

United States Senate Committee on Indian Affairs  
Hearing May 3, 2007 on the "Akaka bill"  
(S.319, the Native Hawaiian Government Reorganization Act of 2007)

Prepared statement by H. William Burgess of Aloha for All<sup>1</sup>

Aloha and thank you for inviting me to testify about this bill which would brush aside core underpinnings of the United States itself.

Two years and three months ago, Sen. Inouye, in his remarks on introduction of the then-version of the Akaka bill (S. 147) at 151 Congressional Record 450 (Senate, Tuesday, January 25, 2005) conceded that **federal Indian law does not provide the authority for Congress to create a Native Hawaiian governing entity.**

"Because the Native Hawaiian government is not an Indian tribe, the body of Federal Indian law that would otherwise customarily apply when the United States extends Federal recognition to an Indian tribal group does not apply."

"That is why concerns which are premised on the manner in which Federal Indian law provides for the respective governmental authorities of the state governments and Indian tribal governments simply don't apply in Hawaii."

**There being no tribe, the Constitution applies.** The Akaka bill stumbles over the Constitution virtually every step it takes.

- As soon as the bill is enacted, **a privileged class would be created in America.** §§2(3) & (22)(D) and §§3(1) & (8) would "find" a "special political and legal relationship" between the United States and anyone with at least one ancestor indigenous to lands now part of the U.S. that "arises out of their status as aboriginal, indigenous, native people of the United States." Creation of a hereditary aristocracy with a special legal and political relationship with the United States is forbidden by the Anti-Titles of Nobility clause of the Constitution.

This "sleeper" provision would also have profound **international and domestic consequences for the United States.** For over 20 years, a draft Declaration of Indigenous Rights has circulated in the United Nations. The U.S. and other major

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1. Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and property owners in Hawaii. We believe that Aloha is for everyone; every citizen is entitled to the equal protection of the laws without regard to her or his ancestry.

For further information about the Akaka bill see: <http://www.aloha4all.org> (click on Q&A's) and <http://www.angelfire.com/hi2/hawaiiansovereignty/OpposeAkakaBill.html> or email [hwburgess@hawaii.rr.com](mailto:hwburgess@hawaii.rr.com) .

nations have opposed it because it challenges the current global system of states; is “inconsistent with international law”; ignores reality by appearing to require recognition to lands now lawfully owned by other citizens.” In November 2006, a subsidiary body of the U.N. General Assembly rejected the draft declaration proposing more time for further review. Enactment of the Akaka bill would undo 20 years of careful diplomatic protection of property rights of American citizens abroad and at home.

- Also immediately upon enactment, **superior political rights are granted to Native Hawaiians**, defined by ancestry: §7(a) The U.S. is deemed to have recognized the right of Native Hawaiians to form their own new government and to adopt its organic governing documents. No one else in the United States has that right. This creates a hereditary aristocracy in violation of Article I, Sec. 9, U.S. Const. “No Title of Nobility shall be granted by the United States.”

- Also, under §8(a) upon enactment, the delegation by the U.S. of authority to the State of Hawaii to “address the conditions of the indigenous, native people of Hawaii” in the Admission Act “is reaffirmed.” This delegation to the State of authority to **single out one ancestral group for special privilege** would also seem to violate the prohibition against hereditary aristocracy. The Constitution forbids the United States from **granting titles of nobility** itself and also precludes the United States from authorizing states to bestow hereditary privilege.

- §7(b)(2)(A)&(B) Requires the Secretary of the DOI to appoint a commission of 9 members who “shall demonstrate ... not less than 10 years of experience in Native Hawaiian genealogy; and ...ability to read and translate English documents written in the Hawaiian language,” This thinly disguised intent to restrict the commission to Native Hawaiians would likely violate the Equal Protection clause of the Fifth Amendment, among other laws, and would **require the Secretary to violate his oath to uphold the Constitution.**

- §7(c)(1)(E) & (F) require the Commission to prepare a roll of adult Native Hawaiians and the Secretary to publish the racially restricted roll in the Federal Register and thereafter update it. Since the purpose of the roll is to **deny or abridge on account of race the right of citizens of the United States to vote**, requiring the Secretary to publish it in the Federal Register would cause the Secretary to violate the Fifteenth Amendment and other laws.

