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TUNA MANAGEMENT IN THE PACIFIC: AN ANALYSIS OF THE SOUTH PACIFIC FORUM FISHERIES AGENCY*

by
Jon Van Dyke**
Susan Heftel***

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** Associate Dean and Professor of Law, University of Hawaii at Manoa; Adjunct Research Associate, Environment and Policy Institute, East-West Center, Honolulu.

*** Third-year law student, University of Hawaii at Manoa; Grantee, Environment and Policy Institute, East-West Center, Honolulu.

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I. INTRODUCTION

A. *The New Law-of-the-Sea Regimes*

During the past several years, most of the South Pacific island nations have claimed 200-mile exclusive economic zones in the oceans around their island boundaries,[1] thus bringing more than six million square miles of the tropical Pacific under national jurisdiction.[2] These island nations are now debating how to take advantage of their new marine resources.[3] Some leaders feel that one important way they can expand their economy is to exploit the highly migratory tunas and bill fishes,[4] the most significant of the living resources harvested in this region.[5] These fish roam throughout the South Pacific, moving quickly in and out of the 200-mile zones. Biologists maintain that all nations participating in a region's fisheries must cooperate if the species are to be managed successfully.[6] The most pressing management question is therefore whether each nation should individually manage the fish within its exclusive economic zone or whether a regional agency should take a regional approach and manage the species with reference to their highly migratory patterns.

Article 64(1) of the Draft Convention on the Law of the Sea (Informal

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[1] *See, e.g.*, Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321 (1979).

[2] R. KEARNEY, THE LAW OF THE SEA AND REGIONAL FISHERIES POLICY 1 (South Pacific Commission Occasional Paper No. 2) (April, 1977) [hereinafter cited as KEARNEY (1977)].

[3] *See generally* REGIONALIZATION OF THE LAW OF THE SEA 309-22 (D. Johnston ed. 1978) (Proceedings, Law of the Sea Institute Eleventh Annual Conference, November 14-17, 1977) [hereinafter cited as REGIONALIZATION].

[4] PAC. ISLANDS MONTHLY, Nov., 1978, at 17.

[5] KEARNEY (1977), *supra* note 2, at 4-5.

[6] *See generally* J. JOSEPH & J. GREENOUGH, INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE, AND BILLFISH (1979) [hereinafter cited as JOSEPH (1979)]; KEARNEY (1977), *supra* note 2; S. SAILA & V. NORTON, TUNA: STATUS, TRENDS, AND ALTERNATIVE MANAGEMENT ARRANGEMENTS (1974); G. KNIGHT, MANAGING THE SEA'S LIVING RESOURCES, LEGAL AND POLITICAL ASPECTS OF HIGH SEAS FISHERIES (1977); F. Christy, Changes in the Law of the Sea and the Effects on Fisheries Management: With Particular Reference to Southeast Asia and the Southwest Pacific (July 25, 1978) (unpublished draft, ICLARM, Manila, Philippines) [hereinafter cited as Christy]; J. KASK, TUNA—A WORLD RESOURCE (The Law of the Sea Institute, Occasional Papers Nos. 1-5) (1968). *See also* text accompanying notes 18 & 19 *infra*.

Text) calls for the establishment of "appropriate international organizations" to ensure conservation and promote "optimum utilization" of highly migratory species.[7] The degree of management authority over highly migratory species that Article 64 actually grants to such international organizations is unclear, however, because Article 56 of the 1980 LOS Draft Convention gives coastal nations sovereign rights over all natural resources within their 200-mile economic zones, without making any exception for the highly migratory species. This apparent contradiction will be examined in detail below.[8]

In 1979, the South Pacific Forum (Forum),[9] a regional organization comprised of the ten self-governing South Pacific island nations along with their larger neighbors Australia and New Zealand, adopted a convention establishing the South Pacific Forum Fisheries Agency (SPFFA)[10] to coordinate regional fishing concerns. Article III of the Convention explicitly recognizes the coastal nations' sovereign rights over all living marine resources, *including the highly migratory species,* within their 200-mile zones.[11] This provision rejects the argument made by the United

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[7] Draft Convention on the Law-of-the-Sea (Informal Text) art. 64(1) (1980) [hereinafter cited as 1980 LOS Draft Convention]. The 1980 LOS Draft Convention is the latest of a series of draft conventions to be considered by the Third United Nations Conference on the Law of the Sea (UNCLOS III). After several years of preparations, the first substantive meeting took place in Caracas, Venezuela, in the summer of 1974. Since then, the Conference has been meeting once or twice a year. As of this writing, no final agreement has been reached. *See* text accompanying notes 276-303 *infra* for a brief discussion of some of the negotiating history of UNCLOS III.

[8] *See* text accompanying notes 268-75 *infra.*

[9] In 1947, six of the developed nations with territories in the South Pacific organized the South Pacific Commission (SPC). These countries were Australia, France, Netherlands, New Zealand, United Kingdom, and the United States. (The Netherlands withdrew in 1962 after its territories achieved independence). As island dependencies gained independence, they joined the Commission on their own right.

The main purpose of the SPC has been to advise the participating countries on ways to improve the well-being of their people. Activities sponsored by the SPC concern marine resources, food, technology, information services, and data analysis. The Commission meets annually at the South Pacific Conference.

Many of the island nations became dissatisfied with the constraints imposed by the Commission. Delegates felt that it was impossible to discuss political matters and that the developed countries dominated the discussions. As a result, these island-countries formed the South Pacific Forum (Forum), which met officially for the first time in August 1971. The current membership consists of Australia, New Zealand, Papua New Guinea, the Solomon Islands, Fiji, the Cook Islands, Kiribati (formerly the Gilbert Islands), Western Samoa, Nauru, Niue, Tuvalu, Tonga, and Vanuatu (formerly the New Hebrides). The operating arm, or "Secretariat" of the Forum is the South Pacific Bureau for Economic Cooperation (SPEC). SPEC's activities to date have focused on developing free trade among its members.

[10] South Pacific Forum Fisheries Agency Convention (Honiara, Solomon Islands, 1979) [hereinafter cited as the SPFFA Convention]. *See* Appendix A for a complete text of the SPFFA Convention.

[11] SPFFA Convention, *supra* note 10, art. III states:

1. The parties to this Convention recognise that the coastal state has sovereign

States and other nations that individual coastal nations' exclusive jurisdiction over highly migratory species conflicts with effective management control over such species, which requires greater regional and international cooperation.[12] The 1979 SPFFA Convention limits the membership in the SPFFA to Forum members and other nations or territories in the region,[13] thereby excluding the United States, Japan, and other distant water fishing nations.

The SPFFA Convention leaves unresolved many problems concerning the management and conservation of highly migratory species. This paper will provide background information on the disputed rights over these species, outline the current fisheries situation, explore unresolved issues, and analyze the alternative solutions that might be adopted by the South Pacific nations to govern their fishing resources effectively.

B. The Island Nations of the South Pacific

The South Pacific region stretches from Papua New Guinea in the west to Easter Island in the east; the Micronesian islands in the north are also generally included in this region. The dependent islands now excluded from the Forum and the SPFFA include the islands in the United States' political community (Guam, American Samoa, the Northern Marianas, Belau (formerly Palau), the Marshall Islands, and the Federated States of Micronesia), the French Overseas Territories (French Polynesia, New Caledonia, and Wallis and Futuna Islands), and Easter Island (a possession of Chile). The New Hebrides became independent in 1980 under its new name of Vanuata and has been accepted as a member of the Forum and the SPFFA.

The developing islands of the South Pacific share many similar economic problems: low per capita incomes, increasing imports in relation to exports, high unemployment, heavy reliance on foreign aid, and limited land resources.[14] Although most have achieved independence or at least a

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rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.

2. Without prejudice to Paragraph (1) of this Article the parties recognise that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.

[12] *See* text accompanying notes 18 & 19 *infra*. *See, e.g.*, Taft, *The Third U.N. Law-of-the-Sea Conference: Major Unresolved Fisheries Issues*, 14 COLUM. J. TRANS. L. 112 (1975); G. KENT, THE POLITICS OF PACIFIC ISLAND FISHERIES 168 (1980).

[13] SPFFA Convention, *supra* note 10, art. II. For further discussion of this, *see* text accompanying notes 41-59, 70-72, & 215-20 *infra*.

[14] *See* G. KENT, *supra* note 12, at 12-53. Nauru is an exception, having a high per capita

self-governing status, many are still largely supported by their former governing countries and by other foreign aid. These island nations desire economic independence and look to the ocean's resources for a means to control their economic destiny.

C. *The Fisheries Resources in the South Pacific Region*

The principal living resources of economic significance currently harvested in the South Pacific are the various species of highly migratory tunas and billfishes.[15] Of the major tuna species, skipjack (called *aku* in Hawaii) is the most significant in the Pacific,[16] and is thought to be underexploited at present throughout most of its range.[17]

Because of the tuna's highly migratory nature, what happens in one portion of a stock's range affects the stock throughout its entire range. Scientists have warned that all nations participating in a region's fisheries must cooperate if conservation and optimum utilization are to be achieved.[18] One commentator has characterized the dangers in the following way: "[I]f coastal states alone were to be given management authority for highly migratory species, they might well find themselves, as a result of overfishing in mid ocean, exercising sovereign rights over 200 miles of empty water."[19] Statistical data on the migratory species in the South Pacific region are inadequate.[20] In order to manage the fisheries resources effectively, the magnitude, distribution, and dynamics of the resource will have to be assessed.

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income because of its phosphate deposits.

[15] KEARNEY (1977), *supra* note 2, at 5.

[16] R. KEARNEY, AN OVERVIEW OF RECENT CHANGES IN THE FISHERIES FOR HIGHLY MIGRATORY SPECIES IN THE WESTERN PACIFIC OCEAN AND PROJECTIONS FOR FUTURE DEVELOPMENTS 1, SPEC (79)17 (1979) [hereinafter cited as KEARNEY (1979)].

[17] JOSEPH (1979), *supra* note 6, at 12; *see also* note 321 *infra*.

[18] *See* sources cited in note 6 *supra*.

[19] Joseph, *The Management of Highly Migratory Species*, MARINE POLICY, Oct., 1977, at 275,282 [hereinafter cited as Joseph (1977)].

[20] KEARNEY (1977), *supra* note 2, at 11. Some international cooperation in tuna research is underway. With support from the United States, France, Japan, New Zealand, and the United Kingdom, the South Pacific Commission sponsored a skipjack tagging project to survey and assess skipjack tuna and bait fish resources in the waters of fourteen countries in the central and western Pacific Ocean. Field work began in October 1977 and approximately 90,000 skipjack have been tagged so far. J. BARDACH & Y. MATSUDA, FISH, FISHING, AND SEA BOUNDARIES: TUNA STOCKS AND FISHING POLICIES IN SOUTHEAST ASIA AND THE SOUTH PACIFIC 477 (East-West Center Environment and Policy Institute, Reprint No. 12, Nov., 1980); R. Shomura, Draft for Comment: Fisheries Aspects of Central and Western Pacific Islands Area (Southwest Fisheries Center Administrative Report No. 17 H (1977)) [hereinafter cited as Shomura].

D. The Fishing Industry in the South Pacific Region

Data on the fishing industry in the South Pacific is fragmentary and frequently out of date.[21] Estimates based on the United Nation's Food and Agricultural Organization (FAO) statistical area 71 (see figure 1), which substantially overlaps with the area of the South Pacific Commission (see figure 2), indicate that total catch of skipjack tuna rose from 205,387 metric tons in 1975 to 363,493 in 1978.[22]

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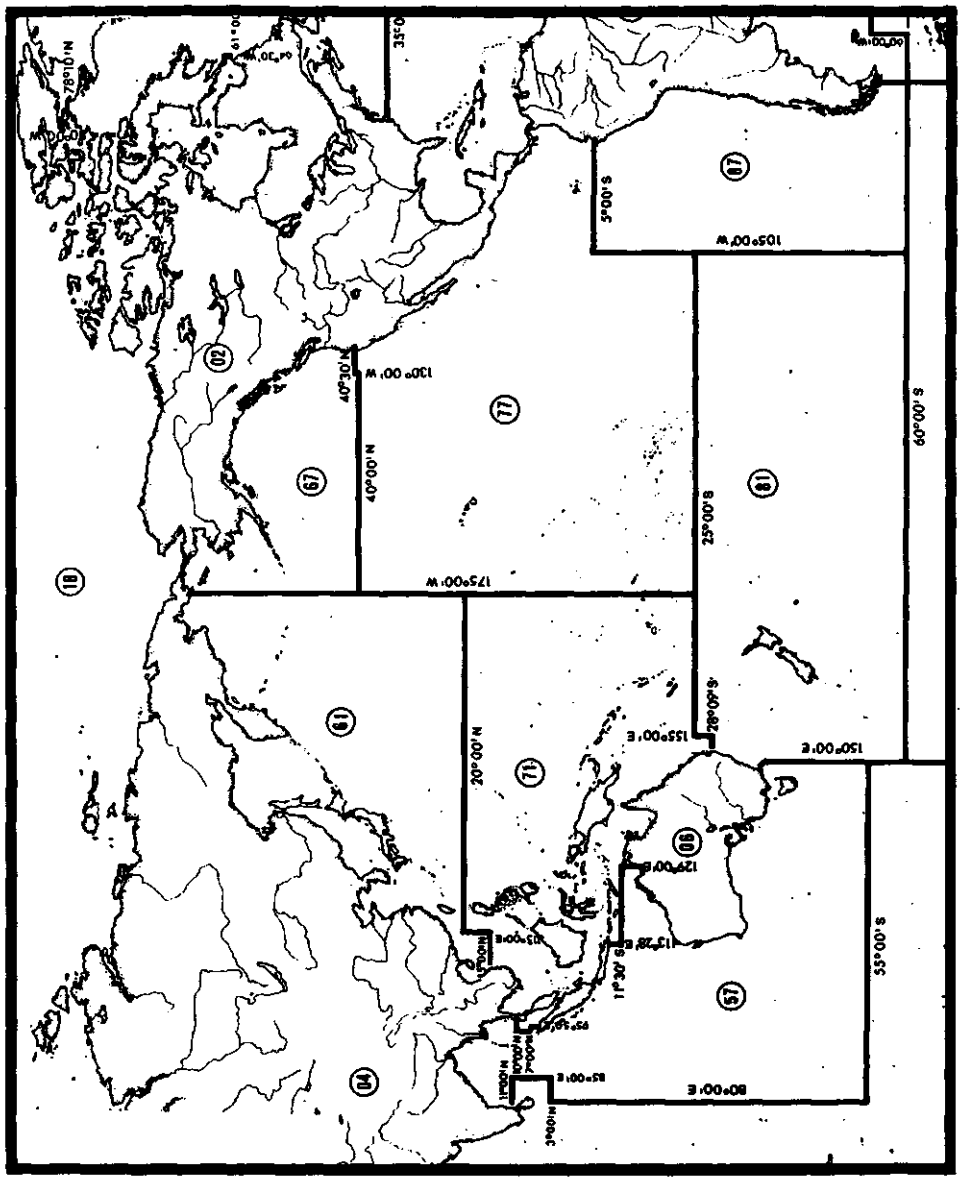
[21] REPORT BY THE DIRECTOR OF SPEC ON THE ESTABLISHMENT OF A SOUTH PACIFIC FISHERIES AGENCY, Annex 2, SPF(77)13 (1977) [hereinafter cited as SPF(77)13]. *See generally* G. KENT, *supra* note 12, at 12-53 for a good survey of the fishing industry in the South Pacific.

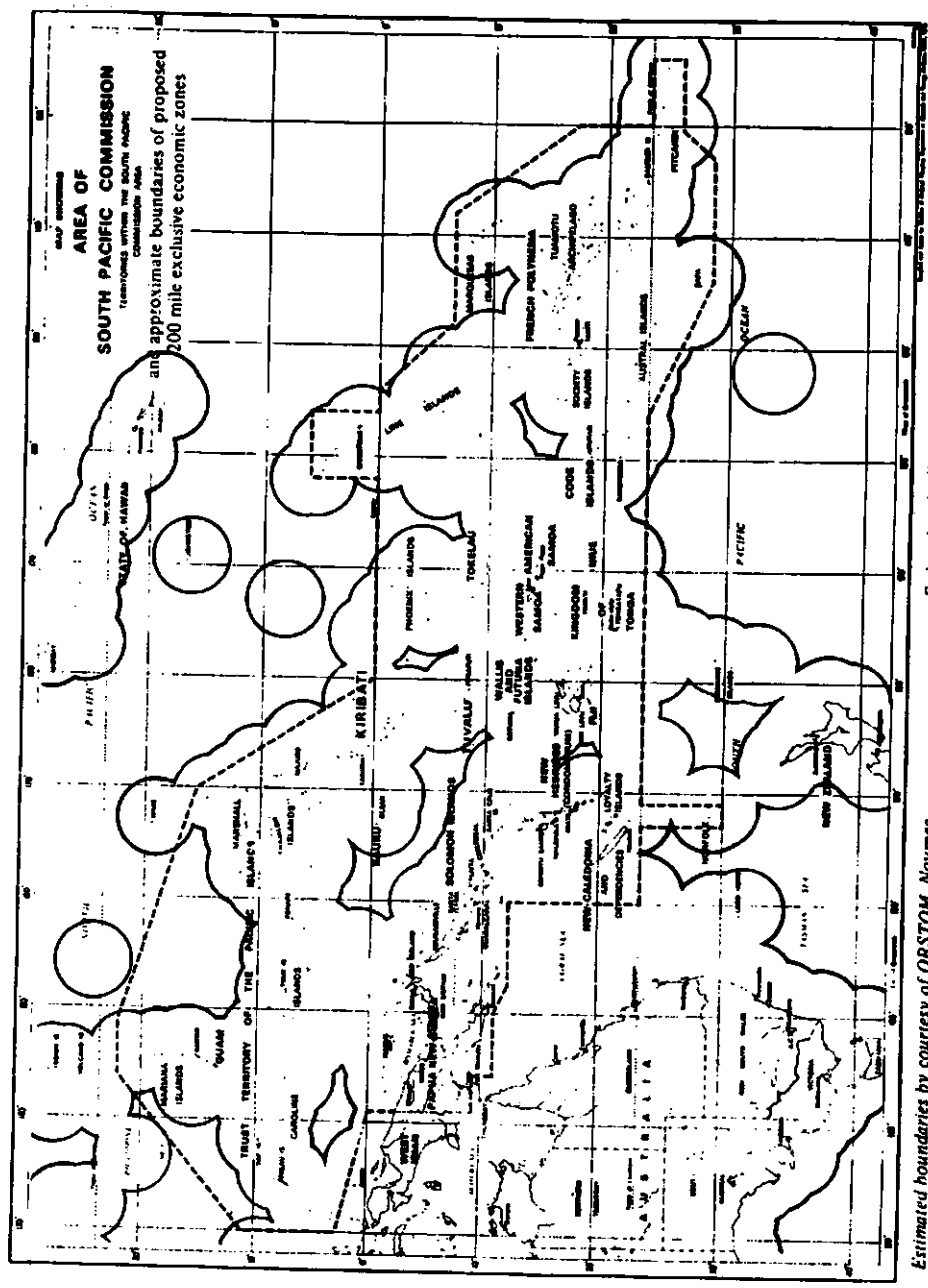
[22] [1978] FAO YEARBOOK OF FISHERY STATISTICS: CATCHES AND LANDINGS 120 (1979). *See also* KEARNEY (1977), *supra* note 2, at 4; STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 2D SESS., SOUTH PACIFIC REGIONAL OVERVIEW AND SOLOMON ISLANDS INDEPENDENCE CEREMONIES: A TRIP REPORT BY SENATOR JOHN GLENN 9 (Comm. Print 1978) [hereinafter cited as GLENN TRIP REPORT].

FIGURE 1: FAO Statistical Areas[23]



[23] [1978] FAO YEARBOOK OF FISHERIES STATISTICS: CATCHES AND LANDINGS (1979).

FIGURE 2: Area of the SPC With Estimated 200-Mile Zones[24]



[24] J. CROSSLAND & R. GRANDPERRIN, FISHERIES DIRECTORY OF THE SOUTH PACIFIC COMMISSION REGION (1979). Reprinted by the courtesy of the SPC. The precise demarcation of each nation's 200-mile exclusive economic zone is still a matter of controversy. The zones as shown in Figure 2 are not official.

Islanders, however, receive only a fraction of this bounty.[35] Throughout the 1970's, vessels from the developing island nations took only 10 to 13% of the total tuna catch, while Japanese vessels took 60%, with Korean, Russian, and Taiwanese vessels accounting for most of the remaining catch.[36] The island governments have been considering three approaches to expand their economic returns from their fishing resources: (1) Direct participation in fisheries; (2) licensing or catch taxes; and (3) joint ventures with the dominant fishing nations.

1. Fisheries

Many of the developing island nations have very small fisheries, and most do not have the capital or the expertise to develop commercial fisheries on their own.[37] Several of the less-developed Pacific Island nations even import large quantities of canned fish.[38] Papua New Guinea is the only one of the developing nations with a major fishing industry.[39]

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[35] G. KENT, *supra* note 12, at 4-10.

[36] GLENN TRIP REPORT, *supra* note 22, at 9. The world's tuna fishing operations can be divided into two groups: the longline fisheries, primarily used by Japan, the Republic of Korea, and Taiwan; and the surface fisheries, primarily of the United States and Japan. The longline fishery technique, used to take tuna at great depths, involves setting a main line, usually eighty miles long, containing branch lines with a total of up to 2,000 hooks. Bait fishing and purse seining are both surface fishing methods. In live bait fishing, when schools of tuna are sighted, chummers throw live bait into the ocean to attract and excite the tuna into a feeding frenzy. Fishermen use poles with short lines and lures with barbless hooks. Because purse seining is highly efficient, it has been replacing bait fishing. A large net surrounds the schools of tuna, and is then drawn shut at the bottom to prevent tuna from escaping. *See generally* JOSEPH (1979), *supra* note 6, at 8-12.

[37] For details concerning fisheries and shore facilities of the South Pacific island nations, *see* G. KENT, *supra* note 12, at 12-53; Shomura, *supra* note 20. The development of South Pacific fisheries has been further enhanced in recent years by development projects from a number of international organizations and individual foreign governments to promote research and development in this field. The Food and Agriculture Organization (FAO) has established a new program to help fisheries development in countries with extended fishing limits, a category that includes all the Pacific island nations. PAC. ISLANDS MONTHLY, Nov., 1979, at 20. The South Pacific Commission has allocated funds for 1980 for marine resource expenditures, including deep-sea fisheries development, research on fish poisoning, and the skipjack survey project. PAC. ISLANDS MONTHLY, Dec., 1979, at 19. The Japanese government has donated substantial sums to some South Pacific countries for fisheries development, especially Papua New Guinea and Fiji. Y. Matsuda & K. Ouchi, Legal and Economic Constraints on Japanese Strategies in Distant-water Tuna Fisheries in the South China Sea and Western Pacific 14-15 (unpublished manuscript in Environment and Policy Institute of the East-West Center, 1980) [hereinafter cited as Economic Constraints]. In 1979, Fiji signed a "technical specification agreement" with Japan, which provides an aid package worth $2 million for Fiji's fishing industry. This money will pay for a skipjack training boat, a research and development vessel, a rural fishing training laboratory, and an icemaking plant. *Id.* at 55.

[38] G. KENT, *supra* note 12, at 92-93.

[39] Allen, *Fisheries Development: An Advisor's View*, NEW PAC. MAGAZINE, Jan./Feb.,

The government of Kiribati recently bought a fishing boat and in the spring of 1979 exported thirty metric tons of fish to Japan.[30] The Tongan government now operates two longline vessels, which generate some foreign exchange earnings.[31] French Polynesia's longline fishery has been shrinking in recent years.[32] Residents of large population centers in American Samoa and Micronesia heavily fish the nearshore and lagoon resources. Truk and Ponape of the Federated States of Micronesia, the Marshalls, and Guam have very small fishing fleets.[33]

2. *Licenses*

The developing countries of the South Pacific have begun to generate revenue from licensing fees and catch taxes paid by foreign boats fishing in the waters around the islands. Although many have negotiated bilateral agreements with major fishing powers, principally Japan, efforts have not been coordinated on a regional level.[34] The United States fishing industry has concluded fishing agreements with the Federated States of Mi-

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1979, at 14.

[30] Carter, *Kiribati: Free But Red Taped to Britain*, PAC. ISLANDS MONTHLY, Sept., 1979, at 23.

[31] G. KENT, *supra* note 12, at 41.

[32] *Id.* at 22.

[33] Allen, *supra* note 29, at 17.

[34] G. KENT, *supra* note 12, at 170-71; Kent, *South Pacific Fisheries Diplomacy*, NEW PAC. MAGAZINE, Jan./Feb. 1980, at 27; Interview with Dr. Langi Kavaliku, Minister of Education, Works, and Civil Aviation, Tonga, and General Secretary of the Program Planning Committee of the Pacific Islands Conference in Honolulu (Feb. 15, 1980) [hereinafter cited as Interview with Dr. Kavaliku].

In 1979, Japan's payment for fishing fees to New Zealand, Papua New Guinea, the Solomon Islands, and Kiribati totaled over $6 million. Economic Constraints, *supra* note 27, at 4. Negotiations between Papua New Guinea and Japan to renew their fishing agreement came to a stalemate after Papua New Guinea demanded that Japan pay an annual fee of $1.25 million, which was also the cost for initial fishing rights. PAC. ISLANDS MONTHLY, Aug., 1979, at 59. Fiji and Japan reached their first fishing agreement in the 1960's then renegotiated it in the 1970's. The Solomons made a compact with Japan in 1971. Interview with Dr. Kavaliku *supra*. Kiribati signed a pact with Japan in 1979, ASIA WEEK, Jan. 19, 1979, at 36, and is negotiating with Taiwan and South Korea. NEW PAC. MAGAZINE, Jan./Feb., 1980, at 58. New Zealand, which has already signed a licensing agreement with South Korea, Russia and Japan, has been discussing Fijian access to historical fishing grounds in New Zealand's exclusive economic zone. Interview with Dr. Kavaliku *supra;* PAC. ISLANDS MONTHLY, Feb., 1979, at 74. The new island nation of Tuvalu has been negotiating fishing rights with Japan, ASIA WEEK, Jan. 19, 1979, at 36, and Nauru has negotiated fishing agreements with Peru. Interview with Dr. Kavaliku *supra*. The Federated States of Micronesia signed an interim fishing agreement with Japan for calendar year 1979 whereby Japan would pay a fee of $2 million for 900 fishing permits. Marianas Variety, Apr. 20, 1979, at 1, col. 3. The second bilateral agreement between the two countries, the Goods and Services Agreement for calendar year 1980, provided for a direct fee of $1.8 million as well as a fee of $300,000 to be paid in goods and services. COMM. ON RESOURCES AND DEVELOPMENT, STANDING COMM. REP. NO. 1-176, Cong. of Federated States of Micronesia, 1st Cong. (1979).

cronesia, Belau and the Marshalls, but the United States government thus far has no formal agreements with any of the South Pacific nations.[35]

3. *Joint Ventures — Fishing, Processing, and Transshipment*

Many of the South Pacific nations have been negotiating for new joint ventures, particularly with Japan.[36] Despite some problems, joint ventures between Japan and the South Pacific countries have fared relatively well.[37]

II. The Fisheries Controversy

A. *Events Contributing to the Current Fisheries Situation in the South Pacific*

Leaders of the member nations of the South Pacific Forum have disagreed on the type of regional fisheries agency they should create. They

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[35] Speech by William Bodde, Jr., United States Ambassador to Fiji, in Honolulu (March 12, 1981). Previously, Stanley Swerdloff of the Hawaii State Fish and Game Department stated that the United States tuna industry has had little success in negotiating fishing rights in the South Pacific area. Interview with Stanley Swerdloff, Hawaii State Fish and Game Department, in Honolulu (July 11, 1979). But August Felando, general manager of the American Tuna Boat Association, indicated in 1979 that neither the United States tuna industry nor the United States government had yet attempted to negotiate for fishing rights within the island nations' 200-mile zones. Interview with August Felando, general manager of the American Tuna Boat Association, in San Diego, Cal. (Aug. 30, 1979). The American Tuna Boat Association at that time told United States fishermen that they may fish for tuna within 200 miles of a coastal state—but outside the 12-mile territorial zone—and that they should not attempt to negotiate for fishing rights in exchange for licenses or catch fees. Peter Wilson from Papua New Guinea declared about the same time, however, that a few United States vessels had been seeking fishing rights. "There are two or three United States purse seiners operating out here at any one time and they are all quite willing to buy licenses under terms determined by us." Letter from Peter Wilson, Advisor/Consultant, Division of Fisheries, Department of Primary Industry, Papua New Guinea, to Jon Van Dyke (Nov. 2, 1979) [hereinafter cited as Wilson letter].

