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## A Race to Racism?

ASCRIBE IT TO TRIBE

BY PAUL M. SULLIVAN

Hawai'i is justly admired as an integrated, racially blended, multi-cultural society. Some would call it a model for the rest of the country, and perhaps for the world. The qualities of respect for others and open-hearted kindness, without regard to race or origin or station in life, are common traits among all of Hawai'i's people and are part of that many-dimensional concept, "aloha." But some people in Hawai'i find no comfort in integration and equality. For several years, a counter-current promoting special privileges for persons of Hawaiian ancestry (one-fifth or more of the state's population) has achieved considerable success. Recently it has expanded into a movement for "Hawaiian sovereignty," a confused concept which can mean anything from the defense of current race-based Hawaiian entitlement programs to outright secession of all or part of the State of Hawai'i as an independent Hawaiian nation.

### OVERVIEW

The sovereignty debate has been ongoing within the State of Hawai'i for over three decades. Currently its primary focus is on proposed Federal legislation commonly known as the "Akaka Bill" after Senator Daniel Akaka (D. HI), its foremost proponent. This bill (actually two identical bills, H.R. 665 in the House of Representatives and S. 344 in the Senate) would authorize people of Hawaiian ancestry to create a governing entity which would submit its organizational documents to the U. S. Department of the Interior (DOI) for review. Following DOI review the entity would be "recognized" by the Federal government much like an Indian tribe and it would have a "government to government" relationship with the United States, the State of Hawai'i and perhaps other states where

its members live and work. Only "Native Hawaiians" could participate in forming this entity. The bill's sole test for being "Native Hawaiian" is having at least one ancestor who lived in the Hawaiian islands before 1778 (when the islands' first "tourist," British explorer James Cook, discovered them). The U. S. Supreme Court has already held that such a political classification by ancestry is "racial."

Thus the Akaka Bill proposes the political and racial segregation of Hawai'i's citizens. It also involves a radical and unprecedented change in Federal law concerning Indian tribes because it proposes the creation of a wholly new entity where no tribe ever existed rather than the recognition of an existing entity with historical continuity and governmental character.

The racially-defined membership of this entity could be as large as 400,000 in Hawai'i and on the mainland, yet the bills provide no resources for the new governing entity and hint only that resources will be taken from the State of Hawai'i without compensation.

There has been a disturbing lack of debate. Advocates for these bills have long asserted that the whole subject of Hawaiian sovereignty is a matter for Hawaiians alone to work out and most of the state's leaders have acquiesced in this exclusion. Nevertheless, a group of individual citizens, taxpayers and property-owners under the banner "Aloha for All," led by retired attorney H. William Burgess and his part-Hawaiian wife Sandra Puanani Burgess, have sought allies in Congress to oppose the Akaka Bill. A number of U.S. Senators and Representatives apparently listened and have prevented earlier versions of the Akaka Bill from passing. There is, however, no assurance that their success will continue.

### A NONEXISTENT TRIBE

As anyone who has lived in Hawai'i knows, there is no "Native Hawaiian tribe" or anything like one. Hawaiians do not live separate and apart from the rest of us. Interracial and interethnic marriage was accepted in Hawai'i from the earliest period of contact with Europeans and Americans, and continuing through the arrival of many thousands of plantation workers from around the world, to produce today's remarkably integrated community. Persons of Hawaiian ancestry are part of this intermingled society. They may be found throughout the state's social, economic and political fabric in positions of power and influence. Neither language nor religion nor a territorial boundary separates them from their neighbors of different backgrounds. They are not segregated by prejudice or by tradition or by a voluntary decision to live apart.

The Akaka Bill offers no guidance on how this racial group could be organized into a tribe. It says only that the "duly elected officers of the Native Hawaiian governing entity" will submit "the organic governing documents" to DOI and that DOI must make specified findings concerning these documents. It implies, but does not expressly state, that only one "entity" will be recognized but it has no mechanism for choosing among competing groups.

### A GOVERNMENT WITHOUT RESOURCES

The Akaka Bill provides no funding for this new entity. The bill says only that "[u]pon the Federal recognition of the Native Hawaiian governing entity by the United States, the United States is authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity."

