribal members is not race discrimination, then presumably discrimination against tribal members by a state government is not race discrimination.

contradictions and misleading metaphors.[3] But I can't sort it out in this report, and neither can the Commission or its staff.

Alas, because this report has been pushed through on an accelerated schedule with Commissioner Statement deadlines running concurrently with other reports, I have time only to address only one aspect of it: Its endorsement of the proposed Native Hawaiian Government Reorganization Act, which would authorize the federal government to facilitate and fund the formation of a Native Hawaiian tribal entity. Unlike most of the other issues addressed in this report, this one really is up the Commission's alley, since it is an effort to use Indian law to circumvent the requirements of the Fourteenth and Fifth Amendments' equal protection provisions by attempting to transform a racial/ethnic group into a tribe.

Before I do that, however, let me comment very briefly on the report more generally. I am mostly in agreement with Commissioner Kirsanow about the source of the problem here: Since the days of Franklin Delano Roosevelt, American policy has been to facilitate communal ownership of property and to deal with Native American individuals through tribal governments rather than as individual American citizens. For the most part this has worked poorly.[4] Commissioner Kirsanow calls it socialism and expresses concern over the many limitations on the ability of tribal members to control their own destinies. I can't say that I disagree. In some parts of Indian Country (though certainly not all), it has evolved into a culture of dependency where it is assumed that the answer to every problem is more assistance from the Federal government. However much one might believe this approach *should* work, it *won't*.[5]

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[3] Perhaps because it was widely assumed throughout much of American history that tribes would decline in significance, relatively little thought has been given to figuring out how to construct a coherent framework of Indian law. At certain points in history, federal policy was to encourage that decline by encouraging assimilation. At other points, federal policy was to resist that decline by protecting the tribal way of life. But in both cases, observers historically expected the decline would nevertheless continue.

[4] For reasons that smaller tribes may be more problematic than larger ones, see Federalist No. 10 (Madison).

[5] It is not that Native Americans, including Native Americans working within the tribal framework, have not had business successes. They have had many, and those successes are not limited to the Indian Gaming (a $32 billion industry in 2017). The Cherokee Nation Businesses LLC is wholly owned by the Cherokee Nation, with Divisions for Hospitality, Manufacturing and Distribution, Healthcare, Real Estate, Security and Defense, Environmental and Construction, and Technology. The Hard Rock Café, Inc. is wholly owned by the Seminole Tribe of Florida. As of this past July, it had 185 cafes, 25 hotels, and 12 casinos. See https://en.wikipedia.org/wiki/Hard_Rock_Cafe. The Chickasaw Nation's Bank2's assets have grown from $7.5 million in 2002 to $140 million in 2017.

Many more enterprises—large and small—are the work of private tribal members. Famous Dave's barbecue restaurants with 152 locations in 33 states is just one example. Its founder—Dave Anderson—is an Ojibwe tribal member who served as Assistant Secretary of the Interior for Indian Affairs during the George W. Bush Administration.

In 2006, the Commission (whose membership was different then) issued a report *opposing* the proposed Native Hawaiian Government Reorganization Act. The current Commission evidently hopes to send that report down the memory hole.

In the original report, the Commission wrote: ***"The Commission recommends against the passage of the Native American Government Reorganization Act … or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."***[6]

With this report, the Commission comes to the opposite conclusion. Unlike the previous Commission, however, this one took no evidence on the issue. Knock me over with a feather if the Commissioners and staff put one-tenth of the effort into Hawaiian issues that was put into the earlier report.

The first question that should come to mind after reading the current report is this: Why is the Native Hawaiian Government Reorganization Act (which usually goes by the name "Akaka Bill" in recognition that it was first put forth by the late Sen. Daniel Akaka) coming up again almost a decade after it was thought to be a dead issue?

One answer to that is that nothing is ever dead in Washington, D.C. Everything always comes back. The red tide that turned the U.S. House of Representatives Republican in 2010 was replaced on Election Day this year by a blue wave in the House of Representatives (though not in the Senate). It may well be that the Akaka Bill will begin to receive more attention on Capitol Hill than it has in recent years. President Trump has not yet taken a position on this bill, but even if he opposes it (as President Bush did), there is always the possibility of a different President being elected in 2020. In a sense, with this Report, the Commission is laying the groundwork for that possibility.

Another part of the answer is that the Obama Administration's strategy proceeding without the cooperation of Congress simply hasn't worked. President Obama famously declared to his Cabinet in 2014, when facing a Republican House of Representatives, "We're not just going to be waiting for legislation." "I've got a pen and I've got a phone...and I can use that pen to sign executive orders and take executive actions and administrative actions."[7] During his administration, the Department of Interior went ahead and fashioned regulations without a Congressional blessing that would assist in creating a Native Hawaiian governing entity and ultimately a Native Hawaiian tribe. But these efforts have not succeeded.[8]

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[6] U.S. Commission on Civil Rights, *The Native Hawaiian Government Reorganization Act of 2005* (2006), available at https://www.usccr.gov/pubs/docs/060531NatHawBriefReport.pdf. Ironically, Commissioner Yaki in dissent objected to that report's lack of thoroughness. Id. at 42.

[7] "Obama on Executive Actions: I've Got a Pen and I've Got a Phone," January 14, 2014, available at https://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone/.

