



December 15, 2009

**Democrats Move Forward with Native Hawaiian Recognition Bill**  
*Numerous constitutional concerns surround bill*

On Wednesday, December 16, 2009 the House Natural Resources Committee will hold a markup on **H.R. 2314, the *Native Hawaiian Government Reorganization Act of 2009***. This bill would recognize Native Hawaiians as a separate governing entity, providing them with the ability to transfer lands, negotiate with other government entities and set their own criminal and civil jurisdictions separate from the United States.

Early last week, an agreement was reached with the Democrat Majority that Wednesday's markup would consist of non-controversial bills that could be considered quickly. Democrats issued notice on Friday that the Native Hawaiian bill would be added. The Majority has had no communication with Republicans regarding this legislation since they cancelled a markup on this bill without explanation in early July.

Democrats are attempting to quickly push this bill through Congress without addressing serious and legitimate constitutional concerns:

- **Native Hawaiians are not members of a tribe**, therefore it is highly questionable whether Congress even has the power to recognize them as a separate governing entity under the Indian Commerce Clause (Article I, Section 8 of the Constitution).
- **Recent Supreme Court rulings such as Rice v. Cayetano in 2000 have called into question Congress' ability to recognize Native Hawaiians as a governing entity.** For example, the ruling in Rice v. Cayetano says:

*"[I]t would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State— and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. **It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.**"*

- **In 2006, the Department of Justice (DOJ) expressed concerns that this Act creates an unconstitutional race-based entity.** In a [letter](#), DOJ wrote that this would "divide

people by their race” and that the Supreme Court and lower Federal Courts have been invalidating state laws that provide race-based qualifications for certain state programs.

- **The United States Commission on Civil Rights also strongly opposes this legislation based on grounds that is discriminates based on race.** In a [letter](#) to members of Congress on August 28, 2009 they wrote that:

*“We do not believe Congress has the constitutional authority to ‘reorganize’ racial or ethnic groups into dependent sovereign nations unless those groups have a long and continuous history of separate self-governance.”*

- **The bill sets a precedent that could be used by other ethnic groups seeking recognition.** Gail Heriot with the U.S. Commission on Civil Rights [testified](#) before the committee that:

*“If ethnic Hawaiians can be accorded tribal status, why not Chicanos in the Southwest? Or Cajuns in Louisiana? Indeed, it is implausible to say that Congress has the power to confer this benefit only upon racial or ethnic groups, since ordinarily Congressional power is at its lowest ebb with issues that touch on race or ethnicity.”*

- **Native Hawaiians do not live in separate communities or on separate lands, they live in neighborhoods with other Hawaiians.** Because this bill could allow Native Hawaiians to establish their own criminal and civil jurisdiction, this could result in neighbors living under different legal regimes. For example, a Native Hawaiian business owner could be exempt from a state sales tax while his competitor down the street is not.
- **Some Native Hawaiian activists have expressed the goal of creating an independent nation for Native Hawaiians – this bill could be the first step towards secession.**

For more information, [click here](#) to read a copy of Ranking Member Hastings’ opening statement from the June 11<sup>th</sup> Full Committee hearing.

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