# The Constitutionality of the Office of Hawaiian Affairs and Other Programs for Native Hawaiians

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The question of the constitutional legitimacy of the Office of Hawaiian Affairs and other special programs and preferences for native Hawaiians has been raised in several contexts during the past year.

Lawyers in the State Attorney General's office have argued that OHA is unconstitutional in the current litigation involving the proper distribution of proceeds from the lands ceded to the U.S. government in 1898. And when the legislature was considering a bill to allow native Hawaiians to have a "live-in" park at Sand Island, a lawyer in the AG's office submitted a memorandum arguing that it might violate the equal protection clause of the U.S. Constitution to provide such a preference for native Hawaiians and not for other groups.

The implications of these arguments are immense, because if it is unconstitutional to establish OHA or a live-in park for native Hawaiians, then the Hawaiian Homes Commission--which has been serving the Hawaiian community since 1921--would appear also to be unconstitutional, along with a number of programs recently enacted by the U.S. Congress to aid native Hawaiians.

Nonetheless, these legal opinions opposing Hawaiian rights are frequently received with sympathy among many sectors of our community because they seem to be consistent with the constitutional principle that we should treat and evaluate each person as an individual rather than as a member of a group. We have a strong national commitment to grant or deny benefits on the basis of individual evaluations, without regard to race, creed, or color, and so we naturally are wary of programs that appear to single out one group for particular governmental benefits.

This view fails to recognize, however, that special programs and preferences for native Hawaiians--and other native Americans on the mainland--are enacted and upheld not for racial reasons, but rather because of the unique legal and political status that native groups have in American law. The U.S. Constitution recognizes the special status of native groups and the U.S. Supreme Court has repeatedly reaffirmed this unique legal status in recent years. The Court has explained that this unique status developed not as an attempt to elevate one group over others solely for racial reasons but rather because of the "special relationship" that exists between the United States government and native peoples. This special relationship arose out of the historical events whereby the United States and U.S. citizens

overcame the natives and took possession of their lands. (The leading case is Morton v. Mancari (1974), and the U.S. Supreme Court has unanimously reaffirmed these principles in at least eight cases involving different preferences for native Americans since 1974.)

The fact that native Hawaiians are ethnically distinct from mainland "Indians" is of no legal importance. Federal courts have extended the special "status" of native groups to all the diverse natives on the mainland and Alaska. Many of these groups were not organized into formal tribes and many had no treaties with the United States. The only factors that link all these peoples together and give them their special legal "status" is (1) that their ancestors were in what is now the United States before Westerners arrived and (2) that their culture was affected and their land holdings reduced as a result of their contact with Westerners.

These factors link native Hawaiians to other native Americans, and in 1982 the Hawaii Supreme Court specifically analogized the native Hawaiians to other native Americans and drew upon the rich body of federal cases involving mainland natives to determine the trust duties owed to native Hawaiian homesteaders. (Ahuna v. Dept. of Hawaiian Home Lands)

The distinction between a program based on political "status" and one based on race can be made clear with some examples. The United States does not grant special privileges to "Indians" from Canada, Mexico, or Guatemala who have moved to and become citizens of the United States even though they are members

of the same racial group as American "Indians." The many programs and preferences given to American Indians through the Bureau of Indian Affairs are based on a political or "status" relationship with the U.S. government and its citizens and not based on a preference for one race over others.

Similarly, the preferences granted to native Hawaiians through the Office of Hawaiian Affairs do not extend to other Polynesians in Hawaii (Tongans, Maoris, etc.), who are members of the same "race" as Hawaiians but do not fit the "political" or "status" classification of being descendants of persons who resided here prior to 1778. The U.S. and the Hawaii Supreme Courts have made it clear that because of historical and political relationships our governments owe a "unique obligation" to natives that descend from peoples that resided in the United States when Westerners arrived. This special obligation does not, however, extend to persons who are of the same race as these natives but come from non-U.S. regions.

The legal conclusion that native peoples can be given preferences and special programs is also supported by three sound policy reasons that remain persuasive today.

First, all ethnic groups except for native peoples agreed at some level or other to participate in the multi-ethnic society that we have in the United States. Every other immigrant group came to the United States understanding that this new country consisted of a multi-ethnic community and implicitly agreed to participate in such a culture. The native people made no such commitment, they were never asked if they wanted to participate

in our melting pot, and they have never specifically agreed to do so. Native peoples were largely conquered by other ethnic groups and have generally been excluded from many of their original land areas. The legislature and courts have felt that in view of this history native peoples should be given some special status under our legal system. (This rationale does not, of course, include blacks who were forcefully brought to North America and kept as slaves during the early years of our country's history. The second policy reason does distinguish blacks from native Americans.)

Second, and equally important, native peoples have no "mother culture" elsewhere to tie themselves to. Every other ethnic group in the United States can look to some other location where their historical and cultural traditions are maintained. They face, therefore, no total loss of their historical roots if they become assimilated into the dominant multi-ethnic culture. On the other hand, native peoples have no place to look for this protection of their culture and heritage, except their place of origin in the United States. If they are not permitted to maintain some unique and special status here, their culture and traditions will be lost forever. In that sense, therefore, native peoples are something like an endangered species deserving of special protection.

Finally, native peoples frequently have strong claims to reparations and land, based on treaties and other early dealings with the government. Preferences granted to native Americans are, therefore, sometimes viewed as partial responses based on

obligations owed to these peoples.

These policies and a consistent line of decisions in federal and Hawaii state courts amply support the constitutional legitimacy of the decision of the people and legislature of Hawaii to create the Office of Hawaiian Affairs to maintain the historical and cultural traditions of the Hawaiian people and promote their economic prosperity. The programs of the Hawaiian Homes Commission are similarly constitutional, as would be a "live-in" park open only to native Hawaiians.

The people and the legislators of Hawaii should know that the state and federal constitutions present no bar to the enactment of new programs that benefit native Hawaiians or single them out for unique treatment. Court decisions over two centuries have recognized the legitimacy of special programs and preferences for natives.