[8] See 81 F.R. 71278, 43 CFR 50, Office of the Secretary: Department of the Interior, Procedures for Establishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, October 14, 2016, available at https://www.federalregister.gov/documents/2016/10/14/2016-23720/procedures-for-reestablishing-a-formal-government-to-government-relationship-with-the-native.

In this Statement, I will try to address why I oppose the Akaka Bill. But here is a brief summary:

Congress does not have the power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor can it do so by purporting to "merely" reconstitute a tribe or other sovereign entity that has ceased to exist. Tribes are "recognized;" they are not created or reconstituted. The federal government may, on occasion, assist already-existing tribes in reforming their internal political structures, but they cannot bring into existence a tribe or other sovereign entity that has never existed or has long ago ceased to exist as a separate polity.

The federal government *especially* cannot take a racial or ethnic group and transform it into a tribe as a means of circumventing the equal protection requirements of the Fifth and Fourteenth Amendments. Yet that is exactly what is being attempted here.[9]

WHAT THE AKAKA BILL WOULD DO: Put as simply as possible, the proposed law would require the federal government to assist the nation's approximately 400,000 Native Hawaiians to organize themselves into a vast indigenous tribe. Ultimately, this purported tribe would almost certainly have powers like those of mainland Indian tribes—including the power to make and enforce laws, promulgate a criminal code, punish offenders, impose and collect taxes, and exercise eminent domain—as well as police powers and the privilege of sovereign immunity. If all 400,000 join (and this may be unlikely), it would be by far the largest tribe in the nation and almost as large as some states, with about half its members residing in Hawaii and half scattered across the mainland. Even with far fewer than all Native Hawaiians participating, this reorganization of the Hawaiian political landscape would be a massive undertaking.

The effort has stalled out for several reasons. First, it turned out that many Native Hawaiian activists who favor Hawaiian independence opposed the measure.

Second, Keli'i Akina, president of the Grassroot Institute, sued in August 2015, claiming that the delegate election violated federal law banning state-conducted race-based elections. On November 27 of that year, Justice Kennedy enjoined the counting of ballots. On December 21, five members of the Court enjoined the counting of ballots and certification of winners. Two weeks later, N'ai Aupuni (the entity holding the election) cancelled the election and offered all 196 of the original delegate candidates seats at a convention to discuss a process for Native Hawaiians to achieve self-governance. Akina filed a motion for contempt of court, claiming that the convention was an unlawful end-run around the Supreme Court's injunction, but lost. A Native Hawaiian constitutional convention was held in February 2016, but the organizers decided not to fund a vote to ratify the proposed constitution. N'ai Aupuni was accordingly dissolved in February 2016.

There are still some efforts underway to try to ratify a constitution, but they appear unlikely to bear fruit anytime soon. According to the ABA Journal, as of December 2016, the organizers had only about one-eighth of the total funds needed to hold a ratification election. The same article stated that any such effort would likely face another costly court challenge. Robert Popper of the Election Integrity Project, who represented Akina in the earlier litigation, told the ABA Journal that "We are actively involved in making sure that we're ready to go if this rears its head again," says Robert Popper, director of Judicial Watch's Election Integrity Project. "There is going to be a serious ... problem no matter how they structure this, and we are dedicated to making that argument." Lorelei Laird, "Native Hawaiians wage an ongoing battle to organize into a sovereign nation," ABA Journal, November 2017, available at http://www.abajournal.com/magazine/article/native_hawaiians_wage_an_ongoing_battle_to_organize_into_a_sovereign_nation.

[9] These reasons (as well as other reasons) would apply to the Obama Administration's efforts too.

The first step under the bill would be the creation of an Office for Native Hawaiian Affairs ("ONHA") at the U.S. Department of the Interior. (See Section 5.)[10] That office would assist "adult [Native Hawaiians] who wish to participate in the reorganization of the Native Hawaiian government." (See Section 7(b).)

The specific task of determining who is and who is not a true "Native Hawaiian" as defined in the bill would fall to a nine-member Commission appointed by the Secretary of the Interior. These nine government appointees would be required to have "not less than 10 years of experience in the study and determination of Native Hawaiian genealogy" and "the ability to read and translate into English documents written in the Hawaiian language." (see Section 7(b)(2)(B).) This replaces an earlier version of the bill requiring that members be Native Hawaiians themselves—a clear violation of the Constitution—although the substitute language might still be challenged as intending to have the racially discriminatory effect. Once appointed, these commission members would ensure that only those who can demonstrate their true Native Hawaiian bloodline are permitted to join. The one-drop rule—notorious in other contexts—would apply.

Once the tribal roll is certified and published, the members, with ONHA's assistance, would establish an interim government, which would then draft governing documents and hold elections to establish the permanent government. Federal recognition would then be "extended to the Native Hawaiian government as representative governing body of the Native Hawaiian people" once these documents have been presented to the Secretary of the Interior and properly certified. (See Section 7.)[11]

Only after this new political behemoth is created will the federal government "enter into negotiations" with it over such matters as "the exercise of civil and criminal jurisdiction," "the delegation of government powers and authorities … by the United States or by the State of Hawaii," "any residual responsibilities of the United States and the State of Hawaii," and "grievances regarding assertions of historic wrongs committed against Native Hawaiians by the United States or by the State of Hawaii." By then, of course, the balance of political power would have shifted decidedly in favor of the new government. It would be in a position to assert that it

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[10] I am using the 2009 version of the Akaka Bill here—H.R. 2314 (111th Congress). There are other versions, but the 2009 version was the last to receive serious consideration.

