

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

Preface

As a person quite possibly with native Hawaiian blood running through his veins,¹⁴ it is quite possible to say that I cannot possibly be impartial when it comes to this issue. And, in truth, that may indeed be the fact. Nevertheless, even before my substantive objections are made known, from a process angle there were serious and substantial flaws in the methodology underlying the report.

First, the report relies upon a briefing from a grand total of four individuals, on an issue that has previously relied upon months of research and fact gathering that has led to two State Advisory Commission reports, one Department of Justice Report, and Congressional action (the “Apology Resolution”), not to mention testimony before the Congress on the NHGRA bill itself that was never incorporated into the record.

The paucity of evidence adduced is hardly the stuff upon which to make recommendations or findings. Even though the Commission, to its credit, stripped the report of all its findings for its final version, does that not itself lend strength and credence to the suggestion that the briefing was flawed from the inception? And if so flawed, how can the Commission opine so strongly upon a record that it could not even find supported now non-existent findings?

Second, aside from ignoring the volumes of research and testimony that lie elsewhere and easily available to the Commission, we ignored soliciting advice and comment from our own State Advisory Commission of Hawai’i. Over the past two decades, the Hawai’i Advisory Committee to the United States Commission on Civil Rights (“HISAC”) has examined issues relating to federal and state relations with Native Hawaiians. As early as 1991, HISAC recommended legislation confirming federal recognition of Native Hawaiians. A mere five years ago, the HISAC found that “the lack of federal recognition for native Hawaiians appears to constitute a clear case of discrimination among the native peoples found within the borders of this nation.”¹⁵ The HISAC concluded “[a]bsent explicit recognition of a Native Hawaiian governing entity, or at least a process for ultimate recognition thereof, it is clear that the civil and political rights of Native Hawaiians will continue to erode.”¹⁶ The HISAC found that “the denial of Native Hawaiian self-determination and self-governance to be a serious erosion of this group’s equal protection and human rights.”¹⁷ Echoing recommendations by the United States

14 My grandfather was born in Hana, Maui, and placed in an orphanage. The story passed down was that he was the product of a Japanese laborer on the islands and a Native Hawaiian. The orphanage records burned down some time ago, so we are unable to verify for sure whether he was half-native Hawaiian or not, but for anyone who knew or saw my grandfather, he had many Polynesian physical characteristics.

15 Hawaii Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians*, at ix (June 2001).

16 *Id.* at 49.

17 *Id.*

Departments of Justice and Interior, the HISAC “strongly recommend[ed]” that the federal government “accelerate efforts to formalize the political relationship between Native Hawaiians and the United States.”¹⁸ The HISAC’s long-standing position of support for legislation like S. 147 to protect the civil rights of native Hawaiians belies recent assertions that such legislation discriminates on the basis of race and causes further racial divide.

The HISAC could and would have been a key source of information, especially updated information, on the state of the record. To exclude them from the dialogue I believe was indefensible and a deliberate attempt to ensure that contrary views were not introduced into the record.

Third, the report as it stands now makes no sense. The lack of findings, the lack of any factual analysis, now makes the report the proverbial Emperor without clothes. The conclusion of the Commission stands without support, without backing, and will be looked upon, I believe, as irrelevant to the debate. Such is the risk one runs when scholarship and balance are lacking.

Substantively, the recommendation of the Commission cannot stand either. It is not based on facts about the political status of indigenous, Native Hawaiians; nor Native Hawaiian history and governance; or facts about existing U.S. policy and law concerning Native Hawaiians. It is a misguided attempt to start a new and destructive precedent in U.S. policy toward Native Americans. The USCCR recommendation disregards the U.S. Constitution that specifically addresses the political relationship between the U.S. and the nations of Native Americans. The USCCR disregarded facts when the choice was made not to include HISAC in the January 2006 briefing on NHGRA and not utilizing the past relevant HISAC reports concerning Native Hawaiians based on significant public hearing and facts. Spring-boarding from trick phrasing and spins offered by ill informed experts, at least one of whom has filed suit to end Native Hawaiian programs established through Congress and the state constitution, the USCCR majority recommendation is an obvious attempt to treat Native Hawaiians unfairly in order to begin the process of destroying existing U.S. policy towards Native Americans.

