

Bad Bill for Hawaii and All States

by Roger Clegg
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Pending in both houses of Congress is legislation proposed by Sen. Daniel K. Akaka (D.-Hawaii) that would recognize Native Hawaiians -- those descended from the islands' aboriginal inhabitants -- as an Indian tribe. What's behind this?

Politicians in Hawaii would like to be able to single out Native Hawaiians for special favors and programs. This appears to be true for both parties, with the Republican governor of the state, Linda Lingle, currently leading the lobbying efforts, along with some high-powered and high-priced D.C. lobbying firms.

As Ken Conklin, a Hawaiian opposing the bill, recently wrote: "Our governor, legislature and congressional delegation aggressively push the Akaka bill.... They say it's righteous; but mostly it's pork-barrel politics. More than 160 racially exclusionary programs funnel big bucks from Washington to Hawaii, giving wealth and power to 'connected' individuals and corporations. Unconstitutional? Racial balkanization? Don't worry. Our friends will be rich."

The problem confronting these politicians is that the Supreme Court made clear three years ago in *Rice v. Cayetano* that "Native Hawaiians" is an ethnic classification, and ethnic classifications are presumptively unconstitutional. If challenged, they will be struck down unless a judge finds that they pass "strict scrutiny" -- the toughest constitutional standard -- and so giveaway programs that use this classification are very vulnerable.

Preferences for Indian tribes, on the other hand, are treated more deferentially by the courts, because of another Supreme Court decision, *Morton v. Mancari*, which held in 1974 that such classifications may be viewed as not racial, but political.

The way out of the box into which *Rice v. Cayetano* placed the Hawaiian politicians is, therefore, obvious: Let's just get Congress to pass a law that magically turns Native Hawaiians into an Indian tribe. If we turn them into a political entity, then when we give them preferential treatment, it will no longer trigger "strict scrutiny." And that is what the Akaka bill does.

The Akaka bill (S 344 and HR 665) asserts that the federal government "has a special political and legal responsibility to promote the welfare of Native Hawaiians" (as opposed to everyone else in Hawaii). It recognizes for Native Hawaiians alone "an inherent right to autonomy in their internal affairs," "an inherent right to self-

determination and self-governance," "the right to reorganize a Native Hawaiian governing entity," and "the right to become economically self-sufficient." In short, it allows them to organize themselves as and to become an Indian tribe.

There are two problems with this approach, both of them obvious and insurmountable. In the first place, Congress can't just turn a racial group into a political group by saying so. One recalls Lincoln's famous joke, "How many legs does a dog have if you call a tail a leg? Just four -- calling a tail a leg doesn't make it one." Could Congress turn African-Americans in the District of Columbia, or the Irish in Massachusetts, or Latinos in Texas, into political rather than racial entities -- into Indian tribes -- simply by so decreeing? Of course not.

The U.S. Department of Interior has a well-developed set of regulations for determining whether an "Indian group" is an "Indian tribe." The focus of those regulations is on whether the group is already a distinct political community, not whether it might become one once recognized. Native Hawaiians -- which the Akaka bill defines as including anyone who has even one drop of "aboriginal, indigenous" blood -- do not come close to passing muster under the DOI regulations.

The second problem is: Why should Congress *want* to facilitate ethnic discrimination, which is all the Akaka bill is designed to do? Far from simply recognizing an autonomy that already exists, the Akaka bill aims to *encourage* racial separation and balkanization. It's bad enough that Hawaiian politicians should be so enthusiastic about this poisonous nonsense -- at least one in five Hawaiians would be eligible to join this "tribe" -- but they have the excuse that they are just playing politics. For the senators and representatives from the other 49 states -- and for the President -- there is no excuse.

The progress of the bill has also been checked because the Justice Department has pointed out the constitutional problems with this racialist legislation. But the Bush Administration has as an uneven record in this area, particularly when political pressure is brought to bear. It's a scary situation.

No bill is an island, and the principles at stake here are not limited to Hawaii.