[11] Note that the Guaranty Clause of the U.S. Constitution, which guarantees all states a republican form of government, will not apply to the new Native Hawaiian government (since it does not apply to any Indian tribe). See U.S. Const. art. IV, sec. 4. Similarly, the Titles of Nobility Clauses will not apply unless the Native Hawaiian government is interpreted by the courts to be a government that derives its powers solely from federal delegation. See U.S. Const. art. I, sec. 9, cl. 8 (limitation on federal power to confer titles of nobility); U.S. Const. art. I, sec. 10, cl. 2 (similar limitation on state power). As the Akaka Bill asserts 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," it is clear that many will not regard that new government as deriving its powers solely from federal delegation. Rather, they will view its powers as deriving from the group's inherent sovereignty. If so, it will thus not be subject to any of the limitations found in the U.S. Constitution, including the Bill of Rights (though the more limited Indian Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 24 U.S.C. § 1301 et seq., could presumably be made to apply).

This is what I mean (and what I believe Justice Thomas meant in *Lara*) when I suggest that Indian law is complicated. If tribal authority arises out of inherent sovereignty, that creates one set of logical conclusions and expectations. If it is instead delegated by the federal government, that creates a different set of conclusions and expectations. If it is a little of both, the issues become exponentially more difficult.

possesses inherent sovereignty and hence has powers quite apart from those delegated to it by the federal and state governments. Moreover, even if the courts were ultimately determine that its powers derive solely from federal delegation, it will likely have the political clout to ensure that those powers are extensive.

Among the issues left for negotiation is the status of the immense property holdings of the State of Hawaii. As the bill puts it: "[T]he United States and the State of Hawaii may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement addressing … the transfer of lands, resources and other assets and the protection of existing rights related to such land or resources." (See Section 8.) The bill does not specify whether the tribe will purchase these assets or receive them as a gift, but some Native Hawaiian activists have said that they expect the latter. Indeed as I will discuss below, it is the anticipated transfer of those assets that inspired the Akaka bill in the first place.

THE INSPIRATION FOR THE AKAKA BILL: Both supporters and opponents of the Akaka Bill agree that the bill must be understood in the context of history, but they differ over which aspects of history have the greater importance.

I believe that to understand the motivations behind the Akaka Bill, one must look at some recent history—especially the decision of the U.S. Supreme Court in *Rice v. Cayetano* (2000).[12] The first version of the bill was introduced shortly after that case was decided. That was no coincidence.

In *Rice*, the Supreme Court ruled that the Constitution's Fifteenth Amendment, which prohibits both the United States and the individual States from discriminating by race in voting rights, prohibited the State of Hawaii from holding elections in which only Native Hawaiians could vote.

To understand how these racially-exclusive elections came to be, one needs to know a little about the state of contemporary racial politics in Hawaii. The election was for trustees of the Office of Hawaiian Affairs ("OHA"), a department of the State of Hawaii that receives and administers 20% of the gross revenues from much of the State's Ceded Lands Trust. In theory, these funds should be administered for the benefit of all Hawaiians, especially those in need. But for reasons that are both historical and political, it is actually operated for the benefit of Native Hawaiians only (as well as for the benefit of the OHA bureaucracy itself). Among other things, Native Hawaiians are eligible for special home loans, business loans, housing and education programs. It is the protection of these racially-exclusive benefits that motivates many of the supporters of the Akaka bill.

Supporters of the bill argue that these benefits are a legitimate continuation of federal policy toward Native Hawaiians that began in the 1920s with policies like the Hawaiian Homes Commission Act. Note that this was a time when many other racially-discriminatory laws were tolerated. The fact that Congress passed a racially discriminatory law in the 1920s—the era of Jim Crow, African American disfranchisement, and Jewish quotas in the Ivy League—is hardly proof of its constitutionality.

The primary asset of the OHA public trust is the accumulated revenues from some 1.8 million acres of land that were once owned by the Kingdom of Hawaii and became public lands of the

[12] 528 U.S. 495 (2000).

Republic of Hawaii after the overthrow of Queen Liliuokalani in 1893. Upon Hawaii's annexation by the United States in 1898, all of these lands were ceded to the United States to be held "solely for the benefit of the *inhabitants* of the Hawaiian Islands for educational and other purposes." (Emphasis supplied). Upon statehood in 1959, some 1.4 million acres were returned to the State of Hawaii to be held in a public trust for one or more of five purposes. One of those five purposes was "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended." The other purposes were (1) "for the support of the public schools and other public educational institutions;" (2) "for the development of far and home ownership on as widespread a basis as possible;" (3) "for the making of public improvements;" and (4) "for the provision of lands for public use." Act of March 18, 1959, § 5(f), Pub. L. 86-3, 73 Stat. 4.

