DOI-2017-0003

To: Secretary Ryan Zinke,
U.S. Department of Interior

From: Kenneth R. Conklin, Ph.D.
President and Executive Director
Center for Hawaiian Sovereignty Studies
46-255 Kahuhipa St. Suite 1205
Kane'ohe, HI 96744
Tel 808-247-7942
e-mail Ken_Conklin@yahoo.com

Date: August 28, 2017

Re: Repeal of Obama midnight regulation 43 CFR Part 50 --
Procedures for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

Dear Secretary Zinke,

This memo is in response to a regulatory reform initiative to alleviate unnecessary burdens placed on the American people, which was established by President Trump in Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda." The general request for comments was published at
https://www.regulations.gov/document?D=DOI-2017-0003-0001
with the specific request for comments related to Department of Interior published at
https://www.regulations.gov/docket?D=DOI-2017-0003

Please find a way to rescind 43 CFR Part 50 -- Procedures for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

The "Final Rule" was published in the Federal Register on October 14, 2016, and took effect on November 14.

Because this was a "midnight regulation" finalized in the closing weeks of the Obama administration, the easiest way to rescind it would be to use the Congressional Review Act. However, it seems likely that the time limit for CRA has already expired. It would be wonderful if a simple executive order could

repeal it, under President Trump's 2-for-1 rule (repeal two existing regulations for every new one). But 43CFR50 was adopted through a process that included a round of public hearings in Hawaii and several states, and two periods of written comments; thus a similar process might be necessary to repeal it. Alternatively Congress could get the job done by including a sentence to repeal it in the appropriation bill that provides funding for the Department of Interior. However, the legislative route to repeal is subject to a Democrat filibuster. Therefore the best way to rescind it, other than CRA, is through the rule-making process.

WHAT IS 43 CFR 50 AND WHY IS IT BAD? -- A GENERAL EXPLANATION

That DOI rule is the Obama administration's executive order implementing the provisions of the failed Hawaiian Government Reorganization bill (known informally as the Akaka bill) that was active in Congress for 13 years (2000-2012) -- the bill in radically different forms was passed by the House in three different Congresses but was blocked in the Senate by holds from individual Republican Senators as well as a 2-day Republican filibuster with many hours of floor debate on a failed motion to proceed. Although the bill repeatedly failed in Congress throughout its 13 year history, despite about $33 Million in lobbying and advertising, President Obama and his Department of Interior have proclaimed such a law by executive order.

43CFR50 is gross overreaching by the Obama administration, violating the separation of powers. The Indian Reorganization Act of 1934 envisioned allowing the Department of Interior to grant federal recognition to tribes that already existed at that time; it does not allow the DOI to create new tribes out of thin air. Ethnic Hawaiians were never organized as a tribe. The Kingdom of Hawaii was an internationally recognized multiracial nation in which Caucasians and Asians with no native blood were subjects (citizens) of the Kingdom with full voting and property rights, by virtue of being born in Hawaii or taking an oath of loyalty to the King. At various times most cabinet ministers, nearly all department heads, and perhaps one-third of the Legislature had no native blood. But now comes 43CFR50 proposing to create a tribe exclusively based on race. There was never a unified government ruling the entirety of the Hawaiian islands that was racially exclusionary.

If the rule is not repealed, it will remain on the books as a "sleeper" from now and forever, allowing federal recognition of a Hawaiian tribe to happen suddenly whenever a small percentage of ethnic Hawaiians might choose to satisfy the

rule's requirements and whenever a future President and DOI Secretary are Democrats.

Small percentage? It should be noted that in Census 2000 there were 401,000 people nationwide who checked the box as having "Native Hawaiian" ancestry, while in Census 2010 there were 527,000 of them. According to 43CFR50, all of them nationwide are eligible to join the Hawaiian tribe. A reasonable extrapolation of the population growth to the end of 2016 would put the number of "Native Hawaiians" at 600,000. The DOI rule would allow federal recognition to be granted if as few as 30,000 of them vote yes in a referendum -- small percentage indeed! (five percent). A special provision says the 30,000 must include at least 9,000 who have at least 50% Hawaiian native blood quantum -- which would be fifteen percent of that special subgroup estimated to contain 60,000).

FOR 124 YEARS DEMOCRATS HAVE HISTORICALLY PUSHED FOR HAWAIIAN ETHNONATIONALISM AND/OR TRIBALIST RACIAL SEPARATISM, WHILE REPUBLICANS HAVE ALWAYS SUPPORTED UNITY AND EQUALITY UNDER THE RACIALLY UNDIVIDED SOVEREIGNTY OF THE STATE OF HAWAII.

