

Legislative Bulletin.....February 23, 2010

Contents:

H.R. 2314—Native Hawaiian Government Reorganization Act of 2010

H.R. 2314 - Native Hawaiian Government Reorganization Act of 2010
(Rep. Abercrombie, D-HI)

Key Conservative Concerns

Take Away Points

- ***Not a Tribe:*** Some conservatives believe native Hawaiians do not appear to meet either the Bureau of Indian Affairs’ seven current mandatory requirements or the Supreme Court’s own definition for recognition as an Indian tribe. They may be more accurately described as a *racial group* thanks to Hawaii’s long history of converging cultures and creeds. Hawaii is a “*melting pot of races.*”
- ***Constitutionally Dubious:*** The explicit Constitutional authority that grants Congress the power to recognize tribes does not extend that authority to arbitrarily designate racial groups as an Indian tribe.
- ***Lack of Transparency:*** House Republicans were provided less than 24 hours notice of whether they would be voting on the bill passed out of committee or a complete rewrite of H.R. 2314.
- ***Balkanization:*** H.R. 2314 would subdivide Americans to different codes of law based on race or ethnicity, even as all residents of Hawaii currently live and function as part of one currently homogenous community.
- ***Thanks, but NO Thanks:*** According to a November 2009 Zogby Poll, *more than 50% of all Hawaiians oppose* the legislation.

For additional conservative concerns, see below.

Order of Business: The bill is expected to be considered on Tuesday, February 23, 2010 under a structured rule. The rule ([H.Res.1083](#)) provides for one hour of debate equally divided and controlled by the majority and minority, waives all points of order against consideration of the bill except those arising under clause 9 or 10 of rule XXI, makes in order three amendments, and one motion to recommit.

Summary: H.R. 2314 would give native Hawaiians essentially the same sovereignty rights as an Indian tribe. This would, in effect, potentially grant upwards of 20% (400,000) of Hawaii's population, that identify themselves as "native Hawaiian," the ability to transfer lands, negotiate with other government entities, set their own criminal and civil jurisdictions, and be exempt from some taxation. Since native Hawaiians exist in all 50 states and U.S. territories, this could grant a native Hawaiian political entity potential authority over all of those individuals as well. Below is a summary of the bill under the Abercrombie substitute amendment in the nature of a substitute made in order under the rule.

Findings & Definitions: The bill contains approximately twelve pages of findings attempting to justify the creation of a separate native Hawaiian government. Some conservatives argue that many of the findings are constitutionally questionable and do not justify dividing Americans by race.

In addition, the bill defines a member of a native Hawaiian constituency as "individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendent of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893...or an individual who is 1 of the indigenous native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act...or a direct lineal descendent of that individual...18 years or older, and citizen of the United States." If they do not reside in the state of Hawaii, they must maintain a "significant cultural, social, or civic connection to the Native Hawaiian community" by satisfying two or more of the following:

- (1) Left the state to serve as a Member of the Armed Forces (or has a parent currently serving) or works for the federal government;
- (2) Is attending an out of state institution of higher education (or has a parent attending) was a resident of Hawaii before leaving to attend the institution;
- (3) Eligible to be a beneficiary of the programs authorized by the Hawaiian Homes Commission Act, 1920 and resides or resided on land set aside as "Hawaiian home lands" or is a child or grandchild of anyone eligible under the Act;
- (4) Is eligible to be a beneficiary of the programs authorized by the Hawaiian Homes Commission Act, 1920;
- (5) Is a child or grandchild of an individual who is or was eligible to be a beneficiary of the programs authorized by the Hawaiian Homes Commission Act, 1920;
- (6) Resides on or has an ownership interest in, or has a parent or grandparent who resides on or has an ownership interest in, "kuleana land." This is land owned by a person who, according to a genealogy verification by the Office of Hawaiian Affairs or by court order, is a lineal descendant of the person or persons who received the original title;
- (7) Is the child or grandchild of, an individual who has been or was a student for at least 1 school year at a school or program taught through the medium of the Hawaiian language under Hawaii Revised Statutes, or at a school founded and operated primarily exclusively for the benefit of Native Hawaiians.
- (8) Has been a member since September 30, 2009, of at least 1 Native Hawaiian membership organization.
- (9) Has been a member since September 30, 2009, of at least 2 Native Hawaiian membership organizations.
- (10) Regarded as Native Hawaiian and whose mother or father is regarded as Native Hawaiian by the Native Hawaiian community, as evidenced by sworn affidavits from two or more qualified Native Hawaiian constituent certified by the Commission as possessing expertise in the social, cultural, and civic affairs of the Native Hawaiian community.

