Testimony for the Senate Judiciary Committee

H.B. 890, H.D. 1, S.D. 1
Relating to the Office of Hawaiian Affairs

by

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(This testimony does not represent the institutional position of the University of Hawaii, but is based on my experience, which includes having taught Constitutional Law for nine years at the University of Hawaii and other law schools.)

The question was raised in earlier testimony whether creating an Office of Hawaiian Affairs would violate the equal protection clause of the fourteenth amendment. Some witnesses have contended that if the state government singles out one ethnic group for this type of office, other ethnic groups would have to be treated similarly. Although our constitution does in general require that all ethnic groups be treated alike, the United States has a long-standing commitment to native peoples and the legislature and courts have traditionally treated native Americans as a separate category. Since the founding of the United States, native peoples have been governed under separate programs and recent court decisions have reaffirmed that native peoples do have a unique status under our laws.

I am attaching references to three cases which illustrate the nature of this special status:

1. Morton v. Mancari, 417 U.S. 535 (1974), allowed the Bureau of Indian Affairs to give a preference to natives living on reservations with regard to hiring by the Bureau. The Supreme Court unanimously approved this hiring preference, arguing that such a preference ought to be viewed not as a racial preference but rather a political preference. Native peoples have a unique political status, as the first Americans, and have always been treated as having quasi-sovereign status.

2. A federal district judge in New Mexico ruled last summer that the State of New Mexico could reserve public land exclusively for native Americans to sell their crafts. When a Caucasian couple applied to sell in this location, the court upheld their exclusion, arguing once again that the state has a strong need to preserve the culture of native peoples and their traditions.

3. A case is now before the United States Supreme Court involving a land dispute in Iowa, between the Indians of that region and the Caucasian landowners. The specific dispute in that case involves a difficult area of water rights law. But its significance for our purposes is that the United States Court of Appeals for the 8th Circuit based its ruling on an 1834 federal statute that specifically gives native peoples a preference in land disputes. The statute states that where natives have previously occupied land that is in dispute, the burden of persuasion rests with the non-Indian.

This statute is an explicit preference, once again based not on race but on the traditional, cultural and political differences between native peoples and all other residents.

Three policy reasons have historically been cited to explain why native peoples are given a strong preference in our legal system:

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 agreeing to participate in such a culture.* The native peoples made no such commitment, and have never agreed willingly to participate in our melting pot. 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 ought to be given some special status under our legal system.

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

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*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 apply to blacks.

maintained. They face, therefore, no total loss of their historical roots. 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 United States government. Preferences granted to native Americans are, therefore, sometimes viewed as partial responses based on obligations owed to these peoples.

These policies and legislative and judicial actions make it clear that it is within the power of the State of Hawaii to create an Office of Hawaiian Affairs which would maintain the historical and cultural traditions of the Hawaiian people and promote their economic prosperity.

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One other aspect of H.B. 890 deserves comment. The method of selecting the trustees of the Office of Hawaiian Affairs in the bill as currently written gives residents of each of the neighbor islands the right to select directly their

own trustees. This decision was made at the Constitutional Convention and approved by the voters. It is based on a strong feeling by the residents of the neighbor islands that their concerns are frequently ignored by delegates from Oahu.

Although the arguments in favor of this method of selection are perfectly understandable and reasonable, the selection scheme nonetheless seems to conflict with the reapportionment standards that have recently been articulated by the United States Supreme Court. Because the Office of Hawaiian Affairs will allocate public funds and will have some general governmental functions, it seems probable that a federal court would rule that the "one-person, one-vote" standard applies. In the context of the Office of Hawaiian Affairs, of course, the standard would be reinterpreted as "one-Hawaiian, one-vote." If the legislature agrees with this interpretation, it is faced with a difficult choice of how to select the trustees of the Office of Hawaiian Affairs. To give a seat to each of the neighbor islands and also to be fair to the much larger number of Hawaiians living on Oahu, the Board would have to consist of about thirty to thirty-five members. Possibly, it could then have an executive board which would carry forth its day-to-day operation. Other alternatives would be to select all the delegates-at-large, with the requirement that certain trustees be residents of the neighbor islands. Such

an approach has a disadvantage of requiring expensive statewide campaigns and removing the trustees from close contact with their constituents. It would also mean that the voters of Oahu could select among the candidates from the neighbor islands to the disadvantage of the residents of those neighbor islands. A final approach would be to retain the number of nine trustees for the Office of Hawaiian Affairs but to reduce the number of trustees from the neighbor islands, along the lines of the current apportionment scheme for the Board of Education. These are difficult policy questions that should be made in communication with the Hawaiian community.