The history of Hawaii, and demands for racial entitlement programs and race-based government, have been a political football between the two political parties for 124 years. 43CFR50 is the latest Democrat attempt to arouse racial grievances and promote racial separatism in Hawaii. We are fortunate to have a Republican President and Republican Congress who can counteract this dangerous and racially divisive new regulation.

In January 1893, following the Hawaiian revolution that overthrew the monarchy, Republican U.S. President Benjamin Harrison was pleased to submit to the Senate a Treaty of Annexation offered by Hawaii's provisional revolutionary government. But in March 1893 Democrat Grover Cleveland became President, and immediately withdrew the treaty. Cleveland secretly sent a hatchet man to Honolulu to destabilize the Provisional Government and try to restore his friend, ex-queen Lili'uokalani, to the throne. In December 1893 Cleveland sent warships to conduct noisy exercises in Hawaii waters in an effort to intimidate the government, while Cleveland's diplomatic minister in Honolulu wrote a letter "ordering" Hawaii President Dole to step down and restore the ex-queen. The U.S. Senate held hearings in February 1894, in open session with sworn testimony under cross-examination, and concluded in the 808-page Morgan Report that the Hawaiian revolution had been done by a local militia without any assistance from the U.S. A Senate resolution then called

upon President Cleveland to stop interfering in Hawaiian affairs. Shortly after Cleveland's term ended, the Republic of Hawaii, formally recognized by personally signed letters from heads of state of at least 19 nations on 4 continents, once again offered a Treaty of Annexation, which newly elected Republican President William McKinley was glad to send to Congress where it was approved in summer 1898 by votes of 42-21 in the Senate and 209-91 in the House.

During the 1970s and 1980s there was a rising tide of Democrat and ethnic Hawaiian political activism in Hawaii, resulting in creation of a State of Hawaii Department of (ethnic) Hawaiian Affairs and strident demands for race-based sovereignty and for reparations for the "illegal" overthrow of the Hawaiian monarchy. Republicans fought back. From 1980-83, under Republican President Ronald Reagan and a Republican Congress, a Native Hawaiians Study Commission concluded that the U.S. had done nothing wrong during the Hawaiian revolution of 1893, and did not owe any reparations.

Is there a federal trust relationship with ethnic Hawaiians, as though they are an Indian tribe? It all depends whether the question is asked to a Democrat or a Republican! In 1979, at the end of the administration of Democrat President Jimmy Carter, Deputy Solicitor Ferguson of the Department of Interior published an Opinion on August 27, 1979 concluding that the Hawaiian Homes Commission Act of 1920 had established a federal trust relationship with ethnic Hawaiians. But on January 19, 1993, the last full day of the Republican administration of President George H.W. Bush (the elder), Thomas L. Sansonetti, Solicitor General of the Department of Interior, issued a 20-page official Opinion (Memorandum number M-36978) that there is no federal trust relationship with Native Hawaiians. On page 20 his concluding paragraph said "For the reasons discussed above, we conclude that the United States is not a trustee for native Hawaiians. We further conclude that the HHCA [Hawaiian Homes Commission Act] did not create a fiduciary responsibility in any party, the United States, the Territory of Hawaii, or the State of Hawaii. Deputy Solicitor Ferguson's opinion of August 27, 1979, is superseded and overruled to the extent that it is inconsistent with this memorandum." But later that same year, on November 15, 1993, after Democrat Bill Clinton had assembled his cabinet and subcabinet officials, the new Solicitor General of the Department of Interior, John D. Leshy, issued a one-page un-numbered Opinion formally withdrawing the Sansonetti Opinion without giving good legal reasons why. Leshy's Opinion was issued on November 15 to coincide with the joint resolution apologizing to ethnic Hawaiians for the U.S. role in the overthrow of Hawaii's monarchy, which passed the Senate on October 27, passed the House

on November 15, and was signed by President Clinton on November 23, 1993 with Hawaii's all-Democrat 2 Senators and 2 Representatives watching.

When Democrat Bill Clinton became President with a Democrat-controlled Congress, Congress passed and the President signed in 1993 an "apology resolution" for the "illegal overthrow" of 1893. Throughout Clinton's eight years in office, there was growing unhappiness among Hawaii's overwhelmingly Democrat politicians that the apology did not produce any tangible reparations. In response, toward the end of his second term President Clinton sent high officials of the U.S. Department of Interior and Department of Justice to Hawaii in December 1999 to hold "reconciliation" hearings asking ethnic Hawaiians what goodies they would like to get from the government to help compensate them for the overthrow from 106 years previously; and then on October 23, 2000, just weeks from the end of his Presidency, Bill Clinton's DOI and DOJ jointly published the propaganda book "From Mauka to Makai: The River of Justice Must Flow Freely." That report was then used as a basis for the "Native Hawaiian Government Reorganization" bill that was active in Congress from 2000 through 2012, with every Democrat in both the Senate and the House supporting the bill at every opportunity along with a few Republicans, especially the left-leaning Republican Senators from Alaska and Maine. 43CFR50 was then developed during Obama's second term and was finally proclaimed on October 14, 2016.