Activists in Hawaii have argued that revenue from the ceded lands should be used exclusively for the benefit of Native Hawaiians and reject the four other purposes. There is, however, no requirement that the State of Hawaii use the property for any particular reason among the five—especially not for the one reason that is constitutionally suspect since it involves a preference for a particular race.[13]

But *Rice v. Cayetano* put these programs in jeopardy. Opponents of the benefits argue that since the Supreme Court held that racially-exclusive OHA elections violated the 15th Amendment, the Court would almost certainly hold that OHA's racially-exclusive benefits violate the 14th Amendment's Equal Protection Clause. By legislatively transforming Native Hawaiians for a racial group to a semi-sovereign tribal group, Akaka Bill supporters hope that prohibitions on race discrimination will no longer apply. The case they rely on is *Morton v. Mancari*. That case held that the Bureau of Indian Affairs' preference for tribal members in hiring did not constitute race discrimination under the Fifth Amendment.[14] Rather, it was a permissible discrimination on the basis of citizenship in s sovereign (or semi-sovereign) entity.

For reasons I will describe in the next section, the Constitution's ban on race discrimination cannot be avoided so easily.

First, however, let me describe the part of history that Akaka Bill supporters point to in support of their cause: They argue that the American government was complicit in the 1893 overthrow of Queen Liliuokalani, which illegally denied not just the Queen's individual right of sovereignty, but also the Native Hawaiians' collective right. The Akaka Bill will help remedy this wrong, they argue, by restoring self-governance to Native Hawaiians.

The claim of American complicity has always been hotly disputed. As far as I know, everyone agrees that the overthrow of Queen Liliuokalani was accomplished mainly by white residents of the Kingdom, who were subjects of the Queen, not by the United States. (Yes, at the time of the

[13] Curiously, the Hawaiian Homes Commission Act, to which the legislation refers, applies only to individuals who are at least half-Native Hawaiian. Nevertheless, as things have evolved, OHA has operated its part of the public trust for the benefit of anyone with Native Hawaiian ancestry. For quite some time on the OHA web site, the caption proudly proclaimed its racial loyalty: "Office of Hawaiian Affairs: For the Betterment of Native Hawaiians." Only in recent years has this been taken down.

[14] 417 U.S. 535 (1974).

overthrow, many whites from Europe and the Americas as well as many Asians had immigrated to the Kingdom; indeed, by that time immigrants and their descendants were a *majority* of the population).[15] Some say that a small force from the American crew of the U.S.S. Boston came ashore to assist in the overthrow at the behest of the American ambassador; others say they came ashore only to protect American property. President Grover Cleveland was among those who believed that the Boston crew was complicit in the overthrow—and he strongly disapproved of its actions. He appointed James Blount, a former member of the U.S. House of Representatives, to travel to Hawaii and investigate the situation. The Blount Report supported Cleveland's suspicions. Meanwhile, the Senate conducted its own investigation. The report it issued—called the Morgan Report for Foreign Relations Committee Chairman John Tyler Morgan—came to the opposite conclusion. See Senate Report 227, 53rd Congress, 2nd Session (February 26, 1894).

I do not claim to have the ability to sort out the dispute and will not try. It happened much too long ago to be able to resolve what was then strongly disputed.[16]

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[15] Thomas G. Thrum, Hawaiian Almanac and Annual for 1893 11, 14 (1892); W.D. Alexander, A Brief History of the Hawaiian People 313 (1891); U.S. Parker, The Economic History of the Hawaiian Islands 81 (1907). See Stuart Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537, 550 (1996)("By 1890, those descended from pre-1778 inhabitants constituted less than half of the population").

[16] I note that in 1993 Congress was not nearly so careful to acknowledge its limitations. One hundred years after the fact and after only one hour of debate in the Senate and even less in the House, it issued a Joint Resolution coming down on the side of the Blount Report. This resolution, informally known as the Apology Resolution, is sometimes cited as support for the Akaka Bill.

Interestingly, in order to help secure passage of the Apology Resolution, Daniel Inouye, then the senior Senator from Hawaii, made a representation that would later come back to haunt those who see it as support for the Akaka Bill. In 2005, then-former Senators Hank Brown and Slade Gorton, wrote in an op-ed in the Wall Street Journal:

> We specifically inquired of its proponents whether the Apology would be employed to seek "special status under which persons of Native Hawaiian descent will be given rights or privileges or reparations or land or money communally that are unavailable to other citizens of Hawaii." We were promised on the floor of the Senate by Daniel Inouye, the senior senator from Hawaii and a personage of impeccable integrity, that, "**As to the matter of the status of Native Hawaiians . . . [t]his resolution has nothing to do with that. . . . I can assure my colleague of that."**

Hank Brown and Slade Gorton, E Pluribus Unum? Not in Hawaii, The Wall Street Journal (August 16, 2005). They also stated:

> The Apology falsely declared that Native Hawaiians enjoyed inherent sovereignty over Hawaii to the exclusion of non-Native Hawaiians. To the extent sovereignty existed outside the monarch, it reposed equally with all Hawaiians irrespective of ancestry. The Apology falsely maintained that Native Hawaiians never by plebiscite relinquished sovereignty to the U.S. In 1959, Native Hawaiians voted by at least a 2-1 margin for statehood in a plebiscite. Finally, the Apology Resolution and its misbegotten offspring, the Akaka Bill, betray this nation's sacred motto: E Pluribus Unum. They would begin a process of splintering sovereignties in the U.S. for every racial, ethnic, or religious group traumatized by an identity crisis. Movement is already afoot among a few Hispanic Americans to carve out race-based sovereignty from eight western states because the U.S. "wrongfully" defeated Mexico in the Mexican-American war.

