"*Aloha!*," Akaka Bill

*By Gail Heriot**

Hawaii has long been known for its warm and welcoming "Spirit of Aloha." It's hard to believe its politics could be any different. But at least with regard to issues of race and ethnicity, Hawaiian politics falls well short of the Aloha standard.

In a nation in which special benefits, based on race or ethnicity, are part of the political landscape in nearly every state, Hawaii is in a class by itself. Special schools, special business loans, special housing and many other benefits are available to those who can prove their Hawaiian bloodline. "Haole," as some ethnic Hawaiians refer to whites, need not apply. And the same goes for African Americans, Hispanics, or Asian Americans—no matter how long they or their families have lived on the islands.

As explained further below, it is against that background that the proposed Native Hawaiian Government Reorganization Act (known as the "Akaka bill")[1] is best understood. But let's look at it apart from that context first. If passed (and as of late passage seems unlikely any time soon), the Akaka bill would create the institutional framework necessary for the nation's approximately 400,000 ethnic Hawaiians to organize into one vast Indian tribe or quasi-tribe. So organized, it would be considerably larger than any existing Indian tribe.

That would have been a momentous step even if the issue were not tied up with preserving Hawaii's extensive system of special benefits for ethnic Hawaiians. Nevertheless, as of a little over a year ago, few outside of Hawaii had ever heard of the bill and few inside had much knowledge of how it would work. The Akaka bill was a sleeper.

It's not that the bill had no opposition. Indeed, although the entire Hawaiian delegation to Congress supported the bill, the only full-scale poll ever done indicates that ethnic Hawaiians reject the notion of a tribe—48% to 43%—when they are informed that under a tribal government they would not be subject to the same laws, regulations and taxes as the rest of the state. And Hawaiians generally oppose the so-called "reorganization" by an astonishing two-to-one ratio. Nevertheless, perhaps in part on the strength of the bill's popularity among political activists, a version of the bill passed the House of Representatives in a previous Congress. That made the Senate the bill's most serious obstacle, where for years a number of Republican Senators had been working to keep the ill-advised bill off the agenda. But those efforts had been quiet, and as a result of a complex series of parliamentary maneuvers by the bill's supporters by the summer of 2005 they had faltered. The bill appeared to be headed for a vote sometime in September. Opponents were not at all certain they could defeat it.

Then came Hurricane Katrina. No time on the Senate floor could be spared for less pressing matters. The Akaka bill would have to wait. That wait might have had a decisive effect. The intervening months created an opportunity for more careful public consideration of the bill. Most notably, after a public briefing, the United States Commission on Civil Rights issued a report on May 18, 2006, which stated the Commission's conclusion very plainly:

> The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 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 degree of privilege.[2]

Meanwhile, newspaper columnists were commentating and bloggers blogging. Even radio talk show hosts got in on the act. Slowly, well-informed voters were learning about the Akaka bill. And they often found themselves uncomfortable with it. Finally on June 7, 2006, the Bush Administration formally came out in "strong" opposition to the bill. The next day a petition for cloture was defeated—four votes short of the necessary sixty. The bill is now considered "dead." But in modern political parlance "dead" doesn't mean dead. It means it's gone for a while and its opponents hope it won't come back. Bill supporters are already talking about the return of the bill. It's therefore worth it to look closely at it.

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Supporters point out that the Akaka Bill would not itself create a tribe. Instead it would create, at taxpayer expense, a Commission made up of ethnic Hawaiians with "expertise in the determination of Native Hawaiian ancestry and lineal descendancy." Their task would be to determine whose bloodline justifies membership in the new tribe and whose does not. Federal employees could be detailed to the Commission to assist in the process. Once the official rolls are constituted, the enrolled adults could elect the members of the "interim governing council." The council would in turn eventually make way for the creation of a more permanent (but as yet unnamed) "governing entity." Two additions to the federal bureaucracy—the Office for Native Hawaiian Relations at the Department of the Interior and the Native Hawaiian Interagency Coordinating Group—would be called upon to facilitate the "reorganization" and to deal with the tribe and its government once established. Supporters are thus correct that the Akaka bill does not itself create a tribe. It simply creates the framework. But the distinction hardly seems worth making. It's clear that unless the Akaka bill passes, there will be no Native Hawaiian government or any Native Hawaiian political entity at all.