From 1996 to 1006 the Hawaii Advisory Committee to the U.S. Commission on Civil Rights was dominated by Democrats appointed under President Clinton. they held a hearing in Honolulu where the panel of hearing officers included three radical left Democrat commissioners from the national USCCR: Yvonne Lee, Elsie Meeks, and Cruz Reynoso. The clear purpose of the two-day forum was to orchestrate support for the Akaka bill. The title of both the forum and the report was: "Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians." The concept was: the Supreme Court decision in Rice v. Cayetano threatens to eventually dismantle the plethora of race-based programs in Hawai'i, and your Civil Rights Commission is here to help figure out what can be done to stop that from happening. Thus we see how the Hawaii Advisory Committee worked zealously against the civil rights of 80% of Hawaii's people. At every step during the appeal of Rice v. Cayetano and the development of the Akaka bill, HAC did everything in its power to influence public opinion and Supreme Court actions. A Supreme Court decision upholding the civil rights of all Hawaii's people was seen as threatening Hawaii's wall of apartheid and therefore threatening the alleged civil right of a racial group to

exercise racial supremacy. The solution proposed was to pass the Akaka bill in order to get around the Rice decision, while at the same time to support the "right" of ethnic Hawaiians to force all of Hawaii to become independent from the United States.

The "civil rights" forum was held in Honolulu on September 28-29, 2000, at Hilton Hawaiian Village. The clear purpose of the two-day forum was to orchestrate support for the Akaka bill. The title of both the forum and the report was: "Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians." The concept was: the Supreme Court decision in Rice v. Cayetano threatens to eventually dismantle the plethora of race-based programs in Hawaii, and your Civil Rights Commission is here to help figure out what can be done to stop that from happening.
Thus we see how the Hawaii Advisory Committee worked zealously against the civil rights of 80% of Hawaii's people. At every step during the appeal of Rice v. Cayetano and the development of the Akaka bill, HAC did everything in its power to influence public opinion and Supreme Court actions. A Supreme Court decision upholding the civil rights of all Hawaii's people was seen as threatening Hawaii's wall of apartheid and therefore threatening the alleged civil right of a racial group to exercise racial supremacy. The solution proposed was to pass the Akaka bill in order to get around the Rice decision, while at the same time to support the "right" of ethnic Hawaiians to force all of Hawaii to become independent from the United States. The report is no longer available on the USCCR website, but a printed copy can be ordered from USCCR. The report is, however, available as a pdf file which can be downloaded from http://www.angelfire.com/hi5/bigfiles/usccrhac0601.pdf

Secession? Did the Hawai'i Advisory Council, and by implication the U.S. Commission on Civil Rights, actually support the "right" of a racial group to force Hawaii to become independent, thereby grossly violating the civil rights of the vast majority of Hawaii citizens? Here's the evidence: About halfway down the lengthy report is the section called "Conclusions and Recommendations" (followed by footnotes that occupy the entire second half of the report). The conclusions clearly support the Akaka bill as a way to overturn the Supreme Court decision; and they also support the right of ethnic Hawaiians to force the secession of Hawaii from the United States.

"... international resolution would necessarily involve secession, a drastic endeavor over which this nation purportedly fought a civil war ... The principle of self-determination necessarily contemplates the potential choice of forms of

governance that may not be authorized by existing domestic law.[420] Whether such a structure is politically or legally possible under the law is secondary, however, to the expression of one's desire for self-determination. ..."

"1. The federal government should accelerate efforts to formalize the political relationship between Native Hawaiians and the United States. This recommendation can be accomplished through the formal and direct recognition by Congress of the United States' responsibilities toward Native Hawaiians, by virtue of the unique political history between the United States and the former Kingdom of Hawaii....[T]he Advisory Committee requests that the U.S. Commission on Civil Rights urge Congress to pass legislation formally recognizing the political status of Native Hawaiians." ...

