

Dissenting Statement of Commissioner Arlan D. Melendez ***Commissioner Michael J. Yaki joins in this dissent.***

In 1893, shortly after becoming President, Grover Cleveland appointed a special envoy to Hawai'i, James Blount, to investigate the circumstances of the overthrow of the indigenous Hawaiian government and the standing of the Provisional Government. Blount delivered a report to President Cleveland later that year finding that representatives of the United States had abused their authority and their participation in the overthrow was responsible for its success.

On the basis of this report, President Cleveland declared that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair," and called for the restoration of the Hawaiian monarchy. The Senate Foreign Relations Committee, at the behest of the Provisional Government, also investigated the role of the U.S. in the overthrow. The Committee held a series of hearings in which representatives of the Provisional Government were given unfettered access to the process in order to justify and obscure their role and that of the U.S., in what President Cleveland referred to as "an act of war..." against the sovereign Hawaiian nation. The Committee Chair issued his opinion exonerating the U.S. of wrongdoing (now known as the Morgan report), blaming the overthrow on the Native Hawaiian monarch. No other committee members signed the Chair's opinion and four members of the committee vigorously dissented, finding that the diplomatic and military might of the U.S. was misused to overthrow the government of the Hawaiian people.

The Apology Resolution approved by Congress in 1993 (attached) officially adopts the accurate account of the overthrow of Hawaii presented in the Blount report and repudiates the Morgan Report. Once again the United States government has acknowledged that an injustice has been committed that "our national character... requires we should endeavor to repair" and is considering legislation that would set in motion the process of repairing the illegal actions committed by the United States over 100 years ago. Yet, the Commission recommends that Congress should not pass this legislation. Because I believe that with today's action the Commission has become a 21st century Morgan Report, I respectfully dissent.

Discussion

I fear that the Commission has lost sight of the bigger picture in making its recommendation. There is much more at stake in this debate than the passage of a particular bill or how Congress remedies the injustice perpetrated against the Native Hawaiian government. The crux of the issue before us, as I see it, is whether the United States government has a moral obligation and the requisite legal authority, to rectify a wrong it has committed. It is inconceivable to me to suggest that the United States government lacks the legal authority to choose to right a wrong that it admits responsibility for, but this seems to be what some of the opponents of this legislation suggest. Justice and fundamental fairness dictate that the federal government must have this power. To argue otherwise is a perversion of the principles and values that underpin our democracy that I simply cannot abide.

Moreover, I believe there is a moral imperative for the federal government to attempt to make amends for the injustices it has committed. I disagree with the sentiment suggested by several of my colleagues that even if Congress has the power to re-recognize the Native Hawaiian government, to do so would be ill-advised. To echo President Cleveland, I believe our national character requires that we endeavor to repair the wrong we have committed.

The Apology Resolution passed by Congress in 1993 acknowledges that an injustice was perpetrated against the Native Hawaiian government by the United States, and there is real value in the fact of this acknowledgement. An apology implies, however, that there is also a concomitant will to address the ramifications of that injustice. There is a lot of unfinished business that must be attended to before true reconciliation between the United States and the Native Hawaiians can be achieved. For the Apology Resolution to be more than hollow words on paper, Congress must take the next step forward in this reconciliation process. I commend the sponsors and supporters of S. 147 for their efforts to do the right thing.

Turning to the specific remedy Congress has chosen—establishing a process for the reorganization of the indigenous Hawaiian government—I believe that the integrity of the Commission’s recommendation would be better served by a rigorous analysis of the principles of federal law that inform the various legislative enactments of the Congress extending federal recognition to certain other groups of indigenous peoples within the United States. In the more than 200 years that the federal government has been dealing with the indigenous peoples of this land, a robust and complex body of law has developed that should inform the Commission’s consideration of S. 147. To suggest that Native Hawaiians are situated in some way that is fundamentally different than American Indians and Alaska Natives, and that therefore these principles do not apply, flies in the face of reason and common sense.

Like the other indigenous peoples of the United States, the Native Hawaiians have a history that long pre-dates discovery of their lands by Westerners. Like American Indians and Alaska Natives, Native Hawaiians have experienced a long history of destructive federal policies aimed at eroding their land base, culture, governmental authority, and economies. But, like American Indians and Alaska Natives, the Native Hawaiian culture and community has survived this terrible history, and it is long past time that their right to self-determination be given full effect.

The unique legal and political relationship that indigenous peoples have with the United States is based on our status as aboriginal people with pre-existing governments with whom the U.S. entered treaties and other agreements. It is this historical, political reality that provides the foundation for the unique relationship that has always existed—and continues to exist today—between the United States and the indigenous people whose homelands fall within the borders of the United States.

The principles of federal law that apply to Congressional efforts to address the conditions of the indigenous peoples of the United States have their origin in the U.S. Constitution. One source of such constitutional authority is found in Article I, section 8, clause 3 of the Constitution which provides that, “the Congress shall have the authority to regulate commerce with the several States, foreign nations, and the Indian tribes.”

