The William S. Richardson School of Law
UNIVERSITY OF HAWAII AT MANOA
2515 Dole Street
Honolulu, Hawaii 96822
TEL: 808-956-8509
FAX: 808-956-6402

April 16, 1993

The Honorable Anthony Chang
Hawaii State Senate
FAX No. 586-6929

The Honorable Thomas Okamura
Hawaii House of Representatives
FAX No. 586-6341

SUBJECT: H.B. No. 1500, Relating to the Hawaiian Homes Commission

Dear Senator Chang and Representative Okamura:

I am writing with regard to the question whether it is constitutional under the federal and state constitutions to grant preferences to native Hawaiians with regard to employment opportunities, grants, and contracts. The original bill authorized these preferences, but S.D.1 appears to have removed some of the references to these preferences.

In my professional judgment, the Constitutions and statutes of the United States and Hawaii permit the U.S. Congress and state legislatures to grant preferences and to create special programs for native peoples, including native Hawaiians.

The special status of native Americans is recognized in the U.S. Constitution in Article I, section 8, clause 3 (the Indian Commerce Clause) and in Article I, section 2. The U.S. Supreme Court has reviewed and approved preferences and special programs for native peoples in an uncontradicted line of cases. The case most frequently cited for the proposition that such preferences are permissible is Morton v. Mancari, 417 U.S. 535 (1974), which upheld a hiring preference for Indians for positions in the Bureau of Indian Affairs (BIA). In an opinion written by Justice Blackmun, the court stated that such a hiring preference is not a "racial" preference but rather is "an employment criterion reasonable designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." Id. at 554. This analysis is obviously relevant to the provisions of H.B. 1500.

Other recent U.S. Supreme Court cases that uphold preferences or special programs for native peoples are 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); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); and Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979). In each of these decisions, the Court ruled unanimously that special treatment for native peoples is permitted as long as the legislative program is rationally related to the government's responsibility to promote the welfare of these groups. For a more detailed discussion of these cases, see Jon Van Dyke, The Constitutionality of the Office of Hawaiian Affairs, 7 U. Haw. L. Rev. 63, 74-79 (1985).

The courts have also consistently held that the ability of legislatures to grant preferences and special programs is not narrowly limited to "Indians," but extends equally to all native peoples. Federal courts that have examined ambiguous statutes regarding natives have interpreted them broadly to include additional native groups, assuming that Congress intended to treat all native groups similarly situated in a similar manner. See, e.g., Pence v. Kleppe, 529 F.2d 135, 139 n.5 (9th Cir. 1976); United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969); Alaska v. Annette Island Packing Co., 289 F. 671 (9th Cir. 1923); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), aff'g 240 F. 274 (9th Cir. 1917).

Similarly, those courts that have examined the status of native Hawaiians have instinctively drawn an analogy between them and other Native Americans. In Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982), the Hawaii Supreme Court said:

> Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.

And in Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D.Haw. 1990), the U.S. District Court for the District of Hawaii reached the same conclusion:

> Plaintiffs argue that the plethora of authority relating to Indian legislation does not apply to native Hawaiians because they are not "Indians." Although Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection

analysis, the distinction plaintiffs seek to draw is meritless.

> Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States. [The court then quoted from Pence v. Kleppe, supra, and Ahuna, supra.]
>
> This court finds applicable the clear body of law surrounding preferences given to American Indians and finds that the United States' commitment to the native people of this state, demonstrated through the Admission Act and the Hawaiian Homes Commission Act, 1920, does not create a suspect classification which offends the constitution. (Emphasis added.)

The Department of the Attorney General issued an opinion on March 25, 1981, which reached the conclusion that employment preferences for persons of Hawaiian ancestry would violated Title VII of the 1964 Civil Rights Act. That opinion does not cite Morton v. Mancari or any of the other cases discussed above, and it must be concluded that the AG's 1981 opinion is simply wrong. In light of the uncontradicted cases discussed above, it is clearly established that native Hawaiians are entitled to the same protections afforded to other Native Americans, and that legislatively-mandated preferences are constitutionally permissible.

If further evidence is required, support for such preferences can also be found in the many recent statutes passed by the U.S. Congress which grant explicit preferences for native Hawaiians. Among these statutes are the following:

A. The Native Hawaiian Education Study, Pub. L. No. 96-374, sec. 1331, 94 Stat. 1499 (1980)(codified at 20 U.S.C. sec. 1221-1 (1982)("Congress declares its commitment to assist in providing the educational services and opportunities which Native hawaiians need").

B. Kalaupapa National Historical Park, Pub. L. No. 96-565, tit. I, 94 Stat. 3321 (1980)(codified at 16 U.S.C. sec. 410jj (Supp. 1980))(providing preferences in employment opportunities for native Hawaiians).

C. The Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 (Supp. 1980)(codified at 42 U.S.C. sec. 2991 (1976)).

D. The Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (1975)(codified at 42 U.S.C. sec. 2991 (1976)(providing assistance to public and nonprofit agencies serving "American Indians, Hawaiian Natives, and Alaskan Natives").

E. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978)(codified at 42 U.S.C. sec. 1996 (1978))(designed to protect the religious expression "of the American Indian, Eskimo, Aleut, and Native Hawaiians").

F. The Native American Employment and Training Programs, as amended in 1978, Pub. L. No. 95-524, sec. 302, 92 Stat. 1909

(1962)(codified at 29 U.S. C. sec. 872 (1978))(to promote "programs to meet the employment and training needs of Hawaiian natives").

G. The Drug Abuse Prevention, Treatment and Rehabilitation Act and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, Pub. L. No. 98-24 sec. 5(a)(2) and (3), 97 Stat. 183 (1983)(codified at 21 U.S.C. sec. 1177 and 42 U.S.C. sec. 4577 (1983))(which states that "Native Americans (including Native Hawaiians and Native American Pacific Islanders)" are to be given special consideration in the design of programs).

H. The Native American Graves Protection and Repatriation Act, Pub. L. No. 101-60, 104 Stat. 3048 (1991)(codified at 25 U.S.C. sec. 3001)(which includes native Hawaiians among the beneficiaries).

In conclusion, I am convinced that legislatively-mandated preference programs for native Hawaiians are legitimate, and I would urge you to reconsider the deletion of the preferences from H.B. 1500. Please let me know if I can be of any further assistance in this matter.

Best wishes,

Jon M. Van Dyke

Jon M. Van Dyke
Professor of Law

cc: Nancy Walsh
FAX No.: 537-4268