Some conservatives argue that the criteria to qualify as a native Hawaiian is too broad, and does not relate to the traditional definitions of an Indian tribe as identified by the Bureau of Indian Affairs.

Policy & Purpose: The bill states that native Hawaiians are a unique and distinct, indigenous, native people with whom the United States has a special political and legal relationship. The bill states that Congress has the authority under the Indian Commerce Clause to enact legislation regarding Native Hawaiians and cites past legislation where it has exercised that right. The bill also concludes that native Hawaiians have “an inherent right to autonomy in their internal affairs, an inherent right of self-determination and self-governance, the right to reorganize a Native Hawaiian governing entity; and the right to become economically self sufficient; and the United States shall continue to engage in a process of reconciliation and political relations with the Native Hawaiian people.”

H.R. 2314 also states the purpose of the bill is to provide a process for the “reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.”

Establishment of New Offices: The bill establishes an Office of Hawaiian Relations under the Department of Interior (DOI) with the purpose of reconciling and reaffirming of government relationship between native Hawaiians and the United States. The bill also establishes the Native Hawaiian Interagency Coordinating Group under the DOI to coordinate and consult on Federal programs and policies that affect native Hawaiians or agency actions of the federal government that significantly or uniquely affect native Hawaiian resources, rights, or lands.

Reorganization Process: The bill establishes a nine-member commission under the DOI to prepare and maintain a roll of the adult Members to participate in the “reorganization” of the native Hawaiian community. The commission’s travel expenses would be paid for by the federal government, and the commission’s executive director could be hired and fired without regard to civil service laws.

The commission will create a roll of all qualified individuals, provided they satisfy the requirements laid out under the bill. The requirements can be filled with lineal documentation or sworn affidavits for elderly individuals. The commission would establish a referendum for the purpose of determining the proposed elements of the governing documents and proposed powers and authorities to be exercised by the native Hawaiian governing entity.

After reorganization is complete, the native Hawaiian governing entity will submit the organic governing documents to be submitted for approval by the Secretary of the DOI. The Secretary has 180 days (option of a 90 day extension) to certify the document establishes governing criteria for the native Hawaiian government, was approved by a majority of the commission, provide the authority to negotiate with Federal, state, and local governing authorities, and prevents the sale, lease, or acquisition of native lands without the approval of the governing authority.

An election would then be held for officers in the new native Hawaiian government, and upon that election “the special political and legal relationship between the United States and the native Hawaiian governing entity is hereby reaffirmed and the United States extends Federal recognition to the native Hawaiian governing entity as the representative governing body of the native Hawaiian people.”

Some conservatives have expressed concern that the new governing entity would have the ability to grant, deny, or revoke membership to the tribe for any reason after the certification by the Secretary.

Reaffirmation of Delegation of Federal Authority: Once the United States extends Federal recognition to the native Hawaiian governing entity, the United States will recognize and affirm the native Hawaiian governing entity's 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 the bill. The federal government and state of Hawaii will have the authority to enter into negotiations with native Hawaiians concerning land exchanges, civil and criminal jurisdiction, taxing authority, residual responsibilities, and additional grievances of "historical wrongs" committed against native Hawaiians.

Some conservatives have expressed concern that the term "historical wrongs" remains undefined and this provision establishes a negotiation process with the newly created native Hawaiian government that would re-draw the various jurisdictional lines for criminal and civil penalties with respect to native Hawaiians across the nation.

Indian Gaming: The bill prohibits the native Hawaiian government from conducting gaming activities under the authority of any federal law, including the Indian Gaming Regulatory Act. H.R. 2314 states that this restriction would apply to gaming activities by the native Hawaiian governing entity whether they would be located on land within the state of Hawaii or within any other state or territory of the U.S. However, it is conceivable that the native Hawaiian government could negotiate with the State of Hawaii to receive the authority needed to conduct gaming activities.

Severability: Provides that if any section or provision of this Act is held invalid by the Supreme Court that the remaining sections or provisions shall continue in full force and effect.

Funding: Authorizes "such sums as necessary" to carry out Act.

Additional Information: There are more than 150 current statutes that confer federal benefits to the native Hawaiian people. However, in 2000, the Supreme Court put many of these benefits in jeopardy with its decision in *Rice v. Cayetano*. Specifically, the Court held that the State of Hawaii's limitation on voting for certain state agency posts to only "native Hawaiians" ran afoul of the Fifteenth Amendment because it used ancestry as a proxy for race. *In the Rice* 7-2 decision, Justice Kennedy wrote the majority opinion, and Justices Breyer and Souter wrote a separate concurring opinion, which stated that while native Hawaiians theoretically are analogous to an Indian tribe, the record showed that "the analogies they...offer are too distant to save a race-based" classification. Although not directly on point, the Court's decision in *Rice* and the comments above by Breyer and Souter have led many to conclude that the current configuration of the justices would likely strike down most federal benefits flowing to native Hawaiians as a racial set-aside, if given a chance.

