Trouble in Paradise: Why the Native Hawaiian Government Reorganization Act deserves to fail
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Amid much wrangling over the economy, a bipartisan debt panel, and President Obama's health-care summit, Congress has chosen this moment to tackle . . . Native Hawaiian sovereignty? Sometime soon, perhaps as early as today, the House of Representatives will vote on the Native Hawaiian Government Reorganization Act (NHGRA), which is a modified version of legislation that has been kicking around since 2000 and failed to win a cloture vote in 2006.

Popularly known as the Akaka Bill for its original Senate architect, 85-year-old Hawaii Democrat Daniel Akaka, the NHGRA would effectively designate Native Hawaiians as a sovereign nation comparable to American-Indian tribes, allowing them to form a governing body that would launch negotiations with federal and state officials over land claims, resource rights, jurisdictional matters, taxing authority, and other issues. The list of eligible Native Hawaiian constituents would be determined by a federal commission, using criteria such as (1) ancestral links to the indigenous Polynesians who lived in the Hawaiian archipelago prior to 1893 (when the Hawaiian monarchy was overthrown), (2) lineal ties to the people who qualified as "Native Hawaiians" under the 1921 Hawaiian Homes Commission Act (which relied on a 50 percent blood quantum), and (3) the ability to demonstrate "a significant cultural, social, or civic connection to the Native Hawaiian community."

But here's the catch: Once Washington formally recognized the fledgling Native Hawaiian governing entity, that entity would have "inherent power and authority to determine its own membership criteria, to determine its own membership, and to grant, deny, revoke, or qualify membership without regard to whether any person was or was not deemed to be a qualified Native Hawaiian constituent under this Act" (emphasis added), provided that membership was voluntary and renounceable. In other words, the eligibility guidelines laid out in the NHGRA are essentially meaningless. The Native Hawaiian government would be able to confer membership on whomever it wanted.

Its broader "powers and privileges" would be negotiated with federal and state authorities. During those negotiations, the "governmental, nonbusiness, [and] noncommercial activities" of the Native Hawaiian entity would be exempt from taxation or regulation by the state of Hawaii, and the entity would be shielded from state lawsuits.

You may be wondering why the House elected to consider the NHGRA this week. The reason is simple: Hawaii Democrat Neil Abercrombie, a longtime Akaka Bill advocate, is

resigning his seat at the end of February in order to run for governor, and he has been promised that a vote will take place before he departs. The NHGRA enjoys overwhelming support among Democrats and is expected to pass easily. Yet Abercrombie and his colleagues have repeatedly tinkered with the text of the legislation to address the concerns of Hawaii governor Linda Lingle, who has championed earlier iterations of the Akaka Bill but raised objections to the latest version.

The NHGRA traces its roots back to 1993, when Congress marked the centennial of Queen Liliuokalani's removal by apologizing for America's involvement in her ouster and acknowledging the "inherent sovereignty" of the Native Hawaiian people. The events surrounding the Hawaiian Kingdom's 1893 demise remain highly controversial; but suffice to say that the Apology Resolution greatly exaggerated the extent of U.S. culpability. Thirty-four senators voted against it, with Washington Republican Slade Gorton warning that the resolution "divides the citizens of the state of Hawaii — who are of course citizens of the United States — into two distinct groups: Native Hawaiians and all other citizens."

Fast-forward to 2000. In Rice v. Cayetano, the U.S. Supreme Court declared that the Office of Hawaiian Affairs could not prohibit non–Native Hawaiians from voting in its trustee elections. "Ancestry can be a proxy for race," wrote Justice Anthony Kennedy in his majority opinion. "It is that proxy here." Shortly after the Court delivered its ruling, Senator Akaka introduced his legislation. One of its principal goals was to insulate Native Hawaiian programs and institutions from future legal challenges.

The old Akaka Bill said that key governmental powers would be transferred to the Native Hawaiian entity after the details had been negotiated with Washington and Honolulu. The new bill would automatically endow the Native Hawaiian body with "the inherent powers and privileges of self-government of a native government under existing law, except as set forth in this Act." As a Republican House staffer observes, "This is now an outright tribal-recognition bill."

What do Hawaiians themselves think of it? In November, before the revised bill had been unveiled, Zogby International conducted an online survey on behalf of Hawaii's anti-NHGRA Grassroot Institute. After explaining various aspects of the legislation, Zogby found that 51 percent of Hawaii residents oppose the Akaka Bill and only 34 percent support it (the other 15 percent are unsure). The poll also showed that 58 percent of Hawaiians would prefer to decide the bill's fate in a statewide referendum, and that 60 percent of Hawaiians believe the so-called ceded lands (1.8 million acres that once belonged to the old Hawaiian monarchy and were given to the U.S. when it annexed Hawaii in 1898) "should be used for the benefit of all the people of Hawaii, not just the Native Hawaiians."

Hawaii received a massive influx of Asian immigrants in the 19th century, and it has long been celebrated for its high rates of racial intermarriage. Therefore, it is often hard to distinguish "Native Hawaiians" from Hawaiians of mixed ancestry. How exactly would the proposed governing entity identify its eligible constituents? Would it rely on a crude blood quantum (as Congress did in the early 1920s when it passed the Hawaiian Homes Commission Act)? Unlike many American Indians, Native Hawaiians are not clustered in reservation-type communities; they are scattered throughout cities, towns, and villages across the archipelago. If the Akaka Bill were enacted, next-door neighbors could

conceivably be subject to different tax codes and different criminal statutes. It would be a logistical nightmare.

And also a constitutional nightmare. “It is a matter of some dispute,” Justice Kennedy noted in his 2000 Rice v. Cayetano opinion, “whether Congress may treat the native Hawaiians as it does the Indian tribes.” In May 2006, the U.S. Civil Rights Commission urged lawmakers to reject an earlier version of the Akaka Bill, and also to reject “any other 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.” In a letter to congressional leaders dated Aug. 28, 2009, six of the eight current commission members affirmed their opposition to the NHGRA.

“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,” they wrote. “Moreover, quite apart from the issue of constitutional authority, creating such an entity sets a harmful precedent. Ethnic Hawaiians will surely not be the only group to demand such treatment. On what ground will Congress tell these other would-be tribes no?”

Good question — one that all House members should ponder before casting a vote in favor of Native Hawaiian separatism.

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