Statement of Bruce Fein on the Constitutionality of Creating a Race-Based Native Hawaiian Government (H.R. 309) Before the House Judiciary Subcommittee on the Constitution

Tuesday, July 19, 2005

Dear Mr. Chairman and Members of the Subcommittee:

I am grateful for the opportunity to address the constitutional authority of Congress to create a race-based government of Native Hawaiians pursuant to the "Akaka Bill," H.R. 309. Congress enjoys no such authority under the Indian Commerce Clause or otherwise. Native Hawaiians share virtually none of the earmarks of Native American Indian Tribes that have justified congressional conferral of semi-sovereign powers under federal law. The race-based government celebrated by the Akaka Bill would flagrantly violate the equal protection component of the Fifth Amendment. It would invite a Balkanization of the United States. It would mark the beginning of the end of E Pluribus Unum as the nation's exalted creed. It should be repudiated every bit as forcefully as was Jim Crow.

Hawaii has been the quintessential example of the American "melting pot", with intermarriage a salient feature of Hawaiian social life. Three fourths of Native Hawaiians have less than 50% of Native Hawaiian blood. King Lunalilo, on the day of his coronation in 1873, boasted: "This nation presents the most interesting example in history of the cordial co-operation of the native and foreign races in the administration of

its government, and most happily, too, in all the relations of life there exists a feeling which every good man will strive to promote." Senator Daniel Inouye (D. Hawaii) echoed the King 121 years later in commemorating the 35th anniversary of Hawaii's statehood: "Hawaii remains one of the greatest examples of a multiethnic society living in relative peace."

Native Hawaiians are not a distinct community. They occupy no demarcated territory set aside only for Native Hawaiians like Indian reservations. No treaties were ever made between a Native Hawaiian entity and the United States. The strongest evidence that Native Hawaiians cannot be likened to Native American Indian tribes is that a statute is required to provide federal recognition because the Department of Interior's standards for tribal recognition cannot be satisfied.

There has never been a Native Hawaiian government or entity. Since the arrival of Captain Cook in 1778, Native Hawaiians and non-Native Hawaiians have uniformly been governed by a common Hawaiian sovereign. Throughout the past two centuries of Hawaiian history, including the entire period of the Kingdom, they served side-by-side in the legislature, Cabinet, and national Supreme Court. Both Native Hawaiians and non-Native Hawaiians exercised the franchise. With rare exceptions, the laws of the Hawaiian Kingdom generally eschewed racial distinctions.

Native Hawaiians have never experienced racial discrimination. None lost an inch of land or other property when the Monarchy was overthrown in 1893 as a step towards establishing a republican form of government. They were never less than equal, and for the past 30 years, Native Hawaiians have invariably been privileged children of the law with regard to housing, education, or other social assistance. The U.S.

Constitution scrupulously protects their right to celebrate their culture. That explains why Queen Liliuokalani confided to then Senator George Hoar (R. Mass.) that, "The best thing for [Native Hawaiians] that could have happened was to belong to the United States."

Ben Franklin sermonized at the signing of the Declaration of Independence that "we must all hang together, or assuredly we shall all hang separately." Abraham Lincoln preached that "A house divided against itself cannot stand." Supreme Court Justice Benjamin Cardozo in Baldwin v. Seelig, 294 U.S. 511, 523 (1935), observed: "The Constitution was framed…upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Justice Antonin Scalia lectured in Adarand Constructors v. Pena, 515 U.S. 200 (1995), that the Constitution acknowledges only one race in the United States. It is American.

The United States Supreme Court in United States v. Sandoval, 231 U.S. 28, 45 (1913), expressly repudiated congressional power arbitrarily to designate a racial or ethnic group as an Indian tribe crowned with sovereignty, whether Native Hawaiians, Jews, Hispanics, Polish Americans, Italian Americans, Japanese Americans, or otherwise. Associate Justice Willis Van Devanter explained with regard to congressional guardianship over Indians: "[I]t is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as

dependent tribes requiring guardianship and protection of the United States are to be determined by Congress, and not by the courts."