As a result, the Hawaiian Congressional delegation has championed H.R. 2314 and similar legislation in previous Congress' to provide a process for the United States to recognize native Hawaiians as a governing entity or tribe that is political in nature. For a more detailed background on the legal precedence leading to this legislation, [click here](#) and review the legislative bulletin circulated on similar legislation (H.R. 505), which passed in the 110th Congress by a vote of [261 – 153](#) on October, 24, 2007.

Background: Polynesians were the first to inhabit the Hawaiian Islands, and they lived in relative isolation until Captain James Cook of Britain arrived in 1778. At the time of Cook's arrival, Hawaii was ruled by different kings often at war with each other. In 1810, Kamehameha I succeeded in unifying the four kingdoms into one nation that was subsequently recognized as a sovereign nation by foreign countries. It was at this time that Hawaii went through a significant westernization with the establishment of a constitutional monarchy, the adoption of laws protecting religious liberty, and the transformation of the feudal land structure to confer freehold title (even while the King retained many lands for himself). In addition, the right of land ownership was extended to foreigners.

In addition to westerners, Hawaii experienced an influx of Asian foreigners, and the proportion of pre-1778 inhabitants gradually decreased—especially as the economics and growth of sugar production required more labor. By 1890, native Hawaiians constituted less than half of the population. Of the 89,990 people living in Hawaii, only 40,622 were either Hawaiian or half-Hawaiian—49,368 were Chinese, Portuguese, Japanese, American, British, and other nationalities. Hawaii had become a melting pot of races and ethnicities. Furthermore, Hawaii's government (both its cabinet and legislature) reflected the multi-racial composition of its subjects—the Kingdom of Hawaii was not a strictly native Hawaiian government as some have contended Queen Liliuokalani attempted to increase the crown's power in January of 1893 after years of gradual reform, and a number of westerners responded by forming a Committee of Public Safety, seizing control of the government, and replacing the monarchy with a provisional government.

This coup was largely bloodless (one policeman was shot in the shoulder), and according to *United States and the Hawaiian Kingdom: A Political History*, while the U.S. Marines were ordered on shore by U.S. Minister John Stevens without explicit permission from President Benjamin Harrison, they were *not* “used to assist in the overthrow of the Queen or in the establishment of the provisional government” but rather present to protect American life and property. When President Harrison learned of the events, he sanctioned Stevens' involvement because he viewed it as crucial “to our interests in the Pacific Ocean” in the face of British and Japanese involvement on the islands.

However, President Grover Cleveland, who took office two months later, denounced the U.S. role and called for a restoration of the Hawaiian monarchy. The provisional government refused, called a constitutional convention, and formed the Republic of Hawaii. The new Republic took control of all crown and government lands and sought annexation to the United States. Cleveland refused to submit such a treaty to the Senate, but his successor, President William McKinley supported annexation and signed the Annexation Act into law in 1898. The Republic of Hawaii ceded title to all of its public lands to the United States.

In 1920, Congress passed the Hawaiian Homes Commission Act to set aside roughly 200,000 acres of land and provide long-term leases to “native Hawaiians.” Native Hawaiians were defined as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Island previous to 1778.” In 1959, Hawaii was admitted as the fiftieth state of the Union and granted title to all public lands within its boundaries (almost 1.2 million additional acres). The Admissions Act authorized the land and income derived from it to be used for a number of purposes, *including but not limited to*, “the betterment of the conditions of native Hawaiians as defined by the Hawaiian Homes Commission Act.”

In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to administer a portion of the funds generated by the 1.2 million acres of ceded lands for the betterment of “native Hawaiians” and “Hawaiians.” The OHA was overseen by a board of trustees that was composed and elected

by Hawaiians. It was these restrictions that the Supreme Court found to be unconstitutional in *Rice v. Cayetano*. In 1993, the United States officially apologized for its involvement in the events of 1893, for its “invasion” and “active support” of an insurrection that led to the overthrow of the Kingdom of Hawaii. The apology resolution also pledged to support reconciliation efforts between the U.S. and the native Hawaiians.

