



February 22, 2010

Native Hawaiian Recognition Bill Creates Unconstitutional Race-Based Government

This week, the House will consider the [Native Hawaiian Government Reorganization Act of 2009 \(H.R. 2314\)](#), which creates a separate, race-based government specifically for Native Hawaiians. This divisive legislation would allow this new government entity to be exempt from state taxes, set their own civil and possibly criminal jurisdictions apart from the State of Hawaii, and take ownership of lands currently owned by the state (and potentially the federal government). Up to 400,000 Native Hawaiians from across the country (not just those living in Hawaii) could be eligible to become members of this new governing entity.

Democrats have re-written this bill behind closed doors (which has yet to be made public anywhere except for the [Republican Committee website](#)), without public consent, while failing to address serious and legitimate concerns:

- **Congress does not have the constitutional authority to recognize Native Hawaiians as a sovereign Indian Tribe.** Native Hawaiians are not and never have been members of a tribe. They do not share the same political and legal history as federally recognized Indian tribes and Congress does not possess the authority to extend tribal recognition to them under the Indian Commerce Clause (Article I, Section 8 of the Constitution). Furthermore, the Supreme Court in [Rice v. Cayetano](#) called into question Congress' ability to recognize Native Hawaiians as a governing entity.
- **It is unconstitutional to divide American people solely by race or ethnicity.** The United States Commission on Civil Rights strongly opposes this legislation based on grounds that it discriminates based on race. In a [letter](#) to members of Congress on August 28, 2009 they wrote that:

"We do not believe Congress has the constitutional authority to 'reorganize' racial or ethnic groups into dependent sovereign nations unless those groups have a long and continuous history of separate self-governance."
- **The State of Hawaii continues to have concerns with this bill, specifically that it would immediately give the government entity "inherit powers" and remove state authority.** Hawaii's Attorney General Mark Bennett and Governor Linda Lingle, who support Native Hawaiian recognition, wrote a [letter](#) last December objecting to last-minute revisions in the bill. According to an article last week in the [Honolulu Advertiser](#), not all of Attorney General Bennett's concerns have been addressed:

“Bennett said the state's concerns about the Obama administration's language have been addressed by the parties. However, he said, the state still has strong objections to clauses in the new draft that could give immunity from state law to the entity, its employees and officers while they are conducting government activity.”

- **Native Hawaiians would be exempt from state laws, regulations and taxes.** Native Hawaiians do not live in separate communities or on separate lands, they live in neighborhoods with other Hawaiians. This would result in neighbors living under different legal regimes. For example, a Native Hawaiian business owner could be exempt from a state sales tax while his competitor down the street is not.
- **The people of Hawaii, whose lives and communities would be dramatically impacted by this legislation, should have a say in whether or not a race-based governing entity is established in their state.** According to a December 2009 Zogby Poll, only 34% of Hawaiians support this legislation. Rather than forcing this upon the people, it should be put to a statewide vote.
- **The membership criteria for inclusion in this government entity would be discarded once federal recognition is extended.** Even though the Department of Justice helped craft the membership criteria, the new governing entity would have the ability to grant, deny, or revoke membership for any reason. Allowing the entity to throw away the criteria after recognition is achieved makes a mockery of the legal process.
- **The bill sets a precedent that could be used by other ethnic groups seeking recognition.** Gail Heriot with the U.S. Commission on Civil Rights [testified](#) before the committee that:

“If ethnic Hawaiians can be accorded tribal status, why not Chicanos in the Southwest? Or Cajuns in Louisiana? Indeed, it is implausible to say that Congress has the power to confer this benefit only upon racial or ethnic groups, since ordinarily Congressional power is at its lowest ebb with issues that touch on race or ethnicity.”

For more information, [read](#) the dissenting views by Ranking Republican Doc Hastings.

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