Id.

I note, however, that even if the crew of the U.S.S. Boston was complicit in the overthrow, it would not give rise to a claim that Native Hawaiians have been robbed of their sovereignty.[17] There are several reasons for this. First, the Kingdom of Hawaii was not a kinship-based tribe, operated for the benefit of a particular racial or ethnic group. From its inception in 1810, the time King Kamehameha I completed his conquest of the Hawaiian Islands, the Kingdom of Hawaii was a multi-racial society. [18] In the true spirit of Aloha for which Hawaii is famous, its rulers were welcoming of immigrants, who came from all over the world, particularly from Portugal, China, Japan, Polynesia, the United States, Great Britain and Germany. Assuming the people of the Kingdom of Hawaii had a collective right of sovereignty that was illegally taken from them, the people of the Kingdom were not simply Native Hawaiians. Second, even if the population of the Kingdom of Hawaii had been mainly Native Hawaiian at the time of the overthrow, at the time Hawaii was made a State in 1959, Native Hawaiian voted overwhelmingly in favor of Statehood. In other words, they made the decision to join the United States as our 50th State.[19]

Let me address the first reason first: At least beginning in the mid-century, immigrants didn't just wash up on the shores of Hawaii with the monarchy passively accepting their presence. They were wanted. One could even say that Hawaiian monarchs were obsessed with increasing immigration.

Perhaps if Members of Congress had known that this resolution would be cited as evidence for the creation of a Native Hawaiian tribe, they would have given the matter more attention.

[17] In addition, the Kingdom of Hawaii was a monarchy. Perhaps Queen Liliuokalani's right of sovereignty was violated by the overthrow (although, given how few monarchists there are left in the world today, it is not clear how many would regard her right to the throne as inviolable). See Rex v. Booth, 2 Haw. 616 (1863)(stating that "[t]he Hawaiian Government was not established by the people" and that instead "King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty").

[18] Until the time of Kamehameha I, the Hawaiian peoples were not united under a single king. Instead, there were small kingdoms on the different islands, some embracing two or islands, some only one island or part of an island. Kuykendall, Vol. 1 at 9. There were four such kingdoms when Cook first visited the Hawaiian Islands. *Id.* at 30. Until 1796, chieftains fought for supremacy. Id. at 22. Kamehameha also took as confidential advisers the English sailors Isaac Davis, who survived an attack on his ship by a different group of Native Hawaiians, and John Young. Id. at 25.

Starting in about 1790, the foreign population of Hawaii slowly started to grow. It was largely comprised of sailors who left their ships – some left with the permission of their officers, but others simply deserted. Young and Davis were among the best known of this group. In the early part of 1794, there were eleven foreigners with Kamehameha at Kealakekua; they were of several nationalities, including Chinese. A dozen or more foreigners aided Kamehameha in conquering Oahu in 1795. Id. at 26-7.

From 1802 until 1812, during which time Kamehameha was away from Hawaii, the English immigrant John Young was governor of that island. Oliver Holmes served for a time as governor of Oahu. Id. at 54.

In the history of the Hawaiian Islands, the consolidation of the entire group into one kingdom was the political development of greatest significance during the forty years after the visits of Captain Cook. Id. at 29.

During the 1820s, foreigners who became permanent residents of Hawaii, or essentially naturalized citizens, did so with the express or tacit permission of Kamehameha II. If they received land, they held it by the same precarious tenure as native subjects, simply at the pleasure of the king. Id. at 73. Kamehameha II also at this time amended the laws to make them more pro-merchant. Id. at 121.

[19] At that point, inquiries were made about whether Native Hawaiians would require special accommodations along the lines of Alaska Natives. Congress was informed—correctly—that Native Hawaiians were part of Hawaii's political mainstream, not a separate society with separate political institutions.

In 1855, King Kamehameha IV addressed the legislature on various legislative issues. One issue, however, he identified as the "subject, in comparison with which all others sink into insignificance." That issue was the size of the Kingdom's population.

What was the King so concerned over the Kingdom's population? It had been decreasing for decades—largely due to the susceptibility of Hawaiians to diseases introduced from the outside.[20] Between 1850 and 1853, for example, the Kingdom's population decreased by 11,000.[21] It reached a low of 56,897 at the time of the 1872 census.[22] A large part of Kamehameha IV's plan was to increase immigration.

Why would immigrants want to come to such a remote place? Well … uh … besides the fact that its islands are a tropical paradise. The Kingdom had a lot to offer, not least of which was its modern political institutions. For the greater part of the 19th century, the Kingdom was a constitutional monarchy. Its Constitution of 1840 was signed by two hands—that of King Kamehameha III and that of the holder of the second highest office in the nation, Keoni Ana, the son of John Young (a British advisor to Kamehameha I and his Native Hawaiian wife). Its opening sentence, the substance of which was suggested by an American missionary, was based loosely on a Biblical verse: "*Ua hana mai ke Akua i na lahuikanaka a pau i ke koko hookah e noho like lakou ma ka homua nei me ke kuikahi, a me ka pomaikai*." Translated, the passage might read: "God has made of one blood all races or people to dwell upon this Earth in unity and blessedness."

