

With All Due Respect, Rep. Cole, My Arguments Against Race-Based Government Are Quite Principled



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BY Ilya Shapiro - While campaigning for former Hawaii governor Linda Lingle, who is now running for U.S. Senate, Rep. Tom Cole (R-OK), the only Native American in Congress, said that opposition to the Akaka Bill is “arrogant” meddling in local affairs. (The Akaka Bill, [which I've covered extensively](#), would create a race-based governing entity that would negotiate with the federal and state governments over all sorts of issues—effectively carving out an unconstitutional system of racial spoils.) As quoted [in the Honolulu Star-Advertiser](#) (\$):

“Hawaii has told us again and again, on a bipartisan basis, this is what we want to do,” Cole said. “I’d have to tell you, I think it’s incredibly arrogant, whether it’s a Republican or a Democrat that opposes tribal sovereignty — in this case sovereignty for Native Hawaiians—when the people of Hawaii have told us we’d like it. Who are we to impose our opinions?”

Cole’s attack is not only a calumny on those who oppose the Akaka Bill in good faith—including all but six of his House Republicans who voted against it in 2010 after years of deliberation, public vetting, and a 2006 Department of Justice conclusion that the bill was unwise as a policy matter and presented serious constitutional difficulties—but itself displays a dangerous misunderstanding of the issues involved.

It’s easy to think of the Akaka Bill as being “merely” another request for self-governance by native peoples as was extended to Aleuts upon Alaskan statehood, but that’s simply not what’s going on in Hawaii. Hawaiians, “Native” and otherwise, have a different history and political sociology from the tribes that are accommodated in our (dubious and counterproductive) Indian law, which itself is a unique compromise with pre-

constitutional reality. Congress can't simply define Hawaiians as an "Indian tribe" because that term has a fixed meaning, limited to preexisting North American tribes that were "dependent nations" at the time of the Founding. Such tribes, to benefit from the protections of Indian law, must have an independent existence and "community" apart from the rest of American society, and their separate government structure must have a continuous history for at least the past century. By these standards, Hawaiians don't qualify.

Moreover, it's false to say that Hawaiians support the Akaka Bill or ethnic/racial preferences more broadly. There has never been a public referendum—Akaka Bill supporters resist such a move—but a **November 2009 Zogby poll** revealed that 51% of Hawaiians oppose the bill, 60% opposed if you remove the undecideds. In addition, 76% would oppose tax increases to pay for the Akaka nation-tribe (which would be inevitable), only 7% favor separate laws and regulations for a new native government, and only 28% say the bill is fair with respect to racial discrimination. Perhaps most importantly, 58% would want a chance to vote before the Akaka Bill could become law, with only 28% saying that would be unnecessary.

Finally, and quite apart from the policy and political considerations, the Akaka Bill has serious constitutional defects. As mentioned above, the Constitution's anomalous Indian law exception was created by the document itself and Congress still retains a great amount of oversight. Once the Constitution was ratified, no government organized under it could create another government that can exempt itself from the Bill of Rights. Even setting these structural issues aside, the Akaka Bill is facially disallowed by the Fifth and Fourteenth Amendments' explicit proscription against any state action that treats people differently based on their race or ethnicity. The Supreme Court has found Native Hawaiians to be an ethnic group, so Congress cannot pass a law giving them rights denied other Americans.

I respect Rep. Cole's right to hold a different view of the Akaka Bill's merits than mine, in which case he could have said something like, "Some folks have principled objections to this. I think they're wrong. I think they misread the Constitution and don't appreciate Hawaii's unique history. We need to show them why they should come over to our side, and Linda Lingle can help me do that." Instead, he accuses us critics of arrogance, ignorance, and willfully thwarting Hawaiians' dreams of self-determination.

With all due respect, Rep. Cole (and Gov. Lingle to the extent she associates herself with his remarks), if you want to pass the Akaka Bill, you need to do a better job of answering some very valid concerns rather than engaging in base demagoguery. And these concerns aren't limited to parochial issues relevant only to Hawaiians. So long as Hawaii remains part of the United States, all Americans have a stake in the future of the state and how it treats its citizens.

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