"4. International solutions should be explored as alternatives to the recognition of a Native Hawaiian governing entity.
"The Hawaii Advisory Committee recognizes that the sentiment for an international resolution to restore a sovereign Hawaiian entity is beyond the immediate scope and power of the U.S. Commission on Civil Rights. Nevertheless, that limitation does not preclude the United States from exploring such alternatives as a part of the reconciliation process that the United States committed to pursue in the 1993 Apology Resolution. ... Accordingly, the United States should give due consideration to re-inscribing Hawaii on the United Nations' list of non-self-governing territories, among other possibilities. ...
"The Hawaii Advisory Committee is fully cognizant of the concern expressed by some that international resolution would necessarily involve secession, a drastic endeavor over which this nation purportedly fought a civil war. However, this view ignores the troubled and racist roots of our nation's history. The Civil War was at its core a conflict over the issue of slavery. Moreover, the Civil War Amendments and Civil Rights Acts, upon which the plaintiff in Rice based his claims, were supposed to effect a reconstruction of American society through equality for African Americans.
"The principle of self-determination necessarily contemplates the potential choice of forms of governance that may not be authorized by existing domestic law.[420] Whether such a structure is politically or legally possible under the law is secondary, however, to the expression of one's desire for self-determination. The important proposition is that those who would choose to swear their allegiance to a restored sovereign Hawaiian entity be given that choice after a full and free debate with those who might prefer some form of association with the United States (including, perhaps, the status quo)....

"Those supervising the reconciliation process should provide for an open, free, and democratic plebiscite on all potential options by which Native Hawaiians might express their inherent right to self-determination. The process should allow for international oversight by nonaligned observers of international repute. After a period for organization of that government, the federal government should engage in negotiations with the sovereign Hawaiian entity."

The U.S. Department of Interior, of course, cannot endorse any recommendation for secession of the entirety of Hawaii from the United States. Therefore 43CFR50 provides a process under U.S. law to assist ethnic Hawaiians to become a federally recognized tribe, which was envisioned in the Hawaii Advisory Committee report.

However, the proposed constitution for the Hawaiian tribe, approved by a monthlong meeting of unelected delegates in February 2016, includes shocking language that not only asserts the right to ethnic Hawaiian racial supremacy over all the lands and waters and people of the entire Hawaii archipelago but also asserts a right to pursue total independence from the U.S. for the entire archipelago -- exactly as recommended by the Hawaii Advisory Committee. Right up front in your face, the preamble says "we join together to affirm a government of, by, and for Native Hawaiian people" [i.e., of the race, by the race, and for the race], and "affirm our ancestral [i.e., race-based] rights and Kuleana to all lands, waters, and resources of our islands and surrounding seas." [i.e., we're gonna take over the whole place, just like Kamehameha did, who was known as "Ka Na'i Aupuni" -- the conqueror.] "We reaffirm the National Sovereignty of the Nation. We reserve all rights to Sovereignty and Self-determination, including the pursuit of independence. Our highest aspirations are set upon the promise of our unity and this Constitution."

The process leading to the creation of the proposed tribal constitution was the result of legislation passed by the legislature of the State of Hawaii authorizing creation of a racial registry. It must be noted that the Hawaii legislature has been dominated by Democrats for several decades -- in 2017 there are 25 state Senators, all 25 being Democrats; and there are 51 Representatives in the state House, 45 of whom are Democrats; and a Democrat Governor.

REFERENCES

There are numerous footnotes documenting all the main points in two lengthy, detailed testimonies by Kenneth Conklin provided during the two rounds of

comments to the Department of Interior Advance Notice, and then Notice, of Proposed Rulemaking leading up to 43CFR50.

Advance notice of proposed rulemaking
Testimony regarding RIN 1090–AB05 (Regulation Identifier Number)
Procedures for Reestablishing a Government-to-Government Relationship With the Native Hawaiian Community
100 pages, August 15, 2014
Table of contents for 14 sections is on pp. 4-7.
http://big09.angelfire.com/
ConklinTestmnyDOI081514RulesChangeHawnTribe.pdf

Notice of proposed rule
Testimony regarding RIN 1090–AB05 (Regulation Identifier Number)
"Procedures for Reestablishing a Government-to-Government Relationship With the Native Hawaiian Community"
134 pages, November 26, 2015
Table of contents for 19 sections is on pp. 2-7.
http://big09.angelfire.com/NPRM100115Conklin112615.pdf

Book: "Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State"
http://tinyurl.com/2a9fqa

Website: "Hawaiian Sovereignty: Thinking Carefully About It"
http://tinyurl.com/6gkzk

Here is the Final Rule as published by the Department of Interior in the Federal Register on October 14, 2016, pp. 71278-71323. This rule is effective November 14, 2016, 30 days after publication in the Federal Register. The lengthy preamble provides an explanation of how the rule allegedly responds to various comments or criticisms made during a public comment period, while the actual rule itself begins on page 71318.
43 CFR 50 "Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community"
In a format that is easy to read, 43 CFR 50 is at
http://tinyurl.com/jyvdbwg
To see the rule as it was actually formatted in the Federal Register, go to
http://tinyurl.com/znjgwkr

