

The Akaka Bill (As Revised) Will Help to Protect Existing Programs for Native Hawaiians and Will Allow Them to Pursue Their Additional Claims

On Wednesday, April 21, 2004, the Senate's Indian Affairs Committee approved changes, mostly technical in nature, to S.B. 344 (the Akaka Bill), in order to meet certain concerns of officials in the U.S. Department of Interior. These changes do not in any way alter the central mission of this Bill, which:

- * would reaffirm the rights of Native Hawaiians as indigenous people and grant formal "Federal recognition" to the Native Hawaiian governing entity,
- * would facilitate a process for establishing this Native Hawaiian governing entity and set in motion a negotiating process for pursuing the additional claims the Hawaiian people have for the lands and resources that were taken from them, and
- * would thereby protect the existing programs that the federal and state governments have established for them.

This revised bill has been immediately attacked by some Hawaiians as an inadequate compromise that would entail giving up rights presently held by Native Hawaiians. Although the Bill is a compromise, as is all legislation, its enactment would be a very positive step to protect and expand the rights and resources of Native Hawaiians, and it would not require any Native Hawaiians to give up any rights or claims they presently possess.

The Pluses

* **Formal Federal Recognition.** The Akaka Bill will provide formal federal recognition of Native Hawaiians as indigenous people entitled to the same legal status as other natives in the United States. Congress has enacted many previous laws that have included "findings" stating that Native Hawaiians have this status, but the 2000 decision of the U.S. Supreme Court in *Rice v. Cayetano* concluded that Congress still had not "determined that native Hawaiians have a status like that of Indians in organized tribes," so some new more formal and more specific enactment is needed. The Akaka Bill is explicit in its language and is designed to fill this gap.

* **Negotiations for the Return of Land and Resources.** The establishment of a Native Hawaiian governing entity pursuant to the Akaka Bill will create a body with the legitimacy to negotiate for the return of land and resources. Although Native Hawaiians could reestablish a government without the Akaka Bill, any governmental body established by a group of Native Hawaiians might still be subject to attack by other Native Hawaiians who did not participate in the process or opposed it. Without the Akaka Bill, therefore, it would be very difficult to enter into a serious negotiation for the return of lands and resources, because the federal and state governments are unlikely to transfer valuable lands and resources unless they are sure they are negotiating with the legitimate representatives of the Native Hawaiian people.

* **Consistent with the Constitutional Authority of Congress.** The U.S. Supreme Court's opinion in the *Lara* case, which was issued on April 19, 2004, strongly confirms Congress's power to legislate for native people and thus gives strong support for the conclusion

that the Akaka Bill would be found to be a constitutional exercise of Congressional power under the Indian Commerce Clause.

*** Allows Additional Claims to Be Brought.** The recent revision to Section 8(c)(2) of the Akaka Bill empowers federal courts to hear claims “over any existing claim against the United States arising under [existing] Federal law...and relating to the legal and political relationship between the United States and the Native Hawaiian governing entity.” Although this is a limited grant of jurisdiction, it does allow at least certain types of claims to be brought that cannot now be pursued, and it grants a generous 20-year period during which such claims can be brought. Although some have complained that this language cuts off claims, it does not exclude any claim that can now be maintained. In fact, this provision goes on to say explicitly that the Court of Federal Claims will continue to have jurisdiction over any claims that can now be brought to that court. The phrase granting “original jurisdiction” to the federal district courts means simply that the district courts sit as trial courts for these actions, rather than as appellate courts. This phrase is not designed to limit, nor would it have the effect of limiting, claims that could be brought in other tribunals, such as international or regional courts.

Does the Akaka Bill Have a Downside? No.

*** Is Approval by Congress and the Hawaii State Legislature of the Transfer of Land, Resources, and Governmental Authority Necessary Before Formal Federal Recognition Would Be Extended to the Native Hawaiian Governing Entity? No.**

Formal federal recognition will occur automatically upon the certification by the U.S. Secretary of Interior that the organic documents establishing the Native Hawaiian governing entity were approved by a majority of those adult Native Hawaiians listed on the roll and that these documents establish the criteria for citizenship in the Native Hawaiian governing entity, establish the power of the governing entity to exercise governmental responsibility, provide the entity with the authority to negotiate with other governmental entities, protect Native Hawaiian lands and the civil rights of Native Hawaiians, and are consistent generally with federal laws governing other native peoples. Once this certification occurs, negotiations would then begin between the Native Hawaiian governing entity and the federal and state governments to transfer lands, resources, and governmental authority to the Native Hawaiian entity.

The language of the revised bill is somewhat difficult to follow, because it is written in legalese drafted to be precise, but it becomes clear after a careful reading that this is the sequence that would be followed. No further action by the U.S. Congress or the Hawaii State Legislature would need to occur before formal federal recognition is granted, but these legislatures would need to approve the later-negotiated transfers of land, resources, and governmental authority. The language introducing Section 7(c)(4)(A), which says that the Secretary of Interior’s certification is to be made “[w]ithin the context of the future negotiations” for the transfer of land, resources, and governmental responsibility, simply reinforces the understanding that such negotiations should begin upon certification. The words “future negotiations” make it clear that the negotiations are to take place *after* the certification.

*** Do Native Hawaiians Relinquish or Abandon or “Settle” any of Their Claims in the Akaka Bill? No.**

Those advocating independence assert that the Akaka Bill will undercut their efforts. But Section 8(c)(1) of the revised Akaka Bill explicitly states that it does not involve the settlement or relinquishment of any claims: “Nothing in this Act serves as a settlement of any claim against the United States.” In its revised “findings” in Section 2(13), the Bill now reaffirms that “the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum.” Working to implement the procedures that would be established under the Akaka Bill would not involve “acquiescing” to the illegal overthrow of the Kingdom of Hawaii in 1893. It is a historical fact that the Kingdom was overthrown illegally in 1893 and that lands were taken without the consent of or compensation to Native Hawaiians. The Akaka Bill would begin the process of providing some long-overdue compensation.

After the Native Hawaiian governing entity is established and is granted formal federal recognition, those favoring independence are still free to promote their cause. But even if Hawaii were to become independent at some time in the future, the Native Hawaiian people would be a numerical minority in the islands, and they would still need something like the Akaka Bill to protect their unique claims to their land and resources.

The Akaka Bill may not have everything one might have hoped for, but it is a good solid bill designed to protect existing programs and to begin the process of addressing and resolving the long-festering claims of the Native Hawaiian people. If Congress passes this Bill, it will open a new era for Native Hawaiians and lead to a better and more prosperous Hawaii for everyone.

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