U.S. HOUSE OF REPRESENTATIVES
Committee on Natural Resources
Dissenting Views
The Honorable Doc Hastings (R-WA)
HR 2314

H.R. 2314 is described by its proponents as legislation to recognize Native Hawaiians for the purpose of organizing a single governing entity to represent them on a government-to-government basis with the State of Hawaii and the Federal government. This is a circuitous means of saying that H.R. 2314 creates a Native Hawaiian Indian tribe, one that could enroll up to 400,000 members (and more after it is recognized). This would be one of the largest tribes in the United States, accordingly with the largest expectation of taxpayer dollars during a time of historic federal deficits and debt.

But there is a key difference between the Hawaiian "tribe" recognized under H.R. 2314 and the tribes duly recognized through Treaty or Act of Congress: the former is not a tribe within the meaning of the Indian Commerce Clause of the Constitution (Article I, Section 8) because it does not share the historical and political relations of Indian tribes with Congress. While proponents often take pains to stress they do not propose to recognize a "tribe," but a "governing entity," the plain language of H.R. 2314 and the Akaka Substitute (discussed below) do extend tribal recognition.

Proponents argue that Congress possesses broad, plenary authority to recognize Indian tribes. They point to a number of Acts passed over the years, including some 160 federal programs benefiting Native Hawaiians because of their status as Native Hawaiians, as evidence that Congress recognizes Native Hawaiians' special status. The fact that federal, racially-based benefits have already been passed is hardly a valid argument on the merits for extending recognition to a Native Hawaiian tribe. This is like saying that the Democrats' $787 billion "stimulus" is evidence that more federal spending is warranted.

More importantly, the Supreme Court considered a case, *Rice v. Cayetano*, related to this controversy. The lawsuit involved a Hawaii state law that limited to Native Hawaiians the eligibility to vote in elections for trustees of the Office of Hawaiian Affairs (OHA). In a 7-2 decision the Supreme Court held that such a restriction is race-based and therefore prohibited by the 15th Amendment to the Constitution. Though the case did not involve a Native Hawaiian entity specifically recognized by Congress, the majority opinion noted that such a proposition "would raise questions of considerable moment and difficulty. It is a matter of some dispute … whether Congress may treat the native Hawaiians as it does the Indian tribes."

H.R. 2314 purports to recognize a Native Hawaiian tribe, but because this would exceed constitutional limits on who Congress can recognize as an Indian, it seeks to establish a race-based government. For this reason, a majority of the U.S. Commission on Civil Rights, which was established pursuant to the Civil Rights Act of 1957, recommended "against

passage of the Native Hawaiian Government Reorganization Act … 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 degrees of privilege."

In the June 11, 2009, hearing on this bill, the testimony of Civil Rights Commission Gail Heriot is instructive. She describes why granting tribal sovereignty to Native Hawaiians does not fit with the islands' history:

> The 1840 Constitution of Hawaii established a bicameral parliament whose members were multi-racial. By 1893 [when Hawaii's ruling monarchy was overthrown], ethnic Hawaiians were a minority of the population. Anyone who was born on Hawaiian soil or who swore allegiance to the Queen was considered a subject of the Queen and hence "Hawaiian," regardless of race. This was no kinship-based tribe. It is thus difficult to argue that ethnic Hawaiians in particular have a right to sovereignty that was violated by the overthrow.
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> More important, all of this has been water under the bridge at least since 1959 when Hawaii was made a State … On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of statehood.

Despite this overwhelming support for Statehood and one set of laws governing all Hawaiians, H.R. 2314 proposes to create a two-tiered system of governance in Hawaii based on one's race. Worse, it is impossible to say precisely how inclusive the entity will be even with respect to Native people of varying degrees of Hawaiian ancestry: under H.R. 2314 the governing entity may discard the carefully-crafted membership rules after it receives federal recognition, and construct an entirely new set of membership rules.

The Akaka Substitute

In the Committee markup of H.R. 2314, Hawaii Congressman Neil Abercrombie filed an amendment in the nature of a substitute that was informally called the "Akaka Substitute" after the Senator from Hawaii who oversaw its development. The Akaka Substitute was drafted in secret by Hawaiian advocates and the Obama Administration, to the exclusion of the participation of Hawaii's Governor and Attorney General. Sprung upon the Committee just prior to the markup as a kind of Midnight Surprise, the Akaka Substitute would have made a bad bill even worse.

As introduced, H.R. 2314 provides that matters such as transferring lands and preempting Federal and State civil, criminal, and tax jurisdiction, must be subject to negotiation with, and the concurrence of, the State of Hawaii and the U.S. Congress. The Akaka Substitute would have short-circuited this reasonable public process by immediately endowing the Hawaiian tribe with the inherent governing powers possessed by other recognized tribes, and preempting State civil and tax authority without the State's consent.

The Akaka Substitute was not offered by Mr. Abercrombie in a gesture of bipartisanship for which the Gentleman is to be commended. It must be noted that it was withdrawn after a letter was submitted to the Committee by the Hawaii Attorney General on his behalf and Hawaii's Governor. While the Governor and Attorney General had been "strong advocates and supports of [Native Hawaiian Recognition legislation] for years", they strongly opposed the Akaka Substitute because it would "completely change the nature of the Native Hawaiian governing entity." In their words:

> These changes, taken together, change the bill from one where the status quo and the relations between the United States, the State of Hawaii, and the Native Hawaiian governing entity can be changed only after negotiations and after passage of implementing legislation, to a model in which the status quo immediately changes, pursuant to an Indian law model." (Emphasis in the original). *(Letter to Chairman Rahall and Ranking Member Hastings, December 15, 2009).*

If those secretly writing the Akaka Substitute seek to keep the Governor and Attorney General in the dark, then what exactly is the goal? Unfortunately, we will probably know only when H.R. 2314 is brought to the Floor, presumably with another substitute amendment drafted behind closed doors. This manner of legislating is not worthy of the grave subject matter at hand, regardless of one's position on it.

In the end, if H.R. 2314 passes, the days of this entity will be numbered. It may take years and millions of dollars in billable hours, but the Supreme Court will perform the job that Congress is duty-bound to undertake today: reject a race-based governing entity in violation of the Constitution. But how many dollars will be spent, and how many racial and political scars will be left on Hawaii's citizens when this controversy is concluded?

H.R. 2314 should be soundly rejected.

Attachment: Letter from State of Hawaii Attorney General Bennett