The bill does not explain the term "land, resources, and assets dedicated to Native Hawaiian use," but the best guess is that the term refers to property of the State of Hawai'i, most likely the

Hawaiian home lands. In 1921, about 200,000 acres of public land in the Territory of Hawai'i were set aside for leasehold homesteading by persons of 50% Hawaiian "blood." The State of Hawai'i now owns these lands and holds them in trust under state and Federal law. The beneficiaries are a very small subset of the "Native Hawaiians" as defined in the Akaka Bill (who need have only one remote Hawaiian ancestor). Many of them have been on the waiting list for a lot for decades. We can expect determined challenges to any proposal to terminate or dilute their rights.

Much of the rest of the State's land consists the former public lands of the kingdom which were granted or "ceded" to the United States upon Hawai'i's annexation in 1898. These lands, too, are held by the state in trust for all the state's citizens pursuant to Federal law and their use is restricted to one or more of five purposes including the support of education and the provision of land for public use. Bettering the condition of "native Hawaiians" is one of the listed purposes, but "native Hawaiians" are defined as those with 50% or more Hawaiian ancestry, and even this provision is being challenged in the courts as an unconstitutional racial preference.

Any agreement by the state to transfer the Hawaiian home lands or any other state property--particularly property held in the ceded lands trust--would require the consent of the State (which should not be assumed). Since the state will retain its present responsibility for social and other services to the citizens of the "entity" who live in Hawai'i, the state will likely demand payment for the property involved.

### A GOVERNMENT WITHOUT PURPOSE

The Akaka Bill says nothing about what the newly-formed governing entity will "do"; that is, which governmental functions will it carry out for its citizens, and which will be left for the State of Hawai'i and the United States. The bill imposes no obligation on the entity to assume any responsibilities of any sort. Its citizens will remain citizens of one of the 50 states or DC as well as the United States and will have continuing entitlements to social services. The entity has no land to administer and only the vaguest hope of acquiring any through the "negotiations" with Federal and state officials. Will it look to the Federal government for support in the future, and if so, for how long and to what extent will that support be granted? If this is what the Akaka Bill contemplates, we should know.

### QUESTIONS, QUESTIONS AND MORE QUESTIONS

If there is no state or Federal funding for the new entity, will the entity tax its own citizens? Such a course may be controversial since it is likely that the property and income of those citizens will also be taxable by the state, since the citizens of the "Native Hawaiian governing entity" will also be citizens and residents of the state of residence and will be earning their income at sites not owned by the "entity."

Throughout any state, persons of Hawaiian ancestry live and work side by side with the rest of the state's citizens. Will ethnic Hawaiian businesses have tax exemptions or other immunities not shared by the non-Hawaiian businesses next door or across the street?

What will be the status of the "governing entity" and the 160,000+ people of Hawaiian ancestry (whether or not citizens of the "governing entity") in the states outside of Hawai'i? (see [HTTP://www.angelfire.com/hi2/hawaiiansoverinty/population2000.html](http://www.angelfire.com/hi2/hawaiiansoverinty/population2000.html)) Will the entity or its citizens be able to claim the

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<sup>1</sup>528 U.S. 495, 120 S.Ct. 1044 (2000).

<sup>2</sup>The court held that the state's definition of "Hawaiian" used ancestry "as a proxy for race", and that the definition of "native Hawaiian", drawn from a Federal statute from Hawai'i's territorial period, shared this "explicit tie to race".

<sup>3</sup>See *Adarand Constructors v. Federico Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995)

immunities of the “governing entity” outside Hawai‘i? What authority, if any, will this new entity have in foreign relations?

Leaving these questions to be resolved (if they can be resolved) between the new entity and the Department of the Interior, which appears to be the Akaka Bill’s approach, ignores the reality that all the citizens of the State of Hawai‘i and the entire nation will be profoundly affected by the answers.