It is hard to imagine an opening sentence to a Constitution that would be more appealing to potential immigrants. And it is worth noting that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution was still decades in the future.[23]

The Kingdom's immigration policy was closely supervised and regulated by the Hawaiian government with an eye toward encouraging population growth and prosperity. According to Ralph S. Kuykendall, in his three-volume history of the Kingdom:

> A law was passed December 30, 1864, creating a Bureau of Immigration, to consist of the minister of the interior and five other members of the privy council. The function of this Bureau or Board as it was more commonly called, were to superintend the importation of foreign laborers, to regulate the contracts to be made with such laborers, and to promote and encourage the introduction of free immigrants from abroad. Supplementing the law were several ordinances of the king in privy council. The first such ordinance prohibited all persons from bringing contract laborers into the kingdom without the express license of the board. The policy of exclusive government control of importation of contract laborers was sharply criticized at a meeting of the Planters' Society in April, 1865, but one of

[20] It is tempting for some to want to blame Captain James Cook, the English explorer and navigator who captained the first ship to visit Hawaii from the West. But that would require him to understand both the germ theory of disease and population-level acquired immunity, which, of course, he didn't and couldn't.

[21] Kuykendall II at 37.

[22] Thomas G. Thrum, Hawaiian Almanac and Annual for 1893 11 (1892).

[23] No one claims that the Kingdom of Hawaii always lived up to its aspirations. No community ever does. For example, Asians could not vote. But one did not have to be born in the Kingdom to vote and thousands of immigrants were registered, including Polynesians, Portuguese, British and French. Id at 14. And the Kingdom came as close to realizing its aspirations as any 19th century polity of which I am aware.

> the king's ministers, Varigny, warmly defended it because the "question was of such an importance and so intimately connected with the future prosperity, the very life of the people." A second ordinance authorized the board to promote the introduction into the kingdom of free immigrants, male and female, for the Portuguese islands, but nothing was accomplished along this line until many years later.[24]

The need was for both contract laborers (which could be temporary) and for permanent settlers.[25] As foreign minister R.C. Wylie put it is 1983, "Unless we get more population, we are a doomed nation."[26] Nevertheless, the efforts of the 1860s did not produce nearly the number of immigrants the monarchy desired. In 1876, the islands were still 89.2% Hawaiian or part-Hawaiian, 6.3% Caucasian, and 4.5% Oriental (what we would call Asian today.)[27]

But things were about to change radically. David Kalākaua become king in 1874. He took an 1881 around-the-world tour, intended primarily to increase the number of immigrants to the Kingdom, took him to Japan, China, Hong Kong, Siam, Singapore, Malaysia, Burma, India, Egypt, Italy, Great Britain, Belgium, Germany, Austria, Portugal, Spain, and the United States. And it served his purpose well. For example, a treaty was arranged between the Kingdom and Portugal by the end of the year. The steamship Monarch arrived in Honolulu in mid-1882, carrying 859 Portuguese immigrants, over half of them women and children.[28]

That was just the beginning. Immigrants poured in from many directions. The United States enacted the Chinese Exclusion Act of 1882, Pub. L. 47-126, 22 Stat. 58, which was a boon to Hawaii. Many Chinese immigrants left the United States for Hawaii; others, who had initially intended to come the United States, came to Hawaii instead. Hawaii's population boomed as it had never done before with immigrants from many countries. By 1890, less than half the Kingdom's population had Native Hawaiian ancestry.

According to the Kingdom's census of 1877, there were 49044 Native Hawaiians (with 1,487 of what were referred to as "half-caste") for a total of 50,531 whole or half Native Hawaiians. By the 1890 census, there were 34,436 Native Hawaiians and 6,186 "half-castes" for a total of 40,622

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[24] Ralph S. Kuykenall, II The Hawaiian Kingdom: Twenty Critical Years: 1854-1874 180 (1966).

[25] Kuykendall reports that "[i]t was, of course, recognized that some of those who were brought primarily for labor would remain and become part of the permanent population; and, on the other hand, those brought in primarily to replenish the population were expected to fill part of the need for laborers. But in the running discussion that was constantly going on, a distinction seemed to be made between immigration for labor supply and immigration for population upbuilding. … Much stress was laid on the importance of bringing in people who were of the same racial stock of the Hawaiians or people who would readily amalgamate with the Hawaiian; "cognate races" were much talked about. This meant, in the first place, Polynesians; but. Since concepts of racial classification were rather vague in popular mind of the day, nearly all Pacific islanders, including Malaysians and even Japanese, were thought cognate to the Hawaiians." Kuykendall II at 181-82.

[26] Kuykendall II at 177.

[27] Kuykendall, III at 116.

