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S. 147 Offends Basic American Values

Why Congress Must Reject Race-Based Government for Native Hawaiians

Executive Summary

- Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for Native Hawaiians living throughout the United States.
- The bill does this by shoehorning the Native Hawaiian population, wherever located, into the federal Indian law system and calling the resulting government a "tribe."
- S. 147 advocates argue that the bill simply grants Native Hawaiians the same status as *some* American Indians and Alaska Natives, but this claim represents a serious distortion of the constitutional and historical standards for recognizing Indian tribes.
- The Supreme Court has held that Congress cannot simply create an Indian tribe. Only those groups of people who have long operated as an Indian tribe, live as a separate and distinct community (geographically and culturally), and have a preexisting political structure can be recognized as a tribe. Native Hawaiians do not satisfy any of these criteria.
- When Hawaii became a state in 1959, there was a broad consensus in Congress and in the nation that Native Hawaiians would not be treated as a separate racial group, and that they would not be transformed into an "Indian tribe."
- To create a race-based government would be offensive to our nation's commitment to equal justice and the elimination of racial distinctions in the law. The inevitable constitutional challenge to this bill almost certainly would reach the U.S. Supreme Court.
- S. 147 would lead the nation down a path to racial balkanization, with different legal codes being applied to persons of different races who live in the same communities.
- The bill also encourages increased litigation, including claims against private landowners and state and federal entities, which would heavily impact private and public resources.
- S. 147 represents a step backwards in American history and would create far more problems — cultural, practical, and constitutional — than it purports to solve. It must be rejected.

"To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. We are American." — Adarand Constuctors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

Introduction

Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for those with Native Hawaiian blood. The bill does this by shoehorning Native Hawaiians (who live in all 50 states) into the federal Indian law system, creating a new race-based entity, and calling it a "tribe." Advocates claim that this result will be fair and equitable because Native Hawaiians would have the same status as some American Indians and Alaska Natives. This deceptive argument ignores the radical transformation to American law that S. 147 threatens. That is because, unlike Indian tribes, this proposed Native Hawaiian government would be defined ***not*** by community, geography, and cultural cohesiveness, as every other Indian tribe is. Instead, the Native Hawaiian entity would be defined by the one distinction abhorrent to American law and civic culture — that of race.

Congress should not be in the business of granting special governmental powers to racial subsets of the American family. We are a nation grounded in equality under the law regardless of skin color or ancestry. Our most violent internal conflicts, whether in the 1860s or the 1960s, have revolved around efforts to eliminate the law's racial distinctions and to encourage a culture where all citizens become comfortable as part of the *American* race. That journey is by no means complete, but this bill halts progress and sends an entirely contrary message — a message of racial division and ethnic separatism, and of rejection of the American melting pot ideal. The bill is, therefore, profoundly counterproductive to the nation's efforts to develop a just, equitable, and color-blind society, and it must not become law.

A Brief Look at the Key Flaws in S. 147

S. 147 authorizes a racially-separate government of Native Hawaiians that will operate as an Indian tribe throughout the United States. The new "tribe" will have as many as 400,000 members nationwide,[1] including more than 20 percent of Hawaii's residents.[2] The new Native Hawaiian entity will have broad-ranging governmental powers and is likely to have jurisdiction over residents of all 50 states.[3] Moreover, if every eligible Native Hawaiian signs up, the new race-based government will be the nation's largest Indian tribe. The multi-step process to create the new government is described in sections 7 and 8 of the legislation, but the essential fact is this: the bill uses a race-based test to govern the organization of the Native Hawaiian entity.

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[1] U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2000* (Dec. 2001), at 8 (hereinafter "Census Report"), available at www.census.gov/prod/2001pubs/c2kbr01-14.pdf (noting 141,000 respondents reporting only Native Hawaiian ancestry and an additional 260,000 who reported Native Hawaiian and at least one other race).

[2] Census Report, Table 2.

[3] Census Report, Table 2.

How S. 147 Authorizes a Race-Based Government

The definition of "Native Hawaiian" is extremely broad, perhaps unconstitutionally so.[4] According to the bill, a "Native Hawaiian" is anyone who is one of the "indigenous, native people of Hawaii" *and* who is a "direct lineal descendant of the aboriginal, indigenous, native people who" resided in the Hawaiian Islands on or before January 1, 1893 *and* "exercised sovereignty" in the same region.[5] As will be discussed below, only one person, Queen Liliuokalani, actually exercised any "sovereignty" in 1893, as Hawaii was then a monarchy. Presumably, S. 147 assumes an ahistorical definition of "sovereignty," referring instead to all persons with "aboriginal, indigenous, native" blood in 1893.