- §7(c)(2) Persons on the roll may develop the criteria and structure of an Interim Governing Council and elect members from the roll to that Council. **Racial restrictions on electors and upon candidates both violate the Fifteenth Amendment and the Voting Rights Act.**

- §7(c)(2)(B)(iii)(I) The Council may conduct a referendum among those on the roll to determine the proposed elements of the organic governing documents of the

Native Hawaiian governing entity. Racial restrictions on persons allowed to **vote in the referendum would violate the 15<sup>th</sup> Amendment and the Voting Rights Act.**

- §7(c)(2)(B)(iii)(IV) Based on the referendum, the Council may develop proposed organic documents and hold elections by persons on the roll to ratify them. This would be the **third racially restricted election and third violation of the 15<sup>th</sup> Amendment and the Voting Rights Act.**

- §7(c)(4)(A) Requires the Secretary to certify that the organic governing documents comply with 7 listed requirements. Use of the roll to make the certification would violate the Equal Protection clause of the Fifth Amendment, among other laws, and would, again, require the Secretary to violate his oath to uphold the Constitution.

- §7(c)(5) Once the Secretary issues the certification, the Council may hold elections of the officers of the new government. (If these elections restrict the right to vote based on race, as seems very likely) they would violate the 15<sup>th</sup> Amendment and the Voting Rights Act.)

- §7(c)(6) Upon the election of the officers, the U.S., without any further action of Congress or the Executive branch, “reaffirms the political and legal relationship between the U.S. and the Native Hawaiian governing entity” and recognizes the Native Hawaiian governing body as the “representative governing body of the Native Hawaiian people.” This would violate the Equal Protection clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments by giving one racial group political power and status and their own sovereign government. These special relationships with the United States are denied to any other citizens.

- §8(b) The 3 governments may then negotiate an agreement for:

- transfer of lands, natural resources & other assets; and
  - delegation of governmental power & authority to the new government; and
  - exercise of civil & criminal jurisdiction by the new government; and
  - “residual responsibilities” of the US & State of Hawaii to the new government.

This **carte blanche grant of authority** to officials of the State and Federal governments to agree to give away public lands, natural resources and other assets to the new government, without receiving anything in return, is beyond all existing constitutional limitations on the power of the Federal and State of Hawaii executive branches. **Even more extreme is the authority to surrender the sovereignty and jurisdiction of the State of Hawaii over some or all of the lands and surrounding waters of some or all of the islands of the State of Hawaii and over some or all of the people of Hawaii.** Likewise, the general power to commit the Federal and State governments to “residual responsibilities” to the new Native Hawaiian government.

- §8(b)(2) The 3 governments may, but are not required to, submit to Congress and to the Hawaii State Governor and legislature, amendments to federal and state laws that will enable implementation of the agreement. Treaties with foreign governments require the approval of 2/3<sup>rd</sup> of the Senate. Constitutional amendments require the consent of the citizens. But the Akaka bill does not require the consent of the citizens of Hawaii or of Congress or of the State of Hawaii legislature to the terms of the agreement. Under the bill, the only mention is that the parties **may** recommend amendments to implement the terms they have agreed to.

Given the **dynamics at the bargaining table created by the bill**: where the State officials are driven by the same urge they now exhibit, to curry favor with what they view as the “swing” vote; and Federal officials are perhaps constrained with a similar inclination; and the new Native Hawaiian government officials have the duty to their constituents to demand the maximum; **it is not likely that the agreement reached will be moderate or that any review by Congress or the Hawaii legislature will be sought if it can be avoided.** More likely is that the State will proceed under the authority of the Akaka bill to promptly implement whatever deal has been made.

**The myth of past injustices and economic deprivations.** Contrary to the claims of the bill supporters, the U.S. took no lands from Hawaiians at the time of the 1893 revolution or the 1898 Annexation (or at any other time) and it did not deprive them of sovereignty. As part of the Annexation Act, the U.S. provided compensation by assuming the debts of about \$4 million which had been incurred by the Kingdom. The lands ceded to the U.S. were government lands under the Kingdom held for the benefit of all citizens without regard to race. They still are. Private land titles were unaffected by the overthrow or annexation. Upon annexation, ordinary Hawaiians became full citizens of the U.S. with more freedom, security, opportunity for prosperity and sovereignty than they ever had under the Kingdom.

The political and economic power of Hawaiians increased dramatically once Hawaii became a Territory. University of Hawaii Political Science Professor Robert Stauffer wrote:

It was a marvelous time to be Hawaiian. They flexed their muscle in the first territorial elections in 1900, electing their own third-party candidates over the *haole* Democrats and Republicans...The governor-controlled bureaucracy also opened up to Hawaiians once they began to vote Republican.

By the '20s and '30s, Hawaiians had gained a position of political power, office and influence never before--nor since--held by a native people in the United States.