## THE CONSTITUTIONAL QUESTION OF RACE

**S**. 344, the current Senate version of the Akaka Bill, is derived from bills introduced in the 106th Congress in the wake of the U.S. Supreme Court’s February 2000 decision in *Rice v. Cayetano*<sup>1</sup>. That decision struck down a racial restriction on voting in Hawai‘i’s statewide elections for trustees of the state’s Office of Hawaiian Affairs (OHA), a state agency charged with administering several hundred million dollars in state funds for the betterment of the conditions of “Hawaiians” and “native Hawaiians.” These groups are defined respectively in state law as persons with at least one pre-1778 Hawaiian ancestor and persons with at least 50% Hawaiian “blood.” Only “Hawaiians” could vote in these OHA elections.

In *Rice*, the Court held that the definition of “Hawaiian” established a racial classification<sup>2</sup> and that the state law unconstitutionally deprived Hawai‘i’s other citizens of the right to vote on grounds of race. Recently, the Federal district court in Hawai‘i, relying on the *Rice* decision, held unconstitutional a state law which permitted only “Hawaiians” to seek office as OHA trustees. That rejection of the racial test for OHA trustees was subsequently upheld on appeal. Other suits based on *Rice* have since been filed to overturn other statutory entitlement programs for persons of Hawaiian ancestry.

If the state and Federal statutes which give favored treatment to persons of Hawaiian ancestry must meet the constitutional standards for racial classifications, they are all at risk. The Supreme Court has not wholly prohibited race-conscious legislation, but it has accepted it only reluctantly, and only in circumstances of grave necessity. Such legislation is subject to “strict scrutiny;” that is, it must be justified by a “compelling interest” and be “narrowly tailored” in duration and effect to achieve its purpose<sup>3</sup>.

To justify special treatment, advocates for Hawaiian causes point to the overthrow of Hawai‘i’s monarchical government in 1893 and complain of “lost sovereignty” and “theft of lands” related to that event, and they recite a litany of social and economic disadvantages suffered today by many persons of Hawaiian ancestry.

But the claims of lost sovereignty and stolen lands cannot withstand careful legal and historical analysis.

As a monarchy, of course, the “sovereignty” of the kingdom resided not in the populace, but in the monarch. It was only after the termination of the monarchy that the populace, both Hawaiian and of other ancestry, had a true share in the sovereignty of the kingdom. Nor was the kingdom’s government “Hawaiian” in the sense that governmental authority was limited to persons of Hawaiian ancestry. Indeed, Westerners had been trusted advisors of the monarchs from the time of Kamehameha I and by 1893, natives and Westerners had long shared fully in the political, social and economic life of the nation. The government was not a government of, by or for a particular race.

Nor was there any “stolen land.” The revolution had no effect on private property rights. The public lands of the kingdom became the public lands of the revolutionary government and

were eventually transferred to the United States in trust for the inhabitants of the Hawaiian islands. In spite of this, advocates for Hawaiian causes have long asserted that persons of Hawaiian ancestry have some special claim to the former crown and government lands of the kingdom. These claims were examined in detail in 1983 by the Congressionally-chartered Native Hawaiians Study Commission and again in in an environmental impact statement for land use changes at the Bellows Air Force Station in Waimanalo, Oahu. On both occasions, there were hearings and extensive public comment on the issues. Each study concluded that these claims had no legal or historical validity.

As to the social and economic disadvantages which many Hawaiians unquestionably experience (but which are not unique to persons of Hawaiian ancestry), the supporters of the Akaka Bill have established neither a race-based cause, nor a need for a race-limited solution, nor any credible link between these disadvantages and the 1893 change of government. Of course, the absolute, permanent race-based classifications in these statutes are not “tailored” in any way to correct the claimed wrongs or to alleviate the social and economic needs.

Thus none of the current Hawaiian-preference laws are likely to survive constitutional challenge.

Can Native Hawaiians claim the special status of Indian tribes which permits special treatment for tribes and their members? In fact, the State of Hawai‘i relied heavily on this argument before the U. S. Supreme Court in *Rice* and the Akaka Bill asserts that Native Hawaiians are, by virtue of their ancestry, entitled to this.