This definition of "Native Hawaiian" focuses on race to the exclusion of all other potentially relevant factors. Nowhere in the definition of "Native Hawaiian" is there any requirement of residency in Hawaii (either presently or at any point in the person's life), any quantum for indigenous blood, any past participation or adoption of Native Hawaiian culture or language, or any documented involvement or interest in Hawaiian (much less Native Hawaiian) political affairs. All of these characteristics — so essential to the recognition of a traditional Indian tribe (as discussed below) — are absent from S. 147. Instead, this legislation relies solely and crudely on race itself, in what amounts to a one-drop racial definition.[6]

It is important to distinguish S. 147's racial test from those that Indian tribes often use to determine their membership. Indian tribes have the authority to determine the rules governing their membership *because they are sovereign entities*.[7] As such, the Equal Protection Clause does not apply to tribes' race-based decisions. In contrast, S. 147 would force the federal government itself to impose and enforce a racial test before any sovereign Native Hawaiian entity even exists (assuming, only for the sake of argument, that Congress has the power to "make" Indian tribal sovereigns through legislation). S. 147's racial test is, therefore, offensive to the Constitution.

Additional Problems in S. 147

Although S. 147's racial test for the new government is its most offensive feature, a few additional aspects of the bill deserve scrutiny.

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[4] In *Rice v. Cayetano*, 528 U.S. 495, 525, 524-527 (2000), Justices Breyer and Souter argued (while concurring in the result) that there is a constitutional limit to how extenuated the definition of a tribal member can be, and strongly suggested that a definition such as this one — membership based on one drop of Native American blood in 1893 — would not pass muster. The majority Justices did not address this argument.

[5] The bill provides an alternate definition as well. Any individual who is one of the "indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual" is also included. That Act defined "Native Hawaiian" as anybody with 1/2 Native Hawaiian blood.

[6] The steps to create the ultimate Native Hawaiian government are spelled out in sections 7 and 8. The procedures are clear that nobody except one with racial bona fides as defined in section 3(10) can participate in the creation of the new government. After the new government is created, it could theoretically restrict the membership to those with more Native Hawaiian blood, but it is difficult to imagine how it could do so from a political standpoint given that the initial definition in this bill is so broad.

[7] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (emphasizing that an Indian tribe is an "independent political community").

First, nothing in the bill guarantees that the ultimate race-based entity will be democratic in nature; in fact, advocates of S. 147 have publicly insisted that the government could take any form.[8] For example, the initial political actors who shape the entity could create a theocratic monarchy.

Second, the bill fails to guarantee that the Bill of Rights applies to the Native Hawaiian entity. Under federal law, the 1st, 5th, and 14th Amendments do not apply to Indian tribes. Those tribes are nonetheless bound by the Indian Civil Rights Act of 1968 ("ICRA"), which provides some, *but not all*, of the Bill of Rights protections (conspicuously excluding, for example, the Establishment Clause and the right to trial by jury in civil cases). In contrast, S. 147 does not apply ICRA to the new entity. Native Hawaiian members of the new entity are, therefore, unlikely to have the protections of key parts of the Bill of Rights when dealing with the new entity.[9]

Third, S. 147 provides no mechanism to enable Hawaiians — all Hawaiians, not just those with one drop of Native Hawaiian blood — to determine whether they want to authorize this race-based government in their midst. This omission is notable given the new entity's inevitable clashes with state law, as discussed below at pages 11-12.

Fourth, the bill empowers the new entity to "negotiate" with the state and federal government over lands and natural resources, the division and exercise of "civil and criminal jurisdiction," and the "delegation of governmental powers" from the United States and Hawaii to the governing entity. Any such negotiations will inevitably come at some price for federal and state taxpayers — not to mention personal liberty in the case of criminal jurisdiction.

S. 147's Core Rationale is Fundamentally Flawed

The major argument in favor of S. 147 is the notion that Congress should just create a Native Hawaiian "Indian tribe" in order to treat them "the same" as American Indians and Alaska Natives. But Congress cannot simply "create" an aboriginal Indian government. The tribal governments that exist on Indian reservations today were not created by the federal government; rather, they were preexisting when those areas were incorporated into the United States. The only exceptions are rare cases where the federal government has recognized an Indian tribe *after* statehood because the tribe could demonstrate that it operated as a sovereign for the past century, was a separate and distinct community, and had a preexisting political organization.[10] If the Native Hawaiians seeking their own government could meet these standards, then Indian law would provide a better fit.