The courts have described Congress's power over Indian affairs as "plenary and exclusive."³² In one of its most recent rulings, the U.S. Supreme Court has described the dynamic nature of Congress' constitutional authority in the field of Native affairs in this manner, "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time," and "such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty."³³

As, over the course of our history, the term "Indians" has been used to describe the indigenous people encountered in geographic areas of the continental United States beyond the original thirteen states that were parties to the first Constitution, including the indigenous native people of Alaska and Hawaii, it is both important and relevant to revisit the origins of this term.

Historical documents and dictionaries make clear that the terms "Indians" and "Indian tribe" were terms derived from commonly-used European parlance which sought to describe the aboriginal, indigenous native people of the various nation states around the world as early as the 1500s. These were never words that the indigenous peoples applied to themselves. The debates of the Continental Congress and the written discourse amongst the Framers of the Constitution as it relates to this provision of the Constitution use the terms "Indians" and "Indian tribes" interchangeably, and it was only in the last draft of the Constitution that emerged from the conference that the term "Indian tribes" was ultimately adopted.

Understanding what is encompassed in these terms is significant for constitutional purposes, because they describe the scope of Congress' authority to enact legislation affecting America's indigenous peoples, notwithstanding the fact that the Congress has from time to time chosen to define the indigenous, native people of the United States by reference to blood quantum or race.³⁴ And with reference to the issue of the use of blood quantum or race, it is Congress' constitutional authority under the Indian Commerce Clause that has led the Supreme Court to draw a legal distinction between laws enacted for the benefit of America's indigenous, native people and assertions that such laws, such as an Indian employment preference law, constitute racial discrimination. In the landmark case, *Morton v. Mancari*,³⁵ the U.S. Supreme Court observed:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government towards the Indians would be jeopardized.

32 *United States v. Lara*, 541 U.S. 193, 200 (2004).

33 *United States v. Lara*, 541 U.S. 193, 200 (2004).

34 Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*

35 417 U.S. 535, 94 S. Ct. 2474, 41 L.Ed.2d 290 (1974).

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique status is of long standing....and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

It is within this legal framework that the Congress has enacted legislation to extend federal recognition to various groups of America's indigenous peoples. As Professors Viet Dinh and Christopher Bartolomucci observed in their testimony submitted to the Commission for its January 20, 2006, briefing on S. 147, the U.S. Supreme Court has sustained this exercise of Congress's constitutional authority most recently in 2004 when it –

recognized Congress' power to restore previously extinguished sovereign relations with Indian tribes. The Court observed that 'Congress has restored previously extinguished tribal status – by re-recognizing a Tribe whose tribal existence it previously had terminated.' *Id.* (citing Congress' restoration of the Menominee Tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress' power "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State."³⁶

The argument that recognition of a Native Hawaiian governing entity would discriminate on the basis of race conflicts with the long-standing principles of federal law concerning the relationship between the United States government's and the indigenous peoples who have inhabited this land from time immemorial—a relationship that has long been recognized by Congress, the federal courts, and the Executive branch. Those making this argument are suggesting that Native Hawaiians should, and indeed must, be treated differently from the other indigenous peoples residing in what is now the United States. S. 147 is intended to establish parity for Native Hawaiians with the other indigenous peoples of America. Those who invoke the equal protection or due process clauses of the Constitution to oppose this legislation are using the very cornerstones of justice and fairness in our democracy to deny equal treatment to one group of indigenous people.

Specific Concerns

I would also like to address some of the specific concerns that were raised by Commissioners at the briefing and during our subsequent discussions.

Constitutional Protections

In the dialogue that took place between Commissioners and those presenting testimony on S. 147 in the January 20, 2006 briefing, there were questions posed with regard to the civil

³⁶ *Lara*, 124 S. Ct. at 205.

rights protections that would be afforded by a Native Hawaiian government to its citizens and to others, be they Native Hawaiian or non-Hawaiian, who voluntarily consent to the jurisdiction of the Native Hawaiian government. In this regard, I believe that it is important to understand, as several of the witnesses testified, that the provisions of the U.S. Constitution, including those protections of the amendments to the U.S. Constitution, apply to all acts of the Congress.

Because federal law recognizes Indian tribes as sovereigns that pre-existed the formation of the United States and the U.S. Supreme Court has affirmed that the Indian tribes as sovereigns were not parties to the U.S. Constitution, Congress has enacted laws to extend the protections of many of the Constitution's guarantees to Indian tribes.

In contrast, there is no provision of S. 147 that exempts the Native Hawaiian government from the U.S. Constitution, and thus, the Native Hawaiian government must accord to all who come under the jurisdiction of the Native Hawaiian government all the protections and guarantees of the U.S. Constitution. In certifying that the organic governing documents of the Native Hawaiian government are consistent with applicable federal law, the Secretary of the Interior is required to assure that the organic governing documents are consistent with not only federal statutes but the protections and guarantees of the U.S. Constitution.