[36] For a detailed description of Japanese joint ventures in the Pacific area, see Pac. Islands Monthly, Sept. 1979, at 34-72; G. Kent, *supra* note 12, at 12-53. The governments of Fiji, Papua New Guinea, the Solomon Islands, French Polynesia, Nauru, Ponape, and Belau now participate in joint ventures in tuna fishing, mostly with Japanese corporations but also with American and Australian interests. A fishing and canning operation jointly owned by the Solomon Islands government and a Japanese company has enjoyed exclusive rights in the Solomon Islands' 12-mile zone in return for a 4% government stake. Joint venture operations between the Japanese and the Fijian and the Solomon governments include the freezing, transshipment, and canning of tuna. American-owned companies operate canneries in American Samoa and Papua New Guinea. Star Kist Fish Company, a United States firm, is currently negotiating with Papua New Guinea to construct a tuna cannery in that country. New Pac. Magazine, Jan./Feb. 1979, at 48.

[37] United States Dep't of Commerce, National Oceanic & Atmospheric Administration, National Marine Fisheries Service Translation No. 31 (March 25, 1978).

have had to resolve internal dissension and conflicts with major world powers, especially the United States.[38] At the Forum meeting in Suva, Fiji, October 13-14, 1976, the members declared their intention to establish 200-mile exclusive economic zones, but made no decision on the highly migratory species.[39]

At the next Forum meeting, held in Port Moresby, Papua New Guinea, August 29-31, 1977, the members decided to establish a South Pacific regional fisheries organization open to "all Forum countries and all countries in the South Pacific with coastal state interests in the region who support the sovereign rights of the coastal state to conserve and manage living resources, including highly migratory species, in its 200-mile zone."[40] Negotiations to establish the new organization began in Suva during November 1977, at the headquarters of the Forum's "trade secretariat"—the South Pacific Bureau for Economic Cooperation (SPEC). The Forum countries were joined at this meeting by the United States, Chile, France, and the United Kingdom, which participated as voting members in representing their island dependencies in the region. At a later meeting in Suva, June 5-10, 1978, these participants concluded a draft convention.

Two major issues dominated the discussions leading up to the 1978 meeting. The first issue was the type of organization to be established. Some favored a body with a broad membership representing not only the countries whose waters contain the resource, but also the countries who are active in harvesting it.[41] This body's primary aim would be conservation and optimum use of the living resources. Others argued for a body limited to Forum members whose primary aim would be to ensure maximum benefits for the islands. The delegates to the 1978 Suva meeting finally agreed upon the broader-based open-membership organization. Article XV of the 1978 Draft Convention would have opened membership in the organization to South Pacific Forum members, independent states in the region, nations with territories in the region, territories in the region with authorization from the responsible government, *plus* independent nations (outside the region) that share a common interest in the conservation, use, or management of the living resources and whose application was supported by two-thirds of the Convention's parties.[42]

The participants disagreed sharply on the second issue, whether highly migratory species should be claimed by coastal nations as a part of their exclusive economic zones. The United States argued vigorously that these

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[38] G. KENT, *supra* note 12, at 1.

[39] SPF(77)13, *supra* note 21, at 1.

[40] 8th South Pacific Forum, Declaration on the Law of the Sea and a Regional Fisheries Agency art. 7 (Port Moresby, Papua New Guinea, Aug. 19-22, 1977).

[41] *See generally* G. KENT, *supra* note 12, at 166-72.

[42] South Pacific Bureau for Economic Development (SPEC), South Pacific Regional Fisheries Organization Draft Convention art. XV, SPEC(75) FA-CONV (Suva, Fiji, June 10, 1978) [hereinafter cited as 1978 SPRFO Draft Convention].

species should be excluded, pointing out that given their highly migratory nature, these fish cannot be effectively managed by individual nations.[43] The South Pacific nations responded that because highly migratory species are the only significant resources within their zones, they *must* be controlled by the coastal nations.[44] The 1978 Draft Convention skirted this issue. Article II(1) simply requested that those parties claiming highly migratory species within their zones notify the director of the organization of their claim.[45]

The 1978 Draft Convention would have established a South Pacific Regional Fisheries Organization as a regional coordinating body.[46] The Organization would have consisted of a Conference of Parties and an Agency which was to be responsible to the Conference. All decisions of the Conference were to be reached by consensus, the so-called "Pacific Way" of resolving disputes, whereby all nations must agree to a particular proposal without taking a formal vote. By developing this consensus method, the participants avoided the difficult question of voting rights for non-Forum nations and their Pacific island dependencies.

The agency anticipated by the 1978 Draft Convention was to have had only advisory powers, and not powers of enforcement, surveillance, or regulation. The agency's major functions were (a) to study the living resources; (b) to provide advice, information, and assistance in fisheries negotiations, the development and implementation of fisheries policies, the issuance of licenses, the collection of fees, and matters pertaining to surveillance and enforcement; (c) to prepare proposals on regional cooperation in conservation and use of the living resources; and (d) to facilitate, without detriment to the sovereign rights of coastal countries, a regional approach to management, licensing, surveillance, and enforcement.

At the Ninth South Pacific Forum meeting in Niue, September 18, 1978, the island nations' leaders rejected the draft convention prepared by lower-level officials at Suva,[47] because they could not agree whether to allow the United States and other non-Forum states into the agency. Western Samoa, Niue, and the Cook Islands wanted to admit the larger fishing nations into the organizations.[48] Apparently these smaller island nations wanted to license out their rights to the resources, and thus desired a regional body with broad membership.[49]

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[43] Interview with Doyle Gates and Robert Iverson, National Oceanic & Atmospheric Administration, National Marine Fisheries Service, in Honolulu (June 29, 1979) [hereinafter cited as Interview with Gates & Iverson]; Taft, *supra* note 12; G. KENT, *supra* note 12, at 168.

[44] G. KENT, *supra* note 12, at 168.

[45] 1978 SPRFO Draft Convention, *supra* note 42, art. II(1).

[46] *Id.* art. III(2).

[47] The Forum meetings are attended by the prime ministers of the member nations. PAC. ISLANDS MONTHLY, Nov., 1977, at 9.

[48] PAC. ISLANDS MONTHLY, Nov., 1978, at 17.

[49] *Id.*

On the other side, Fiji, Papua New Guinea, and the Solomon Islands led the movement against granting membership to the metropolitan nations. Nauru, Tonga, and Kiribati reportedly joined that movement. These developing nations wanted to retain control over their newly-acquired marine resources and feared that an open-membership organization would be dominated by the larger metropolitan powers.[50] Thus the Prime Minister of the Solomons, Peter Kenilorea, stated:

> We do not interfere in the coal mines of America—why should America be able to interfere in the fisheries of the independent Pacific Forum countries? . . . We will not sign that convention until and unless there is a provision to safeguard the immediate concerns of the South Pacific nations. We should have the complete say over our fisheries . . . .[51]

The Prime Minister's fears were not unfounded. The United States is presently governed by the Fishery Conservation and Management Act of 1976 (FCMA), which bars the United States from recognizing exclusive jurisdiction by coastal nations over migratory fish.[52] The United States' argument, that these species cannot be managed by individual nations

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[50] The Honolulu Sunday Star-Bulletin & Advertiser, Apr. 29, 1979, § A, at 28, col. 4; General Manager August Felando of the American Tuna Boat Association does not, however, think the United States poses a threat to the island nations and their 200-mile sovereignties. NAT'L FISHERMAN, Apr., 1979, at 49. According to Felando, the United States has never had more than five tuna boats in the South Pacific, and as of April 1979, only three vessels were in South Pacific waters.

[51] NEW PAC. MAGAZINE, March/Apr., 1979, at 9.

[52] 16 U.S.C. § 1822(e) (1976) states:

> NON RECOGNITION—It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation—
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> (1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;
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> (2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or
>
> (3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

The statute goes on to say that if a foreign nation does not permit United States vessels to harvest highly migratory species within that nation's coastal waters, the United States must then prohibit imports of tuna and tuna products from that nation, and may prohibit imports of other fish or fish products from any fishery of that nation as appropriate. 16 U.S.C. § 1825 (1976).

As of July 1980, this provision had been invoked to cut off tuna imports from Canada, Peru, Costa Rica, and Mexico because of those nations' refusal to allow United States vessels to harvest tuna in their 200-mile zones. Interview with Brian S. Hallman, United States State Dep't Division of Fisheries, in Washington, D.C. (June 30, 1980) [hereinafter cited as Interview with Hallman]; N.Y. Times, July 13, 1980, § 1, at 10, col. 6 (tuna imports from Mexico banned after seizure of United States fishing boats). *See generally* G. KNIGHT, *supra* note 6.

because of their widespread patterns of migration, was viewed as puzzling by the Foreign Minister of Papua New Guinea, Ebia Olewale, "particularly when the United States claims management rights over marlin, another highly migratory species, in order to safeguard the interests of its sports fishermen."[53]

It has also been suggested that the powerful United States tuna industry, which seeks to maintain its access to tuna in the 200-mile zones of other countries, has dictated the United States Government's fishing policy.[54] Negotiators representing the United States have at times expressed a willingness to be flexible on the migratory fish question. The United States' representatives at the 1978 Niue meeting explained to officials from the island nations that the United States could sign a multilateral treaty recognizing coastal nation jurisdiction over highly migratory species within a 200-mile fishing zone only if the treaty created an appropriate regional management organization.[55] If such a treaty were ratified by the Senate, it would take precedence over the FCMA, because the most recent prevails when a treaty and a statute conflict[56] and because the

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[53] PAC. ISLANDS MONTHLY, July, 1979, at 83. Annex I of the 1980 LOS Draft Convention lists seventeen different categories of "highly migratory species" including marlins, swordfish, sailfish, and sharks as well as eight types of tunas. The 1976 United States statute, however, restricts its definition of "highly migratory species" to *"species of tuna* which in the course of their life cycle, spawn and migrate over great distances in waters of the ocean." 16 U.S.C. § 1802(14) (1976) (emphasis added). Marlin, swordfish, and sailfish (which are called "billfish") are, in fact, highly migratory. As the director of the Inter-American Tropical Tuna Commission has stated, "Regardless of whether or not billfish are *legally* categorized as highly migratory species, they are *in fact* very migratory . . . . To be effective, the management of billfish, like the management of tuna, must apply to the entire stocks of animals being considered." JOSEPH (1979), *supra* note 6, at 179 (emphasis added).

[54] Speech by Ira Wolff, United States Foreign Service Officer, in Honolulu (January 23, 1980).

[55] Interview with Gates & Iverson, *supra* note 43.

[56] Whitney v. Robinson, 124 U.S. 190, 194 (1888). Under Article II, § 2, cl. 2 of the United States Constitution, the President has the power to make treaties, "provided two thirds of the Senators present concur." The Senate may be reluctant, however, to pass a treaty requiring the United States to recognize coastal jurisdiction over highly migratory tunas within a South Pacific nation's 200-mile zone. The powerful tuna industry would strongly object to such a treaty because it would set undesirable precedent in other parts of the world where United States vessels fish. Leaders in the tuna industry believe that if countries in the eastern Pacific find that those in the South Pacific receive fishing fees from United States vessels, the industry would face serious trouble in the eastern Pacific. At present, American vessels catch little tuna within the fishing zones of South Pacific nations, about 15,000 tons, compared with the large volume caught within the exclusive economic zones of eastern Pacific countries, approximately 220,000 tons. The United States tuna industry, therefore, has a strong incentive to retain the present United States laws regarding highly migratory tunas. Interview with August Felando, General Manager, American Tuna Boat Association, and James Cary, Executive Director, United States Tuna Foundation, in San Diego, Cal. (Aug. 30, 1979).

The Senate may be more enthusiastic over ratifying a treaty that merely required the United States to recognize jurisdiction over highly migratory species to the extent exercised through a regional organization of the South Pacific, rather than to recognize coastal state

FCMA appears to permit such a formula in any event.[57] Although the treaty would have to be phrased carefully to meet the concerns of the tuna industry,[58] the United States representatives felt that it would be acceptable if the treaty created an organization with real power to manage the migratory resource on a regional basis.[59]

The negotiators from the young island nations were not impressed with this "flexibility" at the 1978 meeting. They decided to postpone creation of an open-membership organization until their own sovereign claims over the marine resources were more firmly established.

B. The Current Fisheries Situation: The SPFFA

After rejecting the 1978 draft at Niue, officials from the Forum nations met in Honiara, Solomon Islands, in May 1979 to prepare a second draft convention which was subsequently approved by the leaders of the Forum at their July 1979 meeting in Honiara.[60] The SPFFA Convention clearly asserts coastal nation sovereignty over migratory species while they are within a 200-mile zone. Article III(1) recognizes that the coastal nation has sovereign rights over the living resources within its exclusive economic zones "for the purposes of exploring and exploiting, conserving and managing the living resources, *including highly migratory species* . . . ."[60.1]

The SPFFA Convention establishes a South Pacific Forum Fisheries Agency consisting of a Forum Fisheries Committee—composed of representatives from all the Forum members—and a Secretariat.[61] Both the

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jurisdiction. United States negotiators have agreed to certain provisions in a Latin American proposal for a new international tuna treaty in the eastern Pacific whereby the regional agency would have the power to (1) set an overall quota for yellowfin tuna; (2) allocate portions of the resource to adjacent states (which would exclude the United States); (3) collect fees from member nations for the fish caught; and (4) redistribute the revenue to coastal states based on distribution of the catch. Interview with Dr. James Joseph, Director of Investigation, IATTC, in San Diego, Cal. (Aug. 31, 1979); [1977] IATTC ANN. REP. 55-57 (1978). These negotiations were stalemated as of July 1980 over the size of the allocations that will be given to the coastal nations. *See* text accompanying notes 90-99 *infra*.

[57] *See* text of statute in note 52 *supra*.

[58] *See* note 56 *supra*. The United States tuna industry consists of 150 boats (of which 130 are modern and efficient) based primarily in San Diego, California. The value of the catch as landed is approximately $400 million.

[59] *See* text accompanying notes 254-58 *infra*.

[60] *See* text accompanying note 10 *supra*.

[60.1] SPFFA Convention, *supra* note 10, art. III(1) (emphasis added).

[61] SPFFA Convention art. I(2), *supra* note 10, states that "The Agency shall consist of a Forum Fisheries Committee and a Secretariat." The Convention does not specifically explain the membership and structure of the Committee, but the remainder of the Convention indicates that all members are represented on the Committee and that each member has equal voting rights. Interview with W.E. Razzell, then Director of the SPFFA, in Mexico City (Oct. 15, 1979) [hereinafter cited as Interview with Razzell]. *See* text accompanying note 208 *infra*.

Forum Fisheries Committee and the Secretariat are designed to be consultative and advisory. Neither body has the power to determine the allowable catch or allocate the surplus catch to foreign countries. The Committee's functions include: (a) preparing policy and administrative guidelines for the SPFFA; (b) providing a forum for consultation on common fisheries; (c) carrying out tasks necessary to give effect to the convention; and (d) promoting intraregional coordination and cooperation in fisheries management, relations with distant water fishing countries, surveillance and enforcement, processing and marketing of fish, and accessibility to the 200-mile zones of other parties.[62]

To oversee these assignments, the Committee appoints a Director of the Agency, who is responsible for hiring a staff and preparing an annual report on the Agency's activities, a draft work program and a budget for the forthcoming year.[63] If accepted by the Committee, the annual activities report, budget, and work program are submitted to the Forum for approval.[64] The Committee holds meetings at least once a year and adopts its own rules of procedure and internal regulations.[65] The SPFFA Convention urges the Committee to make decisions by consensus,[66] but departs from the "Pacific Way" by providing for decisions by two-thirds of the voting parties in attendance when consensus is not possible.[67] Only amendments to the Convention itself require a unanimous vote.[68]

The Secretariat's duties are to: (a) collect, analyze and distribute information on living marine resources, especially the highly migratory species; (b) collect and disseminate information on management, legislation, and agreements adopted by other countries; (c) provide assistance in the development of fisheries policies, negotiations, issuances of licenses, collections of fees, surveillance and enforcement; and (d) establish working arrangements with regional and international organizations, especially the South Pacific Commission.[69]

Membership in the SPFFA is restricted to Forum countries plus other nations or territories *in the region* that are recommended by the Committee and approved by the Forum.[70] This formula excludes distant water fishing nations, and nations with island dependencies, although it may allow these latter nations to participate indirectly through their dependencies.[71] Whether the governing countries will allow, or legally can allow

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[62] SPFFA Convention, *supra* note 10, art. V.
[63] *Id.* art. VI.
[64] *Id.* art. VI(5).
[65] *Id.* art. IV(1).
[66] *Id.*
[67] *Id.* art. IV(2).
[68] *Id.* art. XI(2).
[69] *Id.* art. VII.
[70] *Id.* art. II.
[71] *Id.* art. IV(5) permits observers to attend meetings. *See also* text accompanying notes 13 and 41-42 *supra* and 215-20 *infra*.

their dependencies to sign the SPFFA Convention is an unresolved issue.[72]

Members joining the SPFFA cannot make reservations to the Convention;[73] each must accept the Convention without qualifications. Members can withdraw one year after giving written notice.[74] The Convention enters into force 30 days after the eighth signature by a Forum member.[75] All Forum members have now signed the Convention.[76]

Contributions from members provide the major funding for the SPFFA, but the Committee may also accept contributions from private or public sources.[77] Australia and New Zealand each contribute one-third of the SPFFA's current budget, and the other ten members each contribute one-thirtieth.[78]

III. The SPFFA Convention: Unresolved Issues

The SPFFA Convention represents a significant step toward regional cooperation in the South Pacific and toward the creation of a regional fisheries agency. The Convention provides the means by which the governments of the island communities can meet and consult on fisheries problems. It requires its members to collect and distribute critically needed information on the living marine resources and on the management, marketing, and processing of fish.[79]

The SPFFA Convention is, however, a political compromise that only begins to solve tuna management problems. The Convention leaves many issues unresolved and contains certain ambiguous provisions. In order to understand these problems, it is useful to review the conventions of other regional and international fisheries commissions. After this review, the SPFFA Convention can be compared with these other fisheries conven-

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[72] The Cook Islands, a free associated state with New Zealand, is a Forum member, but it has the right unilaterally to seek complete independence from New Zealand at any point. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 Harv. Int'l L.J. 1, 55 (1980). Puerto Rico, a "free associated state," and the Northern Marianas, a commonwealth of the United States, can achieve independence only with the concurrence of the United States Congress.

The difficult legal problem of whether governing nations *can* allow their island dependencies to join the SPFFA, and the political question of whether these metropolitan powers *will* allow their territories and possessions to join, are beyond the scope of this article. *See generally* M. Riesmann, Puerto Rico and the International Process (1975); T. Franck, Control of the Sea Resources by Semi-Autonomous States (1978).

[73] SPFFA Convention, *supra* note 10, art. X(5).

[74] *Id.* art. XI(1).

[75] *Id.* art. X(2).

[76] Interview with Razzell, *supra* note 61. Ratification of the Convention is discussed at notes 197-201 and accompanying text *infra*.

[77] SPFFA Convention, *supra* note 10, art. VI(6) (7).

[78] *Id.* Annex.

[79] *Id.* art. IX.

tions to focus on the problems and challenges facing the SPFFA.

A. International and Regional Fisheries Commissions

1. The Inter-American Tropical Tuna Commission (IATTC)

The Inter-American Tropical Tuna Commission (IATTC) has operated in the eastern Pacific Ocean since 1950 under the authority of an agreement first negotiated between Costa Rica and the United States.[80] The IATTC Convention allows any nation fishing in the eastern Pacific Ocean to join, if unanimously approved by the existing members of the organization.[81] Seven other countries subsequently joined the Commission, but Mexico, Costa Rica, and Ecuador have recently withdrawn, leaving only the United States, Canada, France, Japan, Nicaragua and Panama as members.[82]

From the beginning, the IATTC experienced difficulties, stemming from disagreements between the United States and the Latin American countries.[83] One such conflict started in the early 1950's when several Latin American countries claimed that their fisheries jurisdiction extended 200 miles off their coasts.[84] The United States, the major harvesting nation in the region, argued that because of the highly migratory nature of tuna, they should belong to whomever can catch them, regardless of national fishing zones.[85] Chile, Peru, and Ecuador disagreed and began seizing United States tuna boats found within their zones.[86] The United

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[80] W. BAYLIFF, ORGANIZATION, FUNCTION, AND ACHIEVEMENTS OF THE IATTC 1 (IATTC SPECIAL REPORT No. 1, 1975). Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (entered into force March 3, 1950) [hereinafter cited as IATTC Convention].

[81] The IATTC Convention, *supra* note 80, art. V(3) states in pertinent part:

> Any government, whose nationals participate in the fisheries covered by this Convention, desiring to adhere to the present Convention, shall address a communication to that effect to each of the High Contracting parties. Upon receiving the unanimous consent of the High Contracting Parties to adherence, such government shall deposit with the Government of the United States of America an instrument of adherence . . . .

[82] Interview with Hallman, *supra* note 52. *See also* [1978] IATTC ANN. REP. 7 (1979).

[83] JOSEPH (1979), *supra* note 6, at 53.

[84] G. KNIGHT, *supra* note 6, at 50; G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 707 (1978) [hereinafter cited as KNIGHT (1978)]. Chile, Ecuador, and Peru, for example, signed an international agreement in 1952 resolving to preserve and make available to their respective peoples the natural resources of areas of sea within 200 miles from their coasts. Agreements between Chile, Ecuador, and Peru were signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, Chile, Aug. 18, 1952. G. KNIGHT, *supra* note 6, at 50. Eventually, all the countries bordering the eastern Pacific extended their fisheries zones to at least 200 miles.

[85] G. KNIGHT, *supra* note 6, at 50; JOSEPH (1979), *supra* note 6, at 14-15.

[86] G. KNIGHT, *supra* note 6, at 51.

States responded by offering an economic subsidy under the 1967 Fisherman's Protective Act[87] to any United States tuna vessel seized by another country.[88] Thus began the conflict known as the "tuna war."

A related disagreement concerned catch allocations.[89] Because studies showed that yellowfin tuna (known in Hawaii as *ahi*) were being overfished, the Commission initiated a regulatory program for the conservation of yellowfin tuna in 1966 by setting an overall annual catch quota to govern the amount that could be harvested (on a first-come-first-served basis) within a defined area called the Commission's Yellowfin Regulatory Area (CYRA).[90] The Latin America coastal nations argued that because of their proximity to the tuna resource they were entitled to larger shares than they could take under the first-come-first-served approach and demanded that national quotas be established.[91] The distant water fishing nations, especially the United States, refused to recognize any special allocation claims based on resource adjacency.[92] When the coastal nations threatened to extend their fisheries jurisdiction to 200 miles and exclude all foreign fleets, the treaty members agreed to a temporary compromise; special national allocations were to be reserved from the total quota, but these allocations were based on economic hardship rather than resource adjacency.[93] Most of the Latin American coastal nations, still unhappy with the situation, withdrew from the IATTC—Mexico and Ecuador in 1978 followed by Costa Rica in 1979.[94]

The Latin American coastal nations have remained firm in their posi-

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[87] 22 U.S.C. § 1971-1979 (originally enacted Aug. 27, 1954, 68 Stat. 883).

[88] G. KNIGHT, *supra* note 6, at 51.

[89] JOSEPH (1979), *supra* note 6, at 14.

[90] W. BAYLIFF, *supra* note 80, at 24; S. SAILA & V. NORTON, *supra* note 6, at 39. The CYRA is a large area that includes both 200-mile coastal zones and high seas areas.

The staff began a research program in 1950, studying yellowfin and skipjack. On the basis of these studies, estimates were made of the sustainable yield of yellowfin. As fishing efforts increased in the eastern Pacific, studies showed that overfishing of yellowfin was occurring in the early 1960's. Although the staff and the Commission recommended catch quotas, they were not implemented until 1966. W. BAYLIFF, *supra* note 80, at 24.

The IATTC has imposed regulations for yellowfin tuna each year from 1966 until the present, making it the only tuna fishery organization to implement a regulatory scheme. The regulations consist of an overall quota for the CYRA, with all participants competing on a first-come-first-served basis for shares of the overall quota. When the reported catch plus expected catches of unregulated vessels and expected incidental catches equals the quota, vessels must stop fishing for yellowfin. JOSEPH (1979), *supra* note 6, at 53. Each nation must regulate the fishery in such a way that the incidental catch of yellowfin by a vessel does not exceed 15% of its total catch of skipjack, bigeye tuna, bluefish tuna, albacore tuna, billfishes, and sharks. W. BAYLIFF, *supra* note 80, at 26. Figure 3, reprinted from the [1978] IATTC ANN. REP. 132 (1979), shows the extent of the area regulated by the IATTC.

See Figure 3 on next page.

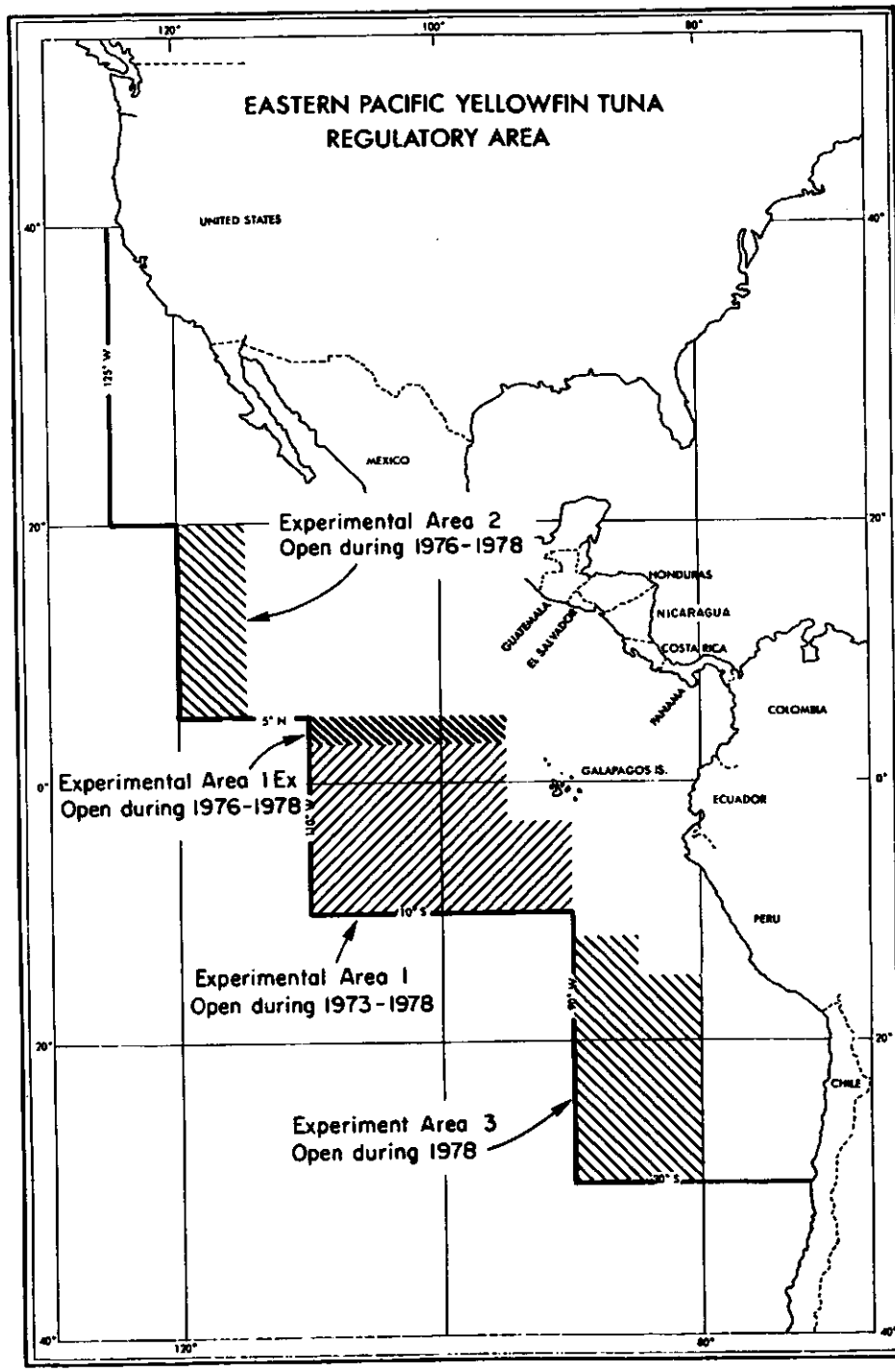
[91] JOSEPH (1979), *supra* note 6, at 53.

[92] *Id.*

[93] *Id.* at 54.