Facts About Indigenous Native Hawaiians, Native Hawaiian and U.S. History, and the Distinct Native Hawaiian Indigenous Political Community Today

Native Hawaiians are the indigenous people of Hawai’i, just as American Indians and Alaska Natives are the indigenous peoples of the remaining 49 states. Hawai’i is the homeland of Native Hawaiians. Over 1,200 years prior to the arrival of European explorer James Cook on the Hawaiian islands, Native Hawaiians determined their own form of governance, culture, way of life, priorities and economic system in order to cherish and protect their homelands, of which they are physically and spiritually a part. They did so continuously until the illegal overthrow of their government by agents and citizens of the U.S. government in 1893. In fact the U.S. engaged in several treaties and conventions with the Native Hawaiian government, including 1826, 1842, 1849, 1875 and 1887. Though deprived of their inherent rights to self-determination as a direct result of the illegal overthrow, coupled with subsequent efforts to terminate Native Hawaiian language, leaders, institutions and government functions, Native Hawaiians persevered

¹⁸ *Id.*

as best they could to perpetuate the distinct vestiges of their culture, institutions, homelands and government functions in order to maintain a distinct community, recognizable to each other.

Today, those living in Hawai'i recognize these aspects of the distinct, functioning Native Hawaiian political community easily. For example: the Royal Benevolent Societies established by Ali'i (Native Hawaiian chiefs and monarchs) continue to maintain certain Native Hawaiian government assigned and cultural functions; the private Ali'i Trusts, such as Kamehameha Schools, Queen Lili'uokalani Trust, Queen Emma Foundation and Lunalilo Home, joined by state government entities established for indigenous Hawaiians, including the Office of Hawaiian Affairs and the Department of Hawaiian Homelands, and Native Hawaiian Serving institutions such as Alu Like, Inc. and Queen Lili'uokalani Children's Center continue the Native Hawaiian government functions of caring for Native Hawaiian health, orphans and families, education, elders, housing economic development, governance, community wide communication and culture and arts; the resurgence of teaching and perpetuation of Native Hawaiian language and other cultural traditions; Native Hawaiian civic participation in matters important to the Native Hawaiian community are conducted extensively through Native Hawaiian organizations including the Association of Hawaiian Civic Clubs, the State Council of Hawaiian Homestead Associations, the Council for Native Hawaiian Advancement, Ka Lahui and various small groups pursuing independence; and Native Hawaiian family reunions where extended family members, young and old, gather to talk, eat, pass on family stories and history, sometimes sing and play Hawaiian music and dance hula and pass on genealogy.

Indeed, if the briefing had been as consultative with the HISAC as it could have been, there would have been testimony that, for example, the Royal Order of Kamehameha, the Hale O Na Ali'i o Hawai'i, and the Daughters of Ka'ahumanu continue to operate under principles consistent with the law of the former Kingdom of Hawai'i. There would have been testimony that these groups went "underground" due to persecution but remained very much alive during that time.¹⁹

The distinct indigenous, political community of Native Hawaiians is recognized by Congress in over 150 pieces of legislation, including the Hawaiian Homes Commission Act and the conditions of statehood. Native Hawaiians are recognized as a distinct indigenous, political community by voters of Hawai'i, as expressed in the Hawai'i state constitution.

The notion introduced by opponents to the NHGRA that the Native Hawaiians don't "fit" federal regulations governing recognition of Native American tribes because they lacked a distinct political identity or continuous functional and separate government²⁰ would ignore all the manifestations of such identity, existence, and recognition noted above.

¹⁹ Communication from Quentin Kawanakoa, former member of the Hawai'i State Advisory Committee, May 12, 2006.

²⁰ See 25 C.F.R. §83.

The NHGRA Does Not Set New Precedent in U.S.

The NHGRA is in fact a measure to establish fairness in U.S. policy towards the three groups of Native Americans of the 50 united states—American Indians, Alaska Natives and Native Hawaiians. The U.S. already provides American Indians and Alaska Natives access to a process of federal recognition, and the NHGRA does the same for Native Hawaiians based on the same constitutional and statutory standing.