Federal Regulations

Over the course of the Commission's deliberations, the suggestion was raised that Native Hawaiians should be required to use the Bureau of Indian Affairs regulatory process for seeking recognition. I would like to clarify that the recognition criteria established by regulation, however, represent only one way that a tribe can seek federal recognition. Tribes have also been recognized by legislation, executive order, and by court decisions. The Indian Commerce Clause gives Congress the authority to recognize groups of Indians as tribes. This Congressional power has been delegated to the Executive branch to take actions consistent with this recognition and it is pursuant to this authority that the recognition criteria mentioned were developed.³⁷ Clearly, since delegated congressional power provides the basis for the regulatory recognition criteria, Congress retains the power to recognize tribes outside of these criteria as well.

Congress has done just that with regard to certain groups of indigenous, native people of the United States who are not eligible to participate in the federal agency regulatory process— in some instances because the federal recognition of the native group was terminated by action of the Congress, or in other instances, because the native group does not reside within the continental United States. The Native Hawaiian people are a group who come within this latter category. They must pursue the federal recognition of their sovereignty, as given expression through the reorganization of a Native government, through Congressional action, because they are not eligible to participate in the federal regulatory process, by the express terms of the regulations.

37 Felix Cohen's Handbook of Federal Indian Law, Sec. 3.02[4] (2005 ed.).

Substitute Amendment

Because the Commission's recommendation is tied to the amendment in the nature of a substitute to S. 147 that was reported by the Senate Indian Affairs Committee on March 9, 2006, it fails to take into consideration the outcome of negotiations that were conducted with representatives of the White House Office of Management and Budget, the Department of Justice and the State of Hawaii and which resulted in further amendments to S. 147.

At its January 20, 2006 briefing, a copy of the substitute amendment to S. 147 containing the negotiated amendments to the bill was provided to the Commissioners by Noe Kalipi, who serves as the Minority Staff Director of the Senate Committee on Veterans Affairs for Senator Akaka and who provided testimony to the Commission at the January 20, 2006 briefing.

Despite the fact that Ms. Kalipi explained that it would be this substitute amendment that would be the subject of the Senate's consideration when S. 147 is taken up in the Senate, the Commissioners voted to base the Commission's recommendation on an earlier, and now superseded version of the bill. Given the participation of representatives of the White House, the Justice Department, and the State of Hawaii in developing the provisions of the substitute amendment, it is my view that the integrity of the Commission's report would have been better served by basing the Commission's finding on the substitute amendment to S. 147.

Other Groups

During the Commission briefing, the question was raised whether groups of illegal or legal immigrants or their descendants with a shared ethnicity, or even a religious group, would be able to claim to be indigenous people and seek special rights. This slippery slope argument is unfounded. Any of these unnamed groups could attempt to seek self-governance rights at any time, regardless of passage of this bill. However, there are a finite number of indigenous groups whose homelands are now within the boundaries of the United States, and it would be impossible for any other racial or ethnic group to fit within the authority given to Congress in the Indian Commerce Clause.

Existence of Native Governments

While the Commission's recommendation against passage of S. 147 suggests that the Native Hawaiian Government Reorganization Act falls within the category of 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," I find no evidence in any of the provisions of S. 147 that would support such a conclusion. Nor am I aware of any research into or documentation of Congressional intent that has been undertaken by the Commission that would lend support to the notion that the bill is intended to subdivide discrete subgroups accorded varying degrees of privilege. In fact, I can find no basis for that conclusion in the record of our briefing or subsequent submissions other than assertions of personal opinion.

I respectfully remind my colleagues that in 49 other states indigenous nations have peacefully coexisted with our neighbors for many years. I can think of no reason, nor did we hear any testimony to suggest one, why this would not also be the case in Hawaii. As a tribal leader, I am deeply troubled that the Commission recommendation could be read to suggest that the existence of Indian tribes within the federal system is somehow undesirable and should not be extended to Native Hawaiians.

Conclusion

Native Hawaiians have now suffered more than a century of injustice, and reaffirmation of the inherent Native Hawaiian right to self-governance by the federal government is long overdue. S. 147 will begin the process of righting the wrong committed by the United States against the indigenous Hawaiian government and will help to ensure the preservation of the Hawaiian culture. As President Cleveland said so long ago, I believe that once Congress acknowledged the wrong that had been committed against the Native Hawaiians, our national character compels that we attempt to right that wrong.

It is long past time for the United States to stop ignoring the historic injustices our nation has perpetrated against the indigenous peoples of the United States. If we continue down this path, our standing as a model of justice and equality for the rest of the world will be jeopardized.

For all of the above reasons, I dissent from the Commission's recommendation.