Potential Conservative Concerns:

Constitutionally Dubious: Many conservatives argue the Constitution does not grant Congress the authority to extend arbitrary designations to racial groups. Long-standing precedent, through the Constitution, Supreme Court, and federal law has long designated an Indian tribe as those that operate with a preexisting political structure and who live separately and distinctly from other communities (both geographically and culturally). Some conservatives believe this does not apply to native Hawaiians because, like all other racial groups on the Island, they have had a distinct impact during the creation of the state. Additionally, Justice Kennedy commented in the *Rice* decision that the equal protection principle enshrined in the Constitution is now the shared “heritage of all the citizens of Hawaii” implying this legislation would be struck down if brought to the Supreme Court.

Not a Tribe; Hawaii is a Melting Pot of Races: Some conservatives have expressed concern that native Hawaiians do not appear to meet either the Bureau of Indian Affairs’ seven current mandatory requirements or the Supreme Court’s own definition for recognition as an Indian tribe. They are more closely related to as a racial group thanks to Hawaii’s long history of dozens of converging cultures and creeds. The seven criteria are:

- (1) Exist already as an Indian tribe since 1900 as documented by state and local officials and anthropologists;
- (2) Exist as a community (including 50% of the group residing geographically together);
- (3) Exert political influence over its members “from historical times to the present;
- (4) Possess governing documents and membership criteria;
- (5) Possess evidence that current membership descends from a historical tribe and
- (6) Does not belong to any other acknowledged tribe; and
- (7) Not be barred from recognition by federal legislation.

Transparency: Some conservatives expressed concern that the Democrats are once again secretly crafting significant legislation behind closed doors and without bipartisan input. Despite reporting a version of H.R. 2314 out of Committee that passed the House in 2007, House Democrats chose to file a new bill less with less than 24 hours notice with significant changes. So significant, the Governor and Attorney General of Hawaii now oppose the legislation.

Ambiguous: Some conservatives have expressed concern the bill would grant broad governmental powers to native Hawaiians including all living descendents of the original inhabitants of Hawaii and does not effectively define what it means to be a member of the new native Hawaiian government. Furthermore, it does not prohibit this government entity from including members located in any state throughout the Union. Additionally, some conservatives have expressed concern how H.R. 2314 could affect the governance of Hawaii if people living in the same neighborhood are subject to different laws, regulations, and taxes.

Balkanization: Some conservatives have expressed concern that H.R. 2314 would subdivide Americans based on race or ethnicity and create different codes of law that would apply to people of different races who live and function as part of one currently homogenous community. Even the U.S. Civil Rights Commission noted recently that this legislation “would discriminate on the

basis of race or national origin and further subdivide the American people into discrete subgroups according to varying degrees of privilege.”

Thanks, but no Thanks: According to a Zogby poll issued in November, almost two fifths of all Hawaiians oppose the Hawaiian Reorganization Act of 2009, or the Akaka Bill, because they believe passing this bill will favor one ethnic group over all others in Hawaii and amounts to a separate, raced-based government and gives preference to certain people based on blood and ancestry. 51% of all Hawaiian are opposed to substitute to H.R. 2314, including the Governor and Attorney General of Hawaii. Only around a third of Hawaiians support this legislation.

Committee Action: On May 7, 2009, the bill was introduced and referred to the Committee on Natural Resources. On December 16, 2009, the committee held a mark-up and ordered the bill to be reported as amended by a vote along party lines of [26 to 13](#).

Administration Position: A statement of Administration Policy is unavailable. However, Governor Lingle and Attorney General Bennett of the state of Hawaii are opposed to the bill in its current form. They [believe](#) the changes to H.R. 2314 incorporated in the amendment in the nature of a substitute are “potentially enormous” and could “constitute and override of Hawaii’s Eleventh Amendment sovereign immunity” status.

Cost to Taxpayers: Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 2314 would cost about \$1 million annually in fiscal years 2010-2012 and less than \$500,000 in each subsequent year.

Does the Bill Expand the Size and Scope of the Federal Government? Yes. The bill would establish the native Hawaiian Interagency Coordinating Group within the Department of Interior, create a nine-member commission responsible for creating and certifying a roll of adult native Hawaiians, and federally recognize a new Native Hawaiian governing entity.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? Yes. The legislation could lead to the creation of a new government unit to represent native Hawaiians, which would have to be recognized by the state of Hawaii. Among other relationships, this would affect the future negotiation of any land transfer between the state of Hawaii and the native Hawaiian governing entity.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? Committee Report 111- 412 states H.R. 2314 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

Constitutional Authority: Committee Report 111- 412 states that Article I, Section 8, grant Congress the authority to grant this bill but fails to cite a specific clause. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution”

RSC Staff Contact: Bruce F. Miller, bruce.miller@mail.house.gov, (202)-226-9720.