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Senator Russell Blair
State Capitol
Honolulu, Hawaii 96813
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Dear Senator Blair:

I am writing with regard to a question that has been raised regarding the constitutionality of the proposal in the Governor's "Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust" that at least three of the five members of the "Board of Individual Claims Resolution" be native Hawaiians. Apparently concern has been raised that the explicit reservation of seats for native Hawaiians could violate the Equal Protection Clauses of the U.S. and Hawaii Constitutions.

The approach proposed by the Governor is clearly constitutional. The constitutional issue is discussed in some detail in an article I wrote several years ago entitled The Constitutionality of the Office of Hawaiian Affairs, 7 U. Hawaii L. Rev. 63 (1985), which explains how federal and state courts have handled preferences for native peoples.

The cases consistently hold that such preferences are constitutional and do not violate the Equal Protection Clause. Preferences for native people are justified by virtue of the special and separate political status of natives are not viewed as racial preferences. Among the many cases that support this analysis are Morton v. Mancari, 417 U.S. 535 (1974); Antoine v. Washington, 420 U.S. 194 (1975); Fisher v. District County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976); United States v. Antelope, 430 U.S. 641 (1977); Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979). See also Ahuna v. Department of Hawaiian Home Lands, 64 Hawaii 327, 640 P.2d 1161 (1982), where the Hawaii Supreme Court concluded that doctrines developed in federal decisions affecting native Americans applied to native Hawaiians.

A number of specific precedents support the creation of decisionmaking bodies with some or all seats allocated to persons of Hawaiian ancestry. At least four of the eight Commissioners on the Hawaiian Homes Commission must be at least one-quarter blood Hawaiians. Hawaiian Homes Commission Act, 1920, 42 Stat. 108, sec. 202. All Trustees of the Office of Hawaiian Affairs must be of Hawaiian ancestry. Hawaii Constitution, art. XII, sec. 5. The

Page 2
February 21, 1991

Kalaupapa National Historical Park Advisory Commission, which was established by the U.S. Congress, consists of eleven members, four of whom are "appointed from recommendations submitted by the Governor of Hawaii, at least one of whom shall be a Native Hawaiian." Pub. L. No. 96-565, tit. I, 94 Stat. 3321, sec. 108(a) (1980) (codified at 16 U.S.C. sec. 410jj-7(a) (Supp. 1980)).

No serious challenges have ever been raised to the composition of these bodies. Because they are designed to govern the resources of the Hawaiian community, which along with other native groups is entitled to self-governance within our legal system, it is entirely appropriate for members of these governing bodies to be of Hawaiian ancestry. The Board of Individual Claims Resolution is also to be established to render decisions affecting the resources of the Hawaiian community, and so it is appropriate (and constitutional) that persons of Hawaiian ancestry serve as members of this Board.

Please let me know if I can provide any further assistance on this issue.

Best wishes,



Jon M. Van Dyke

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