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[8] See Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added), which explains that S. 147 does not restrict what kind of government the Native Hawaiian entity will be, and emphasizes that "total independence" is an option.

[9] The bill does include a provision in section 7(c)(4) requiring the Secretary of the Interior to certify that the civil rights of entity members are "protected," but provides no guidelines to shape the Secretary's discretion. Given that the Indian Civil Rights Act does not precisely mirror the Constitution's Bill of Rights, one cannot assume that the Secretary is bound to guarantee complete constitutional protections.

[10] For a summary of the settled standards for what constitutes an Indian tribe under federal law, see Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes* (March 25, 2005). The standards are derived from longstanding Supreme Court case law. See, e.g., *United States v. Felipe Sandoval*, 231 U.S. 28, 39-46 (1913) (holding that an Indian community must be "separate and isolated," and that Congress cannot arbitrarily designate a group of people as an Indian tribe even if the people are racially similar to Indians).

But advocates for S. 147 cannot demonstrate any of these characteristics. Instead, they focus on only one similarity between those groups and Native Hawaiians — the fact that their ancestors lived on lands now part of the United States. This is little more than a racial test, grounded purely in ancestry and wholly divorced from the standards that determine whether a group of indigenous peoples (or, more typically, their descendants) should be treated as a separate political community. Nor is the test "tailored" to address any purported "wrongs" committed against the Hawaiian people by the United States or other Westerners (or Asians, for that matter). This focus on race and bloodlines is contrary to the settled, court-approved rules for determining what an Indian tribe is, as discussed below. Moreover, it violates the implicit understanding of Congress when Hawaii was admitted to the Union — that Native Hawaiians would not be treated as Indians. As will become apparent, Native Hawaiians simply cannot be treated as an Indian tribe.

Native Hawaiians Cannot Meet Settled Rules for "Tribal" Recognition

The Department of the Interior has a settled process governing the recognition of Indian tribes. The Secretary has promulgated federal regulations, 25 C.F.R. §§ 83.6-83.7, which outline the factors the Secretary must consider before recognizing a tribe. The Congressional Research Service summarizes the main factors as follows:

- "Existence *as an Indian tribe* on a continuous basis since 1900. Evidence may include documents showing that governmental authorities — federal, state, or local — have identified it as an Indian group; identification by anthropologists and scholars; and evidence from newspapers and books.

- "*Existence predominantly as a community*. This may be established by *geographical residence* of 50% of the group; *marriage patterns*; kinship and language patterns; cultural patterns; and social or religious patterns.

- "*Political influence or authority over members as an autonomous entity from historical times until the present.* This may be established by showing evidence of leaders' ability to mobilize the group or settle disputes, inter-group communication links, and *active political processes*.

- "Evidence that the *membership descends from an historical tribe or tribes that combined and functioned together as a political entity*. This may be established by tribal rolls, federal or state records, church or school records, affidavits of leaders and members, and other records."[11]

Only after weighing factors such as these can the Secretary recognize a tribe.

Thus, there are two common threads in these requirements: (1) the group must be a separate and distinct community of Indians, and (2) a preexisting political entity must be present. S. 147 eschews these settled criteria in favor of race and ancestry alone. Indeed, it would be absolutely impossible for persons with Native Hawaiian blood to satisfy these settled criteria.

[11] Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes*, at 2 (emphasis added).

No Separate and Distinct Community

S. 147 repeatedly refers to a Native Hawaiian "people" or "community," but never establishes that such a people or community exists. Certainly there are many Americans who descend from indigenous Hawaiians, but blood alone does not make a "tribe." S. 147 seeks to include virtually every single person who has one drop of indigenous Hawaiian blood in its definition of "Native Hawaiian."[12] It is clear that Native Hawaiian "race" cannot be a proxy for "community," as the following facts demonstrate:

- Native Hawaiians are not geographically or culturally segregated in Hawaii. They live in the same neighborhoods, attend the same schools, worship at the same churches, and participate in the same civic activities as do all Hawaiians.