September 16, 2013: 4 of the 8 members of the U.S. Commission on Civil Rights jointly wrote a strongly-worded 5-page letter to President Obama opposing any attempt to use executive action to give federal recognition to a Hawaiian tribe. The letter reiterated reasons for opposing the concept of the Akaka bill, expressed in official statements by USCCR in previous years, and added objections to the new concept of using executive authority to do what Congress has rejected for 13 years. The USCCR letter, dated September 16, 2013 on official letterhead and bearing the signatures of the 4 Commissioners, can be seen at
http://tinyurl.com/nnqtnvt

There is important testimony against the U.S. Department of Interior proposed regulation for federal recognition of a phony Hawaiian tribe. Testimony was submitted regarding the Preliminary Notice of Proposed Rulemaking, and also regarding the revised Notice of Proposed Rulemaking. See especially detailed testimony by Judicial Watch; Hans A. von Spakovsky (Heritage Foundation); Kenneth Conklin, Ph.D.; John Breitmeier; Grassroot Institute of Hawaii; Paul M. Sullivan, and others.
http://tinyurl.com/zvrtxfd

DURING THE YEARS 2000-2012 THE HAWAIIAN GOVERNMENT REORGANIZATION BILL (AKAKA BILL) WAS ACTIVE IN BOTH CHAMBERS OF CONGRESS, AND DURING 2013-2014 THERE WERE ACTIONS IN THE HAWAII LEGISLATURE LEADING UP TO 43 CFR 50. THERE WERE HUNDREDS OF PUBLISHED ARTICLES AND TESTIMONY ABOUT IT BY CIVIL RIGHTS EXPERTS, REPUBLICANS, CONSERVATIVE COMMENTATORS, SENATORS AND CONGRESSIONAL REPRESENTATIVES. Numerous links are provided below to the author names and full text of the most important published commentaries on both the failed Akaka bill and the recently adopted DOI rule.
AN INDEX FOR YEARS 2000 - 2014 IS AT
http://tinyurl.com/5eflp

White House formal statement on official stationery, October 22, 2007:
http://tinyurl.com/34ws68
"The Administration strongly opposes passage of H.R. 505. As the U.S. Civil Rights Commission recently noted, this legislation "would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege." The President has eschewed such divisive legislation as a matter of policy, noting that "we must ... honor the great American tradition of the melting pot, which has made us one nation out of many peoples." This bill would reverse this great American

tradition and divide the governing institutions of this country by race. If H.R. 505 were presented to the President, his senior advisors would recommend that he veto the bill. H.R. 505 would grant broad governmental powers to a racially-defined group of "Native Hawaiians" to include all living descendents of the original, Polynesian inhabitants of what is now modern-day Hawaii. Members of this class need not have any geographic, political, or cultural connection to Hawaii, much less to some discrete Native Hawaiian community. Proponents of the bill seek to analogize Native Hawaiians to members of existing Indian tribes. As one Federal court recently explained, however, "the history of the indigenous Hawaiians ... is fundamentally different from that of indigenous groups and federally-recognized Indian Tribes in the continental United States." Closely related to those policy concerns, H.R. 505 raises significant constitutional concerns that arise anytime legislation seeks to separate American citizens into race-related classifications rather than according to their own merits and essential qualities. In the particular context of Native Hawaiians, the Supreme Court has invalidated state legislation containing similar race-based qualifications for participation in Native Hawaiian governing entities and programs. Given the substantial historical and cultural differences between Native Hawaiians as a group and members of federally recognized Indian tribes, the Administration believes that tribal recognition is inappropriate and unwise for Native Hawaiians and would raise serious constitutional concerns. The Administration strongly opposes any bill that would formally divide sovereign United States power along suspect lines of race and ethnicity."

In January 2006 the U.S. Commission on Civil Rights held a hearing on the Akaka bill at its Washington D.C. headquarters. Two supporters and two opponents presented testimony with cross-examination by Commissioners. In May the Commission issued its booklet-length report opposing the Akaka bill. "The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 2005, 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." The complete report approved by a 5-2 vote including the controversial "findings", and some news reports and commentaries, are at http://tinyurl.com/ocap3

August 28, 2009: U.S. Commission on Civil Rights letter to Congressional leaders once again blasted the Akaka bill: calling it unconstitutional, racially divisive, setting a bad precedent, and contrary to the multiracial polity of the Hawaiian Kingdom. On official stationery signed by Commissioners. http://tinyurl.com/kqt39k

Letter from James Sensenbrenner, Chairman of House Judiciary Committee, to Speaker Dennis Hastert, July 19, 2001
http://tinyurl.com/49p55