The legal and constitutional status of Indian tribes has never been clear. Recently, in *United States v. Lara*,[3] Justice Clarence Thomas called upon the Court "to re-examine the premises and logic of our tribal sovereignty cases" and suggested that much of the "confusion" in Indian

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law arises from "largely incompatible and doubtful assumptions" underlying the case law. Indian law is in fact riddled with inconsistencies and difficulties, and the Akaka bill raises some of the most basic questions: Can Congress authorize the Department of Interior to take steps leading to the creation (or even the re-creation) of a new tribe? Or is it limited to recognizing those groups that have been continuously functioning as an independent social and political unit for a significant period of time?

Some would argue that the Akaka bill attempts to create a tribe where none has ever existed. And they have certain facts on their side. Prior to the unification of the Hawaiian Islands under King Kamehameha I in 1812, the islands were a patchwork of warring tribes, not a single unit. By the time of unification, however, Hawaii was already well on its way to becoming a multi-racial society. The Kingdom of Hawaii had sizable numbers of Asian, European and American immigrants. Far from being "outsiders," they were often government officials and close advisors to the crown. The Hawaiian royal family freely intermarried with non-ethnic Hawaiians. Indeed, Queen Liliuokalani herself was married to an American of European descent. In any event, no one would argue that an ethnic Hawaiian political and social unit exists today. An existing political and social unit would have a defined membership. It would have its own laws and legal institutions. Ethnic Hawaiians do not.

It is worth pointing out that the Constitution contains no clear statement of congressional authority to regulate *existing* Indian tribes (as opposed to commerce between the United States and Indian tribes), much less to create or organize additional ones. The authority to regulate existing tribes is sometimes said to derive from the necessity of dealing with reality. The existence of Indian tribes in 1787 (as well as today) is a fact. Surely it was the intention of the framers to confer power on Congress to deal with that reality, whether it's considered a happy reality, an unhappy reality, or something in between—or so the argument runs.

But the power to authorize the creation of new tribes (or even authorize the reorganization of a previously existing tribe) is not merely the practical power to cope with the world as it is. New tribes and newly reconstituted tribes alter the status quo in significant ways. If the power to create them exists, what limits are placed on it? Does Congress have the authority to create an Indian tribe for Mexican Americans in Southern California? The Amish of Pennsylvania? Orthodox Jews in New York? (Religious groups would be among the groups most likely to desire tribal status, since tribes, if they are conceptualized as sovereign or quasi-sovereign entities, are not governed by the Bills of Rights, except insofar as the Indian Civil Rights Act of 1968 imposes that legal responsibility on the tribe.[4] A religious group could thus arguably surmount the Establishment Clause difficulties dealt with by the Supreme Court in *Board of Education of Kiryas Joel School District v. Grumet*, by becoming a tribe).[5]

Even assuming the Constitution permits it, is this a power that Congress really wants to exercise? When other groups seek tribal status in the future, where is the political will to tell them no going to come from?

Advocates of the Akaka bill argue that Congress has reorganized tribes before, so no new ground is being broken. But the best precedent they can point to for their argument doesn't provide the support they need. The example of the Menominee Indian tribe of Wisconsin never reached litigation. But even if it had, it is very different from the Hawaii case. In 1954, during a period in which it was fashionable to favor moving away from the concept of tribal sovereignty, Congress had adopted the Menominee Indian Termination Act,[6] which terminated federal recognition of the Menominee tribe. But the Menominee tribe did not cease to exist as a result. It simply took on a corporate existence under the laws of the State of Wisconsin. In 1973, the Menominee sought and obtained re-recognition in the Menominee Restoration Act.[7] Changes were made to the structure of the group in converting from a corporate back to tribal status. But there was always a structure in place.