- Persons with Native Hawaiian blood live throughout the United States. There are more than 400,000 Americans who today claim at least some "Native Hawaiian" blood.[13] Moreover, Native Hawaiians live in all 50 states.[14]

- Native Hawaiians have intermarried with other ethnicities since as early as the 1820s,[15] and "high rates of intermarriage are a unique demographic characteristic of the people of Hawaii."[16]

- Intermarriages in the Native Hawaiian population today are not only common, but predominant. Data show that three-fourths of "only" Native Hawaiians marry outside the race, and more than one-half of "part" Native Hawaiians do the same.[17]

- It is also worth noting that nearly half of *all* marriages in Hawaii are interracial, showing that the culture there continues to be a "melting pot."[18] (Hawaii's racial intermarriage rate is therefore more than *ten times higher* than the 4.5 percent nationwide figure.[19])

- As a result of this intermarriage, some scholars estimate that there are no more than 7,000 "pure-blooded" Native Hawaiians today.[20]

The reality of modern Hawaii — and indeed, of all the United States — is that racial boundaries continue to break down.

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[12] See definition at section 3(10) of S. 147, as well as discussion above at pages 2-3.

[13] Census Report, at 8.

[14] Census Report, Table 2. Technically, the report refers to Native Hawaiians and "other Pacific Islanders," but the only others who fall into "Other Pacific Islander" are the relatively small populations of Fijian and Tongan background. Other major "Pacific Islander" groups such as Filipinos, Samoans, and Guamanians all have their own categories.

[15] Robert C. Schmitt, Foreword to Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at xvi ("Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820s"). Schmitt is identified as the State Statistician for the Hawaii Dep't of Business and Economic Development.

[16] Xuanning Fu & Tim B. Heaton, *Status Exchange in Intermarriage*, Journal of Comparative Family Studies (Jan. 2000), at 1.

[17] See Hawaii Marriage Certificate Data for 1994 cited in Fu & Heaton, Table 2.

[18] Fu & Heaton, Table 2.

[19] U.S. Census Bureau, *America's Families and Living Arrangements: 2003* (Nov. 2004), Table 9.

[20] Bradley E. Hope and Janette Harbottle Hope, *Native Hawaiian Health in Hawaii: Historical Highlights*, California Journal of Health Promotion (2003), at 1. However, fully 141,000 Americans self-reported as only "Native Hawaiian" on the 2000 Census. See Census Report, at 8.

It is apparent that there is no "separate and distinct community" of Native Hawaiians that the law can recognize, but only American citizens, scattered across the nation, who have some ancestry in Hawaii. Such a dispersed people are not what the law contemplates as an "Indian tribe."

No Political Entity

There is another reason why persons with Native Hawaiian blood alone cannot be considered a tribe: they fail the settled "political test" that determines whether a tribe should be recognized.

It is important to understand why there *is* a "political test" for granting tribal recognition. The Constitution does not speak to Native "peoples," but only to "Indian tribes."[21] As the Supreme Court has stated, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. * * * [They are] separate sovereigns pre-existing the Constitution."[22] Thus, Indian tribes are respected as legal entities with quasi-sovereign powers because they existed *prior* to the creation of state governments. Their lands and sovereignty were respected either through treaties entered into with the United States, or due to special reservations in statehood enabling acts. Where Indian communities — communities, not mere racial groups — have been recognized by government post-statehood, it has been due to the recognition that a community continued to exist, and that the community had a semblance of ongoing political cohesion.[23]

No political entity — whether active or dormant — exists in Hawaii that claims to exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed-upon leaders, no political organizations, and no "monarchs-in-waiting." Advocates of S. 147 freely admit this fact.[24] If normal procedures were followed and settled law respected, this failure would preclude the bill's consideration.

Instead, faced with these realities, S. 147's advocates rely upon a confused history of Hawaii to persuade Congress to ignore the normal procedures and settled law. The bill's findings (section 2) proclaim that "Native Hawaiians" exercised "sovereignty" over Hawaii prior to the fall of the monarchy of Queen Liliuokalani in 1893,[25] and that it is therefore appropriate for Native Hawaiians to exercise their "inherent sovereignty" again. This is simply not the case, for two simple reasons.

First, there *was no* race-based Hawaiian government in 1893, so there is no "Native Hawaiian government" to be restored. Since the early 19th century, the Hawaiian "people" included many native-born and naturalized subjects who were not "Native Hawaiians" in the sense of S. 147 — including Americans, Chinese, Japanese, Koreans, Samoans, Portuguese, Scandinavians,

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[21] See Art. I, § 8, cl. 3 (granting Congress power to regulate commerce with "Indian tribes").