[28] Yes, in case you were wondering the Portuguese brought the guitar with them. The Hawaiian ukulele was adapted from the guitar. It was a case of cultural appropriation by Native Hawaiians. But that is a good thing. What gets derisively called "cultural appropriation" in our crazy times has in fact often enriched cultures around the world.

whole or half Native Hawaiians. This was out of a total population of 89,990, making it only 45% of the population.[29]

Why does this matter? It matters because even if we assume arguendo that the overthrow of Queen Liliuokalani was a wrong, the victims of that wrong were not Native Hawaiians specifically. The Native Hawaiian people, through their kings and elected officials, had reached out to the peoples of the world, inviting them to become Hawaiians. The Kingdom of Hawaii was an extremely impressive, cosmopolitan multi-racial, multi-ethnic society. To pretend otherwise sells it short. If some group was denied its right to sovereignty, it was that multi-racial, multi-ethnic group.

Moreover, even if the Kingdom had been essentially a kinship-based tribe consisting overwhelmingly of Native Hawaiians, all of this has been water under the bridge at least since 1959 when Hawaii was made a State. Contemporary accounts describe the inhabitants of the Islands dancing in the street on that occasion. On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of Statehood. Given Hawaii's population at the time, that means Native Hawaiians voted at least 2 to1 in favor. At that point, any wrongs that might have occurred in the past were waived.[30]

Statehood made Hawaiians of all races full and equal members of the greatest nation on Earth, fully entitled to the protection of its laws and right to participate in its political process. All they had to do was agree to live under its laws, including its Constitution. Hawaiians of all races thought that was a bargain. I agree with them, and so did a majority of the U.S. Commission on Civil Rights when it issued its earlier report in 2006 opposing the Akaka Bill.

Interestingly, part of the reason Congress was so receptive to the idea of admitting Hawaii to the union was that Hawaii had a reputation for being a successful multi-racial polity. In 1959, the United States was in the thick of the Cold War. Much of it was a war for the hearts and minds of people around the world. There was no question that Americans had greater freedom than Soviet citizens and that their greater freedom had given them greater prosperity. But it was also a fact that Jim Crow tarnished the country's record. Adding a star to the flag for Hawaii's successful multi-racial, multi-ethnic society would help make it clear what the United States aspired to be and was working its way to becoming.[31]

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[29] Thomas G. Thrum, Hawaiian Almanac and Annual for 1893 11 (1892).

[30] 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.

[31] See The Problem of Race, Worldview Magazine (August 1959), available at https://www.carnegiecouncil.org/publications/100_for_100/the-problem-of-race. "[T]he population of the Hawaiian Islands is only twenty-five percent 'white.' The majority of the population is native Hawaiian, Chinese and Japanese. But in these islands some measure of the racially 'good society' has been achieved—a much greater measure than has been known anywhere else in the United States. Racial discrimination is almost unknown in Hawaii; relations between the various races are as good, probably, as they can ever be in a world where the hearts of men are still corroded by hatred and fear. This new state can set an example for the rest of the nation."

See also, Hawaii—Beauty, Wealth, Amiable People: After Long Years of Trying, the Idyllic Islands at Last Stand on the Brink of Statehood, 46 Life Magazine 58 (March 23, 1959)("... Hawaiian statehood … would also indicate to all the peoples of the Pacific and of Asia that the U.S. can still be the tolerant, hospitable melting pot of old").

The Akaka Bill Is Unconstitutional: The Constitution confers upon Congress the power to regulate commerce with Indian tribes. Specifically, it provides, "The Congress shall have the power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian tribes."[32] This is the sole mention of Indian tribes in Article I, which gives Congress its powers. This is a thin reed upon which to predicate a power to *create* a tribal government. It has already been established that the Commerce Clause does not confer on Congress the power to create commerce. Why would the Indian Commerce Clause confer on Congress the power to create a tribe?[33]

On the other hand, recognizing an existing tribe—specifically recognizing its sovereign or quasi-sovereign status—is a plausible extension of the power to regulate commerce with those tribes. The United States does so, however, only with groups that have a long, continuous history of self-governance. To do otherwise would be to create tribes, not to recognize them.

The reason the United States treated tribes as semi-autonomous entities, because they were and they continue to be such. They had never been brought under the full control of both federal and

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[32] U.S. Const. art. I, § 8, cl. 3. One commentator has claimed that the Framers rejected a clause proposed by James Madison that would have granted Congress plenary authority "to regulate affairs with the Indians" and instead chose the language of the Indian Commerce Clause in order to give Congress narrower powers. See Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Indian L. Rev. 57, 73 (1991) (quoting 2 The Records of the Federal Convention of 1787, at 325 (M. Farrand ed., rev. ed. 1937) (Aug. 18, 1787) (motion of James Madison, Virginia); cited in Stuart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996).

[33] Some 20th century scholars have suggested that the Commerce Clause gives Congress the power to do just about anything that relates to commerce. But in the case of *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court dispelled those suggestions by finding that creating commerce that did not otherwise exist is beyond Congress's powers:

> The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." Id., cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." Id.,cls. 12–14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See Gibbons, 9 Wheat., at 188 ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").

If the Commerce Clause does not give Congress the power to *create* interstate commerce where none previously existed, then it makes little sense to claim that the Indian Commerce Clause gives Congress power to *create Indian commerce* where none previously existed. And, if the Indian Commerce Clause gives Congress no power to create commerce with Indians where none previously existed, it is even more dubious to suggest that it gives Congress power to *create the tribe* with which commerce is transacted.

state authority. Federal policy toward them was simply an appropriate bow to reality. To withdraw recognition to any such group without very good reason would be an injustice.