I. Legal Authorities Establishing OHA/ Purpose of OHA

Hawai'i became the fiftieth state in the union in 1959 pursuant to Pub. L. No. 86-3, 73 Stat. 5 (“Admission Act”). Under this federal law, the United States granted the nascent state title to all public lands within the state, except for some lands reserved for use by the federal Government (“public lands trust”). These lands “together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State] as a public trust for the support of the public schools, . . . the conditions of native Hawaiians” and other purposes.²¹

In 1978, the multicultural residents of Hawai'i voted to amend its state Constitution to 1) establish the Office of Hawaiian Affairs (“OHA”) to “provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and . . . [to] unite Hawaiians as a people;”²² and 2) to establish the public lands trust created by the Admission Act as a constitutional obligation of the State of Hawaii to the native people.²³

The constitutional mandate for OHA was implemented in 1979 via the enactment of Chapter 10, Hawaii Revised Statutes. OHA's statutory purposes include “[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians,” conducting advocacy efforts for native Hawaiians and Hawaiians,” “[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services,” and “[s]erving as a vehicle for reparations.”²⁴ OHA administers funds derived for the most part from its statutory 20-percent share of revenues generated by the use of the public lands trust.²⁵

Several legal challenges to the existence of OHA based upon the Fourteenth Amendment to the United States Constitution have been filed by various plaintiffs, some of who are represented by Mr. Burgess. Mr. Burgess has thus far failed to win the relief he has sought, including injunctive relief, either in the United States District Court for the District of Hawaii or the United States Court of Appeals for the Ninth Circuit. The denial of injunctive relief to Mr.

21 § 5 (f), 73 Stat. 6.

22 1 Proceedings of the Constitutional Convention of Hawai'i 1978, Committee of the Whole Rep. 13, p. 1018 (1980)

23 William Burgess, who testified at the briefing, was a delegate to the 1978 Constitutional Convention, yet Mr. Burgess then voiced no opposition to the establishment of OHA. Communication of Martha Ross, Office of Hawaiian Affairs, May 2006.

24 HRS § 10-3 (4)-(6).

25 HRS § 10-13.5.

Burgess's clients presents a powerful rebuttal to their claims that OHA's administration of its constitutional and statutory obligations to native Hawaiians and Hawaiians deprives all Hawaii's citizens of equal protection of law.

Mr. Burgess describes the "driving force" behind the NHGRA as "discrimination based upon ancestry." Nothing could be further from the truth or more illogical. The "driving force" behind the creation and passage of NHGRA is the desire of the Hawaiian people, and virtually every political representative in the State of Hawaii to achieve federal recognition and legal parity with federal recognition as with the other two native indigenous peoples of America, namely American Indian Nations and Native Alaskans. There is no constitutional impediment to congressional federal recognition of the Hawaiian people.²⁶

Then-United States Solicitor John Roberts (now Chief Justice Roberts) argued in his prior legal briefs to the United States Supreme Court in *Rice v. Cayetano*: "[T]he Constitution, in short, gives Congress room to deal with the particular problems posed by the indigenous people of Hawaii and, at least when legislation is in furtherance of the obligation Congress has assumed to those people, that legislation is no more racial in nature than legislation attempting to honor the federal trust responsibility to any other indigenous people." It is, in sum, "not racial at all."

Roberts went on to say:

Congress is constitutionally empowered to deal with Hawaiians, has recognized such a "special relationship," and—"[i]n recognition of th[at] special relationship"--has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13) (emphasis added). As such, Congress has established with Hawaiians the same type of "unique legal relationship" that exists with respect to the Indian tribes who enjoy the "same rights and privileges" accorded Hawaiians under these laws. 42 U.S.C. § 11701(19). That unique legal or political status--not recognition of "tribal" status, under the latest executive transmutation of what that means--is the touchstone for application of Mancari when, as here, Congress is constitutionally empowered to treat an indigenous group as such.

NHGRA Is a Matter of Indigenous Political Status and Relationship Between the U.S. and the Native Hawaiian Government, and Not a Racial Matter.

