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Mr. Colin Kippen
Deputy Administrator
Office of Hawaiian Affairs
711 Kapi`olani Boulevard
Honolulu, Hawai`i 96813

Subject: Statewide Constitutional Convention

Dear Colin:

This memorandum responds to your request for an analysis of what the holding of a statewide constitutional convention might mean for the rights of the Native Hawaiian people.

Background.

Statewide constitutional conventions have been held in Hawai`i in 1950, 1968, and 1978. Article XVII, Section 2 of Hawai`i's Constitution requires the Legislature to put on the general election ballot at least every ten years the following question: "Shall there be a convention to propose a revision of or amendments to the Constitution?" When the question was posed in 1986, the voters said they did not want to hold a convention. The question was posed again in 1996, with 163,869 voters answering "yes," 160,153 answering "no," 90 marked both "yes" and "no," and 45,245 left blank. Article XVII, Section 2 states that: "If the majority of the ballots

cast upon such a question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.” The State’s Attorney General issued an opinion stating that the blank ballots should be ignored in determining whether “a majority of the ballots cast upon such a question be in the affirmative,” and hence that the voters had approved the convening of a convention. But the Hawai`i Supreme Court disagreed, holding that the blank ballots had to be counted among the “ballots cast upon such a question” and hence that the voters had failed to approve the convening of a convention. Hawai`i State AFL-CIO v. Yoshina, 84 Hawai`i 374, 935 P.2d 89, 98 (1997).

After this conclusion was challenged in federal court by proponents of a convention, U.S. District Judge David Ezra ruled that a new election was required, because the Hawai`i Supreme Court’s decision marked an unforeseeable departure from past election practices, contradicted information distributed by state election officials, and was thus fundamentally unfair to Hawai`i’s voters. But the U.S. Court of Appeals for the Ninth Circuit reversed Judge Ezra’s ruling, characterizing the situation as a “garden variety” election irregularity that did not undermine the integrity of the vote, and holding that federal courts should not intervene with regard to such minor irregularities. Bennett v. Yoshina, 1998 WL 136411 (9th Cir. March 27, 1998). In an opinion by Judge Tashima, the appellate court stated that “[i]t is beyond belief” to suggest that voters who left their ballots blank altered their behavior based on confusion regarding how the votes were to be counted. Id. at *8. Judge Tashima characterized the decision by the Hawai`i Supreme Court as having interpreted the Hawai`i Constitution to reject the holding of “a constitutional convention if the majority of voters either don’t want one or

don't care." Id. at *9. Such a ruling, the Ninth Circuit concluded, may amount "to a garden variety election irregularity, but is hardly a pervasive error that undermines the integrity of the vote." Id.

What's Next?

The current Legislature is considering a bill that would put the question of whether to call a constitutional convention back on the ballot for the November 1998 election. What should OHA's position be on such a bill? What process would follow if the voters unambiguously approved the calling of a convention this time? How could a convention affect Native Hawaiian rights?

The size and structure of each Con Con is to be established by the Legislature, but Article XVII, Section 2 says each convention should have "the same powers and privileges, as nearly as practicable, as provided for the convention of 1978." That Con Con consisted of 102 members—two elected from each House of Representatives district—and it met for three months in the old federal building. It proposed about 100 amendments which were grouped into about 30 separate ballot questions. All of them were approved, partly because of the way the balloting was structured and the way votes were counted. After the 1978 Con Con, the process of counting votes was changed to the system explained in the following paragraph, which makes it somewhat harder to approve proposed amendments.

A constitutional convention cannot alter constitutional provisions itself—it can only propose amendments that the voters can approve or disapprove at the next general election. Article XVII, Section 2 states that proposed amendments are approved at a general election only

if 50 percent of all persons who voted at that general election affirmatively support the amendment (i.e., blank ballots are counted as “no” votes). If the proposed amendment is on the ballot at a special election, Article XVII, Section 2 adds the additional requirement that the majority supporting the amendment must also constitute “at least thirty percent of the total number of registered voters.”

How Might a Statewide Con Con Affect Native Hawaiian Rights?

The “worst case scenario” would occur if the statewide constitutional convention proposed eliminating the amendments added after the 1978 Con Con that established OHA, guaranteed Native Hawaiians a revenue stream from the Public Land Trust, and protected traditional and customary Native Hawaiian rights (Articles XII, Sections 4-7).

Another scenario, if we had an “enlightened” statewide Con Con with delegates supportive of Native Hawaiian rights, the convention might propose some adjustments to the Hawaiian Rights amendments that were added in 1978. The Con Con could alter the manner of selecting Trustees, for instance, so that it would not be necessary to elect the Trustees on a statewide basis. If the Trustees could run from smaller districts, the costs of campaigning would be reduced, and the electorate might develop a closer relationship with their Trustees. Another possibility that has been talked about is to create a new political subdivision for the Native Hawaiian people in order to give Native Hawaiians autonomy within the State’s political system—this approach is sometimes called the “state-within-a-state” sovereignty model. The question of gathering and access rights might be given a close look, in light of the Hawai’i Supreme Court’s PASH decision. The terms “Native Hawaiian” and “Hawaiian” might be given

constitutional definitions (the amendments designed to define these terms after the 1978 Con Con failed to be adopted because of technical problems). Another possible proposal would be to elect the Commissioners governing the Department of Hawaiian Home Lands, or to merge the Department with OHA.