In that case, for example, Congress properly treated Pueblos as an Indian tribe because "considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary…." Chief Justice John Marshall in The Cherokee Nation v. Georgia, 30 U.S. 1 (1831), likened an Indian Tribe's dependency on the United States to the relation of a ward to his guardian. The Akaka Bill, however, does not and could not find that Native Hawaiians need the tutelage of the United States because of their backwardness or child-like vulnerability to exploitation or oppression. Indeed, their political muscle has made them cosseted children of the law. The Supreme Court, however, identified helplessness and dependency as the touchstone for recognizing Indian Tribes in Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943):

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

The Court highlighted the same point in United States v. Kagama, 118 U.S. 375, 383-384 (1886):

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States,-- dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very

> weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."

Finally, the Constitution aimed to overcome, not to foster, parochial conflicts or jealousies. That goal would be shipwrecked by a congressional power to multiply semi-sovereign Indian tribes at will.

Congress would not be powerless to rectify historical wrongs to Native Hawaiians absent the Akaka Bill. Congress enjoys discretion to compensate victims or their families when the United States has caused harm by unconstitutional or immoral conduct, as was done for interned Japanese Americans in the Civil Liberties Act of 1988. Congress might alternatively establish a tribunal akin to the Indian Claims Commission to entertain allegations of dishonest or unethical treatment of Native Hawaiians. As the Supreme Court amplified in United States v. Realty Co., 163 U.S. 427, 440 (1896): "The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based on considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of the individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition of claims against the government which are thus founded."

The Akaka Bill's specific findings to justify its constitutionality are wildly misplaced. Finding (1) asserts that Congress enjoys constitutional authority to address the conditions of the indigenous, native people of the United States. But the finding fails to identify the constitutional source of that power, or how it differs from the power of

Congress to address the conditions of every American citizen. Congress does not find that Native Hawaiians were ever subjugated or victimized by racial discrimination or prevented from maintaining and celebrating a unique culture. Moreover, as noted above, the United States Supreme Court explicitly repudiated congressional power to arbitrarily designate a body of people as an Indian tribe in United States v. Sandoval, *supra*. As Alice Thurston unequivocally stated arguing for Interior Secretary Babbitt in Connecticut v. Babbitt, 228 F.3d. 82 (2nd Cir. 2000): "When the Department of the Interior recognizes a tribe, it is not saying, 'You are now a tribe.' It is saying, 'We recognize that your sovereignty exists.' We don't create tribes out of thin air."

Finding (3) falsely asserts that the United States "has a special political and legal responsibility to promote the welfare of the native people of the United States, including Native Hawaiians." No such responsibility is imposed by the Constitution or laws of the United States. No decision of the United States Supreme Court has ever recognized such a responsibility.

Finding (4) recites various treaties between the Kingdom of Hawaii and the United States from 1826 to 1893. The treaties were with a government of both Native Hawaiians and non-Native Hawaiians, and thus discredit the idea of a distinct Native Hawaiian sovereignty.

Finding (5) falsely declares that the Hawaiian Homes Commission Act (HHCA) set aside approximately 203,500 acres of land to address the conditions of Native Hawaiians in the then federal territory. In fact, the HHCA established a homesteading program for only a small segment of a racially defined class of Hawaii's citizens. Its intended beneficiaries were not and are not now "Native Hawaiians" as defined in the

Akaka bill (i.e., those with any degree of Hawaiian ancestry, no matter how attenuated), but exclusively those with 50% or more Hawaiian "blood" – a limitation which still applies with some exceptions for children of homesteaders who may inherit a homestead lease if the child has at least 25% Hawaiian "blood."

The HHCA was enacted by Congress in 1921 based on stereotyping of "Native Hawaiians" (50% blood quantum) as characteristic of "peoples raised under a communist or feudal system" needing to "be protected against their own thriftlessness". The racism of Plessy v. Ferguson, 163 US 537 (1896), was then in its heyday. If that derogatory stereotyping were ever a legitimate basis for federal legislation, Adarand Constructors v. Pena, *supra.*, and a simple regard for the truth deprive it of any validity today.