[94] Interview with Dr. James Joseph, Director of Investigations, IATTC, in San Diego (Aug. 31, 1979); Interview with Hallman, *supra* note 52.

FIGURE 3: CYRA



tion and continue to argue that the IATTC management agreement must be renegotiated on a basis of resource adjacency to give them a greater share of the tuna catch.[95] Negotiations to create a new regional organization began in 1977, with Mexico and Costa Rica submitting a working draft to a meeting in Costa Rica of representatives from the nations bordering on the eastern Pacific Ocean plus all the remaining members of the IATTC.[96] The United States presented its own draft convention a few months later, and then in January 1979, Mexico, Costa Rica, and the United States jointly introduced a Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean.[97] This draft convention left several key articles blank because of differences which still remain unresolved through subsequent negotiations. Attempts to negotiate this long-term agreement were set aside in 1979, and the nations tried to conclude simply an interim agreement to last three years.[98]

By mid-1980, the positions had further hardened and prospects for a new agreement—interim or otherwise—do not now seem good. The Mexicans have taken the position that coastal nations should have national quotas equal to the entire amount of tuna caught in their 200-mile national zones, leaving to the distant water fishing nations only the tuna beyond the 200-mile limit or that which the coastal nation cannot harvest.[99]

Although the original IATTC Convention is still in force as of 1981 for only six nations, the organizational structure is nonetheless worth evaluating. The IATTC Convention establishes a Commission as its governing body; each member nation has one vote and decisions require unanimous agreement.[100] The Commission's principal duties are to study the tuna's

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[95] [1977] IATTC ANN. REP. 56 (1978).

[96] *Id.*; Letter from Brian S. Hallman, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Dep't of State to Jon Van Dyke (Jan. 28, 1980) [hereinafter cited as Hallman Letter].

[97] Hallman Letter, *supra* note 96. 1979 Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean [hereinafter cited as 1979 Eastern Pacific Draft Convention].

[98] Hallman Letter, *supra* note 96.

[99] About 65-70% of the tuna caught in the Commission's Yellowfin Regulatory Area are caught within 200 miles of the west coast of South America. The 1980 Mexican proposal was that the coastal states should be allocated rights to 65-70% of the entire annual catch quota. Under this proposal, if the coastal nation could not harvest its quota, the surplus would be available to other nations. Because the United States harvested about 65-70% of the tuna yearly as of 1980, this proposal would severely reduce the catch of the United States fleet. In earlier years, United States vessels caught 90% of these fish. The United States tuna industry and the United States government have been, therefore, unreceptive to the Mexican initiative. Interview with Hallman, *supra* note 52. *See* notes 118-23 *infra*.

[100] IATTC Convention, *supra* note 80, art. I(8) states: "Each national section shall have one vote. Decisions, resolutions, recommendations, and publications of the Commission shall be made only by a unanimous vote." Under the Rules of Procedure, amendments to rules can be adopted only by a unanimous vote. Inter-American Tropical Tuna Commission, Rules of Procedure, Rule IV, *reprinted in* [1950-51] IATTC ANN. REP. annex (1952). Votes

biology and recommend proposals for joint action by the member nations to maintain fish levels at the maximum sustainable catch.[101] The Com-

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may be obtained by mail or by other means of communication when voting is conducted between meetings or in cases of emergency. *Id.* rule V.

The Convention requires the Commission to meet at least once each year, Article I(6), but in recent years more than one meeting has been held each year. W. BAYLIFF, *supra* note 80, at 10. Members may use either English or Spanish, the official languages of the Commission, during meetings and may obtain translations upon request. IATTC Convention, *supra* note 80, art. I(14).

The area covered by the Convention is the eastern Pacific Ocean. The Commission must also examine other areas to understand the resources of the eastern Pacific Ocean, because yellowfin, skipjack, and other species of concern travel from east to west across the Pacific Ocean. Scientists have pointed out that IATTC's geographical area of responsibility is considerably less than the ranges of some of the tuna stocks exploited in the eastern Pacific Ocean. Joseph, *Scientific Management of the World Stocks of Tunas, Billfishes, and Related Species*, 30 CANADA FISHERIES RESEARCH BOARD J. 2476, 2479 (1973) [hereinafter cited as Joseph (1973)]; Joseph, *Problems Associated with the Exploitation and Management of Tunas and Billfishes*, in TRANSACTIONS: FORTIETH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE 63, 69 (1975) [hereinafter cited as Joseph (1975)].

The species of fish covered by the Convention are (1) yellowfin tuna, (2) skipjack tuna, (3) baitfish, and (4) other kinds of fish taken by tuna fishing vessels. IATTC Convention, *supra* note 75, art. II(1). Yellowfin catches have exceeded those of any other species in most years, followed by skipjack, and the IATTC staff has paid particular attention to these two species. W. BAYLIFF, *supra* note 80, at 4-5.

[101] IATTC Convention, *supra* note 80, art. II states:

> The Commission shall perform the following functions and duties:
>
> 1. Make investigations concerning the abundance, biology, biometry, and ecology of yellowfin (*Neothunnus*) and skipjack (*Katsuwonus*) tuna in the waters of the eastern Pacific Ocean fished by the nationals of the High Contracting Parties, and the kinds of fishes commonly used as bait in the tuna fisheries, especially the anchoveta, and of other kinds of fish taken by tuna fishing vessels; and the effects of natural factors and human activities on the abundance of the populations of fishes supporting all these fisheries.
>
> 2. Collect and analyze information relating to current and past conditions and trends of the populations of fishes covered by this Convention.
>
> 3. Study and appraise information concerning methods and procedures for maintaining and increasing the populations of fishes covered by this Convention.
>
> 4. Conduct such fishing and other activities, on the high seas and in waters which are under the jurisdiction of the High Contracting Parties, as may be necessary to attain the ends referred to in subparagraphs 1, 2, and 3 of this Article.
>
> 5. Recommend from time to time, on the basis of scientific investigations proposals for joint action by the High Contracting Parties designed to keep the populations of fishes covered by this Convention at those levels of abundance which will permit the maximum sustained catch.
>
> 6. Collect statistics and all kinds of reports concerning catches and the operations of fishing boats, and other information concerning the fishing for fishes covered by this Convention, from vessels or persons engaged in these fisheries.
>
> 7. Publish or otherwise disseminate reports relative to the results of its findings and such other reports as fall within the scope of this Convention, as well as scientific, statistical, and other data relating to the fisheries maintained by the nationals of the High Contracting Parties for the fishes covered by this Convention.

Based on the research of the scientific staff, the Commission makes recommendations, as necessary, to the member states to take appropriate action to maintain the fish populations

mission appoints a Director of Investigations who is responsible for carrying out the technical, scientific, and administrative functions of the Commission with the assistance of an appointed staff.[102] The IATTC is the only tuna organization with an independent, permanent, scientific staff which is adequately funded to carry out an effective research and management program.[103] Unlike other tuna organizations, the IATTC does not have to rely on potentially biased scientists from member countries for its data.[104]

The IATTC Convention has no enforcement provisions. Each member nation agrees to adopt and enforce Commission regulations pertaining to its vessels.[105] Unfortunately, not all members have been physically able or politically willing to enforce the conservation regulations, and so enforcement has not been uniform.[106]

Nonetheless, the IATTC management program for yellowfin has been relatively effective in maintaining the stock at desirable levels.[107] The organization's "total catch quota" which produces an annual tuna "free-for-all" has, however, caused not only a breakdown among the members but also over-capitalization and economic waste.[108] Because this regulatory approach places no limits on entry, it encourages intense competition and national fleets have consequently become increasingly large and efficient. The yellowfin open season has decreased from ten months in 1966 to fewer than three months in 1975.[109] When the yellowfin catch limit is reached, the vessels either fish for other tuna species, such as skipjack or

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at the proper level. The member states are responsible for enacting the necessary legislation. W. BAYLIFF, *supra* note 80, at 14.

[102] IATTC Convention, *supra* note 80, art. III; Joseph (1973), *supra* note 100, at 2477. According to Article I(13), the Director of Investigations is in charge of:

> (a) the drafting of programs of investigations, and the preparation of budget estimates for the Commission;
>
> (b) authorizing the disbursement of the funds for the joint expenses of the Commission;
>
> (c) the accounting of the funds for the joint expenses of the Commission;
>
> (d) the appointment and immediate direction of technical and other personnel required for the functions of the Commission;
>
> (e) arrangements for the cooperation with other organizations or individuals in accordance with paragraph 16 of this Article;
>
> (f) the coordination of the work of the Commission with that of organizations and individuals whose cooperation has been arranged for;
>
> (g) the drafting of administrative, scientific and other reports for the Commission;
>
> (h) the performance of such other duties as the Commission may require.

[103] Joseph (1975), *supra* note 100, at 67; *see* text accompanying notes 133-34, 152-54, and 175-77 *infra* for comparisons.

[104] *See* text accompanying notes 135-38 *infra*.

[105] W. BAYLIFF, *supra* note 80, at 28.

[106] Joseph (1977), *supra* note 19, at 280. For a comparison with other organizations, *see* text accompanying notes 142-43 *infra*.

[107] JOSEPH (1979), *supra* note 6, at 14.

[108] *Id.*; S. SAILA & V. NORTON, *supra* note 6, at 39.

[109] S. SAILA & V. NORTON, *supra* note 6, at 24-26.

secondary market species not yet fully exploited, or move on to other areas. The tremendous acceleration in fleet growth since the mid-1960's has meant decreased productivity for each individual vessel.[110] The catch in tons of tuna per ton of vessel carrying capacity, for example, declined from 5.0 in 1967 to 2.3 in 1975. This decrease in the eastern Pacific has also forced the expansion of fishing by eastern Pacific fleets westward and into the Atlantic.

Although the jointly introduced Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean (1979)[111] (1979 Eastern Pacific Draft Convention) left many issues unresolved, it still merits review. The IATTC is one of the world's oldest and most active regional fisheries organizations, and the draft convention focuses on some of the conflicts between major fishing nations and coastal nations, and provides some insights into the future of any tuna organization in the eastern Pacific.

The 1979 Eastern Pacific Draft Convention would grant the tuna organization more management powers than does the current IATTC Convention. Under the 1979 draft, the IATTC's responsibilities would include setting the total catch quota, assessing, collecting, and redistributing fishing fees, determining national annual allocations, establishing a uniform system of sanctions, and maintaining an international inspection program. The Organization would no longer use the system of a "total catch quota" on a first-come-first-served basis, but would instead guarantee annual allocations from the total quota to certain members.[112] It would require each member to purchase an annual "fishery access certificate" for each of its vessels.[113] The Secretariat would then distribute the proceeds among coastal nations in proportion to the concentration of fish within their respective 200-mile zones.[114]

The 1979 Eastern Pacific Draft Convention also would establish a uniform system of sanctions, and members would be required to adopt the necessary internal legislation to carry out their enforcement responsibilities.[115] Vessels of member nations would keep a daily logbook of their fishing operations and obtain position-fixing devices sanctioned by the

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[110] JOSEPH (1979), *supra* note 6, at 15.

[111] The 1979 Eastern Pacific Draft Convention would establish an Organization consisting of a Conference of member nations and a Secretariat, which would be further divided into a scientific and administrative section. The Conference is the decision-making body of the Organization; each member has one vote in the Conference and decisions must be made unanimously. 1979 Eastern Pacific Draft Convention, *supra* note 97, arts. 5, 9(4). These provisions are discussed at notes 210-11 *infra*.

[112] *Id.* arts. 13, 15, 16, 17. Only species listed in Section A of Annex I would be subject to an overall catch limit. *Id.* art. 13(1)(a). At the time of this writing, yellowfin is the only species listed in Section A.

[113] *Id.* art. 14.

[114] *Id.* art. 19.

[115] *Id.* art. 20(6).

Organization.[116] The Conference would establish and maintain an international inspection program to train and designate national and international inspectors, and set rules and regulations for conducting inspections.[117]

Despite agreement on these provisions, the Latin American nations and the United States continue to battle over other important issues,[118] the most divisive being the annual guaranteed allocations.[119] Adoption of the Mexican's position—that the coastal nations are entitled to *all* the tuna found within their 200-mile zones and thus that they must receive allocations equal to the tuna traditionally caught in their areas—would sharply curtail the activities of the United States fishing fleet.[120] The United States agrees that coastal nations should receive a preference based on the concentration of tuna in their 200-mile zones. The United States argues, however, that a scheme giving coastal nations *all* the tuna in their zones would ignore the historical and traditional fishing activities of the United States tuna fleet,[121] and the migratory nature of tuna.[122] This issue is not likely to be resolved quickly and could disrupt tuna management in the region for years to come.[123]

The United States and the Latin American nations also disagree over the amount of fees to be paid for fishing certificates. The United States has proposed that a specified dollar amount be paid per net registered ton of the vessel. Each vessel would pay a fee of $100 per ton (or approximately $80,000 per vessel) at the beginning of each year, to be divided among the coastal nations in proportion to the percentage of fish caught in each zone.[124] The Latin American nations, on the other hand, favor a payment of 6% of the commercial value of the catch.[125]

Finally, the nations disagree on membership eligibility for nations that are neither coastal nations of the eastern Pacific nor former IATTC members.[126] The United States would allow any nation to become a member of the Organization provided the Conference unanimously agreed.[127] The Latin American nations would keep out new nations and argue that mem-

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[116] *Id.* art. 21(2) (3).

[117] *Id.* art. 21(5).

[118] Hallman Letter, *supra* note 96; Interview with Hallman, *supra* note 52.

[119] *See* text accompanying notes 90-94 *supra.*

[120] *See* note 99 *supra.*

[121] *See* note 99 *supra,* and text accompanying notes 227-29 *infra.*

[122] Interview with Hallman, *supra* note 52.

[123] The legal issues raised by this dispute are analyzed *infra,* text accompanying notes 221-33.

[124] Interview with Hallman, *supra* note 52. Because the fee would be paid at the beginning of each year, no vessel would have an incentive to lie and could be relied on to keep accurate records as to the location of its catch. These data could also be checked through a transponder-satellite monitoring system.

[125] 1979 Eastern Pacific Draft Convention, *supra* note 97, Annex II(1).

[126] *Id.* art. 3.

[127] *Id.*

bership should be open only to those nations that have fished regularly and substantially in the area prior to October 1, 1978, and that receive the Conference's unanimous approval.[128]

2. *The International Commission for the Conservation of Atlantic Tunas (ICCAT)*

The Convention for the Establishment of the International Commission for the Conservation of Atlantic Tunas (ICCAT Convention), signed in Rio de Janeiro in 1966, covers the Atlantic Ocean and its adjacent seas.[129] The ICCAT is responsible for the study of tuna and other fish species exploited in tuna fishing within the convention area that are not under investigation by another international organization.[130] It is open for membership to any United Nations member or any of the United Nations' specialized agencies.[131] Members contribute funds on the basis of catch and utilization.[132]

The ICCAT has a minimal staff—an Executive Secretary and a few administrative and clerical assistants.[133] Because of its minimal funding for scientific research and programs, the ICCAT lacks adequate scientific data.[134] Despite recent efforts to increase the budget, the collection of basic catch and effort data and the implementation of biological studies remain the responsibilities of the individual member governments.[135]

Members have disagreed on the need to establish catch quotas. Their conflicting views stem from differences in scientific opinion[136] and from fears by members that statistical information reflects the biases of a scientist's country rather than an impartial report of the data.[137] During meetings, ICCAT members accuse each other's scientists of presenting biased data, and they are consequently unable to make much progress in the management of the species.[138] Thus, agreement has not yet been reached on catch quotas for yellowfin and northern bluefin tuna notwith-

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[128] *Id.*

[129] Joseph (1973), *supra* note 100, at 2477.

[130] *Id.*

[131] *Id.* As of Dec., 1980, the member nations of the ICCAT were Angola, Benin, Brazil, Canada, Cape Verde, Cuba, France, Gabon, Ghana, Ivory Coast, Japan, Republic of South Korea, Morocco, Portugal, Senegal, Zimbabwe, Spain, the United States, and the Union of Soviet Socialist Republics. JOSEPH (1979), *supra* note 6, at 18.

[132] Joseph (1973), *supra* note 100, at 2479.

[133] *Id.* at 2478.

[134] JOSEPH (1979), *supra* note 6, at 18.

[135] *Id.*

[136] *Id.*

[137] Interview with Clifford Peterson, Assistant Director, IATTC, in San Diego, Cal. (Aug. 30, 1979).

[138] *Id.*

standing many observers' concern over the condition of these stocks.[139]

ICCAT members have, however, agreed on a few regulations.[140] They have set minimum size limits for yellowfin and northern bluefin tuna, and members are cooperating to limit fishing mortality for the northern bluefin to recent levels.[141] Each member government is responsible for enforcing the size limits for its own vessels.[142] As with the IATTC,[143] the enforcement has neither been uniform nor adequate.

3. *The Indian Ocean Fishery Commission (IOFC) and the Indo-Pacific Fisheries Commission (IPFC)*

The Indian Ocean Fishery Commission (IOFC) and the Indo-Pacific Fisheries Commission (IPFC) are even more primitive in structure than the ICCAT. The IOFC was established in 1967 by the Council of the United Nations Food and Agricultural Organization (FAO) under a mandate of the FAO Constitution.[144] This Commission's geographical area of responsibility covers the Indian Ocean and adjacent seas (excluding the Antarctic area), an area broad enough to encompass the range of most of the exploited stocks.[145] The Commission is permitted to study any of the species of living marine resources in this area.[146]

The IPFC was formed in 1948, also under the mandate of the FAO Constitution.[147] The IPFC's area of responsibility includes the marine

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[139] JOSEPH (1979), *supra* note 6, at 18.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 19.

[143] *See* text accompanying notes 105-06, *supra*.

[144] Joseph (1973), *supra* note 100, at 2478. Constitution of the Food and Agricultural Organization art. VI(1). The IOFC's membership includes over thirty-five nations. Discussions were held in 1977 and again in early 1980 as to the possible dismantling of the IOFC and its replacement with a number of smaller regional bodies. IOFC/80/9 (Dec. 1979).

[145] Joseph (1973), *supra* note 100, at 2478; Joseph (1975), *supra* note 100, at 69.

[146] The objectives of the IOFC are:

> 1. to promote, assist, and coordinate national programs over the entire field of fishery development and conservation;
>
> 2. to promote research and development activities in the area through international sources, and in particular international aid programs;
>
> 3. to examine management problems, with particular reference (because of the need to take urgent action) to those relating to the management of offshore resources.

Joseph (1973), *supra* note 100, at 2478.

[147] The stated functions and duties of the IPFC are:

> a. To formulate the oceanographical, biological and other technical aspects of the problems of development and proper utilization of living aquatic resources;
>
> b. To encourage and co-ordinate research and application of improved methods in everyday practice;
>
> c. To assemble, publish or otherwise disseminate oceanographical, biological and other technical information relating to living aquatic resources;
>
> d. To recommend to Members such national or co-operative research and develop-

and fresh waters of the Indo-Pacific region,[148] an area that apparently extends as far east as the fisheries of Hawaii and as far west as those of India and Sri Lanka.[149] None of the independent island nations of the South Pacific has, however, joined this organization.[150] No restrictions are placed on the species that can be studied.[151]

Neither commission employs a permanent secretariat or a research staff, nor has either implemented a regulatory program,[152] and thus depend on working groups of scientists affiliated with other organizations.[153] Consequently, progress has been slow in collecting adequate statistical data, assessing the impact of the fisheries on the stocks of fish, and making recommendations for management.[154] These two commissions have no provision for an operating budget in their founding documents, and must rely on the FAO for support.[155] Membership is restricted to United Nations members,[156] a requirement that excludes Taiwan, which is active in tuna fishing in the regions.

Stock assessment studies have been made by a special ad hoc group of experts serving both commissions.[157] Concerned over the condition of certain fisheries in both the western Pacific and Indian Oceans, the group

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ment projects as may appear necessary or desirable to fill gaps in such knowledge;

e. To undertake, where appropriate, co-operative research and development projects directed to this end;

f. To propose, and where necessary to adopt, measures to bring about the standardization of scientific equipment, techniques and nomenclature;

g. To extend its good offices in assisting its Members to secure essential material and equipment;

h. To report upon such questions relating to oceanographical, biological and other technical problems as may be recommended to it by Members or by the Organization [FAO] and other international, national or private organizations with related interests;

i. To transmit biennially to the Director-General of the Organization a report embodying its views, recommendations and decisions, and make such other reports to the Director-General of the Organization as may seem to be necessary or desirable. Reports of the committees and working parties of the Council provided for in Article III of this Agreement shall be transmitted to the Director-General through the Council.

Agreement For the Establishment of the Indo-Pacific Fisheries Council, Feb. 26, 1948, *as amended*, Jan. 20, 1961, art. IV. 418 U.N.T.S. 348. As of May 1980, the membership of the IPFC included Australia, Bangladesh, France, Indonesia, Japan, the Republic of South Korea, Malaysia, Nepal, New Zealand, Philippines, Sri Lanka, Thailand and the United Kingdom.

[148] *Id.* art. V.

[149] Shomura, *supra* note 20, at 5.

[150] *See* note 147 *supra*, for the list of current members of the IPFC.

[151] Shomura, *supra* note 20, at 4.

[152] JOSEPH (1979), *supra* note 6, at 19.

[153] Joseph (1975), *supra* note 100, at 67.

[154] *Id.*

[155] Joseph (1973), *supra* note 100, at 2479.

[156] JOSEPH (1979), *supra* note 6, at 21.

[157] *Id.* at 20.

strongly recommended that the commissions be given the authority and funding necessary to collect basic data on harvesting activities and the habits of the major species.[158]

4. *The International Whaling Commission (IWC)*

After a disastrous whaling season in 1945-1946 that demonstrated once again how depleted the whale stocks had become, fourteen nations convened in 1946 to draft the International Convention for the Regulation of Whaling,[159] which established the International Whaling Commission (IWC).[160] Although whales are mammals and not fish, and present problems different from those associated with tuna, the IWC is nonetheless a relatively highly evolved international organization concerned with ocean harvesting.

The IWC originally established an overall catch quota expressed in terms of the "blue-whale unit."[161] One blue whale equalled one unit, and other whales were valued at some fraction of this unit.[162] Whaling ships primarily sought the blue whale, the most valuable species, until it was depleted to the point of commercial extinction. As blue whale catches fell, whaling vessels shifted their efforts first to the finback whale and then to the sei whale, with similar results. Whalers understood that it was in their best interest to catch whales as rapidly as possible before the overall quota was reached and the season closed. Companies invested in bigger and faster boats that could cover more area in a shorter period, resulting in what has become known as "The Whaling Olympics." The two problems that have developed in the eastern Pacific tuna industry—overcapitalization and economic waste—occurred in similar fashion in the whaling industry.[163]

In 1971, the IWC abandoned the "blue-whale unit" approach, and be-

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[158] *Id.*

[159] International Convention for the Regulation of Whaling, Dec. 2, 1946, Schedule of Whaling Regulation, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter cited as IWC Convention]. Although the Schedule has been frequently amended, the Convention has been amended only once, in 1956. Protocol to the International Convention for the Regulation of Whaling, *signed under* Nov. 19, 1956, 10 U.S.T. 952, T.I.A.S. No. 4228, 338 U.N.T.S. 366 (entered into force, May 4, 1959).

[160] IWC Convention, *supra* note 159, art. III(1). A complete discussion of the IWC is contained in Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (pts. 1 & 2), 6 ECOLOGY L.Q. 323, 571 (1977). As of 1979 the members of the IWC included Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Iceland, Japan, Republic of South Korea, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Seychelles, Zimbabwe, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom, and the United States.

[161] IWC Convention, *supra* note 159, schedule, § 8(a).

[162] *Id.* § 8(b).

[163] *See* text accompanying note 108 *supra*.

gan setting quotas by species.[164] The species-quota approach has proved much more effective in conserving whales.[165] Under this scheme, a total allowable catch is established for each species. Because no national quotas have been established, however, nations still compete on a first-come-first-served basis.

Under the IWC Convention, each member nation has one vote.[166] The Commission has the authority to promulgate regulations that apply to factory ships, land stations, and whale catchers under the jurisdiction of the member nations.[167] If any member objects to an amendment to a regulation within ninety days of the vote, the amendment is not binding on that nation.[168] A member can withdraw from the convention by giving six months notice,[169] and members have often employed threats of withdrawal to, in effect, veto a proposed conservation measure.[170]

The IWC relies on voluntary national funding to finance research.[171] Fishery experts have argued over the wisdom of continuing the IWC's near total reliance on nationally financed research[172] and many feel that an independent research staff is essential to producing sound research. It has been suggested that those nations currently exploiting whales should bear the cost of research necessary to protect whale stocks.[173]

The Commission has three permanent committees—Administration, Scientific, and Technical.[174] Nations may have any number of representatives on the Scientific or Technical Committees, but have only one vote. Each major whaling nation usually has several representatives at the Scientific Committee meetings. This committee reviews catch data and research programs of member nations, and makes recommendations to the Commission concerning depletion of stocks and research needs.

Scientists have criticized the IWC, asserting that the procedures used by the Scientific Committee to give advice to the Commission have been largely ineffective and that no adequate outside review of Scientific Committee advice currently exists.[175] The Commission's ineffectiveness has also been exacerbated by staff and budgetary constraints.[176] The situation has improved since 1976 when the Commission employed a permanent cetologist as Executive Secretary. The Executive Secretary now has the

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[164] Scarff, *supra* note 160, at 367.
[165] JOSEPH (1979), *supra* note 6, at 122.
[166] IWC Convention, *supra* note 159, art. III(1).
[167] *Id.* art. I(2).
[168] *Id.* art. V(3)(b).
[169] *Id.* art. XI.
[170] Scarff, *supra* note 160, at 357.
[171] *Id.* at 594, 638. The IWC 1978-79 budget was £ 167,166.
[172] *Id.* at 594, 638.
[173] *Id.* at 638.
[174] *Id.* at 355.
[175] *Id.* at 628.
[176] *Id.* at 355.

power to hire outside consultants to conduct research, so the Commission no longer must rely solely on research of member nations.[177]

During the past thirty years, the IWC's conservation program has clearly improved.[178] The IWC has followed the Scientific Committee's advice closely and the Scientific Committee has developed more accurate techniques for stock assessment. Still, conservationists and scientists have harshly criticized the IWC's unwillingness to adopt adequate conservation measures.[179]

The IWC's enforcement scheme can be described as "national enforcement with international supervision."[180] Each nation must report catches to the IWC, hire two whaling inspectors for each of its flag ships to oversee the whaling operation, and report infractions and measures taken to prosecute violators to the Commission. In 1972, the Commission began an international observer system, whereby observers from member governments are exchanged under bilateral agreements to report violations to the IWC.[181] This effort has deterred violations somewhat. The IWC Convention also prohibits payments to gunners or catcher crews for the capture of protected whale species.[182] The primary responsibility for prosecuting violaters remains, however, with the nation under whose flag the ship sails.

As of 1977, only eight of the seventeen countries hunting whales belonged to the IWC, and non-IWC whaling threatened to deplete certain stocks.[183] In addition, several whaling operations circumvent IWC regulations by working under the "flags of convenience" of non-IWC countries even though owned by companies of member nations.[184] The IWC is, in summary, an organization that has gradually evolved toward greater emphasis on conservation, but which is still hampered from pursuing this goal more rigorously by the reluctance of some of its members and the recalcitrance of its non-members.[185]

B. The SPFFA Convention: Ambiguities In Drafting And Unresolved Problems

The SPFFA is the first independent regional fisheries organization ac-

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[177] *Id.* at 355-56.

[178] *Id.* at 635.

[179] *Id.* at 327, 626.

[180] *Id.* at 357.

[181] *Id.* at 367, 607.

[182] IWC Convention, *supra* note 159, schedule, § 14.

[183] Major nonmember countries as of 1979 included the People's Republic of China, Portugal, the Republic of South Korea, and the Somali Republic. Scarff, *supra* note 160, at 598.

[184] *Id.*

[185] The prospects for the survival of the whale increased greatly in late 1980 when the Soviet Union, one of the major whaling nations, announced that it would be terminating all whaling activities.

tive in this area. As the previous section illustrates, most fisheries organizations have had difficulties in identifying their goals and in achieving a unified approach. This section begins with an examination of the SPFFA Convention itself from a drafting perspective, and then turns to some of the major unresolved legal and economic issues.