[22] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 558, 8 L. Ed. 483 (1832)); see also *Morton v. Mancari*, 417 U.S. 535, 554 & 554 n.24 (1974) (emphasizing that government benefits given to Indian tribes do not constitute racial discrimination because the circumstances are "political rather than racial in nature").

[23] See 25 C.F.R. § 83.7 for political requirements.

[24] See legal argument of the State of Hawaii's Office of Hawaiian Affairs, *Treating Similarly Situated Peoples the Same*, available at http://www.nativehawaiians.com/legalbrief.html (explaining that "no vestiges of an official 'tribe' which purports to represent Native Hawaiians remains").

[25] The Queen yielded to a provisional government in 1893, leading to the creation of a Republic of Hawaii (1894-1898), followed by annexation to the United States in 1898. See discussion of Hawaiian history in *Rice v. Cayetano*, 528 U.S. 495 (2000); Merze Tate, *The United States and the Hawaiian Kingdom* (1965), at 155-193.

Scots, Germans, Russians, Puerto Ricans, and Greeks.[26] All were subjects of the monarch, not just those with aboriginal blood. Moreover, the Queen and her predecessor monarchs regularly employed non-Natives at high levels in their governments from as early as 1844, when an American was appointed by King Kamehameha III to be the kingdom's attorney general.[27] Whites regularly served in the legislature throughout the second half of the 19th Century, and the franchise was even expanded to non-citizen residents in 1887.[28] When the Queen's monarchy fell in 1893, the legislature was multi-racial and many of her Cabinet ministers were white.[29] To speak of "restoring" the "Native Hawaiian" government as of 1893 is to ignore the fact that no such racially-exclusive government — or nation — existed.

Second, Hawaii in 1893 was a monarchy, with "sovereignty" residing *only* in the Queen's person, *not* in the people — Native Hawaiian or otherwise. In no way did the "people" of Hawaii exercise sovereignty over those lands; only the Queen had sovereignty.[30] Thus, S. 147's findings are fundamentally flawed in their references to restoring "inherent sovereignty" because such sovereignty simply never existed. The only way that sovereignty could be restored to its 1893 status would be to reinstate a monarchy.

Given the above, it is apparent that those whom S. 147 calls "Native Hawaiians" (1) have no existing government or organization that could be called a "tribe," and (2) have never exercised "inherent sovereignty" as a "native, indigenous people." No "reorganization" is possible or appropriate because no earlier government existed. In the simplest terms, there is nothing to reorganize or restore.

S. 147 Contravenes the Political Understanding Reached at the Time of Statehood

As explained above, Indian tribes' sovereignty is a function of their existence as tribal organizations prior to their having been absorbed into the American system. Indian tribes that exist and are recognized have their sovereignty as a function of (a) statehood enabling laws, (b) treaties between tribal leadership and the U.S. government, and/or (c) later administrative or Congressional recognition that they are separate and distinct communities with some form of political structure. It is highly relevant for present purposes, then, to review what the understanding was at the time that Hawaii became a state in 1959.

It is not in dispute that, at the time Hawaii was admitted as a State, there was an implicit understanding that Hawaii's "native peoples" would ***not*** be treated as an Indian tribe with sovereign powers. There was no political effort in 1898 (at the time of annexation) — or in 1959 — to treat Native Hawaiians like Alaska Natives or as Indian tribes. To the contrary, during the extensive statehood debates of the 1950s, advocates repeatedly emphasized that the Hawaiian Territory was a post-racial "melting pot" without racial divisiveness. There was virtually no discussion of carving out separate sovereignty for "Native Hawaiians."

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[26] Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at 42-98.

[27] Nordyke, *The Peopling of Hawai'i*, at 42; see also Tate, *The United States and the Hawaiian Kingdom*, at 13-22 & 49.

[28] Tate, *The United States and the Hawaiian Kingdom*, at 52 & 53-111.

[29] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193.

[30] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193 (discussing the Queen's efforts to maintain sovereignty solely in her own person).

