DISSENTING VIEWS

H.R. 2314 is described by its proponents as legislation to recognize Native Hawaiians for the purpose of organizing a single governing entity to represent them on a government-to-government basis with the State of Hawaii and the Federal government. This is a circuitous means of saying that H.R. 2314 creates a Native Hawaiian Indian tribe, one that could enroll up to 400,000 members (and more after it is recognized). This would be one of the largest tribes in the United States, accordingly with the largest expectation of taxpayer dollars during a time of historic federal deficits and debt.

But there is a key difference between the Hawaiian "tribe" recognized under H.R. 2314 and the tribes duly recognized through Treaty or Act of Congress: the former is not a tribe within the meaning of the Indian Commerce Clause of the Constitution (Article I, Section 8) because it does not share the historical and political relations of Indian tribes with Congress. While proponents often take pains to stress they do not propose to recognize a "tribe," but a "governing entity," the plain language of H.R. 2314 and the Akaka Substitute (discussed below) do extend tribal recognition.

Proponents argue that Congress possesses broad, plenary authority to recognize Indian tribes. They point to a number of Acts passed over the years, including some 160 federal programs benefiting Native Hawaiians because of their status as Native Hawaiians, as evidence that Congress recognizes Native Hawaiians' special status. The fact that federal, racially-based benefits have already been passed is hardly a valid argument on the merits for extending recognition to a Native Hawaiian tribe. This is like saying that the Democrats' $787 billion "stimulus" is evidence that more federal spending is warranted.

More importantly, the Supreme Court considered a case, Rice v. Cayetano, related to this controversy. The lawsuit involved a Hawaii state law that limited to Native Hawaiians the eligibility to vote in elections for trustees of the Office of Hawaiian Affairs (OHA). In a 7–2 decision the Supreme Court held that such a restriction is race-based and therefore prohibited by the 15th Amendment to the Constitution. Though the case did not involve a Native Hawaiian entity specifically recognized by Congress, the majority opinion noted that such a proposition "would raise questions of considerable moment and difficulty. It is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes."

H.R. 2314 purports to recognize a Native Hawaiian tribe, but because this would exceed constitutional limits on who Congress can recognize as an Indian, it seeks to establish a race-based government. For this reason, a majority of the U.S. Commission on Civil Rights, which was established pursuant to the Civil Rights Act of

1957, recommended "against passage of the Native Hawaiian Government Reorganization Act . . . or 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 the June 11, 2009, hearing on this bill, the testimony of Civil Rights Commission Gail Heriot is instructive. She describes why granting tribal sovereignty to Native Hawaiians does not fit with the islands' history:

> The 1840 Constitution of Hawaii established a bicameral parliament whose members were multi-racial. By 1893 [when Hawaii's ruling monarchy was overthrown], ethnic Hawaiians were a minority of the population. Anyone who was born on Hawaiian soil or who swore allegiance to the Queen was considered a subject of the Queen and hence "Hawaiian," regardless of race. This was no kinship-based tribe. It is thus difficult to argue that ethnic Hawaiians in particular have a right to sovereignty that was violated by the overthrow.
>
> More important, all of this has been water under the bridge at least since 1959 when Hawaii was made a State . . . On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of statehood.

Despite this overwhelming support for Statehood and one set of laws governing all Hawaiians, H.R. 2314 proposes to create a two-tiered system of governance in Hawaii based on one's race. Worse, it is impossible to say precisely how inclusive the entity will be even with respect to Native people of varying degrees of Hawaiian ancestry: under H.R. 2314 the governing entity may discard the carefully-crafted membership rules after it receives federal recognition, and construct an entirely new set of membership rules.

The Akaka Substitute

In the Committee markup of H.R. 2314, Hawaii Congressman Neil Abercrombie filed an amendment in the nature of a substitute that was informally called the "Akaka Substitute" after the Senator from Hawaii who oversaw its development. The Akaka Substitute was drafted in secret by Hawaiian advocates and the Obama Administration, to the exclusion of the participation of Hawaii's Governor and Attorney General. Sprung upon the Committee just prior to the markup as a kind of Midnight Surprise, the Akaka Substitute would have made a bad bill even worse.

