

*New Federal Initiatives Project*

**The Akaka Bill**

**By  
G.L. Brock**

**April 21, 2009**



*The Federalist Society  
for Law and Public Policy Studies*

**[www.fed-soc.org](http://www.fed-soc.org)**

## THE AKAKA BILL

The bill popularly known as the “Akaka Bill” had been introduced in Congress many times, but until recently it had been stalled under the threat of a veto by President Bush. Because President Obama has said he will sign it, it has been given new life. Supporters say the bill simply treats ethnic Hawaiians like other indigenous peoples, helping them to organize into a tribe, and that only racial discrimination prevents them from being recognized as a tribe. Opponents say that there is no historical basis for analogizing ethnic Hawaiians to continuously-existing Indian tribes, and that the bill is just an unconstitutional attempt to authorize racial preferences.

Two versions are currently pending in the Senate (S. 381 and S. 708) and in the House (H.R. 862 and H.R. 1711). They differ from earlier versions and from each other in significant ways that are discussed below.<sup>1</sup>

***What the Akaka Bill Will Do:*** Put simply, the proposed law will assist the nation’s approximately 400,000 ethnic Hawaiians to organize themselves into an indigenous tribe with powers like those of mainland Indian tribes – possibly including the power to promulgate a criminal code, impose taxes and exercise eminent domain. If all 400,000 join, it will be by far the largest tribe in the nation. About half of the 400,000 reside in Hawaii and half on the mainland.

The first step after enactment will be the creation of an Office for Native Hawaiian Affairs (“ONHA”) at the U.S. Department of Interior.<sup>2</sup> That office will “assist adult [ethnic Hawaiians] who wish to participate in the reorganization of the Native Hawaiian government” in preparing the tribal membership roll. The specific task of determining who is and who is not a “Native Hawaiian” as defined in the bill will fall to a Commission appointed by the Secretary of the Interior. The nine members of the Commission must themselves be Native Hawaiians with “expertise in the determination of Native Hawaiian ancestry.”<sup>3</sup> They are to ensure that only those who can demonstrate their Native Hawaiian bloodline are permitted to join.

Once the tribal roll is certified and published, the tribe members, with ONHA’s assistance, will establish an interim government. The interim government will then draft organic governing documents and hold elections to establish the permanent government. After the Secretary of the Interior makes the required certifications, federal recognition will be “extended to the Native Hawaiian government as the representative governing body of the Native Hawaiian people.”<sup>4</sup>

“[T]he United States [would then be] authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian government regarding the transfer of lands, resources and assets dedicated to Native Hawaiian use under existing laws ....”<sup>5</sup> The bill does not specify whether the tribe will purchase these assets or receive them as a gift. Some ethnic Hawaiian activists have said that they expect the property will be given to the tribe.

***Controversy Over the Akaka Bill:*** Both supporters and opponents agree that the bill must be understood in the context of history, but differ over which aspects of history are important. Supporters argue that passage of the bill is a matter of simple justice. They argue that the American government was complicit in the 1893 overthrow of Queen Liliuokalani, which illegally denied not just the Queen’s right of sovereignty, but the ethnic Hawaiians’ collective right.

Opponents argue to some degree (1) that the Kingdom of Hawaii was a multi-racial society from its inception in 1810, (2) that ethnic Hawaiians were a minority of the population by 1893, (3) that the overthrow of the Queen was accomplished by white subjects of the Queen, not the United States, and (4)

that the crew of the U.S.S. Boston came ashore only to protect American property, not to participate in the overthrow. They place their primary reliance, however, on the fact that 94.3% of Hawaiian voters cast ballots in favor of statehood almost half a century later. At that point, opponents argue, whatever wrongs that might have occurred in the past were waived. Moreover, they argue, Congress does not have the constitutional authority to create a sovereign tribe out of individuals who are already fully integrated into the Hawaiian body politic, and doing so could set a bad precedent for other groups, like Tejanos and Californios.

Akaka bill opponents point to a more recent event to help explain the bill's current appeal. In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court ruled that the U.S. Constitution's 15th Amendment, which prohibits States from discriminating by race in voting rights, prohibited Hawaii from holding elections in which only ethnic Hawaiians could vote. The election was for trustees of the Office of Hawaiian Affairs ("OHA"), a department of the State of Hawaii that administers a multi-billion dollar public trust for the exclusive benefit of ethnic Hawaiians. Among other things, ethnic Hawaiians are eligible for special home loans, business loans, housing and education programs. According to Akaka bill opponents, it is the protection of these benefits that motivates supporters.

