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The 'Native Hawaiian' Bill: An Unconstitutional Approach in Furtherance of a Terrible Idea

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The U.S. Senate is scheduled to begin debate as early as June 7, 2006, on the misleadingly named "Native Hawaiian Government Reorganization Act of 2005" (S.147).[1] The proponents of this bill, some motivated by seemingly benign purposes and others by a desire to benefit from special preferences, argue that it redresses ancient wrongs done to early Hawaiians by various powers, including the United States. The bill purports to authorize the creation of an exclusively race-based government of "native" Hawaiians to exercise sovereignty over native Hawaiians living anywhere in the United States. This "Native Hawaiian Government" could allegedly exempt these Hawaiians from whatever aspects of the United States Constitution and state authority it thought undesirable. Not only is this a terrible idea; it is also unconstitutional.

The United States Supreme Court ruled decisively that this approach violates the Constitution in *Rice v. Cayetano* (2000). Yet the proponents of S.147 believe they can bypass this ruling simply by enacting a law that calls the descendants of so-called "aboriginal" Hawaiians an American Indian tribe. The bill would require the federal government to create a database of persons with one drop or more of "aboriginal" Hawaiian blood, organize elections for an "interim government" of this alleged "tribe," and finally recognize the sovereignty and privileges and immunities (or lack thereof) that the new government establishes for its "tribal members." Although Hawaii correctly argued in the *Rice* litigation that descendants of aboriginal Hawaiians are not an American Indian tribe, state officials have changed their minds—because that is the only way they can practice racial discrimination on behalf of a favored interest group. Hopefully, the United States Constitution is not so easily circumvented.

The U.S. Commission on Civil Rights recently conducted a public hearing and considered the constitutional and policy problems with S.147. On May 18, 2006, the commission issued its report recommending against passage of the bill "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 decrees of privilege." The commission's report also notes that every single public comment sent to it opposed the legislation, but for those from Hawaiian government entities, corporations, and those who are employed by them.

This paper, in its entirety, can be found at:
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The approach embodied in S.147 has three fundamental defects.

First, a Hawaiian analogy to American Indian tribes does not work. Hawaiians (regardless of blood purity) are not and cannot be an American Indian tribe. The term "Indian tribes" mentioned in the Constitution has a fixed constitutional meaning that cannot be changed by a simple act of Congress. They are limited to the preexisting tribes within North America, or their offshoots, that were thought to be "dependent nations" at the time of the framing of the Constitution. Such American Indian tribes must have an independent existence and predominately separate "community" apart from the rest of American society, and their government structure must have a continuous history for at least the past century.

By these standards, Hawaiians never could qualify as an American Indian tribe. The fact that they were "aboriginal" people is of no constitutional significance. That does not make a tribe. As the Supreme Court correctly noted in *Rice*, Hawaii was a feudal kingdom when the first sailors and western missionaries arrived on the islands and was ruled by a powerful king in a feudal monarchy, not unlike some in Eastern Europe and the Far East at the time. America has incorporated voluntarily or by conquest many areas controlled by other monarchs, republics, or other nation-states. Monarchies, republics, and other nation-states simply are not Indian tribes. Even if aboriginal Hawaiians were once organized in tribal governments, they have had no type of "Native Hawaiian Government" for over 100 years.

Finally, there is no independent and separate community of "native" Hawaiian descendants, as tribal designation requires. Hawaii is the most integrated and blended society in America and perhaps the world. There are no "native" Hawaiians living apart from other Americans. Hawaiians, whether they have pure, part, or no "aboriginal blood," all live in the same neighborhoods, go to the same schools and churches, and participate in the same community life.

Congress simply cannot create an Indian tribe, as that term is understood in the Constitution, or "recognize" an Indian tribe that never existed. If it could somehow do so, there would be no end to racial separatist "nations" that Congress could carve out of the United States population and exempt from the United States Constitution. This cannot be.

Second, no government organized under the United States Constitution may create another government that is exempted from part of the Constitution. Yet, this is what S.147 purports to do by allowing the "native" Hawaiian government to grant preferences and exempt itself from portions of the Bill of Rights as it sees fit. The "Indian law exception" is controversial enough, but it can exist only because real Indian tribes are not created by Congress or the states but existed prior to the formation of either. Real Indian tribes predate the Constitution, even if some of them have split or reorganized for various reasons. Congress could end the treaties with existing Indian tribes (leaving the merits of such an action aside) if it chose to do so, because these "dependent nations" are still subject to some control. But Congress simply can't create new governments, new nations, or new tribes on its own, and then exempt them from portions of the Constitution. If it could, the restrictions on government in the Bill of Rights and elsewhere would be of extremely limited value.

Third, the Fourteenth Amendment does not allow such naked discrimination as the bill purports to enable. The Fourteenth Amendment was adopted precisely to prevent a state from excluding certain of its residents from the privileges and immunities of citizenship, especially on the basis of race or ethnicity. The Fourteenth Amendment begins with the proposition that: "All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and the State wherein they reside." The next sentence of the Fourteenth Amendment prohibits any state from abridging any of the "privileges or immunities of citizens of the United States." This same section also prohibits the denial of equal protection to any person within a state's jurisdiction. Thus, all United States citizens who reside in Hawaii are equally citizens of Hawaii and are entitled to enjoy all the privilege and immunities common to other citizens, including the protection against discriminatory laws—especially racially-discriminatory laws.

Apart from the insurmountable constitutional defects with S.147, trying to create a separate "Native Hawaiian Government," is a terrible idea on policy grounds. It would be an insult to the independent Indian nations to have their centuries-old governments trivialized, and there would also be no end to the number of purely racist separatist governments that could be formed if Hawaiians were "made" a tribe. Real Indian tribes were not and are not organized along "racial" lines.

There are 562 tribes that the Bureau of Indian Affairs recognizes, and no one thinks that each represents a separate and distinct race. At the time of the framing, many tribes allowed Europeans and Americans to join and other members to leave. In short, they were not and are not "racially" exclusive. If sharing one drop of aboriginal Hawaiian blood makes a tribe, then Chicanos, Latinos, African Americans, Mexicans, and indeed members of any ethnicity could become a tribe if Congress so decrees.

Even if Congress did no more harm than create a separatist Hawaiian government, that act would help destroy the wonderful and admirable blended society that does exist in Hawaii, where intermarriage and the cultural mixing of Asians, Americans, Europeans, and others is a model for the rest of the United States. A government based on "aboriginal" bloodlines would surely damage Hawaii's melting pot culture.

There are legitimate ways to preserve ancient Hawaiian culture and to protect historic trust properties for the benefit all Hawaiians, and all Americans. For example, Congress could charter a new non-profit entity to advise the government and educate the public on Hawaiian culture and history—for the benefit of *all* Americans who cherish them. Alternatively, S. 147 could be dramatically altered to cure its constitutional and policy defects, such as by forbidding any entity comprised of only one race from exercising any government powers, receiving any public land or other government benefits, or exercising any treaty powers. Short of such radical amendment, we believe Members of Congress and the President are bound by the oath they took to support the Constitution not to give effect to measures that violate it.

(S. 147 is unconstitutional for more reasons than could be explained in a brief paper. Those seeking a broader and more detailed analysis of the bill's constitutional shortcomings should read Senator Jon Kyl's June 22, 2005, paper for the Republican Policy Committee.)

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[1] If an effort to prevent S.147 from being considered by the full Senate fails, a substitute version of the bill, S.3064, will likely take its place. This substitute, while addressing several of the policy concerns associated with S.147, has the exact same constitutional and general policy defects.