As introduced, H.R. 2314 provides that matters such as transferring lands and preempting Federal and State civil, criminal, and tax jurisdiction, must be subject to negotiation with, and the concurrence of, the State of Hawaii and the U.S. Congress. The Akaka Substitute would have short-circuited this reasonable public process by immediately endowing the Hawaiian tribe with the inherent governing powers possessed by other recognized tribes, and preempting State civil and tax authority without the State's consent.

The Akaka Substitute was not offered by Mr. Abercrombie in a gesture of bipartisanship for which the Gentleman is to be commended. It must be noted that it was withdrawn after a letter was

submitted to the Committee by the Hawaii Attorney General on his behalf and Hawaii's Governor. While the Governor and Attorney General had been "strong advocates and supports of [Native Hawaiian Recognition legislation] for years", they strongly opposed the Akaka Substitute because it would "completely change the nature of the Native Hawaiian governing entity." In their words:

> These changes, taken together, change the bill from one where the status quo and the relations between the United States, the State of Hawaii, and the Native Hawaiian governing entity can be changed only *after* negotiations and *after* passage of implementing legislation, to a model in which the status quo *immediately* changes, pursuant to an Indian law model." (Emphasis in the original). (Letter to Chairman Rahall and Ranking Member Hastings, December 15, 2009).

If those secretly writing the Akaka Substitute seek to keep the Governor and Attorney General in the dark, then what exactly is the goal? Unfortunately, we will probably know only when H.R. 2314 is brought to the Floor, presumably with another substitute amendment drafted behind closed doors. This manner of legislating is not worthy of the grave subject matter at hand, regardless of one's position on it.

In the end, if H.R. 2314 passes, the days of this entity will be numbered. It may take years and millions of dollars in billable hours, but the Supreme Court will perform the job that Congress is duty-bound to undertake today: reject a race-based governing entity in violation of the Constitution. But how many dollars will be spent, and how many racial and political scars will be left on Hawaii's citizens when this controversy is concluded?

H.R. 2314 should be soundly rejected.

DOC HASTINGS.

Attachment: Letter from State of Hawaii Attorney General Bennett.

LINDA LINGLE
GOVERNOR

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December 15, 2009

The Honorable Nick J. Rahall, II, Chair
The Honorable Doc Hastings, Ranking Minority Member
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: H.R. 2314 - Native Hawaiian Government Reorganization Act

Dear Chair Rahall and Ranking Minority Member Hastings:

As Hawaii's Attorney General and chief legal officer, I write to express the strong opposition of Hawaii Governor Linda Lingle and myself to many of the proposed changes (in a "markup") to the Native Hawaiian Government Reorganization Act, H.R. 2314, also known as the "Akaka Bill." It is my understanding that H.R. 2314 will be marked-up in the House Committee on Natural Resources on Wednesday, December 16, 2009. We were only provided copies of the proposed changes today by the Committee's Minority Staff (yesterday we received an informal copy of two sections of the new bill). None of the changes were drafted with our input or knowledge. As noted, we strongly oppose a number of the changes, but note we have not had the opportunity to carefully study and analyze many of the changes in the new bill.

Governor Lingle and I have been strong advocates and supporters of the Akaka Bill for seven years. We have worked with the Hawaii Congressional Delegation to craft a bill that had strong bipartisan support. The version of the Akaka Bill which we support is the current version of H.R. 2314.

The changes under consideration will completely change the nature of the Native Hawaiian governing entity. The current version of the bill states (in section 8(b)(3)):

> **"Any governmental authority or power to be exercised by the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall be exercised by the Native Hawaiian governing entity only as agreed to in negotiations** pursuant to section 8(b)(1) of this Act and **beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable.** This includes any required modifications to the Hawaii State Constitution in accordance with the Hawaii Revised Statutes." (Emphasis added).

Section 9(b)(3) of the proposed new bill will change the above-quoted language to the following wholly different language:

> **"The Native Hawaiian governing entity shall be vested with the inherent powers and privileges of self-government of a native government under existing law,** except as set forth in section 10(a).[1] **Said powers and privileges may be modified by agreement between the Native Hawaiian governing entity, the United States, and the State** pursuant to paragraph (1), subject to the limit described by section 10(a). Unless so agreed, nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law or authorize the State to tax or regulate the Native Hawaiian governing entity." (Emphasis added).

The following language in the current bill (in section 9(e)) will be removed in its entirety:

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[1] Section 10(a) of the new bill relates only to gambling.