History of the Akaka Bill July 17-31, 2005 -- intense activity in the Senate, including new holds by 6 Senators, resulted in cloture petition; House Judiciary subcommittee hearing on the bill's (un)constitutionality
http://tinyurl.com/jjneo9f

Tuesday July 19, 2005 a hearing on the Akaka bill's (un)constitutionality was held by the U.S. House of Representatives Committee on Judiciary, subcommittee on the Constitution. Senator Kyl took the very unusual step of a Senator submitting his own testimony to that House subcommittee. Senator Kyl's 14-page testimony opposing the Akaka bill can be downloaded from:
http://tinyurl.com/bdayp
A webpage about the House Judiciary subcommittee hearing including the Chairman's own summary is available at:
http://tinyurl.com/c3kg9

Hans A. von Spakovsky, Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. LEGAL MEMORANDUM No. 136
August 18, 2014
The Obama Administration's Attempt to Balkanize Hawaii
http://thf_media.s3.amazonaws.com/2014/pdf/LM136.pdf

Bruce Fein [Constitutional law expert] -- 3 published articles opposing Akaka bill inserted into Congressional Record by Senator Kyl on March 17, 2005 as Senator Kyl reaffirms his opposition to the bill
http://tinyurl.com/65waz

National Review (Online) on November 28, 2016
Midnight Regulations in Paradise
by Ilya Shapiro, a senior research fellow at Cato Institute
http://www.nationalreview.com/article/442496/native-hawaiian-government-race-based-violation- equal-protection

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Here is full text of two speeches by Senator Cornyn (R,TX) given on the Senate floor on June 7 and 8 of 2006, copied from the Congressional Record:

1. NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005--MOTION TO PROCEED -- (Senate - June 07, 2006)
[Page: S5574]
The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I rise to speak on this bill with some trepidation, because, as I heard the Senator from Tennessee say earlier as I was watching the debate from my office, everyone in this Chamber has enormous respect and affection for the Senator from Hawaii. We understand how important this issue is to him and believe he is making his arguments in the best of faith.
I must say, though, that it is staggering to me to think of how important the issues are that underlie this bill. This is not a bill which just affects the State of the Senators from Hawaii; this is a bill which would potentially affect what it means to be an American.

One of the defining characteristics of this great country in which we live is that no matter where we come from, no matter what our ethnic or racial heritage might be, no matter where we were raised, once we pledged allegiance to the United States of America, we became an American, someone who believes in the ideal of America's values, including equal justice under the law. So the very concept that people would be treated differently based upon whether they are Native Hawaiians or whether they came from Ireland or whether they are some other ethnic or racial group is anathema to what it means to be an American.

This bill, it has been observed, would create a race-based and racially separate government for Native Hawaiians. It has been observed by the U.S. Supreme Court in the year 2000 in the Rice v. Cayetano lawsuit that this legislation is actually addressed to limit participation in a government based on one's consanguinity or bloodline, is in effect a proxy for race. What we are talking about is participating in the benefits of being a Native Hawaiian based upon race and racial differences rather than saying to anyone and everyone that America remains a nation where anyone and everyone, based upon their hard work, based upon their willingness to try to accomplish the most they can with the freedoms that we are given--it is totally in contradiction to that goal and that aspiration we have for all Americans.

It is important to address some of the specific allegations that have been made.

First of all, this is equivalent to creating an Indian tribe. The State of Hawaii has stated in court, in 1985, the tribal concept has no place in the context of Hawaiian history.
In the Rice v. Cayetano case, the brief said that for Indians, the formerly independent sovereignty that governed them was for the tribe, but for the Native Hawaiians, their formally independent sovereign nation was the kingdom of Hawaii, not any particular tribe or equivalent political entity. The tribal concept, the brief went on to say, on behalf of the State of Hawaii, the tribal concept simply has no place in the context of Hawaiian history.

If we think about that, it is clear Native Hawaiians, if they are going to be identified based upon having Native Hawaiian blood, do not live on a reservation or any geographically discrete plot of land. Indeed, they are dispersed throughout Hawaii and throughout the Nation. The only defining characteristic is whether an individual has any Native Hawaiian blood.

It is completely different from Indian tribes which were, at the time of the founding of this Nation, sovereign entities unto themselves, so it was entirely appropriate that the Government
negotiated relationships with those existing sovereign entities, the Indian tribes, as they exist even today.

But to say today, in 2006, we all of a sudden are going to identify some 400,000 Native Hawaiians wherever they may live in Hawaii and elsewhere and create a tribe, or a tribe equivalent, out of thin air has simply no counterpart in the way the Indian tribes are created. And, indeed, as the State of Hawaii has said for itself, the tribal concept simply has no place in the context of Hawaiian history.