Under the U.S. Constitution and federal law, America's indigenous, native people are recognized as groups that are not defined by race or ethnicity, but by the fact that their indigenous, native ancestors exercised sovereignty over the lands and areas that subsequently became part of the United States. It is the pre-existing sovereignty—sovereignty that pre-existed the formation of the United States—which the U.S. Constitution recognizes and, on that basis, accords a special status to America's indigenous, native people.

The tortured attempts by persons such as Mr. Burgess to distinguish Native Hawaiians from Native Americans ultimately fail by simple historical comparison. Like the Native

²⁶ See *U.S. v. Lara*, 541 U.S. 193 (2004).

Americans, the Native Hawaiians pre-dated the establishment of the United States. Like the Native Americans, the Native Hawaiians had their own culture, form of government, and distinct sense of identity. Like Native Americans, the United States stripped them of the ownership of their land and trampled over their sovereignty. The only distinction – one without a difference – is that unlike the vast majority of Native American tribes, the Native Hawaiians were not shipped off, force-marched, and relocated to another area far from their original homelands.²⁷

It is somewhat disingenuous that the opponents of NHGRA are suggesting that extending this same U.S. policy to Native Hawaiians, the indigenous, native people of the fiftieth state would lead to racial balkanization. There are over 560 federally recognized American Indian and Alaska Native governing entities in 49 of 50 states, coexisting with all peoples and federal, state and local governments. There is absolutely NO evidence to support this notion, and seems to be spread simply to instill unwarranted fear and opposition to the NHGRA.

NHGRA is Constitutional

In *United States v. Lara*, the Supreme Court held that “[t]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes powers that we have consistently described as plenary and exclusive.” In 1954, Congress terminated the sovereignty of the Menominee Indian Tribe in Wisconsin. In 1973, Congress exercised its discretion, changed its mind, and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee Tribe.

NHGRA does little more than follow the precedent allowed by *Lara* and exercised in the Menominee case. Reliance on federal regulations as gospel ignores the fact that the plenary authority of Congress has resulted in restoration of tribal status, in the case of the Menominee, and the retroactive restoration of tribal lands, as in the case of the Lytton Band in California. The Attorney General of Hawaii, many distinguished professors, and the American Bar Association all firmly believe that Congress has the authority to recognize Native Hawaiians.²⁸

All that NHGRA seeks is parity in U.S. policies towards the three indigenous, native people in the 50 states, American Indians, Alaska Natives and Native Hawaiians. Under the U.S. Constitution and Federal law, America’s indigenous, native people are recognized as groups that

27 Although, like Native Americans, the land ceded to them under the Hawaiian Homes Act is, for the most part, largely uninhabitable or not readily susceptible to development.

28 On February 13, 2006, the policy-making body of the 400,000 members American Bar Association (ABA) “... voted overwhelmingly in favor of a resolution to urge Congress to pass legislation to establish a process to provide federal recognition for a Native Hawaiian governing entity. Such legislation, S. 147, proposed by Sen. Daniel Akaka, is currently pending in Congress.” As further explained by Alan Van Etten, Hawai’i state delegate, ABA, in a Letter to the Editor published on February 21, 2006 in the Honolulu Advertiser, “...The ABA's mission is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law. By passing the resolution, the delegates said yes to the establishment by Congress of a process that would provide Native Hawaiians the same status afforded to America's other indigenous groups, American Indians and Native Alaskans. The blessing by this country's largest and most prestigious legal organization would appear to put to rest the primary legal arguments advanced by this bill's opponents. ... The American Bar Association's support for Hawai'i's indigenous people sends a strong message that a process for Native Hawaiian recognition follows the rule of law and provides great impetus for Congress to take immediate action to pass the Akaka bill.”

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If one accepts the Commission's pronouncement against subdividing the country into "discrete subgroups accorded varying degrees of privilege," then the Commission should immediately call for an end to any recognition of additional Indian tribes. Since that would clearly contravene the Constitutional authority of Congress, that would seem to be an unlikely—and illegal—outcome. Given that the authority for NHGRA stems from the same constitutional source as that for Native Americans, then the Commission majority has chosen to ignore the constitutionality of the proposed law.

NHGRA Has the Support of the Residents of Hawai'i as Reflected in Two Scientific Polls, the Fact that the Majority of Officials Elected by the Voters of Hawai'i Support NHGRA.

