United States Senate
WASHINGTON, DC 20510

August 1, 2014

The Honorable Sally Jewell
Secretary
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Dear Secretary Jewell:

We write in opposition to the Advanced Notice of Proposed Rulemaking (ANPRM) issued on June 20, 2014 regarding the reestablishment of a government-to-government relationship with the Native Hawaiian community, and we respectfully request that you take no further action on the proposal.

While we fully value and celebrate Native Hawaiian heritage, the reestablishment or formation of a free-standing Native Hawaiian government fails to pass constitutional muster. The Supreme Court has stated, "'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,' … and therefore, 'are contrary to our traditions and hence constitutionally suspect.'"[1] Yet, that kind of distinction is precisely what the administration proposes to do here. By singling out a select group of citizens with shared ancestry, but no cohesive political organization since 1893,[2] the administration's proposal epitomizes the type of arbitrary race-based classification that the Supreme Court has found anathema to the Constitution.[3] Four Commissioners from the U.S. Commission on Civil Rights agree. In response to a similar proposal, they wrote, "Neither Congress nor the President has the power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor do they have the power to reconstitute a tribe or other sovereign entity that has ceased to exist as a polity in the past."[4]

Even if you disagree that the reestablishment of a Native Hawaiian government would be patently unconstitutional, Congress has not enacted legislation authorizing the Department of the Interior (the "Department") to engage in such a rulemaking. In fact, Congress has repeatedly refused to adopt legislation that would recognize a Native Hawaiian government or reestablish an administrative path for doing so. As such, any unilateral efforts by the Department to move forward administratively are unlawful. Indeed, the Assistant Secretary for Indian Affairs, Kevin Washburn, testified to this effect in March of last year. He told the House Committee on Natural Resources that the Department does not "have the authority to recognize Native Hawaiians

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[1] *Fisher v. Univ. of Texas at Austin,* 133 S.Ct. 2411, 2418 (2013) (citations omitted).
[2] Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community, 79 Fed. Reg. 35296, 35298 ("[T]here has been no formal, organized Native Hawaiian government since 1893….").
[3] *Cf. United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("Of course, if it 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….") *cited by* Congressional Research Service, *What Does it Mean for an Indian Tribe to be Federally Recognized and How Does a Tribe Gain Federal Recognition* (Apr. 8, 2014).
[4] Letter from U.S. Civil Rights Commissioners Abigail Thernstrom, Peter Kirsanow, Gail Heriot, and Todd Gaziano to President Obama at 1 (Sept. 16, 2013).

through the Part 83 process."[5] Rather, Assistant Secretary Washburn asserted that legislation is necessary. The ANPRM represents a 180 degree pivot from the Department's earlier position. It embodies the administration's troubling reliance on executive fiat in any number of facets of public policy regardless of the Constitutional limits on executive power.

We are further driven to oppose the administration's proposal due to prudential concerns. By the administration's own admission, Native Hawaiians are unlikely to satisfy the current Part 83 process for federal recognition.[6] As a result, the administration is proposing a separate path for Native Hawaiians. A process different from (and likely less stringent than) that which is applicable to American Indians. Such arbitrary action to accommodate a select group cannot be seen as fair to those who have long sought recognition through the current administrative process.

What's more, creating a special process to access privileges not universally available to all Americans invites requests from other similarly situated groups. For example, some have suggested that there would be no way to credibly distinguish this proposal for special treatment of Native Hawaiians from possible requests by other groups, such as the Amish of Pennsylvania.[7] In fact, we agree with the Supreme Court 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."[8] The creation of a new race-based political entity whether Native Hawaiian, Amish, or another group fails to comport with the letter and the spirit of the Equal Protection Clause.

The action proposed in the ANPRM is at worst unconstitutional, and at best offensive to the character of a country devoted to the advancement of all its citizens regardless of race. We ask that you take no further action with regard to establishing a government-to-government relationship with the Native Hawaiian community.

Sincerely,

JEFF FLAKE
United States Senator

LAMAR ALEXANDER
United States Senator

TOM A. COBURN, M.D.
United States Senator

MIKE LEE
United States Senator

[5] *Authorization, Standards, and Procedures for Whether, How, and When Indian Tribes Should be Newly Recognized by the Federal Government: Perspective of the Department of the Interior*, 113th Cong. 29 (2013) (testimony of Kevin Washburn, Assistant Secretary for Indian Affairs).
[6] *See supra* notes 2 and 5.
[7] *See supra* note 4 at 4 ("Rewriting history to create a tribe out of the Native Hawaiian race would open a Pandora's box for other groups to seek tribal status.").
[8] *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).