But the Supreme Court found the argument unpersuasive. It did not reject it outright, but it called it “difficult terrain” and expressed serious reservations about its merits.

There is good reason to believe that if the Court were squarely presented with the issue, it would hold that Native Hawaiians do not share the unique constitutional status of American tribal Indians. In the 1974 case of *Morton v. Mancari*, U. S. Supreme Court noted that Congress’ “unique obligation” towards Indians is not to individuals or groups defined by ancestry, but to tribes. It pointed out that the preference in question “is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”

Can Congress turn a racial group into an Indian tribe? The U. S. Supreme Court held over ninety years ago in *U.S. v. Sandoval* that while Congress has broad power to deal with Indian tribes and to determine what entities are in fact tribes, “it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe[.]” Yet the Akaka Bill proposes to do exactly that: To create a “tribe” and a “governing entity” where none exists now, and to do so using a test for membership virtually identical to that which the *Rice* decision held to be racial. It is because of this that the opponents of the Akaka Bill argue that the bill would impose a political segregation, based solely on race, upon the people of the State of Hawai‘i and the many other states where Native Hawaiians reside.

## A PROMISE OF CONTROVERSY

**G**iven this background, the Akaka Bill will surely be a rich source of disputes and litigation. Among ethnic Hawaiians, it would only be natural for factions to form and contest among themselves for control of, or recognition as,

the single “governing entity.” Hawaiian groups and the Federal government will come into conflict as those who see no future in the first-recognized “governing entity” demand separate recognition for an entity of their own. The governing entity or entities will argue with each other and the state of residence over the questions of resources, jurisdiction, taxation and all the other issues presented when two sovereignties must occupy the same physical space. There will be disputes between the entity and its “citizens” as these citizens discover few benefits and many disappointments in “sovereignty.”

Even if the bill survives in the courts, our national experience with racial and political segregation, like that of the rest of the world, demonstrates that no good comes from such things; that the advantages to the dominant race or class, if any, are transitory, and that such segregation plants seeds of hatred that flourish generations after the inevitable abolition of the formal structures of separateness. If the bill is declared unconstitutional, Hawaiians will have one more “broken promise” to add to the litany of irremediable grievances. Whatever the outcome, those who put their hopes on this bill, along with the other citizens of the State of Hawai‘i and other states where Hawaiians reside, will have enduring scars.

### RECOMMENDATIONS:

Those who are concerned about the Akaka bill, should take at least two actions:

- Visit [www.petitiononline.com/aloha4hi/petition.html](http://www.petitiononline.com/aloha4hi/petition.html)
- Find a way to focus the attention of your federal congress

members on the Akaka Bill and how it might effect your state and the nation.

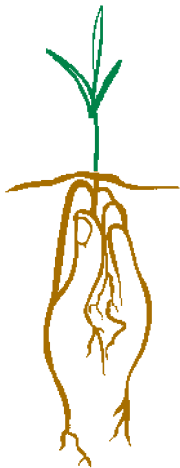
For those who seek more details, send for “*Killing Aloha*” described below, it contains a host of references to assist in gathering further information. Also see <http://www.hawaiiimatters.com>

### ABOUT THE AUTHOR

Paul M. Sullivan is an attorney who has lived and practiced law in Honolulu for over twenty years. His legal studies on Hawaiian issues have appeared in the University of Hawai‘i Law Review and the University of Hawai‘i’s on-line “Asian-Pacific law and Policy Journal.” The above article is derived from his detailed analysis of the Akaka Bill entitled “*Killing Aloha*” which provides a more detailed discussion of the bill as well as citations to legal and historical source materials. Copies of “*Killing Aloha*” may be obtained from the author by e-mail addressed to [sullivanp003@hawaii.rr.com](mailto:sullivanp003@hawaii.rr.com).

Grassroot Institute of Hawaii, as an organization, has taken and will take no official position on the Akaka Bill. This issue of In Pursuit ... addresses a contrary view of the subject as a means of better opening debate and discussion which has, up to now, been muted inside and almost non-existent outside of Hawaii.

– Richard O. Rowland, President



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