Even if the Con Con consisted of delegates sympathetic to Native Hawaiian rights, it would be awkward for the statewide Con Con to meet before the meeting of Native Hawaiians that will be held to propose a government for the Native Hawaiian Nation. It would be much more logical for Native Hawaiians to have their meeting first, so that the statewide Con Con could consider the governmental structure proposed by the Native Hawaiians and thus to suggest modifications to Hawai'i's State Constitution that will accommodate the restored Native Hawaiian Nation.

The Timing of a Statewide Con Con.

If the Legislature does put the Con Con question back on the ballot for this November's election, and if the voters unambiguously approve the calling of such a convention, when would the delegates be elected, and when would the convention be held? Article XVII, Section 2 says that the delegates would be elected at the next general election "unless the legislature shall provide for the election of delegates at a special election." The next general election would be in November 2000, so the delegates would be elected no later than that date, but could be elected at an earlier special election.

Article XVII, Section 2 also says that the convention must "convene not less than five months prior to the next regularly scheduled general election." The convention thus must begin

its deliberations no later than June 2002, but could begin earlier. The proposed amendments would logically be placed on the November 2002 ballot, but a special election could be scheduled at an earlier time if the convention delegates wished.

The process could, therefore, be stretched out over a four-year period, and if that were done it would appear to be possible for the meeting of Native Hawaiians to take place prior to the statewide constitutional convention, although the process might appear to some to be unduly rushed. If consensus and funding could be obtained on the procedures to be followed by the Native Hawaiians, then the delegates to their meeting could be elected in 1999 or 2000, say, and the meeting could take place in 2000 or 2001, with ratification by the Native Hawaiian people taking place shortly thereafter. If such a calendar were maintained, then a statewide meeting in June 2002 could consider the structure of the Native Hawaiian Nation and amend the State's Constitution to accommodate it.

If, on the other hand, a speedier process were to be adopted for the election of delegates to and the convening of the statewide convention, or if the effort to hold a meeting of Native Hawaiian delegates were further delayed, then the statewide meeting would be held first, and no consideration of the proposals offered by the Native Hawaiian meeting could occur. This sequence would be inefficient, costly, and awkward.

What Issues Might Be Considered by a Statewide Con Con?

The same-sex marriage issue has among the most prominent of the issues discussed by proponents of a constitutional convention, but this issue may not loom large if the voters approve a proposed constitutional amendment on the November 1998 ballot that would interpret

a ban on same-sex marriage as consistent with the State's commitment to equal protection of its citizens.

Other issues that may be discussed by the delegates to a statewide Con Con include:

- * The Right to Privacy—What exactly does it mean?

- * Environmental Protection Provisions—Should they be given more teeth? Should the judiciary be given a greater role in protecting the environment? Should the rights of future generations be protected? Should we give constitutional protection to the flora and fauna that inhabit our ecosystem, to protect biodiversity? Should the Commission on Water Resource Management be reevaluated? Should the Land Use Commission be modified?

- * The Right to Bear Arms—Does its scope and meaning require clarification? Should it remain in our Constitution?

- * The Structure of State Government—Is the Executive Branch too centralized and too powerful? Should the line-item veto be retained? Should the counties be given more power? Should citizens have the power of initiative and referendum? Should the “high-three” system of measuring retirement pay for legislators be adjusted? Should the duties of the Lieutenant Governor be redefined?

- * The Operations of the State Legislature—Is a bicameral legislature still justified? Is the membership in the House and Senate too large? Should we return to using multi-member districts? Should we introduce term limits? Can we do better in regulating campaign spending?

- * Higher Education—Should the University of Hawai'i be given more autonomy? Should the structure of the Board of Regents be altered? Should students and faculty have seats on the Board? Should members of the Board be paid?

* The Board of Education—Should it be elected or appointed?

* The Judiciary—Should the Circuit Courts and District Courts be combined? Should we retain the mandatory retirement age of 70? Are the present ten-year terms for judges appropriate? Does the Judicial Selection Commission have too much power over the reappointment of judges? Is the Grand Jury Counsel functioning as it was intended to?

* New Constitutional Rights—The rights of victims of crimes? The rights of parents? A right to hunt and fish?

Summary and Conclusions.

1. It is logical and more efficient for the Native Hawaiian meeting to reestablish the Native Hawaiian Nation to occur before the statewide Con Con.

2. If the Con Con question is put on the November 1998 ballot and unambiguously approved by the voters, the election of delegates could be put off until November 2000, and the Con Con itself need not occur until June 2002. With such a timetable, the Native Hawaiian meeting could occur before the statewide Con Con, but the effort to hold the Native Hawaiian meeting within such a time frame might appear by some to be overly rushed.

3. A statewide Con Con could act to eliminate parts of the Constitution that protect Native Hawaiian rights. An enlightened Con Con could alter and perhaps improve the provisions governing Native Hawaiian rights, but even sympathetic delegates may be reluctant to propose amendments that would benefit Native Hawaiians without guidance from a prior meeting of Native Hawaiians indicating what governmental structure they prefer.

4. The State as a whole might well benefit from a reexamination of its constitutional structure, and an effort by OHA to oppose a statewide Con Con might be viewed as unduly

obstructionist and might fail.

5. The best strategy for OHA, therefore, might be to support the holding of a statewide Con Con, but to urge that it be scheduled after the Native Hawaiian meeting to restore the Native Hawaiian Nation. Because a statewide Con Con held in June 2002 might be too early, it might be best to propose placing the Con Con question on the November 2000 ballot, rather than the November 1998 ballot. Accompanying this proposal should be a description of the likely timetable that will be followed by the Native Hawaiian meeting, including the election of delegates and ratification by Native Hawaiian voters.

Sincerely yours,

Jon M. Van Dyke