The results of a scientific poll in Hawai'i showed 68 percent of those surveyed support the bill.²⁹ The statewide poll was taken Aug. 15-18 by Ward Research, a local public opinion firm.³⁰ The results are consistent with a 2003 poll.³¹ While polls alone do not a mandate make, the consistency between the two polls shows that despite the best efforts of opponents such as Mr. Burgess, the multicultural, multiethnic residents of Hawaii support the recognition of Native Hawaiians and would allow them to take the first, tentative, steps toward recognition and sovereignty.

More importantly, the elected officials of Hawaii have almost unanimously thrown their support to the NHGRA. The NHGRA is supported by most of the elected officials of Hawai'i, including the entire Hawai'i Congressional Delegation, Governor Linda Lingle, the Senate and House of the State Legislature (except two members), all nine Trustees of the Office of Hawaiian Affairs and the mayors of all four counties of Hawai'i.

Conclusion

The NHGRA is about justice. It is about righting a wrong. It is about recognition of the identity and sovereignty of a people who survived attempts by our government to strip them of these precious rights over a hundred years ago. Far from the racial balkanization spread by its

²⁹*OHA Poll Shows Strong Community Support for Akaka Bill*, HONOLULU STAR BULLETIN, August 23, 2005.

³⁰ OHA paid for the poll of 401 randomly selected Hawai'i residents, which had a margin of error of plus or minus 4.9 percentage points.

³¹ *OHA Poll Finds Public Favours Federal Recognition*, HONOLULU ADVERTISER, October 24, 2003. Ward Research was hired in July of 2003 to conduct the telephone survey, in which 600 residents were contacted, about half of them Native Hawaiians. Federal recognition won support from 86 percent of the Hawaiian survey bloc, and 78 percent of the non-Hawaiian participants. However, the idea of creating a Hawaiian government drew 72 percent support from Hawaiian participants and 53 percent from non-Hawaiians.

opponents, NHGRA is simply a step – a baby step at that – towards potential limited sovereignty and self-governance.

Most who live in Hawai'i know the distinct Native Hawaiian community, with its own language and culture, is the heart and breath of Hawai'i. Hawai'i, and no other place on earth, is the homeland of Native Hawaiians.

On one thing the proponents and opponents of NHGRA seem to agree: Hawai'i is a special place in these United States, a multicultural society and model for racial and ethnic harmony that is unlike anywhere else in our country and, increasingly, the world. It is also a place where its multicultural residents recognize the indigenous Native Hawaiian culture as the host culture with a special indigenous political status where there are state holidays acknowledging Native Hawaiian monarchs, and the Hawaiian language is officially recognized.

Perhaps it is the “mainlanders” lack of context and experience that creates a debate where, in Hawai'i, there is practically none. In the mainland, we think of “Aloha” as Hawaii Five-O, surfing, and brightly colored shirts that remain tucked away in the back of our closets. In Hawai'i, however, *Aloha* and the *Aloha* spirit is more than just a slogan. It is proof positive of the influence and power of the Native Hawaiian people and culture that exists and thrives today. In my lifetime, I have seen growing awareness, acceptance and usage of Hawaiian culture, symbols, and language. It is now almost mandatory to use pronunciation symbols whenever Hawaiian words are printed, whereas twenty years ago it was ignored. Multiculturalism in modern Hawai'i means that non-Native Hawaiians respect and honor the traditions of a people who settle on these volcanic paradises after braving thousands of miles of open ocean. The least we can do, the “we” being the American government which took away their islands, is to accord them the basic respect, recognition, and privileges we do all indigenous peoples of our nation. NHGRA will give meaning to the Apology Resolution; it will begin the healing of wounds.

That same *aloha* spirit that imbues the multicultural islands of Hawai'i will, in my opinion, ensure that the processes contained in NHGRA will inure to the benefit of all the people of Hawaii. Perhaps more than any other place in our Union, fears of racial polarization, discrimination, or unequal treatment resulting from the passage of NHGRA should be seen as distant as the stars which the Hawaiians used to navigate their *wa'a*, their canoes, across the vastness of the seas.