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The issue of congressional authority to authorize the creation of a tribal structure where none previously existed recedes in importance, however, beside the issue of racial and ethnic discrimination. Indeed, the desire to legally sanitize Hawaii's vast system of special benefits for ethnic Hawaiians is what drives the push for the Akaka bill. The State of Hawaii's Office of Hawaiian Affairs[8] administers a huge public trust—worth billions of dollars—that in theory benefits all Hawaiians, but for reasons that are both historical and political, in practice, provides benefits exclusively for ethnic Hawaiians. Among other things, ethnic Hawaiians are eligible for special home loans, business loans, housing and educational programs. On the OHA web site, the caption proudly proclaims its racial loyalty, "Office of Hawaiian Affairs: For the Betterment of Native Hawaiians."[9]

The constitutionality of the system has recently been called into question as a result of the Supreme Court's decision in *Rice v. Cayetano*[10] and the Ninth Circuit's decision in *Doe v. Kamehameha Schools*.[11] *Rice* held that Hawaii's election system under which only ethnic Hawaiians could vote for Trustees of the Office of Hawaiian Affairs (identified by the Court as "a state agency") was a violation of the Constitution's Fifteenth Amendment, which prohibits discrimination on the basis of race in voting rights. *Doe* held that the prestigious King Kamehameha schools cannot give ethnic Hawaiians priority over students of all other races and ethnicities for admission without violating 42 U.S.C. Section 1981. Given the results in these cases, it is considered by many to be only a matter of time before other aspects of the OHA's special benefits program will be challenged in court on equal protection and other civil rights grounds and ultimately found contrary to law.

The best hope of those who favor these programs is to transform them from programs that favor one race or ethnicity over others to programs that favor the members of a tribe over non-members. As the Supreme Court held in *Morton v. Mancari*,[12] a case involving a hiring preference for tribal members at the U.S. Bureau of Indian Affairs, such a benefit is "granted to Indians not as a discrete racial group,

but, rather, as members of quasi-sovereign tribal entities." In other words, it's not race discrimination, it's discrimination on the basis of tribal membership.

But *Morton v. Mancari* can't apply to a tribal group that does not yet exist. The very act of transforming ethnic Hawaiians into a tribe is an act performed on a racial group, not a tribal group. When, as here, it is done for the purpose of conferring massive benefits on that group, it is an act of race discrimination subject to strict scrutiny—scrutiny that it might not survive. The proof of all this is apparent if one simply alters the facts slightly. If the State of Hawaii were operating its special benefits programs for whites only or for Asians only, no one would dream that the United States could assist them in this scheme by providing a procedure under which whites or Asians could be declared a tribe and state assets could be thus redirected to the newly created entity.

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Last year, Senator Akaka was asked in a National Public Radio interview whether the sovereign status granted in the bill "could eventually go further, perhaps even leading to outright independence." The question must have seemed extraordinary for anyone unfamiliar with the growing strength of the push for Hawaiian independence. Back in the 1970s, its supporters were considered kooks and lunatics. But today, perhaps as a result of the general multi-cultural movement, although nowhere close to a majority, they are too numerous to be dismissed as crazy. If you drive down a country road in Hawaii, it's surprisingly easy to see an upside down Hawaiian flag, the symbol of the movement, flying over someone's home. Even more extraordinary was Akaka's answer: "That could be. That could be. As far as what's going to happen at the other end, I'm leaving it up to my grandchildren and great-grandchildren."

It's impossible to know, of course, whether the passage of the Akaka bill would have led to serious pressure for Hawaiian independence or whether it would have led to demands for tribal status for other American groups. What seems likely is that it would have added to the pressures that already divide Americans. Fortunately, for now, its passage seems unlikely.

FOOTNOTES

[1] S. 147.

[2] The Native Hawaiian Government Reorganization Act of 2005: A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C., January 20, 2006 at 15.

[3] 541 U.S. 193, 214 (2004).

[4] 25 U.S.C. Sec. 1301-1303.

[5] 512 U.S. 687 (1994).

[6] 25 U.S.C. sec. 891-902.

[7] 25 U.S.C. sec. 903a(b), 903b(c).

[8] *See* HAW. CONST. art. XII, §. 5.

[9] http://www.oha.org.

[10] 528 U.S. 495 (2000).

[11] 416 F.3d 1025 (9th Cir. 2005), *reh'g en banc* Doe ex rel. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 441 F.3d 1029 (9th Circ., Feb. 22, 2006).

[12] 417 U.S. 535 (1974).