Consider, for example, the representative words of some of the key advocates for Hawaii statehood in the years leading up to statehood:

> "Hawaii is America in a microcosm — a melting pot of many racial and national origins, from which has been produced a common nationality, a common patriotism, a common faith in freedom and in the institutions of America." *— Senator Herbert Lehman (D-NY), April 1, 1954, Congressional Record, at 4325.*
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> "Hawaii is the furnace that is melting that melting pot. We are the light. We are showing a way to the American people that true brotherhood of man can be accomplished. We have the light, and we have the goal. And we can show that to the peoples of the world." *— Testimony of Frank Fasi, Democratic National Committeeman for Hawaii, before the Senate Committee on Interior and Insular Affairs, June 30, 1953.*
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> "While it was originally inhabited by Polynesians, and its present population contains substantial numbers of citizens of oriental ancestry, the economy of the islands began 100 years ago to develop in the American pattern, and the government of the islands took on an actual American form 50 years ago. Therefore, today Hawaii is literally an American outpost in the Pacific, completely reflecting the American scene, with its religious variations, its cultural, business, and agricultural customs, and its politics." *— Senator Wallace Bennett (R-UT), Congressional Record, March 10, 1954, at 2983.*
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> "Hawaii is living proof that people of all races, cultures and creeds can live together in harmony and well-being, and that democracy as advocated by the United States has in fact afforded a solution to some of the problems constantly plaguing the world." *— Testimony of John A. Burns, Delegate to Congress from the Territory of Hawaii, before the Senate Committee on the Interior and Insular Affairs, Apr. 1, 1957.*

These statements represent the repeated testimony and arguments that Congress considered prior to granting statehood. Hawaii's admission was granted with the straightforward understanding that the diverse and multiracial Hawaiian community would ***not*** be the fount of the racial separatism that S. 147 presents.[31] As such, this legislation is a significant step backwards. And from a legal

[31] The historical record leaves no room for doubt regarding the post-racial position of statehood advocates. See, for example, Testimony of Edward N. Sylva, Attorney General of Hawaii Territory, before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("we are not race conscious in Hawaii at all"); Testimony of Dr. Gregg Sinclair, President of the University of Hawaii, before the before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("there can be no doubt at all about [Native Hawaiians' and other Hawaiian ethnic groups'] true Americanism"); Testimony of Fred Seaton, Secretary of Interior, before the Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("The overwhelming majority of Hawaiians are native-born Americans; they know no other loyalty and acclaim their citizenship as proudly as you and I"); Statement of Senator Clair Engle (D-CA), Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("There is no mistaking the Americans culture and philosophy that dominates the lives of Hawaii's polyglot mixture"); Statement of Senator Frank Church (D-ID), Subcommittee on Territories and Insular Affairs of the Senate Committee on Interior and Insular Affairs, Feb. 25, 1959 (Hawaiian culture bears the "unmistakable stamp of the United States"); Letter from Interior Secretary Fred Seaton to Chairman James Murray, dated Feb. 4, 1959, collected in record to Statehood for Hawaii Hearing before the Senate Committee on the Interior and Insular Affairs, Mar. 5, 1959 ("Hawaii is truly American in every aspect of its life");

perspective, this history shows that there has been no question of the inapplicability of federal Indian law to Native Hawaiians.[32]

S. 147 Violates Core Constitutional Values

It is astonishing that Congress is considering creating a race-based government in Hawaii (or anywhere else) given the tremendous progress that the nation has made towards eliminating racial distinctions among its citizens. Presumptive color-blindness and race-neutrality is now at the core of our legal system and cultural environment, and represents one of the most important American achievements of the 20th Century. S. 147 is, therefore, profoundly retrograde — a challenge to settled constitutional understandings and a disturbing threat to growing cultural cohesion on matters of race.

As recently as 2000, the Supreme Court warned that any effort to treat Native Hawaiians as an Indian tribe would be constitutionally suspect, calling the subject "difficult terrain" and "a matter of some dispute."[33] The court made this statement when considering an earlier effort by Hawaii's politicians to create a race-based government made up of only of Native Hawaiians — an effort that forms both a legal and precipitating backdrop to the current efforts.

In *Rice v. Cayetano*, the Supreme Court addressed an effort by Hawaii to create a state-sanctioned, race-based entity composed solely of Native Hawaiians (defined solely based on race, similar to in S. 147) and limited the franchise to the Native Hawaiian "race." The Supreme Court found that this effort to create a race-based government in Hawaii violated the Constitution's Fifteenth Amendment, which forbids discrimination in voting based on race. In so doing, the Supreme Court stated:

> One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[34]

Thus, the Supreme Court concluded that the law could not be used as the "instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is

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Statement of Senator James Murray (D-MT), *Congressional Record*, Mar. 11, 1959, at 3854 (Hawaiians "no other loyalty than that to America"); Statement of Senator Alan Bible (D-NV), *Congressional Record*, Mar. 11, 1959, at 3857 ("American ideas, American liberty, American civilization prevail there"); Statement of Senator Gordon Allott (R-CO), Mar. 11, 1959, at 3858 (arguing that statehood shows to the world that Americans believe in "self-government and the equal treatment of all citizens, irrespective or race, color or creed"). The Senate floor debate of March 11, 1959 provides further evidence of Congress's disavowal of racial separatism for Hawaii's people.