1. Legal Status of the Agency

The Convention's provisions on the Agency's legal status appear to be contradictory. Article VIII(1) states that the SPFFA shall have the capacity "to sue and be sued." Article VIII(2), however, states that "[t]he Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable." Former Director Razzell explained that the intent behind these two paragraphs was to immunize the Agency for its "governmental" or "sovereign" activities, but not for its "commercial" activities.[186] This distinction is similar to that of the "restrictive sovereign immunity" theory which denies immunity to nations for their commercial or private activities, but retains the doctrine of sovereign immunity for governmental or public activities.[187]

The SPFFA Convention clearly grants the SPFFA "legal personality" and the "capacity to contract to acquire and dispose of . . . property . . . ."[188] The Convention directs the Agency to make an agreement with its host government, the Solomon Islands, subject to the Committee's approval, providing for "such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency."[189] The governing charters of other international organizations,[190] including the United Nations Charter[191] and the Convention on Privileges and Immunities of the United Nations,[192] contain similar provisions. Most multi-national organizations have been deemed to possess international legal personality,[193] and the SPFFA is no exception.

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[186] Interview with Razzell, *supra* note 61.

[187] *See* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964).

[188] SPFFA Convention, *supra* note 10, art. VIII(1).

[189] *Id.* art. VIII(3).

[190] J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 491-92 (6th ed. 1967). *See, e.g.*, Constitution of the International Labour Organization art. 39; Constitution of the Food and Agricultural Organization art. XV(1); Articles of Agreement of the International Monetary Fund art. IV(1).

[191] Article 104 of the United Nations Charter provides that the United Nations should possess in the territory of each of its members "such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."

[192] Article 1 of the Convention on the Privileges and Immunities of the United Nations provides that: "The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings."

[193] J. STARKE, *supra* note 190, at 491.

The charters for the IATTC, ICCAT, IOFC, and IPFC do not contain provisions on their legal status, nor do they specify their capacity to perform their duties under international or national law.[194] These fishery organizations have usually been able to accomplish necessary legal activities on an ad hoc basis, although in some cases this lack of legal status or capacity has obstructed the timely performance of their duties.[195] As one scientist has noted, even though ad hoc arrangements have generally sufficed to permit the international fisheries bodies to operate in the past, it is desirable that conventions creating such bodies include a provision establishing their legal capacity to perform acts necessary to accomplish their duties.[196] Thus, the SPFFA took a bold step forward by including such provisions in its convention.

2. *Ratification*

Unlike many international conventions, the SPFFA Convention states that it is not subject to ratification, but shall enter into force 30 days following the eighth national signature.[197] Ratification is the process through which governments formally adopt, through constitutionally authorized procedures, the international agreements reached by their delegates.[198] In modern practice, whether an agreement requires ratification is a function of the parties' intent.[199] If a treaty is not subject to ratification, in the absence of a contrary provision, the instrument is binding from the time of signature.[200] The SPFFA members intended to dispense with the requirement of ratification in order to avoid the two-step process of signature and ratification by each nation.[201] Thus, in accordance with the intent of the members, the SPFFA Convention became binding 30 days after the eighth signature.

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[194] Joseph (1973), *supra* note 100, at 2479. The 1979 Eastern Pacific Draft Convention, *supra* note 97, art. 1(2), contains a provision explicitly establishing its "legal personality" and "legal capacity."

[195] Joseph (1973), *supra* note 100, at 2479.

[196] *Id.*

[197] SPFFA Convention, *supra* note 10, art. X(2).

[198] J. STARKE, *supra* note 190, at 353.

[199] *Id.* at 354. The practice of ratification rests partially on the following grounds:

a. Nations have the right to review the decisions of their delegates before undertaking the obligations the delegates agreed to;

b. Nations possess the right, by reason of their sovereignty, to withdraw from participation in any treaty; and

c. The period between signature and ratification enables nations to pass the necessary legislation or obtain the necessary parliamentary approvals so that they can obtain ratification.

J. STARKE, *supra* note 190, at 54-55.

[200] *Id.* at 352.

[201] Interview with Razzell, *supra* note 61.

3. *Publication*

The SPFFA Convention makes no explicit provision for the publication of findings and scientific data collected by the SPFFA. By comparison, the IATTC Convention requires the Commission to: "[p]ublish or otherwise disseminate reports relative to the results of its findings and such other reports as fall within the scope of this Convention, as well as scientific, statistical, and other data relating to the fisheries. . . ."[203] The IATTC staff feels that the timely and thorough publication of research data is one of the most crucial parts of its program of scientific investigation for two reasons. First, publications keep the member states, the scientific community, and the general public informed of the staff's findings. Second, through such publications other researchers can review the data critically, thereby ensuring the soundness of the IATTC's conclusions.[203]

Once the SPFFA has set up its committee for scientific research, the Agency should review the publication systems of the IATTC and other fishery bodies and consider adopting one of its own. The publication of the staff's research results will provide valuable information to the governments of the member nations for use in their fisheries plans, to the scientific community, and to the public at large.

4. *Funding*

The level of funding for the SPFFA was left open by the SPFFA Convention. The Agency has been assembling a staff of twelve, consisting of scientists, fishery experts, and attorneys[204] who will focus their efforts on examining the resources in the region and on technical, legal and policy issues.[205]

The SPFFA can look to other regional fishery commissions for comparative budget estimates. The IATTC, for example, started with an annual budget of $59,000.00 for fiscal year 1951-1952.[206] By fiscal year 1977-1978, the Commission employed a staff of 52 and operated on a budget of $2,196,762.00.[207]

5. *Structure*

The SPFFA Convention leaves unclear the nature and duties of the

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[201] IATTC Convention, *supra* note 80, art. II(7).

[203] W. BAYLIFF, *supra* note 80, at 33.

[204] Interview with Razzell, *supra* note 61.

[205] Interview with Dr. Kavaliku, *supra* note 34.

[206] [1950-1951] ANN. REP. 7 (1952).

[207] [1978] ANN. REP. 15 (1979). The two largest expenditures in 1977-78 went to the regular tuna research program (about $1,225,500) and for salaries (about $708,470).

Committee, the Secretariat and the Director. Like the Commission of the IATTC, the Committee is composed of all the member nations and is responsible for setting Agency policies.[208] The Secretariat, the staff or bureaucracy of the Agency, is analogous to an executive department. The exact duties of the Director are still unclear. Article VII directs the Agency to collect, analyze, and disseminate to member nations scientific information, particularly concerning highly migratory species.[209] The SPFFA Convention does not state whether an independent scientific staff will be funded or whether the Agency will rely on member governments and outside experts.

The IATTC Convention, by contrast, explicitly delineates the duties of the Director of Investigations, which include the appointment and direction of a scientific staff and the drafting of research programs.[210] The 1979 Eastern Pacific Draft Convention goes further and explicitly separates the administrative section of the Secretariat from the scientific section.[211]

The IATTC employs a scientific staff to collect data for the Commission's own use and is the only tuna commission with a permanent research staff. The staff's work has proved adequate for making management recommendations in the eastern Pacific Ocean.[212]

The ICCAT, the IOFC, and the IPFC, on the other hand, have been largely ineffective in collecting and assessing data, and in making recommendations for management, mainly because of an absence of adequate funding and independent scientific staff.[213]

Based on the success of the IATTC and other international commissions with independent research staffs, and the relative lack of success of those without scientific bodies, scientists recommend that fishery commissions maintain independent scientific staffs with the financial support necessary to carry out research and management.[214] The SPFFA should consider this recommendation in forming its own scientific program and in allocating funds for such a program.

6. *Limited Membership and Control Over "High Seas" Pockets*

The Forum rejected a broad-based membership agency in 1978 because many members feared domination by the large metropolitan powers.[215]

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[208] Interview with Razzell, *supra* note 61.

[209] SPFFA Convention, *supra* note 10, art. VII(1).

[210] IATTC Convention, *supra* note 80, art. I(13).

[211] 1979 Eastern Pacific Draft Convention, *supra* note 97, art. 9(4).

[212] Joseph (1975), *supra* note 100, at 67.

[213] Joseph (1977), *supra* note 19, at 280-81; Joseph (1975) *supra* note 100, at 66.

[214] JOSEPH (1979), *supra* note 6, at 23. *See also* text accompanying notes 134-41 & 152-58 *supra*.

[215] *See* the discussion of this controversy in text accompanying notes 47-50 *supra*.

Article 64 of the 1980 LOS Draft Convention, however, calls for an organization consisting of both coastal nations and other nations that fish in the region for highly migratory species.[216] Thus, the SPFFA Convention fails to fulfill the requirements of Article 64 because it limits membership to coastal nations, and excludes distant water fishing nations. From a conservation and management perspective, membership should be open not only to nations situated within the region but also to nations that fish in the region, nations with island dependencies in the region, and nations with waters through which the fish swim at various stages of their life cycle.[217] The SPFFA Convention does recognize a future need for such an agency:

> [E]ffective co-operation for the conservation and optimum utilization of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.[218]

No action has yet been taken, however, to establish such an international organization.

Because of the SPFFA's limited membership, the exclusive economic zones around the dependent island territories (American Samoa, New Caledonia, etc.) may not come under the Agency's jurisdiction, thus thwarting an effective regional management approach.[219] A more complex problem concerns the pockets of high seas left open after nations claim their exclusive economic zones. If the Agency does not control the pockets of high seas outside individual nations' zones, then distant water fishing nations could fish in those pockets and escape regulation.[220] Whether the SPFFA or even an Article 64 organization would have the legal basis for regulating the resources within these pockets of high seas is not clear.

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[216] The 1980 LOS Draft Convention, *supra* note 7, art. 64 states:

Highly migratory species

1. The coastal State and other States whose nations fish in the region for the highly migratory species listed in annex I, shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

[217] Joseph (1975), *supra* note 100, at 68; SPEC, PROPOSALS FOR THE ESTABLISHMENT AND OPERATION OF A SOUTH PACIFIC FISHERIES AGENCY, app. IV, SPEC(77)13 (May, 1977). This latter category would include Indonesia and the Philippines.

[218] SPFFA Convention, *supra* note 10, art. III(2).

[219] *See* text accompanying notes 70-72 *supra*.

[220] S. SAILA & V. NORTON, *supra* note 6, at 52.

Four examples in the area of international law help clarify the legal arguments both for and against regional agency control of the high seas.

a. The Fisheries Jurisdiction Case: United Kingdom v. Iceland[221]

When Iceland declared jurisdiction over a 50-mile exclusive fishing zone around its coast, the United Kingdom objected and sought a remedy in the International Court of Justice (ICJ). In 1974, the Court found that Iceland was entitled to claim preferential fishing rights in the waters adjacent to its coast, but was not entitled unilaterally to exclude United Kingdom vessels from fishing within the area between this 12-mile limit and the proposed 50-mile limit.[222] Three of the Court's pronouncements bear particularly on the issue of control over the high seas.

First, citing what the Court said was customary international law, the Court gave preferential fishing rights to Iceland in the high seas off Iceland's coast because of its special dependence on these fisheries and because the intensity of exploitation of the resources made it imperative to limit the catch.[223] This finding established that a state that has "exceptional dependence" upon its fisheries may be entitled to preferential fishing rights in those parts of the high seas adjacent to its fishing zone. This principle can be extended to apply to the South Pacific. The island nations of the South Pacific contend that because of their dependence upon the resources of the sea for their economic future, they must ensure that the high seas resources of the region are not exploited to their detriment.[224] These nations could argue that because of the highly migratory nature of the region's resources, any effective management program must apply to the pockets of the high seas as well. The Iceland analogy does not, however, apply directly to the situation in the South Pacific. First, the fishery resources have not been overexploited. In fact, skipjack, the region's major resource, appears to be underexploited.[225] Moreover, given the island nations' nascent fisheries, it is unlikely they can show the dependence on the fishery resources in the highseas pockets that was established by Iceland.

In its second pronouncement, the Court recognized the right of all nations to fish freely on the high seas, subject to the duty of all nations to respect the rights of other nations and to conserve for the benefit of all.[226] The Court ruled that a coastal nation entitled to preferential fishing rights could not totally exclude other nations from fishing in the disputed waters, particularly if other states had traditionally fished in these waters

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[221] [1974] I.C.J. 3.
[222] *Id.* at 34.
[223] *Id.* at 26-27.
[224] REGIONALIZATION, *supra* note 3, at 310.
[225] *See* note 17 *supra* and note 321 *infra*.
[226] [1974] I.C.J. at 22.

and had established an economic dependence on the same fishing grounds.[227] The Court noted that statistics indicated that United Kingdom vessels had fished in the disputed area on a continuous basis since 1920, that their annual total catch had not varied greatly, and that the waters around Iceland constituted the most important of the United Kingdom's distant water fishing grounds for bottom dwelling species.[228] The Court also found that because the United Kingdom's vessels lacked adequate alternate fishing grounds in the North Atlantic, Iceland's exclusion of them from the Icelandic area would produce widespread unemployment in the British fishing industry.[229]

Some of the distant water fishing nations now excluded from the SPFFA could similarly argue that they possess traditional fishing rights in the region and are economically dependent on fishing within the South Pacific region. Japan, for example, was the first country to develop longline fisheries in the central and western Pacific Ocean in the early 1950's.[230] In 1958, Korean vessels entered the fishery and in the mid-1960's Taiwan began longline fishing in this area.[231] Prior to 1965, skipjack catches from the central and western Pacific were negligible except for Japan's efforts, and the rapid expansion of the skipjack fisheries in this region since 1966 was largely the result of increased fishing by the Japanese pole-and-line fishing fleet.[232] Japan continues to be the major fish harvesting nation in this region, with Taiwan and South Korea expanding their fishing efforts.

In order to counter these strong, historical rights of Japan, Taiwan and South Korea, the SPFFA, or an Article 64 agency in the South Pacific, would have to argue that effective conservation of highly migratory species is impossible if foreign flag vessels can fish without control in the pockets of high seas in the region.

In a third pronouncement in the *Fisheries Jurisdiction Case*, the ICJ directed Iceland and the United Kingdom to negotiate an equitable solution and jointly to examine measures needed to insure conservation, development, and equitable exploitation of the fishery resources.[233] If applied to the South Pacific, the Court's pronouncement would arguably require the island nations of the South Pacific to negotiate a compromise with the distant water fishing nations regarding fishing in the high seas pockets. Article 64 of the 1980 LOS Draft Convention appears to require similar negotiations.

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[227] *Id.* at 27-28.

[228] *Id.* at 28.

[229] *Id.*

[230] KEARNEY (1979), *supra* note 16, at 20.

[231] *Id.*

[232] *Id.* at 3.

[233] [1974] I.C.J. at 34-35.

b. The 1980 Draft Convention on the Law-of-the-Sea (Informal Text)

As of this writing, the Third United Nations Law-of-the-Sea Conference (UNCLOS III) has not produced a formal treaty. Certain parts of the 1980 LOS Draft Convention may, however, be considered as emerging, customary, international law.[234] The 1980 LOS Draft Convention provides a basis for arguing that a properly organized regional fisheries organization would have jurisdiction over the highly migratory species as they swim beyond the exclusive economic zones.

Articles 64, 86, 87, 116, 118 and 119 of the 1980 LOS Draft Convention suggest that a regional management body with broad membership has the right to establish management and conservation measures on the "high seas." Under Article 86, ocean areas outside individual nations' 200-mile zones would be "high seas," because these pockets "are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[235] Article 87 confirms the basic principle that the "high seas are open to all States."[236] The freedoms enumerated, however, including the freedom to fish, are subject to other states' exercise of their freedom of the high seas.[237] Article 89 prohibits any nation from exercising sovereignty over any part of the high seas,[238] but does not mention whether a *regional body* may do so.

Article 64 requires both coastal and fishing nations to cooperate directly or through "appropriate international organizations."[239] Such cooperation is required "with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the re-

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[234] G. KNIGHT, *supra* note 6, at 58. The negotiating texts produced after the 1975, 1976, 1977, 1978, 1979, and 1980 sessions of the United Nations Conference on the Law-of-the-Sea reflect a general sense of agreement of participating nations concerning most of the provisions on fisheries. These informal texts as well as national viewpoints expressed during the debates indicate the trend of emerging international law on fisheries issues. G. KNIGHT, *supra* note 6, at 58. The *Fisheries Jurisdiction Case* provides significant precedent for treating the negotiating texts as at least emerging international law. The International Court of Justice in that case referred to documents from earlier law-of-the-sea conferences and subsequent practice of nations as "existing rules of international law." [1974] I.C.J. at 22-23. These documents included the 1958 Geneva Convention on the High Seas and resolutions adopted at the 1958 and 1960 Conferences concerning preferential fishing rights for coastal nations dependent upon coastal fisheries. *Id.* The International Court of Justice in 1974 did not look at the negotiating text as authoritative law because at that time the discussion had just begun. *Id.* at 23. An international tribunal today might take these texts much more seriously, particularly if the practices of fishing and coastal nations were beginning to conform to the emerging language.

[235] 1980 LOS Draft Convention, *supra* note 7, art. 86.

[236] *Id.* art. 87(1). *See also* Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958. 559 U.N.T.S. 286.

[237] 1980 LOS Draft Convention, *supra* note 7, art. 87(2).

[238] *Id.* art. 89.

[239] *Id.* art. 64(1).

gion, both within *and beyond the exclusive economic zone.*"[240] This goal is urged somewhat weakly—"with a view to." Nonetheless, it is stated in terms that do have specific meaning if the data are adequate to evaluate the impact of harvesting the highly migratory fish species. The organization required under this Article logically should have the power to achieve its goal, at least in any situation affecting nations that will have ratified the Law-of-the-Sea treaty. If all relevant nations have ratified the treaty, the fishery organization would effectively be able to exercise jurisdiction over the migrating fish while they are traveling through the high seas.

Freedom of fishing is also subject to the conditions set out in Section 2 of Part VII on the High Seas titled "Management and Conservation of the Living Resources of the High Seas."[241] Under this section, the right to fish on the high seas is subject to other treaties as well as the rights, duties, and interests of coastal nations, including those of Article 64.[242]

Article 118 extends the cooperation requirement of Article 64 to nations fishing for identical resources, such as for highly migratory species, "in the areas of the *high seas.*"[243] Article 119 provides for all states concerned to adopt conservation measures to maintain harvested species in the high seas at levels that can produce the maximum sustainable yield (qualified by the special requirements of developing countries).[244] Further, they must exchange and contribute scientific information and other data relevant to the conservation of fish stocks.[245]

Taken together, these articles suggest that *any* nation can fish on the

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[240] *Id.* (emphasis added).

[241] *Id.* pt. VII, § 2.

[242] *Id.* art. 116.

[243] *Id.* art. 118 (emphasis added).

[244] *See, e.g.*, text accompanying note 242 *supra.*

[245] 1980 LOS Draft Convention, *supra* note 7, art. 119 states:

Conservation of the living resources of the high seas.

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) Adopt measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards;

(b) Take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through subregional, regional and global organizations where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

high seas, including the pockets in the South Pacific region, providing that all nations fishing for similar species, including the highly migratory species, in the same area of the high seas (such as within one pocket) cooperate with each other in the management and conservation of such species. A further obligation is placed on those nations also fishing for highly migratory species in the exclusive economic zones of other nations to cooperate with the coastal states in adopting conservation measures.

Under the 1980 LOS Draft Convention, the SPFFA could not exclude any distant water fishing nation from fishing within these pockets of high seas, unless that nation failed to cooperate with the Forum nations' management and conservation efforts. The text does not offer any specific guidance on how to apportion limited resources on the high seas, but it does require that the conservation measures that are adopted "not discriminate in form or in fact against the fishermen of any State."[246] Thus, the SPFFA probably could not unilaterally adopt measures that would adversely affect only non-Forum nations, and would be required to negotiate conservation measures with non-Forum nations that fish in the high seas areas. Once such negotiations begin, arrangements similar to the regional fishing commissions discussed previously might be established, including licensing arrangements and fee requirements. Only an organization open to all, however, would be authorized to set such fees.

Article 119(1) (a) of the 1980 LOS Draft Convention states that conservation measures are to be adopted with reference to the "special requirements of developing countries."[247] The exact benefits that this provision will afford to the South Pacific nations are unclear, but the language does imply that developing nations can claim preferences with regard to limited resources.

c. *The International Whaling Commission (IWC)*

The IWC has a management program that governs its members' activities on the high seas as well as in the fishing zones of member nations.[248] Most major whaling nations belong to the IWC, and it has slowly been able to establish more restrictive quotas on its members. Whaling does take place outside the IWC framework,[249] however, and non-IWC whaling poses a threat to certain stocks.[250] The IWC has regulated whaling on the high seas only to the extent that member nations' vessels have been involved, and it has had to induce non-members to join before it could impose regulations on their activities. The IWC does not, therefore, provide a precedent for the proposition that a management organization can re-

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[246] *Id.* art. 119(3).

[247] *Id.* art. 119(1)(a).

[248] *See* text accompanying notes 159-85 *supra.*

[249] JOSEPH (1979), *supra* note 5, at 122; Scarff, *supra* note 160, at 598.

[250] Scarff, *supra* note 160, at 598.

strict activities of unconsenting nations on the high seas.

d. Tuna management in the eastern Pacific Ocean

The IATTC is an example of a fisheries management organization whose members agree to take joint and individual action to maintain fish populations at proper levels on the high seas. In the IATTC's case, the focus is on the high seas area adjacent to the national fisheries zones off the west coast of South America.[251] Member nations have agreed to establish annual catch quotas and special catch allocations for yellowfin tuna[252] that apply to their fishing fleets on the high seas. In the years since the establishment of the IATTC in 1950, all the Latin American members have claimed 200-mile zones, thus reducing the size of the high seas area involved. Nonetheless, parts of the high seas are still subject to regulation under the IATTC Convention.[253]

e. Conclusion

Taken together, these international precedents suggest that:

(1) all nations fishing within the pockets of high seas in the South Pacific region and all countries in the region should cooperate together to establish conservation and management measures;

(2) developing coastal nations in the region may be able to receive special benefits based on their particular needs;

(3) under the regime that would be established under the 1980 LOS Draft Convention, nations not willing to cooperate in the establishment of management and conservation measures could be prohibited from fishing within the pockets of high seas in the region;

(4) otherwise, regulations governing fishing on the high seas cannot discriminate against the citizens of any nation;

(5) nations may have a claim for a preference in allocation based on traditional fishing patterns if related to a bona fide economic need; and

(6) a regional organization not open to all interested nations would not have the power to set license fees or allocate limited stocks in the high seas areas.

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[251] *See* IATTC Convention, *supra* note 80, arts. II(5), III.

[252] W. BAYLIFF, *supra* note 80, at 24.

[253] *See* Figure 3 at note 90 *supra*.

IV. Managing the Highly Migratory Species

A. The Alternative Models Available in the Pacific

Several experts have suggested strategies to manage highly migratory species in the South Pacific region. Although these experts differ in approach, they agree that any effective management scheme must include all nations participating in the fisheries, and should give considerably more strength to the regional organization than has been given to the SPFFA.

R. E. Kearney proposes a multiphase approach to the development of a fisheries body designed to ensure that the fish stocks are maintained at the maximum sustainable yield and also to give the Forum nations control over the development of their fisheries.[354] In Phase I, membership of the proposed agency would include all countries and territories of the region; island members of the South Pacific Commission[355] as well as the Forum nations would be encouraged to participate. A small team of biologists and economists would be responsible for the compilation of relevant data, and the continued study of the fisheries as they developed. In addition, this advisory group would submit interim management and development proposals to the member governments.

In Phase II, membership would be expanded to nations fishing in the region plus all resource adjacent nations (the Asian coastal nations of the western Pacific, particularly Indonesia and the Philippines). This phase would involve implementing the management licensing procedures recommended by the agency during Phase I, upon the members' consent. A much larger research and administrative staff would be needed because of the increase in membership, and the agency's additional functions. After Phase II, a final phase would incorporate a surveillance network that could more than double the agency's operating costs.

G. Kent agrees that a new fisheries agency should be initially limited although he rejects the multiphase approach.[356] Under his scheme, the agency's scope of authority to manage the fisheries would be narrowly limited, but where it did have authority, its powers would be strong. Thus, in the area of conservation, individual nations might retain the authority to manage fish stocks off their coast, but the agency would be empowered to intervene if a nation permitted sustained overexploitation, or otherwise abused its powers. If the new agency proved successful, its scope of authority could be expanded.

The Papua New Guinea government,[357] along with others,[358] has pro-

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[354] Kearney (1977), *supra* note 2, at 26-28.

[355] *See* note 9 *supra*.

[356] G. Kent, *supra* note 12, at 161-64.

[357] Letter from Jacob Lemeki, Acting Minister for Foreign Affairs and Trade of Papua New Guinea to Congressman John Breaux, Chairman, House and Merchant Marine Sub-

posed a two-tiered system of management over highly migratory species in the South Pacific. The Forum countries would exclusively comprise one agency, much like the SPFFA, but membership in the second agency would be open to other interested countries. The larger agency's functions would be limited to research, development, and recommendations of measures for conservation and optimum utilization of the stocks. It would have little actual management authority and no regulatory powers. The larger agency would report to the smaller agency, and act as its research and development arm. Assuming agreement by all members, the limited membership agency would determine common terms of access, fees, licenses, and taxes; set overall and national catch quotas if needed; redistribute revenue; and direct surveillance. The area covered by the regional agency would include the pockets of high seas enclosed by the exclusive economic zones of Forum nations. Distant water fishing vessels would be required to purchase a license and to pay a fee based on the amount of fish harvested from each nation's exclusive economic zone. This license would allow a vessel to fish anywhere within the region, subject to the laws and regulations of each coastal nation. Members could restrict fishing within their respective zones to a class of vessels, to certain areas, to certain species, or to certain nations. As a condition to licensing, all distant water fishing nations would carry a transmitter which would automatically give the daily location and name of the vessels via satellite to a regional control center. Further, each vessel would be required to fill out a daily log to be sent to the agency. This data would then be checked against data relayed to the control center by satellite.

Experts agree as to the advantages of having a strong fishing agency with actual management powers as opposed to an advisory agency such as the SPFFA as presently constituted. However, the legal issue still remains as to whether this type of management scheme complies with the requirements of the emerging relevant international law. A related question pertains to the type of regional organization United States law requires. This latter question is important because United States participation in the licensing negotiations for fishing rights in the South Pacific region could benefit Forum members significantly. The next sections will analyze the legal requirements for a new regional fisheries organization under United States legislation, and under the 1980 LOS Draft Convention.

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committee on Fisheries, Congress of the United States (May 8, 1980) [hereinafter cited as Breaux Letter].

[258] Hawkins, *Fisheries: One For the Forum—One For Everybody*, PAC. ISLANDS MONTHLY, July, 1979, at 83; T. Friend, An Economist's Perspective on the Need for a Stronger Forum Fisheries Agency in the Southwest Pacific 32-63 (Unpublished paper for the Food Project, Resource Systems Institute, East-West Center) (1980) [hereinafter cited as Friend.]; Wilson Letter, *supra* note 35.

B. *The United States Fishery Conservation and Management Act of 1976*

The United States Fishery Conservation and Management Act of 1976 (FCMA)[259] is important to the Forum nations for three reasons. First, by not complying with United States law, the South Pacific nations could inhibit, rather than encourage United States participation in their fisheries. Second, by reaching an agreement with the United States on the issue of highly migratory species, the Forum nations could avoid conflict with the United States and the economic retaliation provided for by the FCMA. Finally, the FCMA provides at least one country's view on the meaning of "conservation and management," terms which neither the SPFFA Convention nor the 1980 LOS Draft Convention define.

The FCMA prohibits the importation of fish and fish products into the United States from any nation that seizes a United States vessel beyond its territorial sea under a jurisdictional claim not recognized by the United States.[260] It also prohibits the United States from recognizing a fishing zone claimed by any country that "fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements."[261] The FCMA defines "highly migratory species" as tuna,[262] and defines "international fishery agreement" as a fishing agreement, convention or treaty to which the United States is a party.[263] The FCMA does not define the term "manage." However, the term "conservation and management" is defined as all rules, regulations, and other measures required to maintain or restore any fishery resource, and assure that fishery resources can be taken on a continuing basis with options available for future uses of these resources.[264] The exact duties of the regional or international agency are left open by the FCMA, but the definition of management and conservation is broad enough to include all those duties required to manage the fish stocks in such a way as to ensure their continued supply for a variety of uses. Missing from the definition, however, is the requirement that fish stocks be managed so as to ensure maximum or optimal economic returns.

A tuna fishery agreement for the South Pacific region would thus satisfy the requirements of the FCMA if the United States were a party to the agreement and the organization established by the agreement were given the management and conservation powers needed to maintain tuna stocks and assure their continued supply for a variety of uses.