Finding (6) asserts that the land set aside assists Native Hawaiians in maintaining distinct race-based settlements, an illicit constitutional objective under Buchanan v. Warley, 245 U.S. 60 (1917), and indistinguishable in principle from South Africa's execrated Bantustans.

Finding (7) notes that approximately 6,800 Native Hawaiian families reside on the set aside Home Lands and an additional 18,000 are on the race-based waiting list. These racial preferences in housing are not remedial. They do not rest on proof of past discrimination (which does not exist). The preferences are thus flagrantly unconstitutional. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, *supra*.

Finding (8) notes that the statehood compact included a ceded lands trust for five purposes, one of which is the betterment of Native Hawaiians. As elaborated above, the

20% racial set aside enacted in a 1978 statue violates the general color-blindness mandate of the Constitution.

Finding (9) asserts that Native Hawaiians have continuously sought access to the ceded lands to establish and maintain native settlements and distinct native communities throughout the State. Those objectives are constitutionally indistinguishable from the objectives of whites during the ugly decades of Jim Crow to promote an exclusive white culture exemplified in *Gone with the Wind* or *The Invisible Man*. The United States Constitution protects all cultures, except for those rooted in racial discrimination or hierarchies.

Finding (10) asserts that the Home Lands and other ceded lands are instrumental in the ability of the Native Hawaiian community to celebrate Native Hawaiian culture and to survive. That finding is generally false. The United States Constitution fastidiously safeguards Native Hawaiians like all other groups in their cultural distinctiveness or otherwise. There is but one exception. A culture that demands racial discrimination against outsiders is unconstitutional and is not worth preserving. Further, as Senator Inouye himself has proclaimed, Native Hawaiians and other citizens are thriving in harmony as a model for other racially diverse communities under the banner of the United States Constitution.

Finding (11) asserts that Native Hawaiians continue to maintain other distinctively native areas in Hawaii. Racial discrimination in housing, however, is illegal under the Fair Housing Act, the Civil Rights Act of 1871, and the Equal Protection Clause of the Fourteenth Amendment if state action is implicated.

Contrary to Finding (13), the Monarchy was overthrown without the collusion of the United States or its agents; the Native Hawaiian people enjoyed no more inherent sovereignty under the kingdom than did non-Native Hawaiians; in any event, sovereignty at the time of the overthrow rested with Queen Liliuokalani, not the people; the public lands of Hawaii belonged no more to Native Hawaiians than to non-Native Hawaiians; and, there was never a legal or moral obligation of the United States or the Provisional Government after the overthrow to obtain the consent of Native Hawaiians to receive control over government or crown lands. No Native Hawaiian lost a square inch of land by the overthrow.

Findings (16), (17), and (18) corroborate that the United States Constitution guarantees religious or cultural freedom to Native Hawaiians as it does for any other distinctive group. On the other hand, the finding falsely asserts that Native Hawaiians enjoy a right to self-determination, i.e., a right to establish an independent race-based nation or sovereignty. The Civil War definitively established that no individual or group in the United States enjoys a right to secede from the Union, including Native American Indian tribes.

Finding (19) falsely asserts that Native Hawaiians enjoy an "inherent right" to reorganize a Native Hawaiian governing entity to honor their right to self-determination. The Constitution denies such a right of self-determination. A Native Hawaiians lawsuit to enforce such a right would be dismissed as frivolous. Further, there has never been a race-based Native Hawaiian governing entity. An attempt to reorganize something that never existed would be an exercise in futility, or folly, or both.

Finding (20) falsely insinuates that Congress is saddled with a greater responsibility for the welfare of Native Hawaiians than for non-Native Hawaiians. The Constitution imposes an equal responsibility on Congress. Race-based distinctions in the exercise of congressional power are flagrantly unconstitutional. *See* Adarand Constructors, *supra*.

Finding (21) repeats the false insinuation that the United States is permitted under the Constitution to create a racial quota in the administration of public lands, contrary to Adarand Constructors, *supra*.

Subsection (A) of Finding (22) falsely asserts that sovereignty in the Hawaiian Islands rested with aboriginal peoples that pre-dated Native Hawaiians, i.e. that the aboriginals were practicing and preaching government by the consent of the governed long before Thomas Jefferson's Declaration of Independence. But there is not a crumb of evidence anywhere in the world that any aboriginals believed in popular sovereignty, no more so than King Kamehameha I who founded the Kingdom of Hawaii by force, not by plebiscite.