As to the goals and the aspirations of this particular legislation, it is clear this bill lays down some rudimentary, I would say early, steps in the recognition of a political governing body. But as to the goals of this legislation and the supporters of this legislation, the Office of Hawaiian Affairs acknowledges what the goals are under the Akaka bill. It says: The Native Hawaiian people may exercise their right to self-determination by selecting another form of government, including free association or total independence.

The concept of any people within the confines of the United States claiming their total independence is not unknown to our Nation's history. Six hundred thousand people died in a civil war, claiming a right to independence from the

Union. There has been much bloodshed, many lives lost, to preserve this great Union that we call the United States of America.

When I say this seemingly innocuous legislation raises profound issues that affect who we are as a Nation and what we will be as a Nation, I mean that in all sincerity. This legislation would be a serious step backward for our Nation and could not be any further from the American ideal.
From the beginning, Americans have been a people bound together not by blood or ancestry but rather by a set of ideas. These ideas are familiar to all of us: liberty, democracy, freedom, and most of all, equal justice under the law. These are the ideas that unite all Americans. They are ideas that have literally changed the course of human events.

No longer are the greatest civilizations in the world recognized or measured by how many subjects bow before a king or how many nations are conquered by armies. Today, we measure greatness of a nation to the extent that the nation's people are recognized as equal under the law. This is enshrined in our most basic documents. Thomas Jefferson's Declaration of Independence, stating "that all men are created equal."

But we know too well that those are words on paper. The long road to equality, on which we most certainly continue to travel and which continues to be a work in progress, has been costly to our Nation. As I mentioned a moment ago, it has been paid for with the blood of hundreds of thousands of American patriots. Unfortunately, the signposts along the way have been too often marked by violence and bigotry when we have seen Americans pitted against other Americans claiming special status because of the color of their skin or because of their relationships.
Today, however, America stands as a shining example of what happens when people set the ideal in their mind as the goal to work forward. As Justice Harlan noted in his classic dissent in the case Plessy v. Ferguson: [O]ur Constitution is color-blind, and knows neither nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

While it certainly took far too long in our own Nation's history to embrace the truth of Justice Harlan's position, and we certainly have more to do as a work in progress ourselves, America has made significant progress toward equality. Unfortunately, this bill -- whatever good the intentions may be, and I grant those without any argument -- the bill threatens to undermine all of the progress we have made by establishing a race-based government and requiring the Federal Government enforce its creation.

There are the bill sponsors, the Governor of Hawaii, and the Attorney General, who argue that the bill does not establish a race-based government. Indeed, they say that the bill neither further balkanizes the United States nor sets up a race-based separate government in Hawaii.

With all due respect, a plain reading of the legislation indicates otherwise. The bill clearly states that only Native Hawaiians can participate in the newly established community, period. And a Native Hawaiian is defined in part as "[o]ne of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous native people."

[Page: S5575]
But perhaps the most troubling description of the bill comes from our friends, the Senators from Hawaii:
".... the first step is to create a list of Native Hawaiians eligible ..... The individuals on the list will be verified by a commission of individuals in Hawaii with demonstrated expertise and knowledge in Hawaiian genealogy. The list will be forwarded to the Secretary of the Department of Interior who is authorized to certify the list only if the Secretary is fully satisfied that the individuals meet the necessary criteria."

In other words, the legislation requires that the Federal Government hire Federal employees to serve on a race-based commission that itself would use a racial test to determine membership in the race-based so-called tribe.

I ask my colleagues to explain to me how this does not "set up a race-based separate government in Hawaii." It seems that if words have any meaning, the truth is plain to see that it does, indeed, establish a race-based system without precedent in American history.

What concerns me even more is that the proponents claim the legislation will not balkanize the United States. But this claim virtually ignores the entirety of our Nation's long and historic struggle over issues of race from slavery to Jim Crow laws and beyond, laws and policies that define our people based on race are bound to ultimately fail.

Furthermore, by claiming to create an analogy to an Indian tribe out of Native Hawaiians scattered across the planet, Congress will be giving the new government some of the same benefits as other Indian tribes. Yet the new government will operate at a very different environment with no geographic

boundaries nor physical communities. The people who may be confirmed as Native Hawaiians are completely integrated with all others throughout Hawaii and throughout the 50 States. Developing this government will create a large number of structural and practical difficulties that one can only imagine.

Since time is short today, and it is my sincere hope that our colleagues will vote against cloture on this bill, I will reserve additional comments for a later time.