[32] A small amount of acreage is set aside for some Native Hawaiian peoples through the Hawaiian Homes Commission Act (1920), ratified later in the Hawaiian Admission Act. Federal courts have repeatedly made clear that these laws did not create any "trust relationship" (akin to that which exists with Indian tribes) between the federal government and Native Hawaiians. *E.g.*, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1224 (9th Cir. 1978); *Han v. Dep't of Justice*, 824 F. Supp. 1480 (D. Haw. 1993) (finding no trust responsibility), *aff'd* 45 F.3d 333 (1995); *Na Iwi O Na Kupuna O Makupu v. Dalton*, 894 F. Supp. 1397, 1410 (D. Haw. 1995) (holding that "the federal government has no trust responsibility to Native Hawaiians").

[33] *Rice v. Cayetano*, 528 U.S. 495, 518-519 (2000).

[34] *Rice*, 528 U.S. at 517.

disclosed by their ethnic characteristics and cultural traditions."[35] To do so would be "odious to a free people whose institutions are founded upon the doctrine of equality."[36]

The Supreme Court's holding in *Rice*, although formally limited to the Fifteenth Amendment challenge, is likely to reach the race-based plans of S. 147. The bill's advocates believe that by cloaking their efforts in federal Indian law, they will be able to relax the standard of review in federal courts from "strict scrutiny," which applies to race-based governmental decisions,[37] to the more deferential "rational basis review," which applies to the sovereign-to-sovereign governmental interactions found in federal Indian law.[38] This argument will likely fail because the Supreme Court — in an earlier and unrelated case — has already held that Congress may not do what S. 147's advocates intend: to insulate a program from strict scrutiny by "bring[ing] a community or body of people within the range of this [Congressional] power by arbitrarily calling them an Indian tribe."[39] And as noted above, the Supreme Court has already registered its skepticism about the ability of Congress to recognize Native Hawaiians as a "tribe."[40]

Despite these signals from the Supreme Court, Congress should not be too sanguine about the Supreme Court doing its proverbial dirty work by striking down this bill if it were to become law. Challenges to S. 147 are likely to arise in the same courts — the District of Hawaii and the Ninth Circuit — that upheld the unconstitutional race-based voting system struck down in *Rice v. Cayetano*. Supreme Court jurisdiction would be discretionary, and the Court's composition is likely to be different at the time of the decision. Congress should not "punt;" it should instead exercise its independent obligation to "support and defend the Constitution" by refusing to pass this bill.

S. 147 Will Be Racially Divisive In Hawaii and Throughout the Nation

S. 147 advocates repeatedly claim that creating a racially-exclusive government will be a "unifying force,"[41] but the practical effects of the legislation do not square with these claims. This is because, by creating an "Indian tribe" out of some Native Hawaiians, Congress will be creating a path by which the new government gains the same privileges and immunities that other Indian tribes have — in particular, freedom from state taxation and regulation. But the new government will be operating in an environment that is completely different from that which other Indian tribes have dealt, because there will be no segregated space (reservations) or physical communities. As noted above, Native Hawaiians live in the same neighborhoods, attend the same schools, work for the same employers, and worship at the same churches as others in Hawaii and across the nation.

This assimilation will not prevent Native Hawaiians from insulating themselves from the state laws that their neighbors must obey. Because Native Hawaiians do not have segregated "reservation" lands, the natural way for the new entity to gain the privileges and immunities is to ask the Secretary of Interior to take land "into trust." Once land is taken "into trust," it cannot be taxed or regulated. The federal government has repeatedly taken very small amounts of land "into trust" upon petition by members of Indian tribes. One such case is a recent decision by the

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[35] *Rice*, 528 U.S. at 517.
[36] *Rice*, 528 U.S. at 517 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).
[37] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
[38] *Morton v. Mancari*, 417 U.S. 535, 554 (1974).
[39] *United States v. Felipe Sandoval*, 251 U.S. 28, 46 (1913).
[40] *Rice*, 528 U.S. at 518-519.
[41] See, e.g., Testimony of Linda Lingle, Governor of Hawaii, before the Senate Indian Affairs Committee, March 1, 2004, at 3.