The two-tiered agency approach may not satisfy the FCMA's literal re-

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[259] 16 U.S.C. §§ 1801-1882 (1976). *See also* text accompanying notes 52-57 *supra*.
[260] 16 U.S.C. § 1825 (1976). *See* note 52 *supra*.
[261] 16 U.S.C. § 1822 (1976).
[262] 16 U.S.C. § 1803(14) (1976).
[263] 16 U.S.C. § 1803(15) (1976).
[264] 16 U.S.C. § 1802(2) (1976).

quirements because the organization to which the United States would belong would be only an advisory body with no rule-making powers. Three reasons exist, however, why the United States might be willing to accept such a management scheme for highly migratory species, and thus loosely interpret the FCMA. First, the broad based agency *would* have advisory power with respect to conservation of the tuna resources. Second, the FCMA does not explicitly state that tuna management by international agreement must include such regulations as fee schedules, national quotas, and surveillance and enforcement regulations. Finally, and perhaps most important, such an agency would satisfy the United States' concern that all nations participating in the region's fisheries cooperate, at least to the extent of ensuring the conservation of the highly migratory resources.

C. The Third United Nations Law-of-the-Sea Conference and Emerging International Law

The most crucial concern of the SPFFA with regard to the Law-of-the-Sea treaty that now appears to be reaching final form is the power of the agency in relation to its member nations and to the non-member nations, that is, the extent to which members of the SPFFA would have to recognize the regulatory power of an open-membership organization to manage and conserve the highly migratory species. More specifically, to what extent must the SPFFA members share their power and duties concerning the highly migratory species with the distant water fishing nations?

It must be remembered that notwithstanding the SPFFA's significance in being the first regional fisheries organization in the South Pacific, the Forum nations intended it to be merely advisory. Its convention grants the SPFFA only limited duties, for example, to collect data and provide advice and assistance to member nations upon their request.[365] The SPFFA Convention[366] reserves ultimate management and conservation responsibilities over living marine resources within the 200-mile zones, including the highly migratory species, to the individual coastal nations.[367] Moreover, as previously established, because of its limited membership, the SPFFA does not fulfill the mandate of Article 64 of the 1980 LOS Draft Convention for a broad based fisheries agency.[368] How would the SPFFA operate under the 1980 LOS Draft Convention?

The 1980 LOS Draft Convention is ambiguous on how the highly migratory species should be regulated within individual nations' 200-mile zones. Article 64 of the 1980 LOS Draft Convention states that coastal

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[365] SPFFA Convention, *supra* note 10, art. VII.

[366] Omitted.

[367] SPFFA Convention, *supra* note 10, art. III(1).

[368] *See* text accompanying notes 7 & 216-253 *supra*.

nations and nations fishing for highly migratory species shall cooperate in the conservation and promotion of optimum utilization of such species.[269] On the other hand, Article 56 gives to the coastal nation sovereign rights over the natural resources within its exclusive economic zone.[270] These sovereign rights include the power to conserve and manage the living resources. The article makes no exception for highly migratory species. Further, Article 61 directs the coastal nation to determine the allowable catch of the living marine resources within its exclusive economic zone[271] and to maintain each species at the maximum sustainable yield.[272] Article 62 requires coastal nations to promote the optimum utilization of the living resources within their exclusive economic zone[273] and to allocate the "surplus" catch to other nations.[274] This latter article also permits the coastal nation to establish regulations relating to licensing, catch quotas, and enforcement procedures.[275]

Given the unqualified language of Articles 56, 61, and 62, the degree of management authority that Article 64 gives to a regional agency over highly migratory species and the exact role of such an organization remains ambiguous. The negotiating history of the Third United Nations Law-of-the-Sea Conference (UNCLOS III) sheds some light on these issues.

1. *Pre-Caracas Discussion*

During the negotiations in the early 1970's, the United States opposed extending exclusive fishing zones to 200 miles, and submitted a draft article giving coastal nations jurisdiction over *coastal species* to the full extent of their migratory range.[276] However, it also suggested that *highly migratory species* be managed by an international or regional organization.[277] Japan and Russia also opposed the 200-mile zone idea but called

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[269] *See* text accompanying note 7 *supra*.

[270] 1980 LOS Draft Convention, *supra* note 7, art. 56(1).

[271] *Id.* art. 61(1).

[272] *Id.* art. 61(3).

[273] *Id.* art. 62(1).

[274] *Id.* art. 62(2).

[275] *Id.* art. 62(4).

[276] Draft Article on the Breadth of the Territorial Sea, Straits, and Fisheries, Submitted to Sub-Committee II by the United States of America. U.N. Doc. A/AC.138/SC.II/L.4 (Aug. 3, 1971). G. KNIGHT, *supra* note 6, at 58-59; Hollick, *United States Ocean Politics*, 10 SAN DIEGO L. REV. 467, 489 (1973). *See also* Stevenson & Oxman, *The Preparations for the Law-of-the-Sea Conference*, 68 AM. J. INT'L L. 1, 14 n.45, 20-22 (1974) [hereinafter cited as *Preparations for LOS*] for a discussion on and cites to the draft fisheries articles submitted to the Seabed Committee by the Union of Soviet Socialist Republics; Japan; the United States; Australia and New Zealand; Bulgaria, Czechoslovakia, Hungary, Poland, and the Union of Soviet Socialist Republics; Canada; India, Kenya, Madagascar, Senegal, and Sri Lanka; Ecuador, Panama, Peru, and Zaire.

[277] *Preparations for LOS*, *supra* note 276, at 21.

for offshore preferential fishing rights for developing countries.[278] However, Japan and Russia would not have extended preferential fishing rights to highly migratory species. Other delegations remained virtually silent on the issue[279] and the effect of other proposals is unclear.[280]

During the early negotiations, many nations did stress the need to continue international and regional fishery commissions.[281] Every comprehensive fisheries proposal referred to international fishery arrangements in either permissive or mandatory language,[282] and delegates spoke in favor of the continuation of such commissions. Norway's representative, Jen Evensen, although unwilling to commit his country to any specific proposal, spoke for many others present when he stressed that it was "necessary to strengthen the scope and powers of international and regional fisheries organizations with respect to the conservation of the living resources of the sea, the management and allocation of fisheries and the settlement of the disputes."[283]

2. *The Caracas Session (1974)*

During the Caracas Session of the Conference, over 100 nations spoke in favor of a 200-mile exclusive economic zone,[284] and a strong consensus began to emerge on this concept. Advocates of the 200-mile zone disagreed, however, on many important issues, notably on the role of regional and international organizations in fisheries management and on special provisions for highly migratory species.[285]

The Second Committee of the Conference summarized the major themes emerging from proposals submitted to the Seabed Committee, and produced the "Main Trends" working paper.[286] This paper outlined two alternative positions with specific and detailed provisions on the functions and powers of regional organizations to manage highly migratory species. "Formula A", based in part on the United States proposals,[287] would have allowed coastal nations to regulate fishing for highly migratory species within their fishing zones, but only in accordance with

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[278] G. KNIGHT *supra* note 6, at 59-60; Gutteridge, *The U.N. and the Law of the Sea*, in NEW DIRECTIONS IN THE LAW OF THE SEA 322 (P. Churchill, K. Simmonds, J. Welch eds. 1973) [hereinafter cited as Gutteridge]; *Preparations for LOS*, *supra* note 276, at 21.

[279] *Preparations for LOS*, *supra* note 276, at 23.

[280] *Id.* at 22.

[281] *Id.* at 20; Gutteridge, *supra* note 278, at 322-23.

[282] *Preparations for LOS*, *supra* note 276, at 20.

[283] U.N. Doc. A/AC.138/SC.II/SR.33-47 (Nov. 29, 1972).

[284] Stevensen & Oxman, *The Third United Nations Conference on the Law-of-the-Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 16 (1975) [hereinafter cited as *Caracas Session*]; Taft, *supra* note 12, at 113.

[285] Taft, *supra* note 12, at 113.

[286] U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974).

[287] U.N. Doc. A/Conf.62/C.2/L.47 (Aug. 8, 1974), Art. 19.

regulations established by the appropriate regional or international organizations.[288] The organizations would have had the responsibility for setting catch quotas, other conservation measures, and fees. All coastal nations in the region and any other country whose nationals fished for highly migratory species would participate.[289]

"Formula B" was based on a draft submitted by Australia and New Zealand.[290] This formula also proposed that highly migratory species be managed by regional or international organizations,[291] but it differed from "Formula A" in one major respect. The Director-General of the Food and Agriculture Organization (FAO) was to decide, upon request by a coastal or distant water fishing nation, whether the highly migratory species of a region required the establishment of a regional agency.[292] The FAO Director-General was also to be responsible for designating the members of the organization.

3. *The 1975 Geneva Session*

By the time the Geneva session began, the highly migratory species issue had become so contentious that no agreement could be reached.[293] The issue was raised by the "Evensen Group," forty nations representing all regions that met informally under the leadership of Jen Evensen of Norway.[294] Article 12 of the Evensen Group draft represented a final attempt by the United States and the Union of Soviet Socialist Republics to develop a compromise whereby the coastal nation could regulate fishing for highly migratory species within its 200-mile zone, but cooperate with others through an international organization.[295] The proposed organization would have set the fishing standards and would have made recommendations to ensure conservation and optimum utilization, including recommendations concerning catch and allocation, permits, a uniform fee system, and penalties.[296] The organization itself would have decided which regulations were to be binding on member nations, and which were

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[288] U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974), Provision 112, Formula A.

[289] *Id.*

[290] U.N. Doc. A/Conf.62/C.2/L.57 Rev. 1 (Aug. 13, 1974).

[291] U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974), Provision 112, Formula B.

[292] *Id.*

[293] STAFF OF SUBCOMMITTEE ON MINERALS, MATERIALS, AND FUELS, SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, STATUS REPORT ON THE LAW-OF-THE-SEA CONFERENCE, 94th Cong., 1st Sess., pt. 3, at 1236 (1975) [hereinafter cited as STATUS REP. ON LOS]; Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The Geneva Session*, 69 AM. J. INT'L L. 763, 779 n.32 (1975).

[294] STATUS REP. ON LOS, *supra* note 293, at 1218.

[295] Miles, *An Interpretation of the Geneva Proceedings, Part III*, 3 OCEAN DEV. & INT'L L. 303, 309-10 (1976).

[296] *Id.* at 331-32.

to be merely advisory.[297] The proposed article would have protected coastal nations by requiring a two-thirds majority vote, including the votes of *all coastal nations* present,[298] to adopt any regulation or recommendation.

Few nations liked the proposed article. The Japanese, the Group of 77,[299] and their allies all argued strongly against it.[300] Consequently, during their last meeting, the Evensen Group withdrew the proposal and left the article on highly migratory species blank.

4. *After the 1975 Geneva Session*

At the close of the Geneva Session, the Conference produced the Informal Single Negotiating Text (ISNT) to serve as a basis for future negotiations. The provision on highly migratory species (Article 53) is identical to Article 64 of later negotiating texts including the 1980 LOS Draft Convention.[301] The United States, pressured by the powerful tuna industry, still sought to amend the article at the New York session in 1980 to give regional fisheries commissions explicit and detailed management and conservation powers over highly migratory species.[302] The revised version of the text produced after this session, however, contained no changes regarding highly migratory species.[303] In short, the 1980 LOS Draft Convention's uncertain treatment of the highly migratory species issue represents a major disagreement by the participants.

5. *Management of Highly Migratory Species Under Emerging International Law*

Clearly the highly migratory species controversy remains unsettled. The extent to which coastal nations must share or coordinate conservation and management authority with a regional organization is still open for debate. Some experts argue that the 1980 LOS Draft Convention places no restrictions whatsoever on the coastal nation to manage tuna within its own exclusive economic zone. One writer,[304] for example, has asserted that the governing article

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[297] STATUS REP. ON LOS, *supra* note 293, at 1237.

[298] Miles, *supra* note 295, at 331-32.

[299] The Group of 77 consists of a large number of mostly under-developed countries.

[300] Miles, *supra* note 295, at 310.

[301] *See* 1980 LOS Draft Convention, *supra* note 7, art. 64.

[302] Interview with Choon-Ho Park, Research Associate, East-West Center, in Honolulu (March 5, 1980).

[303] 1980 LOS Draft Convention, *supra* note 7, art. 64.

[304] Interview with Dr. Gary Knight, Campanile Professor of Marine Resources Law, Louisiana State University Law Center (March 6, 1980).

> merely *requests* the coastal state and states whose nations fish for tuna to cooperate on their conservation and optimum utilization either directly or through appropriate international organizations. Where these do not exist, the parties are *requested* to cooperate to establish them. There are again no restrictions on the authority of the coastal state to regulate tuna fisheries occurring within the Exclusive Economic Zone.[305]

Others have argued that Article 64 does not represent a consensus because no agreement could ever be reached in the Evensen Group on provisions for highly migratory species.[306] Coastal nations could also legitimately contend that a regional fisheries agency need not be given actual management and conservation duties because during the Law-of-the-Sea negotiations only the United States and a few other nations supported such proposals.

The language of Article 64 and the negotiating history of UNCLOS III present another side to the highly migratory species controversy which tends to refute the notion that the 1980 LOS Draft Convention places no restrictions on the coastal nation to manage tuna within its 200-mile zone. First, the language of Article 64 is cast in mandatory terms. Article 64 states that coastal nations and distant water fishing nations *shall* cooperate directly or through appropriate international organizations in the conservation of highly migratory species and *shall* cooperate to establish appropriate international organizations in regions where none exist.[307] Second, a coastal nation is not given unfettered discretion over living marine resources within its exclusive economic zone. Article 56, for example, directs the coastal nation, in exercising its rights in the exclusive economic zone, to "have due regard to the rights and duties of other States" and to "act in a manner compatible with the provisions of the present Convention."[308] The mandate of Article 61—to ensure the "conservation of the living resources"[309]—reflects one of the major goals of UNCLOS III. Biologists agree that the conservation of highly migratory species will be possible only with the cooperation of *all* nations in whose waters the species travel or spawn and *all* distant water fishing nations.[310] Third, throughout the negotiations of UNCLOS III, nations recognized the need for strengthening or at least continuing international and regional fishery organizations.[311] Finally, the "practice of nations" throughout the world (at least until very recent years) would counter the argument that a coastal nation may manage highly migratory species within its exclusive

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[305] Miles, *supra* note 295, at 310 (emphasis added).

[306] STATUS REP. ON LOS, *supra* note 293, at 1204.

[307] 1980 LOS Draft Convention, *supra* note 7, art. 64(1).

[308] *Id.* art. 56(2).

[309] *Id.* art. 61.

[310] *See* JOSEPH (1979), *supra* note 6; KEARNEY (1977), *supra* note 2; S. SAILA & V. NORTON, *supra* note 6. *See also* text accompanying notes 4-6, 18 *supra*.

[311] *See* text accompanying notes 281-92 *supra*.

economic zone without restriction.[312] Since 1966, coastal nations bordering the eastern Pacific Ocean, for example, have delegated various conservation and mangement powers to the IATTC, such as setting the total allowable catch and the fishing season for yellowfin tuna.[313] The new tuna agreement for the eastern Pacific currently being negotiated may grant the regional agency additional management duties, including the allocation of national quotas, the setting, collection, and redistribution of fees, and the establishment of surveillance and enforcement regulations (although the coastal nations are insisting on greater rights over the resources adjacent to their shores).[314]

Based on the language of Article 64 and other articles of the 1980 LOS Draft Convention, on the negotiating history of UNCLOS III, and on the somewhat ambiguous "practice of nations," emerging international law arguably requires, at a minimum that a broad-based regional fisheries agency be established whose membership includes the coastal nations and island territories of the South Pacific region, other nations in whose waters highly migratory species travel or spawn and distant water fishing nations. Further, a certain degree of cooperation is required from the member nations to ensure the conservation of highly migratory species.

A two-tiered management plan, as outlined above,[315] would seem to comply with emerging international law. Most important, the broad-based body would satisfy the requirement that membership be open to all states concerned. Moreover, cooperation among members to ensure conservation of the highly migratory species would be achieved at least to the extent that this open-membership body would be empowered to perform necessary scientific studies and to recommend conservation measures, such as catch quotas, for any species requiring such regulation. The limited membership body would further ensure the conservation of the highly migratory species for two reasons. First, the Forum nations would be required to cooperate among themselves to carry out such management duties as issuing licenses, setting, collecting, and redistributing fees, determining common terms of access, setting catch quotas, and establishing surveillance and enforcement regulations. Second, the Forum nations would cooperate with the larger membership body at least to the extent that they would take into account this body's recommendations on the conservation of highly migratory species.

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[312] *See* text accompanying notes 221-33 *supra*.

[313] *See* text accompanying notes 89-90 *supra*.

[314] *See* text accompanying notes 111-28 *supra*.

[315] *See* text accompanying notes 257-58 *supra*.

D. Benefits of a Strong Regional Agency and of the Two-Tiered Approach to Fisheries Management in the South Pacific Region

The stated concern of the nations comprising the South Pacific Forum, to "secure the maximum benefits from the living marine resources of the region,"[316] will require a common approach to fisheries management and conservation through a strong regional fisheries agency. Such an agency should be delegated specific duties, including broadly based research and, as agreed upon by the member nations, common terms of access, licensing, revenue collection and redistribution, surveillance, and conservation regulations. The Forum nations could create such an agency by strengthening and expanding the SPFFA's responsibilities. At the same time, cooperation by foreign fishing nations and non-Forum resource adjacent nations could be gained through including them in a second, broadly based agency. This greater cooperation is one of the chief benefits of the two-tiered system. Other advantages of a strong regional fisheries agency and the two-tiered approach are discussed below.

1. Conservation and Research

The highly migratory nature of the resources, the variability in catch, and the mobility of the fishing fleets have convinced biologists that fisheries magnagement in the South Pacific requires a regional approach.[317] Although the SPFFA has set up a small research body,[318] all the nations participating in the fisheries are not currently included, and a non-member fishing nation that refused to cooperate in monitoring a species could make the agency's work pointless.[319] A broadly based regional agency could play a vital role in providing resource assessment and analysis over the *entire* range of any species both within the region and on the high seas.

Experts have pointed out that future development and management strategies will be directed towards optimizing socio-economic returns from the harvest.[320] Conservation of the skipjack species is unlikely to be a significant issue in the near future because skipjack resources for the

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[316] SPFFA Convention, *supra* note 10, preamble.

[317] *See* text accompanying notes 18-19 & 289-93 *supra;* SPF(77)13 (1977) *supra* note 21, at Annex 2. Papua New Guinea Dep't of Primary Industry, Regional Management Programme, Discussion Paper on the SPFFA (no date) (received with Wilson Letter, *supra* note 35, on Nov. 2, 1980) [hereinafter cited as PNG Discussion Paper].

[318] *See* text accompanying note 204 *supra.*

[319] Friend, *supra* note 258, at 58-59.

[320] KEARNEY (1979), *supra* note 16, at 58; Friend, *supra* note 258, at 34-40; SPC Secretariat, Some Economic Aspects of the Development and Management of the Fisheries in the Central and Western Pacific 3, 3-15, SPConf. 20/WP.14 (1980) [hereinafter cited as SPConf. 20/WP.14].

Pacific region appear currently to be under-exploited.[321] Monitoring the species over their entire range will, however, continue to be an important task in the event some species do require conservation.[322] With the perfection of purse-seining techniques, for example, large-scale fishing could result in the rapid depletion of a species.[323] In this regard, the IATTC demonstrates the importance of research, for when it was shown that yellowfin tuna had become overfished, the Commission initiated a regulatory program for the conservation of yellowfin.[324] Biologists do not know what impact surface fishing will have on the resources of the larger tuna species, particularly yellowfin and bigeye, and it is impossible to predict if the present yields of these species can be maintained.[325] Thus, in order to be effective, the study and conservation of the highly migratory species should involve *all* nations participating in the fisheries and *all* nations with resources in the region through a broadly based agency.

2. *Negotiations, Licensing, and Access*

The member nations of the SPFFA could help to increase the benefits from their resources by implementing common policies on access and licensing and presenting a united front for negotiations with the distant water fishing nations.[326] A strong power block could serve as a cartel, drawing its power from its control over resources that others desired.[327] The present system, where nations negotiate *individually* with foreign countries, encourages Forum nations to compete with each other to sell fishing rights by lowering their fees. By preventing competitive undercutting, the SPFFA could demand better terms in licensing foreign fishing vessels, selling fish, and establishing joint ventures. In addition, the Agency could increase the flow of benefits to the nations with smaller fishery zones, thereby lessening the gap between rich and poor in the region.[328]

Uniform, regional licensing would also solve a problem faced by the distant water fishing vessels. The fish they seek are highly migratory, making it difficult for them to predict where concentrations of fish will be

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[321] KEARNEY (1979), *supra* note 16, at 58; Friend, *supra* note 258, at 35; JOSEPH (1979), *supra* note 6, at 12.

[322] Breaux Letter, *supra* note 257.

[323] Friend, *supra* note 258, at 35.

[324] *See* text accompanying note 90 *supra*.

[325] KEARNEY (1979), *supra* note 16, at 59; Friend, *supra* note 258, at 35-40.

[326] KEARNEY (1979), *supra* note 16, at 59-60; G. KENT, *supra* note 12, at 162; SPF(77)13, *supra* note 21, at 3-6; SPFFA, The Economic Aspects of Fisheries Development and Management, SPConf. 20/WP.11 (1980).

[327] G. KENT, *supra* note 12, at 162; Friend, *supra* note 258, at 4; *PNG Discussion Paper*, *supra* note 317.

[328] G. KENT, *supra* note 12, at 137-47.

found,[329] and accordingly, from which nations to buy licenses. Because most fishing ventures already operate on small profit margins (5-10%), vessels from distant water fishing nations may be unable to pay individual access fees to every nation in the region.[330] By offering access to the region under the uniform conditions, the Forum nations would give foreign fishing vessels the opportunity to range freely without concern for national licenses and boundaries. Only when these vessels operate effectively and profitably can the region fully realize the economic benefit of its fisheries resources.

3. *Surveillance and Enforcement*

Serious problems exist in providing adequate surveillance and enforcement for this vast region. A major concern at the twentieth South Pacific Conference, held in October 1980 at Port Moresby, Papua New Guinea, was the poachers from foreign countries.[331] Experts have recognized that conventional methods of policing by boats and airplanes are inadequate because of the immense ocean area involved. They suggest the addition of a satellite system.[332] Such a system would clearly require regional cooperation to share the high cost and avoid duplication of facilities.[333] A regional approach could also facilitate the enforcement of access fee payments, licensing, and conservation regulations.[334]

4. *Summary*

A two-tiered approach to fisheries management in the South Pacific region presents several distinct advantages. First, such a system complies with both international and United States law. Further, including the distant-water fishing nations in a regional agency will encourage their participation in the fisheries and their cooperation in research and conservation. Distant water fishing countries that were members would be more inclined to contribute aid and expertise to the SPFFA because the benefits of having such an agency would also accrue to them. Finally, the two-tiered approach allows the island nations to retain control over their fisheries resources.

For these reasons, a strong regional fishing agency with specific conservation and management duties, combined with a broadly based agency

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[329] SPF(77)13 Annex, *supra* note 21, at 3-4; KEARNEY (1977), *supra* note 2, at 6; Friend, *supra* note 258, at 12.

[330] KEARNEY (1979), *supra* note 16, at 59.

[331] Honolulu Advertiser, Jan. 12, 1981, § A, at 6, col. 1.

[332] KEARNEY (1977), *supra* note 2, at 13; Friend, *supra* note 258, at 53-56.

[333] Friend, *supra* note 258, at 53-56. *See also* Christy, *supra* note 6, at 234-35.

[334] *Id.*

with research responsibilities, will help the Forum nations realize their goal of maximizing yields and optimizing the socio-economic returns from their ocean resources.

V. Conclusion and Summary

From a biological perspective, highly migratory species should be managed on a regional basis. Any management scheme should encompass the entire range of these species and involve the participation of all nations and territories whose waters these fish migrate through and spawn in, as well as the participation of all foreign fishing nations. The actual management of highly migratory tunas is plagued, however, with complex legal, political, and operational problems. The South Pacific island countries regard tuna temporarily in their fishing zones as their own property and subject to each individual nation's management, authority and control. United States legislation requiring tuna to be managed by international agreement clashes with the Forum countries' stance on highly migratory tuna. These United States laws have created significant tension between the island nations and the United States. The successive negotiating texts of UNCLOS III, including the 1980 Draft Convention, all recognize the need for, and call for international and regional cooperation to ensure the conservation and optimum use of highly migratory species. Simultaneously, however, these negotiating texts also grant to the coastal nations sovereign rights to exploit and manage the tunas within their exclusive economic zones.

Certain principles have emerged from arrangements in other regions and from the negotiating texts of UNCLOS III to reconcile the conflicting interests and viewpoints. First, coastal nations should have a preference in harvesting their living marine resources. They are obligated, however, to share any fish surplus with other countries. A specific preference is available to the developing nations in the region, though the contours of this preference remain ambiguous. Nations that have traditionally fished in the region or within a coastal nation's exclusive economic zone should be allowed to continue to fish there if the coastal nation lacks the capacity to harvest all of its fish. The 1980 Draft Convention and the 1974 *Iceland Fisheries Case* both recognize some limited historical fishing rights of a non-coastal nation, particularly when that nation would experience economic dislocation or hardship if denied access to its traditional fishing grounds.

Cooperation and negotiation to resolve disputes and ensure the conservation of highly migratory tunas have also emerged as guiding principles. Cooperation in the management of tuna is desirable between the Forum nations and the foreign fishing powers, and among the island nations themselves, both within the exclusive economic zones and on the high seas. The Forum countries have recognized that effective cooperation will

require additional international machinery. The SPFFA may provide the beginning of such cooperation, but greater cooperative efforts must clearly be sought. An agency composed of the Forum countries, other nations in whose waters the fish migrate or spawn, and distant water fishing nations should be established in order to obtain adequate biological data, to provide sound management advice, and to resolve disputes and develop a more active dialogue between the island nations and the foreign fishing powers. The SPFFA is the start of cooperative efforts among the island nations themselves. In order to secure the maximum benefits from their vast ocean resources, however, the Forum nations need to establish a fisheries body with broad regulatory management authority rather than weak advisory duties.

A two-tiered management approach appears to be a good strategy, at least for now. The developing island nations will benefit from having a forum where they can meet together to work out their own problems and differences, assess their own needs, and control the development of their fisheries. A second fisheries organization with a broad membership is needed to provide overall management advice and to assist with surveillance and enforcement. The enforcement and surveillance of tuna fisheries in this vast ocean region will be costly and difficult. Forum nations have already begun to experience problems with poachers from foreign countries. A regional agency with as much pooling of resources and with as much cooperation as the political and economic circumstances of the time permit, could help the island nations resolve their serious enforcement and surveillance dilemma.

The island communities of the South Pacific have already established an excellent reputation for working together to develop regional organizations to meet their collective needs. They have also been able to maintain good relations with the developed nations interested in the region. It should not be difficult to create a two-tiered formula for tuna management that will both preserve the community interests of the islands and also promote sound management and conservation by all the nations harvesting the highly migratory species.

Appendix A

SOUTH PACIFIC FORUM FISHERIES AGENCY

CONVENTION

THE GOVERNMENTS COMPRISING THE SOUTH PACIFIC FORUM

Noting the Declaration on Law of the Sea and a Regional Fisheries Agency adopted at the 8th South Pacific Forum held in Port Moresby in August 1977;

Recognising their common interest in the conservation and optimum utilisation of the living marine resources of the South Pacific region and in particular of the highly migratory species;

Desiring to promote regional co-operation and co-ordination in respect of fisheries policies;

Bearing in mind recent developments in the law of the sea;

Concerned to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries; and

Desiring to facilitate the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information about the living marine resources of the region, and in particular the highly migratory species;

HAVE AGREED AS FOLLOWS:

Article I

Agency

1. There is hereby established a South Pacific Forum Fisheries Agency.
2. The Agency shall consist of a Forum Fisheries Committee and a Secretariat.
3. The seat of the Agency shall be at Honiara, Solomon Islands.

Article II

Membership

Membership of the Agency shall be open to:
(a) members of the South Pacific Forum
(b) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum.

Article III

Recognition of Coastal States' Rights

1. The Parties to this Convention recognise that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.
2. Without prejudice to Paragraph (1) of this Article the Parties recognise that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.

Article IV

1. The Committee shall hold a regular session at least once every year. A special session shall be held at any time at the request of at least four Parties. The Committee shall endeavour to take decisions by consensus.
2. Where consensus is not possible each Party shall have one vote and decisions shall be taken by a two-thirds majority of the parties present and voting.
3. The Committee shall adopt such rules of procedure and other internal administrative regulations as it considers necessary.
4. The Committee may establish such sub-committees, including technical and budget sub-committees as it may consider necessary.
5. The South Pacific Bureau for Economic Co-operation (SPEC) may participate in the work of the Committee. States, territories and other international organisations may participate as observers in accordance with such criteria as the Committee may determine.