> "(e) Jurisdiction-**Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii. The status quo of Federal and State jurisdiction can change only as a result of further legislation, if any, enacted after the conclusion, in relevant part, of the negotiation process established in section 8(b).**" (Emphasis added).

The new bill will also provide in section 10(c) that "The [Native Hawaiian Interim Governing] Council and **the subsequent governing entity recognized under this Act shall be an Indian tribe** [pursuant to certain sections of the Indian Civil Rights Act of 1968]…." (Emphasis added).

These changes, taken together, change the bill from one where the status quo and the relations between the United States, the State of Hawaii, and the Native Hawaiian governing entity can be changed only after negotiations and after passage of implementing legislation, to a model in which the status quo immediately changes, pursuant to an Indian law model.

The magnitude and potential impact of such changes cannot be overstated. The present version of the bill preserves all the rights and interests of the State of Hawaii until the Congress and the State Legislature can evaluate the result of negotiations. The proposed revisions make immediate changes to the rights and interests of the State of Hawaii. These changes may immediately incorporate into the law governing native Hawaiians a vast body of Indian law, much of which is unsuited for the State of Hawaii, and none of which (to our knowledge) has been evaluated for its impact on Hawaii.[2]

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[2] That the bill does not preempt State authority over Native Hawaiians or their property does not change the fact that many "inherent" powers and privileges of "self-government" are immediately transferred to the Native Hawaiian governing entity. Moreover, the fact that the Native Hawaiian governing entity may be considered an Indian tribe only for some purposes, increases rather than decreases the uncertainty created by the new bill.

These changes are extensive, have been not part of any bill which we have supported, and have an enormous potential to negatively impact Hawaii and its citizens. We note, moreover, that there has been no public hearing reflecting this new model in at least the last seven years. The views of Hawaii's citizens, native Hawaiian and non-native Hawaiian alike, have not been heard (certainly not recently) with regard to this new model.

The implications of forever changing the relationship between native Hawaiians and the State of Hawaii, and simply deciding native Hawaiians are an Indian tribe (for at least some purposes), are potentially enormous.[3] We oppose these changes. And, we do so mindful of the fact that Governor Lingle and I have been among the strongest supporters of the Akaka Bill for seven years.

We also note that the new bill has a new term—"Qualified Native Hawaiian Constituent"—which is defined in six pages of the bill. There have never been public hearings on this new term and its significance, and we have not had the opportunity to study it in detail.[4]

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[3] Some may argue that many (or even most) rights of an Indian tribe are tied to tribal land. However, even if this is so (and there is litigation throughout the country on this issue), the impact of the new bill on Hawaii, and the meaning of "the inherent powers and privileges of self-government of a native government under existing laws," in the Hawaii context is, at best, unclear. It appears, however, that the language could incorporate those rights in 25 U.S.C. § 476 of the Indian Reorganization Act, which are themselves substantial, and which have never applied in Hawaii. And, the new bill will certainly engender new disputes over the status of much of the land in Hawaii.

[4] Part of the definition requires a person to meet two or more of ten newly set forth criteria, none of which, to our knowledge, has been discussed with the native Hawaiian community.

We also oppose other changes to the bill, including removing the current language in section 8(c)(3), which sets forth the State of Hawaii's complete retention of its sovereign immunity (unless waived in accord with State law), and which makes clear that nothing in the bill shall be construed to constitute an override of Hawaii's Eleventh Amendment sovereign immunity pursuant to section 5 of the Fourteenth Amendment.

We continue to believe the Akaka Bill in its present form is important and needed legislation that has strong bipartisan support. We also believe that the changes we oppose will affect and erode the basis for such support.

We respectfully ask that the changes to the Akaka Bill which we oppose not be made. We also respectfully ask the Committee to hold a public hearing, with testimony, as the new bill is so different from the current version. We are available to discuss the Akaka Bill and this letter at your convenience, and thank you in advance for your consideration of this letter.

Very truly yours,

Mark J. Bennett
Attorney General
State of Hawaii

cc: Members of the House Committee on Natural Resources
The Honorable Neil Abercrombie
The Honorable Mazie K. Hirono
The Honorable Daniel K. Akaka
The Honorable Daniel K. Inouye
Governor Linda Lingle

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