

Congress Has Jurisdiction on Hawaiians
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The Honolulu Advertiser
November 1, 2005

Does Congress have the authority to treat Native Hawaiians as it does American Indians and Native Alaskans? That is the legal question raised by legislation now pending before Congress.

Constitutional text, Supreme Court precedent and historical events provide the answer: Congress' broad power in regard to Indian tribes allows Congress to recognize that Native Hawaiians have the same sovereign status as this country's other indigenous peoples.

The proposed Native Hawaiian Government Reorganization Act would establish a process by which Native Hawaiians would reconstitute their aboriginal government. Before Hawai'i became a state, the kingdom of Hawai'i was a sovereign nation recognized as such by the United States.

In 1893, American officials and the U.S. military aided in the overthrow of the Hawaiian monarchy. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change.

Congress has ample authority to reaffirm the government-to-government relationship with Native Hawaiians and their current effort to reorganize their governing entity. Congress' broadest constitutional power — the power to regulate commerce — specifically encompasses the power to regulate commerce "with the Indian tribes."

Based upon the commerce clause and other constitutional provisions, the Supreme Court has acknowledged Congress' plenary power to legislate regarding Indian affairs. In the 1998 *Venette* case, the court did not question Congress' power to enact legislation for Native Alaskans.

Congress has used that power in the past to restore the relationship with tribal governments terminated by the United States. In 1954, Congress terminated the Menominee tribe in Wisconsin. In 1973, Congress reversed course and enacted a law restoring the federal relationship with the Menominee and assisted in its reorganization. The bill before Congress is patterned after that law and would do for Native Hawaiians what Congress did for the Menominee and for Alaska's natives.

The bill does not run afoul of *Rice v. Cayetano*, a 2000 Supreme Court opinion often touted by the bill's opponents. In *Rice*, the court ruled that the state of Hawai'i could not limit the right to vote in a state election to Native Hawaiians. But *Rice* did not address whether Congress may treat Native Hawaiians as it does its other indigenous groups — Indian tribes and Alaska natives.

Indeed, the court's opinion clearly left open the possibility that Congress could so treat Native Hawaiians. The Supreme Court has long held that congressional legislation dealing with indigenous groups is political, not racial, in character and therefore is neither discrimination nor unconstitutional.

Likewise, the constitutionality of the bill is not affected by the recent lower federal court decision that the prestigious Kamehameha Schools in Hawai'i cannot completely bar admission by non-Native Hawaiians. That case involved the obligations of a private school under the civil rights statutes. The question here is whether Congress has the constitutional authority to restore the government-to-government relationship with Native Hawaiians.

The answer to that legal question is yes.

When Congress enacts laws for indigenous peoples, it does so on a government-to-government basis. Scores of federal laws and regulations exist relating to American Indians, Native Alaskans and Native Hawaiians, and none has ever been struck down as racially discriminatory. Indeed, a review of the current state of the law makes clear that laws focused upon any of these indigenous peoples are within Congress' powers.

At the end of the day, a decision by Congress to treat Native Hawaiians like other native groups is a political decision, one that courts are not likely to second-guess. In a 1913 case involving the New Mexico Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as Indians, even though their culture, customs and assimilation into the community differed from that of other Indian tribes.

The court decided that Congress' judgment was not arbitrary and that judicial review should end there. The legislation now before the Senate concerning Native Hawaiians easily passes that legal test.