I conclude by saying this is an idea that runs completely counter to America as a melting pot, which has been so often used to describe our Nation as a Nation that is comprised of many races and many ethnicities, people of wildly divergent beliefs. But the one thing we do agree on is the founding ideals that have made America unique, none of which is more important than equal justice under the law. If we are to embrace for the first time in American history, as a matter of our legislative actions, race-based distinctions for Americans, it will be a day we will long rue and will be a black mark in our Nation's long march toward equal justice.

I yield the floor.

2. NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005--MOTION TO PROCEED -- (Senate - June 08, 2006)
[Page: S5632]

Mr. CORNYN. Mr. President, how much time remains on our side of the aisle?
The PRESIDING OFFICER. Twenty-one minutes.
Mr. CORNYN. I ask unanimous consent that I be allotted 10 minutes out of that time. The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CORNYN. Mr. President, yesterday, when I came to the floor and spoke on this legislation -- the so-called Native Hawaiian legislation -- I indicated that I had profound concerns about the constitutionality of the bill. I might add that it is not sufficient for Members of Congress to say that the courts will clean up the mess after we pass the bill. Indeed, it is our responsibility to uphold and defend the Constitution as Members of the Senate.

Yesterday, we heard a few hours of discussion from both those who support and those who oppose the bill. I have made no secret of my opposition. Simply put, I cannot and I will not support a bill the purpose of which is to divide America and is based upon race, and which is clearly contrary to our fundamental American principle of equal justice under the law.

The bill would create a separate race-based government for Native Hawaiians to the exclusion of all other Americans. And because of its very focus on race, the legislation creates particularly troublesome constitutional problems. In fact, it appears to be designed to be an end-run around the U.S. Supreme Court decision in the year 2000, in Rice v. Cayetano, a Ninth Circuit Court of Appeals decision which has struck down the practice of segmenting Hawaiians based upon race. I mentioned the 2000 decision in Rice v. Cayetano. That was a 7-to-2 decision which struck down the ancestry requirements for voting for the Office of Native Hawaiian Affairs trustee elections. The Court found that because ancestry was a proxy for race and the election was an affair of the State, it was in violation of the Constitution, and particularly the 15th amendment to the Constitution.

Justice Kennedy, writing for the majority, makes clear why the very purpose of S.147 creates broad constitutional concerns: "One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens."

Some say this bill simply equates Native Hawaiians to Indian tribes. But Congress cannot simply and arbitrarily create Indian tribes where they don't exist. The Constitution does not authorize Congress to make Indian tribes out of subsets of Americans who have no relationship whatsoever to an Indian tribe. The Supreme Court has been clear that Congress may not insulate a program from the Constitution's strict scrutiny for legal distinctions based upon race by "bring[ing] a community or body of people within the range of this [congressional] power by arbitrarily calling them an Indian tribe."

In addition, the 14th amendment precludes the use of race in making appointments -- something clearly contemplated by this bill. This bill perhaps most clearly raises constitutional concerns in its direct contravention of the Supreme Court ruling in Rice. The legislation would require that the Department of the Interior manage a special election in which eligibility depends entirely on race. As I have pointed out before, the Court made clear that racial restrictions relating to Native Hawaiians is prohibited by the 15th amendment.

In summary, in its attempt to pigeonhole Native Hawaiians as equivalent to an Indian tribe and to create a governmental entity based entirely on race, S.147 runs counter to the express letter and certainly the spirit of the Constitution.

Unfortunately, despite these clear constitutional problems, it seems that some in the Senate are content to acquiesce -- to accept passing an unconstitutional bill, while passing the buck to the courts to bail us out. Yet just 2 days ago, my colleagues on the other side of the aisle were talking about what they thought was "wasting time" on defending marriage, a basic institution -- perhaps the most basic institution -- in our society.
And yet they are willing to spend a week debating a measure that has little chance of passing and that flies squarely in the face of the Constitution. I find these inconsistencies difficult to reconcile.
The sponsors of this legislation last year wrote a Dear Colleague letter that suggests that any constitutional inquiries should be left to the courts, the implication of which is Congress should not concern itself with the bill's constitutionality. I could not disagree more.

When I came to Washington, I, like the rest of my colleagues, swore an oath to defend and uphold the Constitution of the United States. That pledge is non-negotiable and does not allow,
much less require, me or any Member of the Senate to defer our obligations to pass legislation that reasonably appears to be within the four corners of the United States Constitution.

Congress is required to uphold the Constitution, as are judges. More importantly, it is imperative that we pass legislation that furthers the principles of the Constitution rather than dissolve them. A constitutional commitment to equal justice for all would be undermined should we choose today to endorse the creation of a race-based government. This is not a question that should be passed off to the courts. We should decide right here and right now.

I urge my colleagues to vote against cloture on the motion to proceed. If they are serious about working on issues that really matter, I urge them to allow the Senate to move on to consider other pressing business.

I yield the floor.