Article V

Functions of the Committee

1. The functions of the Committee shall be as follows:
   (a) to provide detailed policy and administrative guidance and direction to the Agency;
   (b) to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
   (c) to carry out such other functions as may be necessary to give effect to this Convention.
2. In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:
   (a) harmonisation of policies with respect to fisheries management;
   (b) co-operation in respect of relations with distant water fishing countries;
   (c) co-operation in surveillance and enforcement;
   (d) co-operation in respect of onshore fish processing;
   (e) co-operation in marketing;
   (f) co-operation in respect of access to the 200 mile zones of other Parties.

Article VI

Director, Staff and Budget

1. The Committee shall appoint a Director of the agency on such conditions as it may determine.
2. The Committee may appoint a Deputy Director of the Agency on such conditions as it may determine.
3. The Director may appoint other staff in accordance with such rules and on such conditions as the Committee may determine.
4. The Director shall submit to the Committee for approval:
   (a) an annual report on the activities of the Agency for the preceding year;
   (b) a draft work programme and budget for the succeeding year.
5. The approved report, budget and work programme shall be submitted to the Forum.
6. The budget shall be financed by contributions according to the shares set out in the Annex to this Convention. The Annex shall be subject to review from time to time by the Committee.
7. The Committee shall adopt financial regulations for the administration of the finances of the Agency. Such regulations may authorise the Agency to accept contributions from private or public sources.
8. All questions concerning the budget of the Agency, including contri-

butions to the budget, shall be determined by the Committee.

9. In advance of the Committee's approval of the budget, the Agency shall be entitled to incur expenditure up to a limit not exceeding two-thirds of the preceding year's approved budgetary expenditure.

Article VII

Functions of the Agency

Subject to direction by the Committee the Agency shall:

(a) collect, analyse, evaluate and disseminate to Parties relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migratory species;

(b) collect and disseminate to Parties relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region;

(c) collect and disseminate to Parties relevant information on prices, shipping, processing and marketing of fish and fish products;

(d) provide, on request, to any Party technical advice and information, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licences, the collection of fees or in matters pertaining to surveillance and enforcement;

(e) seek to establish working arrangements with relevant regional and international organisations, particularly the South Pacific Commission; and

(f) undertake such other functions the Committee may decide.

Article VIII

Legal Status, Privileges and Immunities

1. The Agency shall have legal personality and in particular the capacity to contract, to acquire and dispose of movable and immovable property and to sue and be sued.
2. The Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable.
3. Subject to approval by the Committee the Agency shall promptly conclude an agreement with the Government of Solomon Islands providing for such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency.

Article IX

Information

The Parties shall provide the Agency with available and appropriate information including:

(a) catch and effort statistics in respect of fishing operations in waters under their jurisdiction or conducted by vessels under their jurisdiction;
(b) relevant laws, regulations and international agreements;
(c) relevant biological and statistical data; and
(d) action with respect to decisions taken by the Committee.

Article X

Signature, Accession, Entry into Force

1. This Convention shall be open for signature by members of the South Pacific Forum.
2. This Convention is not subject to ratification and shall enter into force 30 days following the eighth signature. Thereafter it shall enter into force for any signing or acceding state thirty days after signature or the receipt by the depositary of an instrument of accession.
3. This Convention shall be deposited with the Government of Solomon Islands (herein referred to as the depositary) who shall be responsible for its registration with the United Nations.
4. States or territories admitted to membership of the Agency in accordance with Article II(b) shall deposit an instrument of accession with the depositary.
5. Reservations to this Convention shall not be permitted.

Article XI

Withdrawal and Amendment

1. Any Party may withdraw from this Convention by giving written notice to the depositary. Withdrawal shall take effect one year after receipt of such notice.
2. Any Party may propose amendments to the Convention for consideration by the Committee. The text of any amendment shall be adopted by a unanimous decision. The Committee may determine the procedures for the entry into force of amendments to this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorised

thereto by their respective Governments, have signed this Convention

Opened for signature at Honiara this 10th day of July, 1979.

For the Government of Australia:

For the Government of the Cook Islands:

For the Government of Fiji:

For the Government of Kiribati:

For the Government of Nauru:

For the Government of New Zealand:

For the Government of Niue:

For the Government of Papua New Guinea:

For the Government of Solomon Islands:

For the Government of Tonga:

For the Government of Tuvalu:

For the Government of Western Samoa:

ANNEX

The following are the shares to be contributed by Parties to the Convention towards the budget of the Agency in accordance with Article VI(6):

Australia	1/3
Cook Islands	1/30
Fiji	1/30
Kiribati	1/30
Nauru	1/30
New Zealand	1/3
Niue	1/30
Papua New Guinea	1/30
Solomon Islands	1/30
Tonga	1/30
Tuvalu	1/30
Western Samoa	1/30

INTERNAL REVENUE CODE SECTION 4942: ITS IMPACT ON PRIVATE FOUNDATIONS

Private foundations[1] have had a profound impact on American society. Their unique flexibility has allowed them to act as an impetus for change in American philanthropy by directing funds towards new and innovative programs not otherwise widely supported by private contributions.[2] Unlike operating charitable organizations that work with funds consigned to fixed budgets and programs, private foundations, whose assets are free of commitment to any specific program, can shift their financial support between projects with relative ease.[3] Their independence and autonomy enable them to pass benefits to society by means unavailable to government and other public institutions.[4] In harnessing "the energies and finances of private citizens to humane, experimental, creative and controversial purposes, [the private foundation] may well be a prerequisite to the continu-

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[1] The Foundation Center, a clearinghouse for information on private foundations, defines the private foundation as a nonprofit, nongovernmental organization "set up as a corporation or trust, usually under state laws, to receive and distribute funds for the advancement of human welfare. [Its] funds typically come from the investment of [its] principal, or corpus, which consists of gifts and bequests from [its] founders." FOUNDATION CENTER, PHILANTHROPIC FOUNDATIONS IN THE UNITED STATES 7 (1969) [hereinafter cited as PHILANTHROPIC FOUNDATIONS]. Critics such as the late Representative Wright Patman, a staunch watchdog against foundation abuses, however, have defined the private foundation as " 'the modern device for obtaining maximum benefits through tax avoidance.' . . . 'a tax-dodging apparatus for people best able to pay taxes.' " W. RUDY, THE FOUNDATIONS: THEIR USE AND ABUSE 3 (1970).

[2] Creel, *Problems Posed for Larger Foundations*, in TAX PROBLEMS OF NON-PROFIT ORGANIZATIONS 181, 186 (G. Webster & W. Lehrfeld eds. 1970).

[3] U.S. TREAS. DEP'T, 89TH CONG., 1ST SESS., REPORT ON PRIVATE FOUNDATIONS TO U.S. SENATE COMM. ON FINANCE 13 (Comm. Print 1965) [hereinafter cited as TREASURY REPORT].

[4] *Id.* at 12. The report states that a foundation's

> philanthropy plays a special and vital role in our society; Government services cannot provide a satisfactory substitute. Religious activity is perhaps unique, because Government is constitutionally barred from undertaking it. Here, private freedom of choice is the preeminent consideration. But in other fields, too, Government is best restricted to a partial and, perhaps, minor role. Research in some of the more controversial areas of the social sciences is an example. Even with respect to activities in which Government must take a major part today—such as education, social security, relief and elimination of poverty—charitable organizations may make vital and unique contributions.

Id.

ation of a democratic society."[5]

Congress has long recognized the unique contributions philanthropic foundations make to society by exempting them from income taxation.[6] Because foundations can operate where governmental action would be inappropriate, inconsistent with established mores, or simply too controversial, the government has provided tax incentives to both donors and recipient foundations to encourage private support of foundation activities.[7]

At the same time, however, the Internal Revenue Code's foundation tax structure prior to 1969 allowed these organizations, through the accumulation of income, to achieve an unanticipated position of economic dominance in America. In reaction to this development, Congress enacted section 4942 of the Internal Revenue Code, one of several provisions in the Tax Reform Act of 1969[8] which imposed limitations and prohibitions on foundation activities.[9] With respect to the specific problem of undistributed income, section 4942 was directed at correcting prior abuses and stimulating the outflow of benefits previously withheld from society by setting forth a series of objective, prescriptive guidelines for the distribution of funds.

The enactment of section 4942, however, immediately raised fears that Congress had "tolled the bell" on private foundations.[10] Whether the benefits that now flow from private foundations under section 4942 outweigh their heavy cost to society has not yet been evaluated even though section

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[5] *Private Foundations and the 1969 Tax Reform Act*, 7 COLUM. J.L. & SOC. PROB. 240, 242 (1971).

[6] W. SMITH & C. CHIECHI, PRIVATE FOUNDATIONS 8 (1974). *See generally* Heimann, *Foundations and Government: Perspectives for the Future*, in THE FUTURE OF FOUNDATIONS 259 (F. Heimann ed. 1973). Private foundations are exempt from the payment of income tax under sections 501(a) and 501(c)(3) of the Internal Revenue Code.

[7] W. RUDY, *supra* note 1, at 3. Donors to qualified private foundations are allowed a current deduction for their contributions to the extent provided for in section 170(b)(1)(A)(iv) of the Internal Revenue Code. *See also* note 6 *supra*.

[8] Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of 26 U.S.C.).

[9] Under I.R.C. §§ 4940-4946, private foundations' activities and operations are restricted in four general ways. First, of course, they are required to annually distribute the greater of their current income, or an amount representing 5% of their assets for a charitable purpose. Second, foundations are prohibited from self-dealing by restrictions against transacting business with its donors or related parties, regardless of the benefits inuring to the foundation. Moreover, it may not invest in speculative ventures, or acquire, directly or indirectly, more than a 20% interest in any business enterprise. Third, the foundation is prohibited from making any noncharitable expenditures such as payments to government officials, or trying to influence the result of a specific election. They are also barred from expending funds to influence legislation by affecting public opinion, or communicating with relevant government officials. Finally, the foundations must make all charitable distributions along objective and nondiscriminatory guidelines approved in advance by the Internal Revenue Service (IRS), and must exercise reasonable care in overseeing the manner in which the grantee uses the funds. This latter requirement entails preparing detailed financial reports for submission to the IRS. Labovitz, *1969 Tax Reforms Reconsidered*, in THE FUTURE OF FOUNDATIONS 101 (F. Heimann ed. 1973).

[10] Taggart, *The Charitable Deduction*, 26 TAX L. REV. 63, 65 (1970).

4942 has been part of the Internal Revenue Code for over ten years.[11] This comment attempts to fill that void. First, it provides an historical evaluation of Congress' treatment of private foundations under the Code. Against this background, it then analyzes the results of an empirical study directed at assessing the impact of section 4942 on private foundations in Hawaii. Finally, it utilizes the study's results as a basis for assessing the future of private foundations in general under the present tax structure, and for suggesting possible reforms.

I. Definition of a Private Foundation Under the Internal Revenue Code

Prior to the Tax Reform Act of 1969, Congress did not formally recognize the private foundation as a separate entity under the Internal Revenue Code. The Code merely differentiated between private and public charities, treating private foundations under the general rubric of the former.[12] With the adoption of the 1969 Act, however, the concept of the private foundation officially came into existence. It is now defined in negative terms under section 509(a) of the Internal Revenue Code as a charitable organization exempt from income taxation under section 501(c)(3) that does not meet "exclusionary tests primarily covering charities dependent on broad-based or 'public' support."[13]

More precisely, private foundations include all domestic and foreign 501(c)(3) organizations *except:* (1) churches, schools, hospitals and affiliated medical institutions, state college fundraising organizations, governmental units, and organizations[14] that normally receive a substantial part

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[11] Although a study of section 4942's minimum distribution requirement was performed by John R. Labovitz and reported in Labovitz, *The Impact of the Private Foundation Provisions of the Tax Reform Act of 1969: Early Empirical Measurements*, 3 J. Legal Stud. 63 (1974), no conclusion was reached regarding the impact of I.R.C. § 4942 since there was a transition rule provided for under I.R.C. § 4942(e)(4) that did not terminate until 1975. Moreover, the study was confined to an analysis of informational returns filed by private foundations in 1970. Since section 4942 did not affect all foundations until 1972, the study's usefulness in assessing section 4942's full impact on private foundations is narrowly circumscribed.

[12] See, for example, sections 170, 503, 504, and 6033 of the Internal Revenue Code in force prior to the Tax Reform Act of 1969. Halperin, *Private Foundations—Definitions and Termination*, 29 N.Y.U. Inst. Fed. Tax 1783, 1784 (1971). Halperin notes that the standards imposed on private charities were harsher than those imposed on their public counterparts. For example, deductions for gifts to private groups were limited to 20% of adjusted gross income instead of 30%, arm's length dealing was required, and private charities were prohibited from retaining unreasonable accumulations of income. Congress, through the Tax Reform Act of 1969, sought to rectify the inequities inherent in the Code provisions drawing the distinction between public and private charities.

[13] Labovitz, *supra* note 11, at 63.

[14] Such organizations are further defined in I.R.C. § 170(c)(2).

of their support[15] directly or indirectly from the general public or governmental units; (2) organizations that normally receive more than one-third of their support from the general public or governmental units in gifts, grants, contributions, membership fees, and gross receipts from activities related to their charitable purposes,[16] (3) supporting organizations formed and operated exclusively "for the benefit of, to perform the function of, or to carry out the purposes of" and operated, supervised, or controlled by or in connection with one or more specified "organizations" qualifying under the first two exclusions; and (4) organizations concerned exclusively with testing for public safety.[17]

In effect, a private foundation is "a charitable organization that receives its contributions from relatively few sources and spends its funds through grants or through operating programs."[18] If any uncertainty exists as to whether a section 501(c)(3) organization is a private foundation, the definition under the Tax Reform Act of 1969 establishes a legal presumption that it is.[19]

II. The Law Prior to Section 4942

A. *Adoption of Internal Revenue Code Section 504*[20]

Prior to 1950, Congress placed no restrictions on income accumulation by tax-exempt foundations. Although the Internal Revenue Service (IRS) had challenged the exempt status of a few foundations for what it perceived to be improper accumulations of wealth, courts were reluctant to deny foundations their exemption from the income tax.[21] Even where foundations had clearly abused the philanthropic device by using substantially all of their income to buy "thin corporations" and pay off the acquired corporation's indebtedness, courts found in favor of the foundation.[22]

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[15] "Substantial part" is administratively defined as one-third in Treas. Reg. § 1.170A-9(e)(1)-(2) (1972).

[16] This exclusion is designed for organizations with substantial receipts from sources such as admission fees and proceeds from the sale of publications that do not qualify under the first exclusion.

[17] I.R.C. § 509(a).

[18] Parrish, *The Foundation: "A Special American Institution,"* in The Future of Foundations 7, 10 (F. Heimann ed. 1973); *see* Treas. Reg. § 1.509(a)-1 (1972).

[19] Foundation Center, Foundations and the Tax Bill: Testimony on Title I of the Tax Reform Act of 1969 Submitted by Witnesses Appearing Before the U.S. Senate Finance Committee 1, 98 (1969).

[20] Int. Rev. Code of 1954, ch. 1, § 504, 68A Stat. 168 (repealed 1969). The section 504 referred to here should not be confused with the current I.R.C. § 504.

[21] *See, e.g.*, C.F. Mueller Co. v. Commissioner, 190 F.2d 120 (3d Cir. 1951); Commissioner v. Orton, 173 F.2d 483 (6th Cir. 1949); Samuel Friedland Foundation v. United States, 144 F. Supp. 74 (D.N.J. 1956).

[22] Duhl, *Tax Exempt Organizations: The Attack on Unreasonable Accumulations of In-*

The idea that a foundation's tax-free earnings did not have to be annually distributed to charities, however, eventually became a subject of concern to Congress. In testimony before the House Ways and Means Committee, Treasury Department representatives pointed out that by allowing private foundations to accumulate their income without making charitable distributions, Congress was in effect permitting the foundations' donors to realize private benefits through personal use of the foundations' resources. Through loans, investments, and other business transactions of the foundations, donors could acquire or retain control over business enterprises in which they held an interest.[23]

Following hearings on the problem, the House Ways and Means Committee in 1950 proposed a tax on that portion of an exempt organization's investment income which it did not currently distribute for charitable purposes.[24] The Senate Finance Committee, however, rejected the direct limitation as too inflexible a measure. It supported instead a proposal requiring exempt organizations to make annual public disclosures regarding the extent of their income accumulations.[25] Committee members hoped that the publication requirement would provide the necessary negative incentive to encourage distributions by these organizations.[26]

As ultimately enacted, section 504 of the 1954 Code (section 3814 of the 1939 Code) represented a compromise between these two positions. It retained the Senate bill's publication requirement and at the same time imposed a direct limitation on the ability of an exempt organization to accumulate income. As a result of section 504, a charitable organization was denied exemptions for any year or years in which it accumulated amounts of income that were:

> (1) Unreasonable in amount or duration in order to carry out the charitable, educational, or other purpose or function constituting the basis for exemption . . .; or
> (2) Used to a substantial degree for purposes or functions other than those constituting the basis for exemption . . .; or
> (3) Invested in such a manner as to jeopardize the carrying out of the charitable, educational, or other purpose or function constituting the basis for

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come, 57 GEO. L.J. 483, 485 (1968). *See, e.g.*, Ohio Furnace Co. v. Commissioner, 25 T.C. 179 (1955); Alan Levin Foundation v. Commissioner, 24 T.C. 15 (1955).

[23] *Hearings on the Revenue Revision of 1950 Before the House Ways and Means Committee*, 81st Cong., 2d Sess. 167 (1950).

[24] H.R. REP. No. 2319, 81st Cong., 2d Sess. 40-44 (1950).

[25] S. REP. No. 2375, 81st Cong., 2d Sess. 34 (1950); *see* Lehrfeld, *The Annual Tax on Foundation Income; Rules Governing Distributions of Income*, 29 N.Y.U. INST. FED. TAX 1799, 1816 (1971).

[26] S. REP. No. 2375, *supra* note 25, at 35. Senator Walter F. George, Chairman of the Senate Finance Committee, declared that the purpose of the provision was to "correct the practice, followed by some of these organizations, of receiving large amounts of money without spending the funds for the purposes which form the basis for the organization's tax exempt status." 96 CONG. REC. 13273-74 (1950).

exemption.[27]

Exemptions were also denied for each succeeding year in which the accumulation remained undistributed.[28]

B. *Problems with Section 504*

Contrary to the hopes held by the supporters of section 504, however, the measure proved to be inherently incapable of solving the problem of income accumulation for two reasons. First, a foundation could easily avoid the prohibition against unreasonable accumulations by acquiring assets which produced little or no current income.[29] For example, a foundation investing exclusively in growth securities or appreciating but unproductive land could increase its net worth while legitimately claiming no income subject to the limitations on accumulations.[30] As a direct result, most foundations were able to avoid having to distribute anything approaching their total return on capital. Instead, they treated their capital gains and appreciation as additions to principal which were not available for distribution as grants.[31] A 1962 survey conducted by the Treasury Department indicated that only approximately one-fourth of all private foundations distributed an amount equal to their annual income.[32] On the other hand, however, those foundations not already locked into unproductive assets were forced into making investments yielding mediocre returns.[33] A report prepared by the Commission on Foundations and Private Philanthropy[34] and presented to the Senate Finance Committee in 1978[35] revealed that the total rate of return[36] on foundation assets for

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[27] Int. Rev. Code of 1954, ch. 1, § 504, 68A Stat. 168 (repealed 1969).

[28] *Id.*

[29] Lehrfeld, *supra* note 25, at 1820.

[30] *See* Rev. Rul. 67-267, 1967-2 C.B. 207 (when a foundation subject to section 504 distributes appreciated property, the amount by which the property's fair market value exceeds its adjusted basis is disregarded in determining the unreasonableness of its accumulated income); Rev. Rul. 66-282, 1966-2 C.B. 231 (amount of oil royalty's fair market value exceeds the foundation's basis, although income, is disregarded in determining the reasonableness of income accumulation).

[31] Labovitz, *supra* note 11, at 65.

[32] TREASURY REPORT, *supra* note 3, at 26. Although the Treasury Department acknowledged that such a practice could be justified by a desire to increase future distributions, it characterized the practice as abusive. *Id.* at 28.

[33] Labovitz, *supra* note 11, at 65.

[34] COMMISSION ON FOUNDATIONS AND PRIVATE PHILANTHROPY, FOUNDATIONS, PRIVATE GIVING, AND PUBLIC POLICY: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON FOUNDATIONS AND PRIVATE PHILANTHROPY 74 (1970) [hereinafter cited as PETERSON COMMISSION REPORT].

[35] SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., THE ROLE OF FOUNDATIONS TODAY AND THE EFFECTS OF THE TAX REFORM ACT OF 1969 UPON FOUNDATIONS 127 (Comm. Print 1973) [hereinafter cited as ROLE OF FOUNDATIONS].

1968 was substantially lower than that of mutual funds.[37] Ironically, instead of increasing distributions of income to society, section 504 inhibited income-producing investment and, thus, reduced the amount of distributions made to foundation beneficiaries.

Second, and perhaps more significantly, the statutory prohibition against unreasonable accumulations of income proved impossible to enforce. The "unreasonable" standard was difficult to administer because of its wholly subjective nature and the absence in the Code of any objective, explanatory guidelines.[38] Even the Treasury Regulations were unable to posit an objective and ascertainable standard. It merely provided that accumulations became unreasonable when "more income [was] accumulated than [was] needed or when the duration of the accumulation [was] longer than [was] needed in order to carry out the purpose constituting the basis for the organization's exemption."[39] This "need" standard itself represented but another subjective standard begging clarification and objective criteria. Neither the Treasury Department nor the IRS, however, was able to prescribe the amount of income or periods of accumulation which it would consider unreasonable.[40]

The only interpretive aid available to define the "unreasonable" standard was furnished by judicial opinions and revenue rulings.[41] These

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[36] The total rate of return is defined as the sum of dividends, interest, and realized capital gains, *i.e.*, current income, divided by market value of assets.

[37] The Commission's findings, based on a sampling of foundations form 990-A filed for 1968 are summarized in the table below:

Total Return on Foundation Assets as Percentage of Assets, 1968

Foundations with Assets	Median Total Return on Assets (%)
under $200,000	4.7
$200,000 - $1,000,000	6.7
$1,000,000 - $10,000,000	6.0
$10,000,000 - $100,000,000	7.7
over $100,000,000	8.5
Company foundations	5.8
Community foundations	5.2
Weighted figure for all foundations	5.6

ROLE OF FOUNDATIONS, *supra* note 35, at 135 (footnote omitted). By contrast, average total return was 15.3% for common stock mutual funds. *Id.*

[38] The only cases where the IRS could emphatically find "unreasonableness" was when the organization's charter mandated income accumulation. *See, e.g.*, Rev. Rul. 67-106, 1967-1 C.B. 126; Rev. Rul. 67-108, 1967-1 C.B. 127.

[39] Treas. Reg. § 1.504-1(b)(1) (1958).

[40] Lehrfeld, *supra* note 25, at 1818. The Service's failure to prescribe an allowable amount or percentage of earnings provoked much congressional criticism. *See Hearings Before Subcommittee No. 1 on Foundations, Select Committee on Small Business*, 89th Cong., 2d Sess. 129, 130 (1964).

[41] *See, e.g.*, Erie Endowment v. United States, 316 F.2d 151, 155 (3d Cir. 1963) (reasona-

cases and rulings were of limited utility, however, as they failed to provide a general rule applicable to a range of specific factual situations. A foundation unsure of its exempt status under section 504 had to either request a specific ruling from the IRS or hope that the court would agree with its interpretation of section 504 when it went to trial.[42] Such was the situation encountered by the parties in *Danforth Foundation v. United States*.[43]

The Danforth Foundation was organized in the 1920's. It had regularly accumulated a portion of its annual income so that by 1950, when section 504 was enacted, its assets were valued at over $24 million and it had accumulated approximately $4.3 million in income. In 1950, the foundation reported approximately $950,000 in income, incurred roughly $26,000 in expenses and distributed a mere $120,908 in charitable gifts, grants, and expenses.[44] During a two-year period beginning in 1951, the foundation developed a grant program that anticipated use of the accumulated income for scholarships, special study grants, fellowships for potential teachers, summer sessions for Christian study, and a building fund for college chapels. When the IRS challenged the foundation's income accumulations for 1951 and 1952, the foundation asserted that its trustees' decision to accumulate its income was made in good faith[45] and in anticipation of an expansive program requiring the pool of funds.[46] The trial court ruled in favor of the Government and the Danforth Foundation appealed to the Eighth Circuit.

On appeal the foundation had reason to be optimistic. Prior to the *Danforth* case, the IRS had issued a ruling favorable to the foundation's position, determining that a foundation might charge against current income the total amount of a commitment made for scientific or educational projects, even though the amount was payable over a three-year

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bleness in terms of time and amount determined in context of rational planned program of charitable intent); Shiffman v. Commissioner, 32 T.C. 1073, 1081 (1959) (assuming, but not deciding, that use of income to pay its indebtedness incurred in acquiring income-producing property constitutes accumulation of income, accumulation over a five-year period was not unreasonable); Rev. Rul. 54-137, 1954-1 C.B. 289 (the accumulation of income for three years from gifts and bequests by the foundation's creator is not unreasonable in amount or duration where the foundation permanently retains one year's income and distributes the remainder of the accumulation at the end of the three-year period). *See also* Tell Foundation v. Wood, 52 A.F.T.R. 1801 (E.D. Ariz. 1957).

[42] The general rule in ascertaining the tax exempt status was that exemptions were not a right the charity possessed, but a congressional "balm." Erie Endowment v. United States, 316 F.2d at 153.

[43] 347 F.2d 673 (8th Cir. 1965), *aff'g* 222 F. Supp. 761 (E.D. Mo. 1963).

[44] Danforth Foundation v. United States, 222 F. Supp. at 765.

[45] The trial court acknowledged that the Danforth Foundation trustees no doubt acted in good faith, but explained that "reasonableness" was to be determined strictly according to the statute. *Id.* at 767.

[46] *Id. See generally* Hulman Foundation, Inc. v. United States, 217 F. Supp. 423 (S.D. Ind. 1962); Shiffman v. Commissioner, 32 T.C. 1073 (1959).

period and the sums were accumulated pending the recipient's decision regarding expenditure of the funds.[47] Moreover, the federal district court's decision in *Samuel Friedland Foundation v. United States*[48] appeared to support the foundation's case. In permitting the Samuel Friedland Foundation to accumulate funds for construction of a medical research building, the court articulated the "concrete program" test to determine the reasonableness of income accumulations. It held that the true test of reasonableness was whether the charitable organization had a concrete program for use of the accumulated income for charitable purposes and whether, in light of existing circumstances, the program was a reasonable one.[49]

With this support for its position, the Danforth Foundation reasonably expected to win approval of its practice of accumulating income for proposed projects.[50] The court of appeals, however, upheld the trial court's judgment in favor of the Government. Observing that the foundation's proposed projects would require many years to become complete, self-operating programs capable of utilizing income, the court held that the Danforth Foundation lacked a concrete program and was accumulating unreasonable amounts of income.[51] The court referred with approval to the

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[47] Rev. Rul. 55-674, 1955-2 C.B. 264. A foundation may report, in the year in which the commitment was made, a contribution for a specific and unconditional grant for which a reserve is created. The grant must be for a bona fide scientific or educational purpose, and may be advanced, even in substantial part, over a fixed period extending beyond the commitment year. The IRS also ruled that a foundation may deduct the total amount of funds committed for the construction of a building, notwithstanding that the funds are released as the work progresses. In certain limited situations, a foundation may take a full current deduction for a reserve created for future costs and expenses.

[48] 144 F. Supp. 74 (D.N.J. 1956). The grantor, Samuel Friedland, was the principal stockholder of Food Fair Stores, Inc., a nationwide supermarket chain. In furtherance of Samuel Friedland Foundation's principal aim to benefit medical charities, the directors decided to accumulate income for the purpose of giving $500,000 to Brandeis University for a medical research center. The foundation's investments included a large block of Food Fair common shares and common shares in a film company. In addition, it also held several mortgages, promissory notes and owned a shopping center. The IRS contended that the accumulation was unreasonable, that the investments were contrary to the exempt purposes and that the assets were used, to a substantial degree, to buy shares from the principal shareholder to his advantage.

[49] The court in *Samuel Friedland Foundation* focused on four considerations before making its determination: "(1) the purpose of the accumulation and the dollar goal, (2) the funds available at the beginning of the period, (3) the likelihood of funds becoming available from contributions, and (4) the extent of time required to reach the goal." Danforth Foundation v. United States, 222 F. Supp. at 764. *See* Treas. Reg. § 1.504-1(b)(1) (1958). *See also* Truscott v. United States, 1 A.F.T.R.2d 1743 (E.D. Pa. 1958) (accumulation of income for ten years not unreasonable when used to provide for feasible pension plan).

[50] Duhl, *supra* note 22, at 498.