Secretary to take into trust a three-acre parcel of land in Nebraska — a parcel which used to house a bar called "Dan's Lounge," but which soon will feature a casino. A federal district court allowed the Secretary to take the land into trust (and thereby insulate it from many state laws) despite its small size.[42] In Hawaii, it is likely that Native Hawaiians will attempt to use the same process to persuade the Secretary of the Interior to take some of their homes and businesses "into trust" on a wholesale or even piecemeal basis. The result will be different legal codes applying to different people living in the same communities depending on their race.

Finally, it is important to understand how this bill is being promoted in Hawaii. While some advocates are telling Senators that the legislation is a ticket to racial harmony, the State of Hawaii itself is telling Native Hawaiians that it is the path to greater independence. Consider this paragraph from an Internet website operated by the Office of Hawaiian Affairs, in a section titled, *How Will Federal Recognition Affect Me*:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S. 344 [the bill number in the 108th Congress] creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people *may exercise their right to self-determination by selecting another form of government including free association or total independence*.[43]

It is difficult to see how a bill touted in Hawaii as a potential path to "total independence" is going to help reconcile whatever racial divisions exist there. It goes without saying that Congress does not serve the nation's long-term interests by providing vehicles for its citizens to secede from the Union.

Additional Long-Term Issues Created by S. 147

Before concluding, it is important to highlight additional provisions of S. 147 that create challenges Congress will be forced to confront if this bill becomes law. For example:

- ***Future Taxpayer Liabilities.*** Section 8(c) of the bill provides a 20-year statute of limitations for new legal claims against the federal government by Native Hawaiians. Prominent among the potential claims are "*Cobell*-style litigation" — claims that the federal government has abused its "trust relationship" with Indians.[44] Other claims could include disputes over land title to Hawaiian lands owned by state and federal governments, *as well as* private citizens. For example, private landowners in the Northeast United States have been fighting claims of prior aboriginal title on their lands for the past 30 years. Moreover, the bill expressly states that no pending claims against the federal government shall be settled. Given the extent of the pending lawsuits filed

[42] See Memorandum and Order entered July 29, 2004, in *Santee Sioux Nation v. Norton*, No. 8:03CV133 (D. Nebraska), on file with the Senate Republican Policy Committee.

[43] Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added).

[44] For more information on *Cobell* litigation, see Congressional Research Service, *The Indian Trust Fund Litigation: An Overview of Cobell v. Norton* (February 25, 2005).

by Native American individuals and tribes, this lengthy statute of limitations period virtually guarantees additional federal financial burdens.

- ***Gambling.*** The question of gambling in Hawaii on Indian lands is not answered by S. 147. On the one hand, section 9 provides that the bill does not authorize gambling under the Indian Gaming Regulatory Act. On the other hand, section 8(b) ensures that the new Native Hawaiian entity would be free to negotiate gaming rights with the State of Hawaii and with the federal government.

- ***Effect on other Indian Funding.*** Under the bill, the current programs for the benefit of Native Hawaiians are presumed to continue, and Bureau of Indian Affairs, Indian Health Service, and other Indian-related monies are segregated for existing tribes. *However*, given that the primary rationale for S. 147 is that Native Hawaiians should be "just like Indians," it is highly likely that future Congresses will rationalize the programs and lump Indian and Hawaiian funding together. When current political compromises become little more than faint memories, there will be natural pressure to funnel monies to Native Hawaiians through the Indian law system. When that happens, Native Americans will be competing with 400,000 Native Hawaiians for federal resources. And, of course, that 400,000 figure will only grow over time.

- ***Authorization for Additional Appropriations.*** Section 11 contains an open-ended authorization for additional funds necessary to carry out the Act. In 2004, the Congressional Budge Office estimated that an earlier version of this bill would cost "nearly $1 million annually in fiscal years 2005-2007 and less than $500,000 in each subsequent year, assuming the availability of appropriated funds."[45]

Conclusion

Congress should not be in the business of creating governments for racial groups that are living in an integrated, largely assimilated society. If the Native Hawaiians lived as Indian tribes, with separate and distinct communities and with their own political entities, then the injury to the nation in recognizing them would be much less dramatic. But this is not the case. Federal Indian law should not be manipulated into a racial spoils system. If Congress can create a government based on blood alone, then the Constitution's commitment to equality under the law means very little. Rather than putting that constitutional question to the Supreme Court, Congress should answer the question itself and defeat this legislation.

[45] CBO Estimate for H.R. 4282, Sept. 22, 2004.