By retroactively creating a tribe out of individuals who are already full, mainstream citizens of both the United States and the State of Hawaii, and who do not have a long and continuous history of separate self-governance, the Akaka Bill would be breaking new ground. Supporters of the bill have argued that the recognition of the Menominee tribe by Congress in 1973 is a counter example. But their argument falls short. In the middle of the 20th century, it became briefly fashionable to advocate the termination of the special status of Indian tribes under the law. In 1961, the Menominee tribe in Wisconsin became the first to have its trust relationship with the United States and its semi-sovereign status terminated. The Menominees, however, did not simply melt into the population of the State of Wisconsin. The tribe *incorporated* under the laws of Wisconsin and continued to function as a corporate entity. By the 1970s, the termination option was no longer fashionable and the Menominee tribe requested and received re-recognition by Act of Congress.

Unlike Native Hawaiians, the Menominees never lacked organization. Even during the brief period they lacked federal recognition, the tribe maintained a corporate existence under the laws of the State of Wisconsin. They did not need Congress to help them identify who was a Menominee and who was not. They knew. It had clear and identifiable leaders. All they wanted or needed was renewal of federal recognition and of the federal trust relationship. By contrast, the Akaka Bill requires the Secretary of the Interior to appoint and assist a Commission to determine the initial membership on the Native Hawaiian tribe. This would be unprecedented. See *United States v. Sandoval*, 231 U.S. 28 (1913)("it is not meant by this [decision] that congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe ...."

If Native Hawaiians can be accorded tribal status, why not Chicanos in the Southwest? As former Senators Hank Brown and Slade Gorton have pointed out, some are already arguing for this.[34] Or Cajuns in Louisiana?

Moreover, it is implausible to say that Congress has the power to confer this benefit only upon racial or ethnic groups, since ordinarily Congressional power is at its lowest ebb with issues that touch on race or ethnicity. Religious groups–like Orthodox Jews in New York or the Amish in Pennsylvania or the Mormons in Utah–may be particularly interested in gaining tribal status. It would enable them to exercise governmental powers without concern over the Establishment Clause, since that clause does not apply to tribes. Becoming a tribe will thus arguably allow them to surmount the difficulties discussed by the Supreme Court in *Board of Education of Kiryas Joel School District v. Grumit*, 512 U.S. 687 (1994)(holding that the creation of a school district designed to coincide with the neighborhood boundaries of a religious group and hence facilitate that group's control of school policy constitutes an unconstitutional aid to religion).

Some legal scholars are already arguing that special status ought to be broadly available to what have been called "dissident" communities of many types. See, e.g., Mark D. Rosen, The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian

[34] Hank Brown and Slade Gorton, E Pluribus Unum? Not in Hawaii, The Wall Street Journal (August 16, 2005)(for more information see supra at n. 14).

Country: A Liberal Theory, 84 Va. L. Rev. 1053 (1998); Mark D. Rosen, "Illiberal" Societal Cultures, Liberalism and American Constitutionalism, 12 J. Contemp. Legal Issues 803(2002). Who will say no to these (and other) groups?

Even if Congress does have the power to create a sovereign or quasi-sovereign tribe where none currently exists, it cannot do so in this case, since the reason for doing so is to confer benefits on a *racial group*. Such a scheme violates the Fifth Amendment's Due Process Clause. Insofar as the State of Hawaii is complicit in the scheme by transferring the Ceded Lands to the new Native Hawaiian government, it will be violating the Fourteenth Amendment's Equal Protection Clause. The United States government cannot achieve by indirection what it very likely could not have achieved directly.

That is not because *Morton v. Mancari* is not good law. It is. But *Morton v. Mancari* was decided the way it was because such a benefit is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." In other words, it's not race discrimination, it's discrimination on the basis of tribal membership.

This case would be different. The very act of transforming Native Hawaiians into a tribe would be an act performed on a racial group, not a tribal group. When, as here, it is done for the purpose of conferring massive benefits on that group, it is an act of race discrimination subject to strict scrutiny–scrutiny that it likely cannot survive.[35]

The proof of all this is apparent if one simply alters the facts slightly. If the State of Hawaii were operating its special benefits programs for Whites only or for Asians only, no one would dream that the United States could assist them in this scheme by providing a procedure under which Whites or Asians could be declared a tribe.

[35] Two of the leading Supreme Court cases that make plain that racial classifications are subject to strict scrutiny—*Adarand v. Peña*, 515 U.S. 200, 1995, and *City of Richmond v. J.A. Croson & Co*., 488 U.S. 469, 1989—both dealt with racial classifications that accorded preferential treatment to Native Americans, as well as to members of other historically disadvantaged groups. The disadvantaged groups receiving preferential treatment in *Adarand* were "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" (*Adarand* at 205, quoting Small Business Act, 15 U.S.C. 637(d)(2)-(3) (1994)). In *Croson*, the preference struck down was "unconstitutional was intended to benefit "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Croson*, 488 U.S. at 478 (quoting Richmond, Va., Code 12-23 (1985)) (emphasis added).