[51] 347 F.2d at 678. The court reasoned that

> [i]t would defeat the language and intent of § 3814 [1939 Code] which was designed to force the use of foundation income for charitable purposes, to permit the delay in distribution of accumulating income which would result from withholding disburse-

trial court's opinion, in which the lower court distinguished the *Samuel Friedland Foundation* case on the ground that the Samuel Friedland Foundation had committed its accumulated funds to the construction of a building which could reasonably have been completed within six to eight years.[52] Commentators reviewing with approval the *Danforth* decision have observed that the *Samuel Friedland Foundation* concrete program test, although a pragmatic one, allowed a foundation with the most speculative plans for the use of its accumulated earnings to retain unlimited amounts of income.[53] "A foundation, by carefully wording its charter, could accumulate income to erect an expensive college dormitory without . . . [conveying any] . . . immediate benefits."[54]

In short, and as later studies would confirm, the unreasonable accumulation standard under section 504 "hardly guaranteed that the public would receive benefits commensurate with the immediate tax deduction a contributor received from his gifts to a foundation."[55] Publication of the information returns was in and of itself inadequate to encourage tax exempt foundations to distribute income. It thus became clear that neither judicial review nor public scrutiny could compensate for a defective statute in achieving Congress' objectives.[56]

III. Tax Reform Act of 1969

A. *1965 Report from the Treasury Department*

In 1961, Representative Wright Patman, Chairman of the House Select Committee on Small Business, initiated the "Congressional Investigation of Foundations" which ultimately paved the way for the enactment of

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ment of such income until adequate self-operating programs were established which would consume the income as it accumulated. The trust by 1951 was a well-established trust. The problem of a large excess of income over charitable expenditures was not a new one. The burden imposed upon the taxpayer here by § 3814 was in essence the same as that imposed upon other foundations.

Id. *See* Erie Endowment v. United States, 316 F.2d at 155; Duhl, *supra* note 22, at 498.

[52] 347 F.2d at 678-97; *see* Danforth Foundation v. United States, 222 F. Supp. at 764.

[53] *See, e.g.*, Lehrfeld, *supra* note 25, at 1819. *See* Stevens Bros. Foundation v. Commissioner, 324 F.2d 633 (1933) (accumulation unreasonable where foundation failed to formulate and design a charitable program having a definite, functional objective); Curt Teich Foundation v. Commissioner, 48 T.C. 963, 975 (1967) (when the minutes of the foundation contained no references to a plan to establish a self-sustaining scholarship and there were no letters or other evidence of such a plan, income accumulation could not be justified).

[54] Duhl, *supra* note 22, at 499.

[55] Labovitz, *supra* note 11, at 65; *see* Erie Endowment v. United States, 316 F.2d at 153 ("Absent a sufficient amount of charitable work commensurate with the total amount of [a foundation's] available charitable funds, exempt status must cease or, in fact, never come into existence.").

[56] Duhl, *supra* note 22, at 499.

section 4942.[57] Patman's six-volume report[58] focused on foundations' income accumulations and distributions to determine whether foundations were carrying on their charitable functions in a manner deserving of tax-exempt status.[59]

In the fourth installment of his report, entitled *$4.6 Billion Receipt in 4 Years; Only $2.2 Billion Disbursed to Charity,*[60] Patman charged that private foundations were not disbursing their income to the public. The report, analyzing receipts and disbursements of 575 foundations between

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[57] Congress had investigated private foundations on three previous occasions, but because of the investigations' political orientation and sensationalism, they were largely ignored. In 1915, Senator Frank P. Walsh, chairman of the Industrial Relations Committee, headed an investigation on alleged foundation involvement in anti-union activities. Although this probe initially centered around the labor struggles in the Colorado coal fields, including the Rockefeller-controlled Colorado Fuel and Iron Company, it was later extended to other Rockefeller concerns, notably the Rockefeller Foundation. *See* Parrish, *supra* note 18, at 30. "The Senate's concern was that foundations . . . were being used . . . as tools of reaction to help Big Business dominate the worker." *See* W. RUDY, *supra* note 1, at 7. While the majority report severely censured private foundations and advocated their abolishment, no congressional action followed. *See* F. ANDREWS, PATMAN AND FOUNDATIONS: REVIEW AND ASSESSMENT 2 (1968).

Whereas the Walsh investigation had charged foundations with being agents of capitalism, a subsequent congressional investigation, occurring during the McCarthy era, resulted in charges that foundations were agents of Marxist socialism. *Id.* at 3. The attack was conducted on two fronts. The Cox committee of 1952, headed by Representative Eugene E. Cox, resembled a witch hunt. The committee eventually cleared foundations of charges of being pro-Communist and declared that "on the balance, the record of foundations is good." *See* W. RUDY, *supra* note 1, at 7. The Reece committee, formed in 1954 by Representative Carrol Reece, set out to prove that foundations were engaged in an anti-American conspiracy. Foundations were permitted to submit only written replies to witness accusations that the federal income tax was a socialist plot abetted by a "diabolical conspiracy of foundations." *See* F. ANDREWS, *supra* at 3. Although the committee concluded that "foundations might eventually control a large part of the American economy; and that they had led education 'toward the promotion of collectivism' and a supported subversion," Congress again remained unmoved. W. RUDY, *supra* note 1, at 8.

[58] *See* HOUSE SELECT COMM. ON SMALL BUSINESS, 87TH CONG., 2D SESS., CHAIRMAN'S REPORT—TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY (Comm. Print 1962) [hereinafter cited as PATMAN REPORT No. 1]; HOUSE SELECT COMM. ON SMALL BUSINESS, 88TH-90TH CONG., SUBCOMM. CHAIRMAN'S REPORT TO SUBCOMM. NO. 1—TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY (Comm. Prints 1963-68). *See generally* F. ANDREWS, *supra* note 57.

[59] W. RUDY, *supra* note 1, at 9.

[60] HOUSE SELECT COMM. ON SMALL BUSINESS, 89TH CONG., 2D SESS., SUBCOMM. CHAIRMAN'S REPORT TO SUBCOMM. NO. 1—TAX-EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS: THEIR IMPACT ON OUR ECONOMY (Comm. Print 1966). The opening statement of the report read:

> The tax exempt, private foundation—that strange creation of American folkways, a holdover from the conscience-stricken moments of the robber barons at the turn of the century—is an indulgence which the taxpayer may soon have to decide [that] he can no longer afford to support in the manner to which its founders have been accustomed.

Id.

1961 and 1964,[61] revealed that 111 organizations each owned over 10% of the outstanding stock of various domestic corporations, many owning in excess of 70% of a particular corporation. At the close of 1960, the net worth of 534 foundations was 23% greater than the total capital funds of the nation's 50 largest commercial banks and 26% greater than the invested capital of the 50 largest merchandising firms.[62]

Despite technical errors in his use of data,[63] Patman's disclosures led the Senate Finance and the House Ways and Means Committees in 1965 to request the Treasury Department to report on the Internal Revenue Code provisions relating to private foundations, and to suggest possible corrective legislation to eliminate abuses.[64] Armed with this mandate, the Treasury Department surveyed approximately 1,300 private foundations—100% of all foundations with assets of $10 million or more, 25% of those with assets of between $1 million and $10 million, 10% of those with assets of $100,000 and $1 million, and 5% of those with assets of $100,000 or less.[65] Its report listed six categories of major abuses and contained extensive recommendations for dealing with them.[66] Not surprisingly, the Treasury Department included among the major abuses delay in the distribution of benefits to charities,[67] finding that many foundations were deferring current grants for charitable purposes and accumulating their income.

The solution to problems stemming from section 504, argued the Treasury Department, lay in adopting "a rule which would give both taxpayers and the Service *workable objective standards*" governing distributions.[68] The report proposed that all private, nonoperating foundations[69]

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[61] F. ANDREWS, *supra* note 57, at 34.

[62] PATMAN REPORT No. 1, *supra* note 58, at 71.

[63] In Patman's fourth installment of his report, the headlined *$4.6 Billion Receipts*, included new gifts to foundations (either to increase their assets or to set them up initially), realized capital gains, income from business operations or charged services not offset by costs and all other types of income. Also, the headlined *Only $2.2 Billion Disbursed to Charity* included only amounts paid out in direct contributions, gifts, and grants. It did not include the substantial operating programs of some foundations or the cost of investment services and office management. Furthermore, the report included some non-foundations, *e.g.*, the Educational Testing Service. *See* F. ANDREWS, *supra* note 57, at 35-36.

[64] 120 CONG. REC. 33953 (1974).

[65] W. SMITH & C. CHIECHI, *supra* note 6, at 29.

[66] W. RUDY, *supra* note 1, at 10.

[67] Although Federal tax laws encourage and in substantial measure finance private charities, a number of foundations were deferring current grants from charitable purposes and instead, accumulating income. As a result, worthy causes were not receiving needed funds and certain foundations were indefinitely perpetuating their existence. *See* TREASURY REPORT, *supra* note 3, at 24.

[68] TREASURY REPORT, *supra* note 3, at 26. *See generally* text accompanying note 80 *infra*.

[69] Nonoperating foundations are private foundations as defined in I.R.C. § 509(a). An operating foundation is a foundation which makes qualifying distributions directly for the active conduct of activities constituting the purpose for which it is organized, equal to substantially (85%) of all of its adjusted net income. Treas. Reg. § 53.4942(b)-1(b)(3) (1972).

be required to distribute all of their net income on a "reasonably current basis."[70] Where actual income fell below a reasonable rate of return for a diversified portfolio,[71] nonoperating foundations would be required to distribute to charity a percentage of the investment asset value equal to a reasonable return.[72]

Although the Treasury Report suggested that the Secretary of the Treasury be granted authority to adjust the required minimum rate of distribution to reflect market conditions, it also recommended that the level be comparable to the yield on investment funds held by comparable organizations such as universities.[73] It concluded that the rate in 1965 should be set at between 3 and 3½%.[74]

In its conclusion, the Treasury Department expressed the hope that the proposed changes would impress upon foundation trustees their duty not to subordinate the present needs of charities by concentrating on increasing their foundation's size to provide for some unnamed cause at some indefinite future date.[75] The foundations could not be allowed to serve as an obstacle in the flow of funds from the original donor to operating charities.[76]

B. Section 4942—A Code Analysis

The Treasury Report's recommendation for minimum distribution requirements was included by Congress in the Tax Reform Act of 1969.[77]

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[70] TREASURY REPORT, *supra* note 3, at 26.

[71] *See generally* text accompanying note 37 *supra*.

[72] TREASURY REPORT, *supra* note 3, at 28.

> To insure that all private nonoperating foundations provide at least a minimum current benefit to charity it is recommended that there be established a "floor" below which the current benefits provided by the foundation to the public would not be permitted to drop. Such an approach could provide that if a private nonoperating foundation's income, and therefore its required payment to charity under the direct-accumulation proposal, falls below a specified percentage of the value of its holdings, the foundation would have to pay to charity, from its corpus, an amount which would approximate the income which it would have received had it invested its funds in the type of assets held by comparable organizations.

Id.

[73] TREASURY REPORT, *supra* note 3, at 28.

[74] *Id.*

[75] *See* text accompanying notes 53-54 *supra*.

[76] TREASURY REPORT, *supra* note 3, at 29.

[77] Pursuant to the Revenue and Expenditure Control Act of 1968, § 110, Pub. L. No. 90-364, 82 Stat. 251, the Treasury Department prepared a set of proposals that incorporated the 1965 Treasury Report's recommendations. Between mid-February and the end of April, 1969, the House Ways and Means Committee conducted tax hearings as part of its general consideration of the Tax Reform Bill. *General Tax Reform: Hearings on Tax Reform Before the House Ways and Means Committee*, 93d Cong., 1st Sess. 5039 (1974).

Section 4942 of the Internal Revenue Code of 1954 was just one of the provisions of the comprehensive Tax Reform Act of 1969 that revamped the private foundation tax structure.

Codified as Internal Revenue Code Section 4942, the provision represents a substantial departure from the underlying theory of section 504. Whereas section 504 had relied on subjective standards, public scrutiny and the threat of revocation of tax-exempt status[78] to encourage income distributions, section 4942 was intended to provide objective, unambiguous guidelines coupled with increasingly severe sanctions for violations. Its supporters hoped that the measure would encourage foundations to improve investment performance through portfolio diversification to include higher yielding investments. In this way, the foundations could increase their financial support for charitable organizations and activities.[79]

1. General Code Provisions

The operation of section 4942 is relatively simple. Private foundations must annually distribute an amount equal to their adjusted net income or a minimum investment return, whichever is greater,[80] reduced by the 2% excise tax imposed on investment income.[81] Any income in excess of the amount distributed is subject to a 15% excise tax at the beginning of the second taxable year after the year in which the income was earned. This tax is imposed for each year thereafter until the foundation clears itself of the undistributed income,[82] or until the IRS serves a deficiency notice.[83] In the latter event, if undistributed income still remains at the close of a correction period, an additional tax equivalent to the entire amount accumulated is assessed.[84] In other words, nondistributing foundations are ultimately forced to pay their accumulated income to the Treasury Department.

However, while the penalty provisions of section 4942 are the most striking, the minimum distribution requirements form the heart of section 4942. Not only was section 4942 enacted in response to the problems of income accumulation, but criticism of the section has centered mainly on the distribution rules. Thus, the success or failure of section 4942 must be assessed in light of the provisions relating to the governance of foundation distributions.

These provisions have been described as "the most far reaching legislation affecting private philanthropy in our two hundred year history." Worthy, *The Tax Reform Act of 1969: Consequences for Private Foundations*, 39 LAW & CONTEMP. PROB. 232 (1975). The distribution requirements are, perhaps, the most radical of these provisions.

[78] ROLE OF FOUNDATIONS, *supra* note 35.

[79] PETERSON COMMISSION REPORT, *supra* note 34, at 76.

[80] I.R.C. § 4942(d).

[81] I.R.C. § 4940(a) imposes a tax equal to 2% of the net investment income of each private foundation during a taxable year.

[82] I.R.C. § 4942(a)-(b). *See generally* H. Fort Flowers Foundation, Inc. v. Commissioner, 72 T.C. 399 (1979).

[83] I.R.C. § 4942(j)(2); Treas. Reg. § 53.4942(a)-1(c)(3) (1973).

[84] I.R.C. § 4942(a)-(b). The correction period is defined at section 4942(j)(2).

2. *The Minimum Investment Return*

Any analysis of section 4942 must begin with the minimum investment return requirement. While the distribution requirements are set by the higher of net annual income or the minimum investment return, the latter establishes the *minimum* distribution required. Even in the absence of income, a foundation must distribute funds. Thus, by adopting a minimum distribution requirement, Congress effectively precluded the utilization of low yield investments or nonproductive, appreciating property by the foundations as a viable method for growth.[85]

The minimum investment return is determined by multiplying the aggregate net fair market value of a foundation's assets[86] by the minimum investment rate, presently 5%.[87] Assets used directly in carrying out a foundation's exempt purposes, however, are excluded from the formula.[88] The test to determine which assets are excluded is whether the assets are "used directly in carrying out" a foundation's exempt purposes.[89] Thus, a foundation with assets only occasionally used for its exempt purposes must make the appropriate allocation in computing its minimum investment return.[90] Nonetheless, the IRS has allowed exclusions for assets ranging from hospitals and churches to paintings[91] and islands.[92]

The determination of the applicable rate by which foundation assets were to be multiplied was the most controversial aspect of the original

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[85] TREASURY REPORT, *supra* note 3, at 28. *See* text accompanying notes 29-32 *supra*.

[86] The responsibility for valuing these assets lies solely with the foundations. The IRS, however, is rigorous and demanding in its scrutiny of the valuation. The fair market value of listed securities must be determined on a monthly basis. This is derived from the mean of high and low stock prices during the month. These means are then averaged annually and give a base from which the minimum investment return is computed. I.R.C. § 4942(e)(2).

Other assets must be valued as frequently as appropriate by an independent, competent appraiser. Treas. Reg. § 53.4942(a)-2(c)(4)(iv)(b) (1973). Disqualified persons may not make the appraisal. I.R.C. § 4946(a). If an incorrect asset valuation, made in good faith and not wilfully, results in insufficient distributions, deficiency distributions are permitted. I.R.C. § 4942(a)(2).

[87] I.R.C. § 4942(e)(1)(A); I.R.C. § 4942(e)(1)(B). For a history of changes in the minimum investment ratio, *see* text accompanying notes 93-102 *infra*.

[88] I.R.C. § 4942(e)(1)(A).

[89] *See also* Rev. Rul. 76-85, 1976-1 C.B. 357 (in determining its minimum investment return, a private foundation need not take into account assets used in a trade or business for which substantially all work is performed without compensation).

[90] Treas. Reg. § 53.4942(a)-2(c)(3) (1973).

[91] Rev. Rul. 74-498, 1974-2 C.B. 387 (value of collection of paintings owned by a foundation to further arts that was loaned to museums for exhibition may be excluded in computing minimum investment return).

[92] Rev. Rul. 75-207, 1975-1 C.B. 361 (value of an island, owned by a private foundation dedicated to preserving the ecological, historical, and archaeological character of the island that has no residential use and to which present access is limited to invited public and private researchers, may be excluded from the foundation's minimum investment return). *See also* Rev. Rul. 75-392, 1975-2 C.B. 446 (a reasonable cash balance held for use in carrying out the foundation's exempt purpose may also be excluded).

enactment.[93] The House of Representatives passed a bill calling for a minimum rate of 5%[94] to the Senate. Although the Senate Finance Committee retained the 5% recommendation, when the bill reached the floor, Senator Charles H. Percy proposed amending the bill to raise the rate to 6%, adjusted annually.

Although the rationale behind the Percy Amendment was inherently different from other proposals to raise the rate, it indicated, once again, the skepticism towards private foundations. Unlike those who urged a high rate to encourage distribution,[95] Percy spoke for the supporters of a forty-year limitation on a foundation's existence. The high rate, explained Percy, represented a compromise between those who wanted a definite life and those who opposed it.[96] Thus, Congress' ultimate adoption of the Percy Amendment symbolized a victory for opponents of the foundations.

The victory, however, was a short-lived one. When the Treasury Department raised the rate to 6.75% for 1976,[97] foundation supporters demanded that Congress reduce the rate and eliminate the Treasury's adjustment power. They contended that the 6% rate forced foundations to invade their corpus and precluded foundations from purchasing securities promising high rates of return.[98] According to the foundations, the required current distribution rate was higher than the yield that could be produced by a balanced investment portfolio.[99] Moreover, the Treasury Department was charged with relying too extensively on interest rates, to the derogation of overall investment yields, in fixing the applicable rate.[100]

The perseverance of the foundations paid off in the end. Congress even-

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[93] In the original enactment, all foundations created after December 31, 1969, were required to distribute 6% immediately. A transition rule, however, was provided for those foundations existing prior to January 1, 1979, to allow them sufficient time to revise their investment and distribution policies. S. REP. No. 91-552, 91st Cong., 1st Sess. (1969). The minimum payment for these foundations was 4½% for 1972, 5% for 1973, 5½% for 1974, and 6% for 1975, and a rate to be determined by the Secretary of Treasury for subsequent years. For the years 1970 and 1971, they were required only to distribute their adjusted net income. Tax Reform Act of 1969, § 101(1)(B), Pub. L. No. 91-172, 83 Stat. 487.

[94] H.R. REP. No. 13270, 91st Cong., 1st Sess. (1969).

[95] *See, e.g.*, the testimony of the Commission on Foundations and Private Philanthropy, a private organization formed in 1969 to conduct a comprehensive study of foundations, to the Senate Finance Committee. In the testimony, Peter G. Peterson, the Commission's president and founder, emphasized the need to force greater distributions. He concluded that based upon the 1959-69 experience of balanced mutual funds, a rate between 6% and 8% was reasonable. *Hearings Before the Senate Committee on Finance on H.R. 13270*, 91st Cong., 1st Sess. 6170 (1969).

[96] 120 CONG. REC. 33956 (1974).

[97] Rev. Rul. 76-193, 1976-1 C.B. 357. This ruling is noteworthy for its brevity. The Treasury Department did not even attempt to explain why the raise was necessary.

[98] 120 CONG. REC. 33956 (1974).

[99] Steuerle, *Distribution Requirements for Foundations*, 1977-78 NAT'L TAX ASS'N—TAX INST. AMERICA 423, 424 (1977).

[100] Worthy, *supra* note 77, at 241.

tually agreed that the 6.75% rate imposed a great hardship on the foundations, and that the unpredictability of the rate from year to year made it difficult for the foundation managers to schedule their portfolio investments.[101] As a result, in the Tax Reform Act of 1976, the minimum distribution rate was reduced to 5%, and the Treasury Department's adjustment power was eliminated.[102]

3. *Adjusted Net Income*

Although the minimum investment rate establishes the bottom line for distributions under section 4942, the problems most often arise with respect to ascertaining net income. Moreover, if the trend in Hawaii holds true for the rest of the nation, distributions by private foundations are more than likely to be based upon their adjusted net income rather than the minimum investment rate.[103]

The adjusted net income is the amount by which gross income exceeds allowable deductions.[104] Gross income includes all income[105] other than capital gains[106] and tax exempt interest;[107] capital gains and losses are included only to the extent of net short-term capital gains.[108] Also included in gross income are repayments of loans made earlier for charitable purposes or return of other amounts previously deducted as qualifying distributions.[109] Finally, amounts previously treated as qualifying distri-

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[101] Goldberg, *Effect of the 1976 Tax Reform Act on Tax Exempt Organizations*, 35 N.Y.U. INST. TAX at TRA-89, -91 (1977).

[102] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1713.

[103] *See* p. 94 *infra*.

[104] I.R.C. § 4942(f)(1). *See, e.g.*, Rev. Rul. 75-442, 1975-2 C.B. 448 (where a private foundation received annual payments as beneficiary of a deferred compensation plan, each payment was includable in gross income to the extent it exceeded the value, at the decedent's death, of the right to receive the payment).

[105] *But cf.* Rev. Rul. 77-252, 1977-2 C.B. 390 (a private foundation that made an interest-free loan from its corpus to a charity in a year where its distribution requirements were met, and did not use the loan to reduce the amount of its distributions in any year was entitled to return the repayments to its corpus and not include it in income computations).

[106] I.R.C. § 4942(f)(2)(B). The Treasury's position is that both long-term gain or loss, and net section 1231 gains are excluded from the computation of adjusted gross income. Net section 1231 losses, however, are includible if covered by the section 4942 rules pertaining to losses. Treas. Reg. § 53.4942(a)-2(d)(2)(ii) (1976).

[107] I.R.C. § 4942(f)(2)(A). Private foundations must report income earned on governmental obligations otherwise excluded by section 103.

[108] I.R.C. § 4942(f)(2)(B). *See, e.g.*, Rev. Rul. 73-320, 1973-2 C.B. 385 (capital gains received from a regulated investment company described in section 851 are treated as long-term capital gains under section 852(b)(3) and are thus excluded from the calculations of adjusted net income).

Short-term capital losses are excluded not only in calculating net adjusted income, but also in calculating short-term capital gains in prior or future years. Treas. Reg. § 53.4942(a)-2(d)(2)(ii) (1976).

[109] I.R.C. § 4942(f)(2)(C)(i). *Cf.* Rev. Rul. 77-252, 1977-2 C.B. 390, *supra* note 105. *But see*

butions[110] under the set-aside provision which no longer qualify as "set-asides" must also be included in gross income.[111] Contributions from donors to private foundations are, of course, not included.[112]

A foundation is entitled to certain deductions allowed a corporation, "subject to the tax imposed by section 11 for the taxable year."[113] These allowable deductions are limited to (a) ordinary and necessary expenses paid or incurred in the production or collection of gross income, or for the management, conservation or maintenance of property held for the production of income,[114] and (b) allowances for depreciation and depletion. Depreciation is computed exclusively on the straight line method.[115] Deductions related to the charitable program itself, however, should not be taken since these can be treated as qualifying distributions.[116] A private foundation must therefore allocate its operating expenses between those paid or incurred for the production or collection of gross income, and those other administrative expenses which may be properly treated as qualifying distributions.[117]

4. *Qualifying Distributions*

In general, a qualifying distribution is any amount paid to accomplish an exempt purpose[118] or to acquire an asset which is used or held directly

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Rev. Rul. 75-443, 1975-2 C.B. 449 (repayment of principal received by a private foundation in taxable years beginning after 1968 on loans made prior to 1968 for charitable purposes are not included in income, although interest payments are included).

The Code also provides that in computing income section 483 shall not apply to binding contracts entered into prior to January 1, 1970. I.R.C. § 4942(f)(2)(D). The interest imputed to the foundation on pre-1970 contracts is treated as a gain or loss on the sale.

[110] Qualifying distributions, defined in section 4942(g)(1), are amounts paid for a charitable purpose. *See generally* text accompanying notes 118-37 *infra*.

[111] I.R.C. § 4942(f)(2)(C)(i)-(ii). For a detailed discussion on qualifying distributions and set-asides, *see* text accompanying notes 138-42 *infra*.

[112] Lehrfeld, *supra* note 25, at 1826.

[113] I.R.C. § 4942(f)(1)(B).

[114] I.R.C. § 4942(f)(3)(A). Operating expenses which may be allocated to the production or collection of income include compensation of officers and other employees, interest, rent, and taxes. Treas. Reg. § 53.4942(a)-2(d)(4) (1973). Allowable corporate deductions such as net operating loss and dividend received deductions do not reduce a private foundation's gross income since these deductions do not fall into the category of expenses "paid or incurred." Treas. Reg. § 53.4942(a)-2(d)(4)(i) (1973).

[115] I.R.C. § 4940(c)(3)(B).

[116] I.R.C. § 4942(g).

[117] Treas. Reg. § 53.4942(a)-2(d)(4) (1973). *See generally* text accompanying notes 124-25 *infra*.

[118] I.R.C. § 170(c)(2)(B). An exempt purpose may be religious, charitable, scientific, literary or educational, the fostering of national or international amateur sports competition, and the prevention of cruelty to animals.

If the payment is a grant to either a private nonoperating foundation or to a controlled organization, *see* I.R.C. §§ 4942(g)(1)(A)-(B), 4946, such organizations must satisfy redistri-

in carrying out the foundation's exempt purpose,[119] or any set-aside for future distribution which has received prior IRS approval.[120] Except for set-asides, only amounts actually paid out by a foundation constitute qualifying distributions.[121] However, amounts contributed to an organization controlled by the foundation itself or by persons who are disqualified[122] are not qualifying distributions.[123]

Administrative expenses will be treated as qualifying distributions only if they are directly related to the foundation's exempt purposes.[124] For example, administrative expenses for conducting a qualified grant program will generally be considered to constitute qualifying distributions.[125] It is also important to distinguish between qualified administrative expenses and unqualified ones, *i.e.*, investment expenses.[126] Unqualified investment expenses can only be deducted where a foundation's adjusted net income exceeds its minimum investment return.[127] Where the adjusted net income is less than the minimum investment return, the unqualified investment expenses are permanently lost.

Loans by foundations for exempt purposes are treated as qualifying distributions, but when repaid increase the foundation's adjusted net income.[128] A foundation that borrows money to support a particular grant program makes a qualifying distribution when it expends the funds.[129]

Amounts paid to acquire assets used or held for use in directly carrying out a foundation's exempt purposes are also characterized as qualifying distributions.[130] Depreciation of these assets, however, does not amount to a qualifying distribution.[131]

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bution requirements in order for the payment to be a qualifying distribution. *See* I.R.C. § 4942(g)(3)(A); text accompanying notes 134-37 *infra*.

[119] I.R.C. § 4942(g)(1)(B).

[120] I.R.C. § 4942(g)(2)(B).

[121] Lehrfeld, *supra* note 25, at 1840.

[122] I.R.C. § 4946 defines the term "disqualified person" for purposes of the subchapter on private foundations.

[123] I.R.C. § 4942(g)(1)(A).

[124] Moorehead, *Qualifying Distributions: Do Your Grants And Activities Comply?*, 11 CONF. ON CHARITABLE FOUNDATIONS 203, 211 (1976).

[125] *Id.*

[126] For example, the fees paid to an investment advisor and salaries paid to manage the foundation's investment portfolio are not qualifying distributions, but are deductions from gross income. *Id.*

[127] For example, if a foundation's adjusted net income is $110,000 and its minimum investment return totals $100,000, its unqualified investment expenses may be used to reduce gross income in arriving at adjusted net income. If its adjusted net income is only $90,000, however, such expenses are disregarded.

[128] H. Fort Flowers Foundation, Inc. v. Commissioner, 72 T.C. 399 (1979). *Cf.* notes 105, 109 *supra* for examples of how other types of loans by private foundations are treated.

[129] Moorehead, *supra* note 124, at 216.

[130] I.R.C. § 4942(g)(1)(B).