Subsection (B) falsely insinuates that Native Hawaiians as opposed to non-Native Hawaiians enjoyed sovereignty or possessed sovereign lands. The two were equal under the law. In any event, sovereignty until the 1893 overthrow rested with the Monarch. Sovereign lands were employed equally for the benefit of Native Hawaiians and non-Native Hawaiians.

Subsection (C) falsely asserts that the United States extends services to Native Hawaiians because of their unique status as an indigenous, native people. The services are extended because Native Hawaiians are United States citizens and entitled to the

equal protection of the laws. The subsection also falsely insinuates that Hawaii previously featured a race-based government.

Subsection (D) falsely asserts a special trust relationship of American Indians, Alaska Natives, and Native Hawaiians with the United States arising out of their status as aboriginal, indigenous, native people of the United States. The United States has accorded American Indians and Alaska Natives a trust relation in recognition of existing sovereign entities and a past history of oppression and helplessness. The trust relationship, however, is voluntary and could be ended unilaterally by Congress at any time. Native Hawaiians, in contrast, have never featured a race-based government entity. They have never suffered discrimination. They voted overwhelmingly for statehood. And they have flourished since annexation in 1898, as Senator Inouye confirms.

Finding (23) falsely insinuates that a majority of Hawaiians support the Akaka Bill based on politically correct stances of the state legislature and the governor. The best polling barometers indicate that Hawaiian citizens oppose creating a race-based governing entity by a 2-1 margin, with 48% of Native Hawaiians in opposition. If the proponents of the Akaka Bill genuinely believed Finding (23), they would readily accede to holding hearings and a plebiscite in Hawaii as a condition of its effectiveness as was done for statehood.

Even assuming Congress enjoyed authority to create a race-based Native Hawaiian government under the Indian Commerce Clause, treaty making power, or some inherent national power, the Akaka Bill would nevertheless violate the equal protection component of the Fifth Amendment as elaborated in Bolling v. Sharpe, 347 U.S. 497 (1954). The Akaka Bill disfranchises non-Native Hawaiians in the election of a Native

Hawaiian entity because of race. The Supreme Court invalidated a comparable race-based disenfranchisement in the election of trustees of the Office of Hawaiian Affairs. Writing for the Court in Rice v. Cayetano, 528 U.S. 495, 517 (2000), Justice Anthony Kennedy elaborated on the evils of a race-based politics:

> "The ancestral inquiry mandated by [Hawaii] is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' Hirabayashi v. United States, 320 U.S. 81 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name."

The Akaka Bill also clashes with the spirit of Article IV's prohibition on creating a new State within the jurisdiction of another State without its consent. The Native Hawaiian entity to be fashioned within Hawaii would not be contingent on the consent of the State of Hawaii.

Native Hawaiians are indistinguishable from numerous other racial or ethnic groupings in their historical relations with the United States. If the Akaka Bill can make Native Hawaiians into Indian tribes by fiat, then Balkanization will soon follow as groups clamor for separate sovereignties to obtain a treasure trove of race-based legal immunities and privileges. Indeed, Mexican Americans have already formed MEChA (Movimiento Estudiantil Chicano de Aztlan) claiming a right to "repatriate" Aztlan, land from eight or nine states including Colorado, California, Arizona, Texas, Utah, New Mexico, Oregon,

and parts of Washington transferred by the Treaty of Guadalupe Hidalgo from Mexico to the United States.

It could be expected that every group possessed of an historical grievance, genuine or concocted, would assert a right to a separate sovereignty, including African-Americans, Chinese-Americans, Japanese-Americans, Irish-Americans, Italian-Americans, Jews, Mormons, Roman Catholics, or the Amish. The United States would degenerate into the Holy Roman Empire.

The 9/11 abominations underscored the strength of the United States, the thrill, pride and courage of its citizens awakened by equal opportunity and respect irrespective of ancestry. The Akaka Bill would erode that strength.

It must be defeated.