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ISLAND COMMENTARY

Akaka Bill a zero-sum game, not 'win-win'

By Tom Macdonald
and Bill Burgess

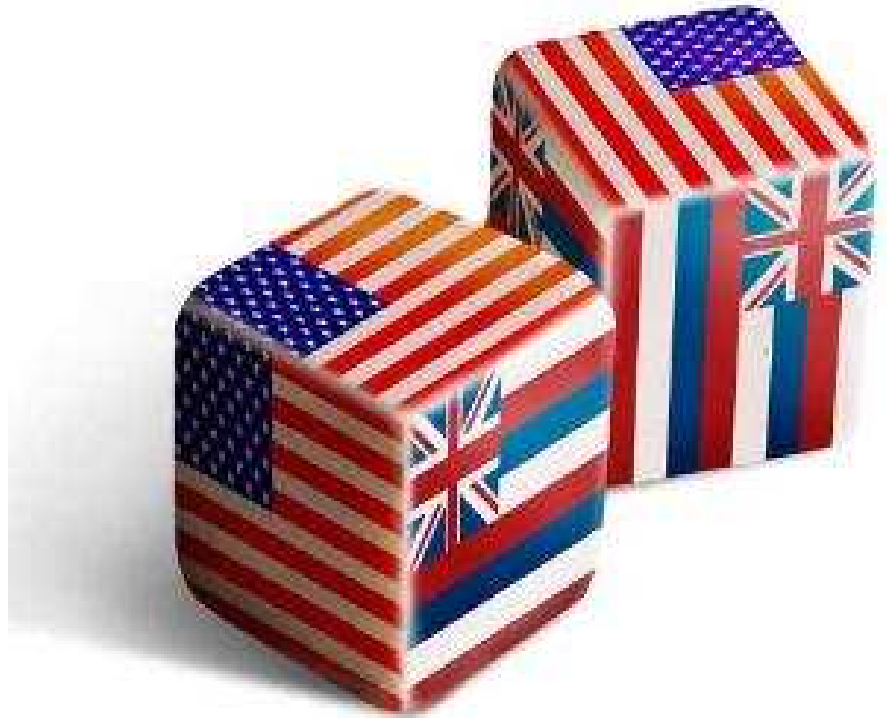
POSTED: 01:30 a.m. HST,
Aug 31, 2009

Jon Van Dyke's [Aug. 24 "Island
Commentary"](#) asserts that

passage of the Akaka Bill would
be a win-win situation for all the people of Hawaii. Everybody would win. We strongly
disagree: It is a zero-sum game, where for every winner there is a loser.

The main objective of the bill, according to Rep. Neil Abercrombie, one of its major supporters, is the transfer of land and money from ownership of the state, where it benefits all Hawaii's people, to ownership by a new Hawaiian governing body, where that same land and money would be available to benefit only so-called "native Hawaiians." Every dollar or acre of land transferred to the new governing body would be a dollar less, or an acre less, available for the benefit of everyone in Hawaii. That is a classic zero-sum game, not a "win-win."

Let us focus on just who these "native Hawaiians" are who would benefit under the Akaka Bill. The definition of "native Hawaiian" in the bill is so broad as to be ludicrous. Anyone, living anywhere in the world, with at least one ancestor indigenous to Hawaii before 1778, when Captain Cook and Westerners first arrived in Hawaii, would be eligible to participate in the formation of the new Hawaiian governing body. The vast majority of these people would have less than 2 percent Hawaiian blood and large numbers of them would never even have visited Hawaii. Why should they have higher priority to benefit from state land and money than their next door neighbors who do not have that precious drop of Hawaiian blood?



Professor Van Dyke asserts that the bill would "certainly be found constitutional" and he cites the 1993 Apology Resolution as the foundation for his certainty. But earlier this year, the U.S. Supreme Court ruled that all the "whereas" clauses that Professor Van Dyke relies on for his argument had no legal force and effect, and did not change the legal landscape in Hawaii. The court ruled that the Republic ceded absolute title free and clear from any trust or claim whatsoever that arose before 1898, whether from native Hawaiians or any other party.

And Professor Van Dyke fails to mention the real constitutional problem with the Akaka Bill: that the U.S. Supreme Court has already ruled in *Rice v. Cayetano* that the definitions of "Hawaiian" and "native Hawaiian," essentially the same ancestral definition used in the Akaka Bill, are racial classifications. The court ruled that use of ancestry as a test for voting was clearly a proxy for race, and violates the 15th Amendment to the U.S. Constitution. The Akaka Bill calls for elections and referenda in which eligibility to vote is restricted by the same unlawful racial restrictions. The bill will almost certainly be found to be unconstitutional.

The U.S. Civil Rights Commission reached a similar conclusion in 2006: Recommending against passage of the bill 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.

Unfortunately, it will take several years for litigation on the Akaka Bill to pass through the lower courts and reach the U.S. Supreme Court. And during that time, the incipient inter-ethnic conflicts we are already beginning to see in Hawaii will in all likelihood grow significantly, and the ethnic harmony that has been a major benefit of living in Hawaii will be severely frayed, perhaps beyond repair.

Much of Professor Van Dyke's commentary rehashes the now discredited "whereas" clauses of the Apology Resolution. The Akaka Bill purports to provide a "reconciliation." But despite Professor Van Dyke's protestations to the contrary, any "reconciliation" provided by the Akaka Bill will be one-sided and lead to more conflict, not more aloha, in Hawaii.

Tom Macdonald and Bill Burgess are founding directors of Aloha for All, a nonprofit group dedicated to equal rights for all citizens of Hawaii. Macdonald is the retired president of Hawaiian Trust Co.; Burgess is a lawyer who has represented Hawaii plaintiffs in several lawsuits pursuing equal rights.