Akaka bill supporters argue that these benefits are a perfectly legitimate continuation of federal policy toward ethnic Hawaiians that began long ago with policies like the Hawaiian Homes Commission Act of 1921.<sup>6</sup> The primary asset of the OHA public trust is some 1.8 million acres of land that were once owned by the Hawaiian monarchy and are now known as the "ceded lands." After annexation, the lands became the property of the U.S. government, and after statehood, most were ceded back to the State of Hawaii for use in fulfilling five purposes. One of those five purposes was "for the betterment of the conditions of native Hawaiians." Hawaiian activists argue that revenue from the ceded lands should be used exclusively for the benefit of ethnic Hawaiians and reject the other four purposes.<sup>7</sup>

But *Rice v. Cayetano* put these programs in jeopardy. Opponents of the benefits argue that since the Supreme Court held that racially-exclusive OHA elections violated the 15<sup>th</sup> Amendment, the Court would almost certainly hold that OHA's racially-exclusive benefits violate the 14<sup>th</sup> Amendment's Equal Protection Clause. By legislatively transforming ethnic Hawaiians from a racial group to a semi-sovereign tribal group, Akaka bill supporters hope that those 14<sup>th</sup> and 15<sup>th</sup> Amendment prohibitions on race discrimination will no longer apply. See *Morton v. Mancari*, 417 U.S. 535 (1974) (holding that the Bureau of Indian Affairs preference for tribal members did not constitute race discrimination under the Fifth Amendment). Opponents disagree that the 14<sup>th</sup> Amendment can be so avoided and argue that any benefits conferred on the tribe will be unconstitutional race discrimination.

***Unusual Supporters and Opponents:*** Republican Gov. Linda Lingle is an Akaka bill supporter and has lobbied heavily for it as a reasonable political accommodation to ethnic Hawaiians. On the other hand, the U.S. Commission on Civil Rights came out against it in 2006:

"The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 2005 (S. 147) as reported out of committee on May 16, 2005, 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."

The Commission on Civil Rights took note of the fact the Indian tribes are not subject to the Bill of Rights and are required to accord civil rights to their members only under the limited circumstances specified in the Indian Civil Rights Act, 25 U.S.C. sec. 1301-03.

***Differences Between Current and Earlier Versions of the Bill:*** When Sen. Daniel Akaka re-

introduced the bill as S. 381 on February 4, 2009, provisions that had been negotiated in years past in order to get a majority behind it had been removed. For example, the 2007 version (S. 310) had specifically reserved questions concerning the extent of the tribal government's authority to exercise criminal and civil jurisdiction for negotiations to occur after federal recognition. The current bills (S. 381, H.R. 862, S. 708, H.R. 1711) are silent. The earlier bill explicitly reserved sovereign immunity for both the federal and state governments against potential claims by the new tribe. The current bills are silent.

The 2007 version (S. 310) disavowed any intent to create a new government with the authority to engage in Indian gaming. S. 381 and its twin, H.R. 862, contained no such provision. On March 25, 2009, however, Senator Akaka introduced S. 708, which restores the provision on Indian gaming. H.R. 1711 is identical. All four bills are currently pending.

---

<sup>1</sup> Earlier versions of the proposed law were titled "the Native Hawaiian Government Reorganization Act," but that appellation was dropped this year.

<sup>2</sup> See Section 4.

<sup>3</sup> See Section 7. (The Library of Congress "Thomas" website is defective in that each of the pending bills appears not to have a Section 7. Section 7 can be accessed by clicking on Section 6 in the Table of Contents and scrolling down.)

<sup>4</sup> See *id.*

<sup>5</sup> See Section 9.

<sup>6</sup> Act of July 9, 1921, 42 Stat. 108.

<sup>7</sup> The other four purposes were (1) "for the support of the public schools and other public educational institutions"; (2) "for the development of farm and home ownership;" (3) "for the making of public improvements"; and (4) "for the provision of lands for public use." There is no requirement that the State of Hawaii use the property for any particular reason among the five. Act of March 18, 1959, section 5(f), P.L. 86-3, 73 Stat. 4.

### **Related Links:**

"The Akaka Bill" program held on February 12, 2008, Event Audio/Video: [http://www.fed-soc.org/publications/pubID.511/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.511/pub_detail.asp)

"Akaka Bill Debate" from The Federalist Society Online Debate Series: <http://www.fed-soc.org/debates/dbtid.10/default.asp>

S.708 IN THE SENATE OF THE UNITED STATES, March 25, 2009:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s708is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s708is.txt.pdf)

H.R.1711 IN THE HOUSE OF REPRESENTATIVES, March 25, 2009:

[http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1711ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=111_cong_bills&docid=f:h1711ih.txt.pdf)