Hawaii Reporter
Freedom to Report Real News

Trouble in Paradise: Akaka Bill's Passage Would Threaten Many Hawaiian Institutions

By Ilya Shapiro, 1/6/2010 3:34:40 PM

As we enter 2010, we can at least be thankful that another year has passed without the Native Hawaiian Government Reorganization Act becoming law. Rumors of it being attached to defense appropriations turned out to be unsubstantiated and, though the Akaka Bill has cleared the committee stage, it still awaits a suitable legislative vehicle on the Senate floor.

Senate Majority Leader Harry Reid certainly does not want to expend political capital on what most of his colleagues see as a parochial Hawaiian issue. But the Akaka Bill is not some outlandish earmark providing for the construction of bridges and tunnels among the Hawaiian islands. Instead, it would fundamentally redesign on racial lines a state that has otherwise been a model of openness to all peoples.

Hawaii's congressional delegation trumpets proudly that the reason for the bill is to protect native Hawaiian entitlements. Cases in point are: admissions policies at the Kamehameha Schools; Department of Hawaiian Home Lands leases to applicants with a native Hawaiian blood quantum of 50% or more; the University of Hawaii's special financial assistance to native Hawaiians; and the Office of Hawaiian Affairs, which finances a long list of exclusive programs.

Whether you like any of these entitlements or not, the Akaka Bill—or rather, legal challenges resulting from its passage—would jeopardize all of them. For example, after the U.S. Supreme Court ruled in *Rice v. Cayetano* that the Hawaiians-only voting qualifications in OHA elections violated the Fifteenth Amendment—because Hawaiians were not an Indian tribe and thus do not warrant special treatment—trustees prudently settled the Kamehameha Schools lawsuit rather than allow their admissions policy to be struck down (and along with it the Bishop Estate's tax-free status). And just last year the Supreme Court unanimously rebuked OHA's political posturing in the ceded lands case.

Hawaii's congressional delegation—including gubernatorial candidate Neil Abercrombie—seems not to have gotten the message, intending to push the Akaka Bill as soon as Congress finishes with health care. And President Obama has promised to sign it. Unfortunately, much as with health care, neither Congress nor the White House has taken constitutional concerns seriously. Put simply, the Akaka Bill violates the Fifth and Fourteenth Amendments' proscription on racially discriminatory state action.

Hawaii's congressional delegation, meanwhile, continues to insist that there is enormous public support for the bill—even while refusing to survey this support or allow a referendum. And for good reason: a recent Zogby poll shows that 60% of those who have an opinion on the Akaka Bill oppose it and 76% oppose paying the higher taxes that would be necessary to pay for a separate Hawaiian nation-tribe.

Even if the Akaka Bill somehow passed a referendum, however, it is almost certain that the Supreme Court would ultimately declare it unconstitutional. Congress simply cannot create new sovereigns outside the constitutional framework, and analogies to American Indians misconstrue both the history and legal status of peoples who predate the United States.

That is, the Constitution's Indian law exception arises from a unique compromise with pre-constitutional realities —"dependent nations" with a separate existence and long-standing self-government. Once the Constitution was ratified, no government organized under it could create another government that can exempt itself from the Bill of Rights. And the Supreme Court said in the 1913 case of *United States v. Sandoval* that Congress cannot create new Indian tribes.

Rice showed that one-drop rules and other race-based voting requirements are unconstitutional—in Hawaii as elsewhere. Moreover, the Court found Native Hawaiians to be an ethnic group, so Congress cannot pass a law giving them rights denied others. Indeed, racial preferences are contrary to the ongoing efforts to safeguard equality in an America that now has a biracial president who grew up in Hawaii.

Both Rice and the ceded lands case suggest that a race-based governing entity of the kind the Akaka Bill envisions simply does not pass constitutional muster. But forcing the Supreme Court to say so will have far-ranging implications, opening the door to successful challenges of all Hawaiians-only entitlement programs.

Hawaiians have to decide for themselves if this institutional instability is what they want. The Bishop Estate trustees found the challenge to their policies so threatening that they paid millions of dollars to prevent Supreme Court review.

Like the Bishop Estate trustees, all Hawaiians should now ask themselves whether they wish to endure the Pandora's Box of litigation the Akaka Bill would open. If the answer is no, they should petition their congressional delegation to stop this legislation.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute, and member of the Grassroot Institute of Hawaii's Board of Scholars. At a University of Hawaii Law School debate last year, he correctly predicted that the Supreme Court would unanimously reverse the Hawaii Supreme Court in ruling against OHA in the ceded lands case.

Guest Commentary...