Hawaiians were local judges, attorneys, board and commission members, and nearly all of the civil service. With 70 percent of the electorate--but denied the vote under federal law--the Japanese found themselves utterly shut out.

Even by the late 1930s, they comprised only just over 1 percent of the civil service.

This was "democracy" in a classic sense: the spoils going to the electoral victors.

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Higher-paying professions were often barred to the disenfranchised Asian Americans. *Haoles* or Hawaiians got these. The lower ethnic classes (Chinese, Japanese and later the Filipinos) dominated the lower-paying professions.

But even here an ethnic-wage system prevailed. Doing the same work, a Hawaiian got paid more per hour than a Portuguese, a Chinese, a Japanese or a Filipino--and each of them, in turn, got paid more than the ethnic group below them.

Robert Stauffer, "Real Politics", Honolulu Weekly, October 19, 1994 at page 4.

The alliance between Hawaiians, with a clear majority of voters through the 1922 election, and more than any other group until 1938, and the Republican party is described in more depth in Fuchs, *Hawaii Pono: A Social History*, Harcourt, Brace & World, Inc., 1961, at 158-161.

### **Hawaiians prosper without "entitlements" or the Akaka bill.**

The 2005 American Community Survey (ACS) for California, recently released by the U.S. Census Bureau, confirms Native Hawaiians' ability to prosper without special government programs. The estimated 65,000 Native Hawaiian residents of California, with no Office of Hawaiian Affairs or Hawaiian Homes or other such race-based entitlements, enjoyed higher median household (\$55,610) and family (\$62,019) incomes, relative to the total California population (\$53,629 and \$61,476 respectively) despite having smaller median household and family sizes. California is particularly appropriate for comparing earning power, because California has the greatest Native Hawaiian population outside of Hawaii; and it happens that the median age of Native Hawaiians residing in California (33.7 years) is almost identical to that of the general population of California (33.4 years).

The fact that Native Hawaiians are quite capable of making it on their own was suggested by Census 2000 which showed the then – 60,000 Native Hawaiian residents of California enjoyed comparable relative median household and family incomes despite their 5 year younger median age.

See Jere Krischel, *Census: Native Hawaiians Do Better When Treated Equally*, CERA Journal Special Akaka Bill Edition included in our packets for Committee members.

Hawaiians today are no different, in any constitutionally significant way, from any other ethnic group in Hawaii's multi-ethnic, intermarried, integrated society. Like all the rest of us, some do well, some don't and most are somewhere in between.

### **The people of Hawaii don't want the Akaka bill**

Grassroot Institute of Hawaii commissioned two comprehensive automated surveys of every household in the telephone universe of the State of Hawaii, one in July 2005 and the second in May 2006. Of the 20,426 live answers to the question, two to one consistently answered "No" when asked, "Do you want Congress to pass the Akaka bill?"

In 1959, in the Hawaii statehood plebiscite, over 94% voted "Yes" for Statehood.

### **Racial Tensions are simmering in Hawaii's melting pot**

So said the headline on the first page of USA Today 3/7/07 describing the attack Feb. 19th 2007 in the parking lot of the Waikēle mall on Oahu, when a Hawaiian family beat a young soldier and his wife unconscious while their three year old son sat in the back seat of their car. The attack, "unusual for its brutality," sparked impassioned public debate.

Tenured University of Hawaii Professor Haunani Kay Trask's picture is displayed in the USA today article and the caption quotes her, "Secession? God I would love it. I hate the United States of America."

The USA Today article and related links may be found at <http://tinyurl.com/2jle2e>. See also, The Gathering Storm, Chapter 1 of *Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State* by Kenneth R. Conklin, PhD <http://tinyurl.com/2f7p8b>.

The brutality at Waikēle mall is a flashing red light. Over 1 million American citizens in Hawaii are under siege by what can fairly be called an evil empire dedicated to Native Hawaiian Supremacy.

Red shirted protesters march often and anti-American signs are regularly posted along King Street on the Grounds of Iolani Palace. Our Governor wears the red protest shirts and tells them she supports their cause. Last August at a statehood day celebration at Iolani Palace, thugs with bull horns in the faces of the high school band members there to play patriotic music, drove them away.

Passage of the Akaka bill would encourage the Hawaiian Supremacists. Even if the bill is declared unconstitutional after a year or two or more of litigation, it may well be too late to put the Aloha State back together again.

A firm rejection of the Akaka bill by this Committee would reassure the people of Hawaii that racial supremacy and separatism are not acceptable. That, in the eyes of government, there is only one race here. It is American.

Mahalo,

Honolulu, Hawaii April 30, 2007.



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