[131] Rev. Rul. 74-560, 1974-2 C.B. 389. When nonexempt property is converted into exempt property, the amount of the qualifying distribution is the property's fair market value on

Grants to other organizations are qualifying distributions only where the grantee organization is either a noncontrolled operating foundation[132] or a noncontrolled public charity.[133] The recipient organizations must pay out the qualifying distribution unless it receives the IRS's approval for a set-aside.

If the grantee organization is a nonoperating private foundation or a controlled organization, the "redistribution rule" codified at Internal Revenue Code Section 4942(g)(3)(A) and (B) applies. Under this rule, a grant to either of these organizations will be qualifying to the grantor only if the grantee uses the funds for charitable purposes within one year of receipt.[134] If the grantee fails to make the necessary redistribution, the *grantor's* gross income for the following year is increased by the undistributed amount.[135] The grantee organization does not fulfill its redistribution obligation by passing the contribution to another private foundation or controlled organization.[136] It may, however, also establish a set-aside in the amount of the contribution with the IRS's approval.[137]

The Code's set-aside provision allows all foundations, upon IRS approval, to fund long-term projects by accumulating income which must be distributed within five years.[138] Extensions beyond the five-year period

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the date it is committed to exempt use. Rev. Rul. 71-102, 1971-1 C.B. 379.

[132] The test of control is whether the grantor foundation and/or any disqualified persons with respect to the grantor foundation, may by aggregating their votes or position of authority, require the donee organization to make a particular expenditure or to refrain from one. Moorehead, *supra* note 124, at 208.

[133] Noncontrolled public charities are those organizations which are exempt under I.R.C. § 501(c) and are excluded from private foundation status by section 509(a)(1)-(3). These include churches, hospitals, schools, colleges, and other publicly supported organizations. *Id.* at 206. *See, e.g.*, Rev. Rul. 80-97, 1980-1 C.B. 257 (a private foundation contribution to an exempt cemetery company not described in § 170(c)(2)(B) is not a qualifying distribution under § 4942(g)).

[134] I.R.C. § 4942(g)(3)(A)-(B).

[135] Moorehead, *supra* note 124, at 210. The Code requires the grantor foundation to obtain adequate documentation of the grantee's distribution.

[136] *Cf.* Rev. Rul. 78-315, 1978-2 C.B. 271 (a private foundation operating as a cultural center makes qualifying distribution when it turns over substantially all of its adjusted net income to a separate corporation that, in a fiduciary capacity, disburses such income to the cultural center in a timely manner).

[137] Rev. Rul. 78-45, 1978-1 C.B. 378.

[138] I.R.C. § 4942(g)(2)(B); *see* H.R. REP. No. 91-413, 91st Cong., 1st Sess. (1969).

> Such may include a plan to erect a building to house a direct charitable, educational or other exempt activity of a foundation even though its exact location and architectural plans have not been finalized; a plan to fund a specific research program which is of such magnitude as to require an accumulation before commencement even though not all of the details of the program have been finalized.

Id. Treas. Reg. § 53.4942(a)-3(b) (1973). *See, e.g.*, Rev. Rul. 74-450, 74-2 C.B. 388 (a private foundation's plan to convert farmland into an extension of its existing wildlife sanctuary and a public park, payment for which was to be made within five years, furthered its charitable purposes and thus constituted a "specific project" for which an amount may be set-aside and treated as a qualifying distribution).

can be granted by the IRS.[139] Prior to the adoption of the 1976 Tax Reform Act, a private foundation, to obtain a favorable ruling for a set-aside, was required to demonstrate that a particular project could be more effectively carried out by an accumulation of funds than by immediate distribution.[140] This requirement, however, proved too difficult to meet[141] and under the present Code, in addition to the subjective test, a "safe harbor" is provided.[142]

In general, a distribution is first deemed to have been made out of the preceeding taxable year's undistributed income, if any exists[143] and thereafter out of the current taxable year's undistributed income.[144] If these sources are exhausted, any remaining qualifying distributions would come out of the foundation's corpus.[145]

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[139] Of course, the purpose of the set-aside provision automatically excludes those projects which the foundation is capable of subsidizing out of current income. Rev. Rul. 75-511, 1975-2 C.B. 450 (a private foundation whose primary activity is the making of renewable scholarships and fixed sum research grants that normally run for three years, for which payments have been made annually from current income, may not set-aside amounts representing the maximum for each grantee from which the annual payments will be made as qualifying distributions).

[140] I.R.C. § 4942(g)(2)(B); *see* Treas. Reg. § 53.4942(a)-3(b)(3)(iii); *see, e.g.*, Rev. Rul. 79-319, 1979-2 C.B. 388 (a foundation that could make its grant payments out of current or future income and sought to defer payments merely to retain control over the funds is not eligible to a set-aside).

[141] S. REP. No. 94-9438, 94th Cong., 1st Sess. 593 (1976).

[142] *See* I.R.C. § 4942(g)(2)(B). A foundation may make its own determination that a project will not be accomplished during the taxable year if it fulfills two objective requirements. I.R.C. § 4942(g)(2)(B)(ii). First, the foundation's actual distribution, including the set-aside, must be at least equal to the minimum distribution for every year after December 31, 1975. I.R.C. § 4942(g)(2)(B)(ii)(II). Second, for the four taxable years preceding the first taxable year after December 31, 1975, or in the fifth year following the creation of an organization, all distributions, including the set-asides, must equal 80% of the minimum distribution in the first preceding year, 60% in the second preceding year, 40% in the third preceding year, and 20% in the fourth preceding year. I.R.C. § 4942(g)(2)(B)(ii)(III). *See generally* S. REP. No. 94-9438, 94th Cong., 1st Sess. 594 (1976).

[143] I.R.C. § 4942(h)(1)(A).

[144] I.R.C. § 4942(h)(1)(B).

[145] I.R.C. § 4942(h)(1)(C). The Code also provides that where a contribution exceeds a prior year's undistributed income, the foundation may elect to treat the excess as having been made out of either the undistributed income of another prior year, or out of corpus, instead of having to allocate the excess to the current year's income. I.R.C. § 4942(h)(2). *See, e.g.*, Rev. Rul. 78-45, 1978-1 C.B. 378. This option allows the foundation to avoid second and third level taxes for the current year. The procedures for election and revocation of election are set forth in the Regulations at section 53.4942(a)-3(d)(2).

Further, if the qualifying distribution in one or more years exceeds the distributable amounts in such years and the excess is treated as having been made out of the corpus or from undistributed income for the current year, then the distributable amount for the current year may be reduced by the amount equal to the excess. I.R.C. § 4942(i)(1). The excess may be carried over and applied against the undistributed requirements for five succeeding years. I.R.C. § 4942(i)(2). In recommending the carryover rules, the Treasury Department reasoned that the rule would act as an averaging device and allow a foundation to make an immediate gift to an operating charity out of corpus and to recoup its expenditure out of

IV. Effects of Section 4942 on Private Foundations in Hawaii

The enactment of section 4942 raised fears among foundation supporters that Congress had effectively placed the private foundations in captivity.[146] As one critic observed, "[a] delicate balancing had to be made between abuses and benefits and it is not at all clear that Congress was correct in its decision in all cases."[147] The policy of increasing distributions from the private foundations to society, of course, receives widespread support. The real focus of attention in the section 4942 analysis, however, has been on its long-term effects on the future of the private foundation.[148] The primary fear is that the private foundation will be unable to keep pace with the minimum distribution requirement without having to invade its corpus and thus jeopardize its existence.[149]

The following empirical study of section 4942's effect on private foundations in Hawaii, thus, had two objectives: (1) To assess the impact sec-

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future earnings. Treasury Report, *supra* note 3, at 27.

In addition, where a private foundation having an excess of qualifying distributions as described in section 4942(i) transfers its total assets to another private foundation controlled by the same persons who controlled the transferor, the transferee may apply that carryover to reduce its distributable amount. Rev. Rul. 78-387, 1978-2 C.B. 270.

[146] *See* Taggart, *supra* note 10.

[147] *Private Foundations and the 1969 Tax Reform Act*, *supra* note 5, at 277. *See* Labovitz, *supra* note 11, at 87. Armand G. Erpf, President of the Arkville Erpf Fund, Inc., in a letter to the Columbia Journal of Law and Social Problems dated December 30, 1970 wrote:

> "The abuse of the private foundation is one thing but to eradicate the conception is another. To burn the house down because there are a few rats is a typical example of nihilism which we decry so vehemently in the form of revolutionaries who espouse terriorism for the sake of terror to fulfill the malaise of their psyche but do not concern themselves with the void left in their wake.
>
> "This to me is the essential divergence and malevolence of the provision affecting foundations in the recent so-called reform tax legislation."

Private Foundations and the 1969 Tax Reform Act, *supra* note 5, at 267.

[148] Questions have also been raised as to section 4942's constitutionality. *See* Note, *Some Constitutional Aspects of Section 4942 of the Internal Revenue Code*, 9 New Eng. L. Rev. 207 (1974). The author argues that section 4942 defies "not only the present law, but also the same, basic, constitutional principles that allow the Congress the power to tax." *Id.* at 208. In addition, the writer contends that section 4942 constitutes an unreasonable restraint on interstate commerce, that it violates the equal protection clause of the fourteenth amendment, that it arbitrarily deprives property and liberty, and that it violates the doctrine of separation of powers. *Id.* Since the use of the taxing power for regulatory purposes has been consistently upheld on a minimum rationality basis, *see, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953); Sonzinsky v. United States, 300 U.S. 506 (1937); McCray v. United States, 195 U.S. 27 (1904), it is highly likely that section 4942 can withstand constitutional challenge. *See* H. Fort Flowers Foundation, Inc. v. Commissioner, 72 T.C. 399 (1979).

[149] The requirement of a minimum rate of distribution was perhaps the most criticized requirement of section 4942. "It [was] feared that this requirement will cut into the foundation assets and if accompanied by poor market action, could eventually reduce capital substantially." *Private Foundations and the 1969 Tax Reform Act*, *supra* note 5, at 272.

tion 4942 has had upon distributions by Hawaii's private foundations, and (2) to analyze the effect the minimum distribution requirement has had upon the foundations' investment strategies, their size, and their growth. Thirty foundations in Hawaii whose annual grants exceed $100 were selected from the FOUNDATION CENTER DATA BOOK[150]—a listing of all private foundations in the United States. All foundations listing assets of $10 million or more were reviewed, while the remaining organizations were picked at random.[151] The organizations selected accounted for 87% of the total grants distributed in Hawaii in 1978,[152] and represented 41%

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[150] FOUNDATION CENTER, FOUNDATION CENTER DATA BOOK (1979).

[151] The organizations selected for the survey (listed below according to their amount of assets) were:

TOTAL ASSETS GREATER THAN $10 MILLION

1. Atherton Family Foundation
2. Harold K.L. Castle Foundation
3. McInerny Foundation
4. Samuel and Mary Castle Foundation

TOTAL ASSETS BETWEEN $1 MILLION AND $10 MILLION

1. S.W. Wilcox Foundation
2. G.N. Wilcox General Trust
3. Chinn Ho Foundation
4. Mary D. and Walter F. Frear Foundation
5. Charles and Anna Cooke Foundation

TOTAL ASSETS BETWEEN $500,000 AND $1 MILLION

1. Elsie H. Wilcox Foundation
2. Baldwin Memorial Foundation
3. George and Ida Castle Foundation

TOTAL ASSETS BETWEEN $100,000 AND $500,000

1. Rama Watumull Foundation
2. Ross Foundation
3. Dr. and Mrs. L.Q. Pang Foundation
4. Mosher Galt Foundation
5. Dora Isenberg Foundation
6. Damon Trust
7. Amfac Foundation

TOTAL ASSETS LESS THAN $100,000

1. Kuwamoto Foundation
2. Akeroyd Foundation for Mental Health
3. Louise and Y.T. Lum Foundation
4. David Gillette Foundation
5. Barbara Cox Anthony Foundation
6. Larry and Beatrice Ching Foundation
7. Earle J.C. Family Foundation
8. Lowell S. Dillingham Foundation
9. Paul R. Agena Foundation
10. Francis H.I. Brown Foundation
11. Hans and Clara Davis Foundation

These foundations were grouped according to the categories used by the Treasury Department survey. *See* text accompanying note 65 *supra*.

[152] The total amount of grants for 1978 was $5,460,029. These selected organizations accounted for $4,754,072 of the total or 87%.

of the total number of foundations in Hawaii which distributed $100 or more in 1978.[153] Data was then compiled from IRS information returns filed annually by these foundations,[154] and a comparative study was made of the data available before section 4942's enactment with data for the same foundations for the nine-year period immediately following section 4942's adoption.[155]

A. *Impact of Section 4942 on Private Foundation Distributions in Hawaii*

A primary purpose of the minimum distribution requirement was to increase private foundation funding of charitable organizations and their activities.[156] Analysis of the amounts distributed by the examined foundations indicates that the requirement has, perhaps, been *too* successful in fulfilling that purpose during the past eight years.

The average amount distributed for the years 1972-78 by foundations studied for which pre-1970 data was available far exceeded the average amount distributed prior to section 4942's enactment.

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[153] Seventy-three foundations gave $100 or more in 1978. The information returns of thirty were examined.

[154] The most serious limitation encountered during the study was the incompleteness of the data. The Hawaii State Department of Taxation maintains its own returns, however, these are not open for public inspection. The only source of data publicly available on the foundations are the information returns—Forms 990AR and 990PF—filed annually by the private foundations with the IRS. A collection of these information returns for Hawaii is maintained at the University of Hawaii Library for the years 1969 to 1978. The University of Hawaii Library is a regional resource center for the Foundation Center of New York. The returns filed with the IRS, especially for the pre-1970 years, were difficult to work with; much of the information was irrelevant or omitted, sets of returns for several foundations were incomplete, and they required manual calculations.

[155] The author recognizes that other events and social forces may also have affected foundations during the periods examined. While no pure causal relationships can be assumed, however, some of the changes undoubtedly reflect the influences of section 4942. Similarly, although the 1976 Tax Reform Act lowered the distribution rate from 6% to 5%, *see* text accompanying note 102 *supra*, it did not significantly affect the study's results or conclusion. This study focuses upon the effect of a minimum distribution return as a concept and not as a specific percentage requirement. Most of the foundations examined had their distribution rate gradually increased from 4½% in 1972 to 6% in 1976 before it was finally set at 5%.

[156] ROLE OF FOUNDATIONS, *supra* note 35, at 132. The author of the report argued that any other objectives which might be attributed to the minimum distribution requirement, such as causing poor investment returns, are irrelevant in a critical examination of the requirement.

TABLE 1

A Comparison of Distribution Prior to and after Section 4942

Name of Foundation	Avg. Dist. for 1969 & 1970 (Prior to 4942)	Avg. Dist. for 1971 through 1978 (After Enactment of 4942)	Percentage Increase
S.W. Wilcox Tr.	$ 24,525	$ 115,157	370
G.M. Wilcox Gen.	173,482	401,334	131
Frear Foundation	104,810	154,095	47
Elsie Wilcox Fdn.	21,817	28,182	29
Baldwin Mem. Fdn.	16,632	40,733	145
Cooke Ltd.	222,009	382,992	73
McInerny Fdn.	442,347	936,494	112
S & M Castle Fdn.	213,891	610,950	186
TOTALS	1,219,513	2,669,937	119

As shown in Table 1, the foundations more than doubled their total distributions under section 4942.

The effectiveness of section 4942 in promoting private foundation distributions to society, however, has been even more substantial than the above figures might indicate. In the taxable years studied, the qualifying amounts that the evaluated foundations distributed were *less* than the minimum distribution level 36% of the time. (See Table 2.) Thus, in approximately 4 out of 10 situations, the minimum distribution requirement forced the private foundations to turn sums over to the federal government. In other words, the minimum distribution requirement created an excess amount of distributable funds.[157]

TABLE 2

A Comparison of Qualifying Distributions to Distributable Amounts after 1970

Foundation by Asset Size	Number of Years Where Qualifying Distributions Did Not Meet Distributable Amount Requirement	Aggregate Number of Years Examined	Percentage
0 - $100,000	22	79	28
$100,000 - $500,000	10	36	28
$500,000 - $1 million	9	20	45
$1 - $10 million	15	26	58
Over $10 million	11	23	48
TOTALS	67	184	36

[157] On the whole, it was the smaller foundations—those with less than $500,000 in assets—that were able to distribute the available amounts. This is, perhaps, an indication that the larger foundations have not yet been able to develop comprehensive programs capable of

As the study indicates, each category of foundations has been able to steadily increase its average annual distributions since 1970. (See Table 3.) Part of this trend, of course, is attributable to the increasing rates of distribution which were required during the "phasein period" provided for in section 4942.[158] At the same time, it should be noted that the annual distributions for 1977 increased over those for 1976 despite a reduction in the minimum distribution rate from 6% to 5% under the 1976 Tax Reform Act.[159] Hopefully, this last statistic indicates that at least part of the upward trend in average distributions reflects the foundations' improved ability to fully disperse their available funds.

TABLE 3

Average Annual Distributions (Dollars)

Foundation by Asset Size	1971	1972	1973	1974	1975	1976	1977
0 - $100,000	2,786	3,003	4,506	10,156	7,550	10,902	18,660
$100,000 - $500,000				49,518	68,522	76,818	81,154
$500,000 - $1 million	26,111	38,549	52,618	49,719	54,032	51,767	164,585
$1 - $10 million	225,009	229,427	265,343	271,525	341,175	284,606	325,162
Over $10 million		463,447	614,110	1,019,784	803,352	837,367	887,105

B. Impact of Section 4942 on Foundation Investment Strategy, Size and Growth

The requirement of a minimum rate of distribution, set at 6% until the 1976 Tax Reform Act, caused the greatest consternation among foundation officials.[160] The 6% rate was criticized as being unrealistic and unreasonable in light of then existing market conditions and other rates of returns.[161] The Labovitz study of section 4942, released in 1974, found 37% of all foundations earned less than 6% on their investments in 1967, and an even higher 59% earned less than a 6% return in 1970.[162] Thus, except for those foundations that were able to maintain an above average investment return, the enactment of section 4942 required foundations to dip into their corpora to meet the minimum distribution requirements.[163]

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distributing their available funds.

[158] Tax Reform Act of 1969, § 101(l)(3), 83 Stat. 487. This was a transitional provision which has lapsed.

[159] *See* text accompanying note 102 *supra*.

[160] *Private Foundations and the 1969 Tax Reform Act*, *supra* note 5, at 272.

[161] Steuerle, *supra* note 99, at 424.

[162] Labovitz, *supra* note 11, at 89.

[163] Labovitz found that in 1970,

> [t]he additional payout that would have been required for these foundations to meet the payout would have added 4.7 per cent to the total distributions of foundations

The private foundations surveyed in Hawaii experienced even greater difficulty in meeting the 6% level. (See Table 4.) At the same time, however, from at least the vantage point of the Hawaii foundations, the reduction to 5% of the minimum distribution rate by the 1976 Tax Reform Act was an appropriate step.[164] With the exception of those foundations with assets valued above $10 million, Hawaii foundations were able to earn at least a 5% rate of return between 1970 and 1977. Apparently these larger foundations were the only ones to have invested heavily in rapidly appreciating real estate.[165] As a result, it was particularly difficult for them to maintain the required average rate of return as their net worths increased. The smaller foundations, on the other hand, tended to hold assets in the form of more stable securities or cash, where a 5% rate of return is normal.[166]

TABLE 4

Percentage of Return on Total Assets: 1970-1977

Foundation by Asset Size	Average Rate of Return (%)
0 - $100,000	5
$100,000 - $500,000	5.68
$500,000 - $1 million	5.1
$1 - $10 million	5.7
Over $10 million	4.82

At first glance, this investment pattern seems to affirm the prediction of those critics who felt that the minimum investment requirement would force all foundations to invest heavily in fixed value securities, *i.e.*, government and corporate bonds, in order to achieve high current yields but low long-term growth. Only in this way, it was argued, would the foundations be able to meet their yearly obligation to distribute the minimum

with less than $200,000 in assets, 9.5 per cent for those with $200,000-$1 million, 17.1 per cent for those with $1 million-$10 million, and 57.8 per cent for those with $10 million or more.

Labovitz, *supra* note 11, at 91-92 (footnote omitted).

[164] A study by the University of Chicago showed generally that the average rate of return to all investors in common stock over long periods of time—40 years or more—has averaged something slightly under 5%. Worthy, *supra* note 77, at 241.

[165] Whereas foundations with more than $10 million in assets on the average maintained significant proportions of their investment portfolios in real estate (Atherton Family Foundation - 7.5%, Harold K.L. Castle Foundation - 66.42%, McInerny Foundation - 13.49%, Samuel and Mary Castle Foundation - 11.53%, with the exception of the S.W. Wilcox Foundation - 4.84%, Charles and Anna Cooke Foundation - 15.6%, Baldwin Memorial Foundation - 1.5%, and the George and Ida Castle Foundation - 67%), all the other foundations examined did not have any real estate holdings.

[166] *See* note 164 *supra*.

rate while avoiding the hazards of maintaining the required rate of return on expanding assets. The rule, the critics also argued, did not make adequate allowance for variations in the investment policies and asset compositions of various foundations.[167]

This criticism is further supported by the fact that the foundations with the highest rate of return—those with assets of $1 million to $10 million which realized a 5.7% rate—also had the highest median percentage of their assets in fixed value securities. (See Table 5.)

TABLE 5

Average Investment in Fixed Assets (%)

Foundation by Asset Size	1971	1972	1973	1974	1975	1976	1977	Median
0 - $100,000	16.0	25.0	25.0	25.0	21.0	24.0	36.0	25.0
$100,000 - $500,000			3.0	4.9	5.6	7.0	3.1	5.6
$500,000 - $1 million	10.0	15.0	21.0	19.0	20.0	20.0	21.0	20.0
$1 - $10 million	21.0	25.0	28.0	26.0	25.0	25.0	27.0	26.0
Over $10 million		29.0	29.0	14.0	14.0	15.0	16.0	14.0

While 63% of all foundations sampled invested in fixed value securities, this category of foundations was able to earn a net income greater than the minimum investment rate in a remarkable 90% of the foundations examined. (See Table 6.)

TABLE 6

Percentage of Years in which Adjusted Net Income Exceeded Minimum Investment Return

Foundation by Asset Size	Percentage
0 - $100,000	57
$100,000 - $500,000	79
$500,000 - $1 million	71
$1 - $10 million	90
Over $10 million	65

The soundness of this correlation between investment policy and rate of return is marred, however, by the record of those foundations with assets

[167] ROLE OF FOUNDATIONS, *supra* note 35, at 143. The critical difference among foundations *vis-a-vis* the minimum distribution requirement is the liquidity of their assets and the current income flow that the assets produce. A foundation with substantial assets in a low payout growth corporation may be unfairly discriminated against if the minimum distribution requirement is applied with respect to assets rather than with respect to income.

between $100,000 and $500,000. These foundations, with a mere 5.6% of their assets in fixed securities (see Table 5), still achieved the second highest rate of return (see Table 4) and the second best success record in earning more than the minimum investment rate. (See Table 6.) Thus, it seems that contrary to the critics' prediction of inflexibility, a foundation need not invest heavily in fixed value assets to satisfy the minimum investment return requirement.[168]

The most important and vociferously voiced criticism of section 4942, however, has to a large extent been substantiated. Above all, the critics predicted that the provision would retard, if not reverse, the growth of private foundations and force them to delve into their corpora.[169] Along these lines, they additionally predicted that a foundation would not be able to maintain the "real dollar" value of its net assets in the face of inflation.[170]

These fears were apparently well-grounded. Although the short-term benefits of section 4942 are evidenced by increased distributions to society, early indications project a less than bright future for many foundations. Sixty-three percent of the foundations examined showed either no growth or a diminishing asset corpus during the period studied.[171] (See Table 7.)

TABLE 7

Effect of Section 4942 on the Total Assets of Foundations in Hawaii

Foundation by Asset Size	Percentage Showing Diminished or No Growth in Assets
0 - $100,000	60
$100,000 - $500,000	50
$500,000 - $1 million	67
$1 - $10 million	55
Over $10 million	33

[168] Perhaps a better rule of thumb is that the foundation should keep its investments liquid—whether in cash or other easily convertible assets. This will enable it not only to meet its annual distribution requirement, but also to exercise better control over its growth rate. While such an investment policy bars foundations from profitable, long-term ventures such as real estate, within the context of section 4942 it is appropriate. The underlying policy of forcing *current* distributions to society must always be kept in mind.

[169] *See* note 149 *supra*.

[170] "While some foundations may be able to earn a sufficient return on their investments to keep abreast of inflation . . . many will be unable to sustain such investment results and will thus slowly diminish in size in terms of the real dollars." *Private Foundations and the 1969 Tax Reform Act, supra* note 5 (footnote omitted).

[171] Statistical information was derived from a trend analysis of the asset base of each foundation for the years 1971-77.

The foundations most seriously affected by section 4942's enactment were the smallest foundations—those with less than $100,000 in assets. Sixty percent of these foundations showed no growth or a diminishing asset base. In 43% of the periods examined, these foundations' required distributions which exceeded their annual earnings, *i.e.*, distributable amounts exceeded adjusted net income. (See Table 8.)

TABLE 8

Percentage of Periods in which Distributable Amount Exceeded Adjusted Net Income

Foundation by Asset Size	Percentage
0 - $100,000	43
$100,000 - $500,000	21
$500,000 - $1 million	29
$1 - $10 million	10
Over $10 million	35

The inability of these foundations to meet their section 4942 obligations out of income means that foundations have been forced to liquidate their assets, precisely what critics had feared.

The size of the smaller foundations may be the limiting factor insofar as their investment capabilities are concerned. Unlike larger foundations, the small foundation is unable to purchase real estate and other growth assets which require a large initial investment, but which compensate over time for the loss of corpus to distributions in the early years. When forced to distribute from their corpora, these foundations are not capable of regaining the loss.[172]

In contrast, foundations with assets over $10 million show a definite trend of increasing net worth, increasing the average value of their assets

[172] It would be ironic if the smaller foundations, and not the larger foundations, were most seriously affected by section 4942. As the legislative history shows, one of the principal concerns leading to enactment of the provision was the immense size of the private foundations. *See* text accompanying note 62 *supra*.

from $9.2 million in 1971 to $15.7 million in 1977. (See Table 9.)

TABLE 9

Average Annual Assets (Dollars)

Foundation by Asset Size	1972	1973	1974	1975	1976	1977
0 - $100,000	21,433	21,998	21,628	25,966	23,875	27,196
$100,000 - $500,000		241,936	228,369	269,436	248,966	246,777
$500,000 - $1 million		714,548	671,863	720,676	744,512	746,488
$1 - $10 million	4,767,883	4,230,453	4,763,506	4,946,040	4,802,949	4,826,607
Over $10 million	8,005,943	7,269,656	14,105,082	14,757,749	14,528,776	15,772,549

These were the only foundations that showed significant increases in net worth over a long period of time despite the fact that their 4.82% rate of return on assets was the lowest of all foundations, and that they were required to make substantial distributions out of their corpora.

This ability to show increases in assets despite disbursements from corpus appears to be attributable in part to the makeup of their investment portfolios. The large foundations sampled all have significant real estate holdings in Hawaii,[173] the rapidly increasing value of which enables the foundations to maintain a high growth rate. These foundations have also been able to attract immensely wealthy contributors who add substantially and regularly to the foundations' total assets.[174] Contributions to a foundation are not figured in calculating the minimum distribution rate.

Data gathered for foundations with assets between $100,000 and $10 million do not show a distinguishable trend of either an increasing or decreasing asset portfolio. (See Table 9.) Their average rates of return for 1971-77 have enabled them merely to meet their minimum distribution requirement without touching the corpus. Because these foundations show relatively little growth, however, they face the danger of diminution in real value by the present double-digit inflation rate. Since both the basis of the minimum distribution requirement—the fair market value of assets—and the distributable amounts remain constant, the real value of the distributions to society and the foundations themselves will diminish as the real value of the dollar declines.

To date, these foundations have been able to show an annual increase in their distributions. (See Table 3.) This trend, however, does not reflect the problems of a no-growth portfolio because the minimum distribution rate has increased annually by one-half percent since 1972 under section

[173] *See* note 165 *supra*.

[174] *See generally* FOUNDATION CENTER, *supra* note 150.

4942's phasein rule.[175] Thus, unless the value of their assets increases steadily in the future through appreciation or additional contributions, or unless the inflationary trend makes a radical reversal, these foundations' effectiveness in society will fade.

V. Conclusions and Recommendations

> [F]oundations have freed large parts of the world from the curse of diseases such as malaria and yellow fever; have brought enjoyment of the arts to millions of people; have created and helped support universities and research institutes; have clarified and otherwise served the law; have in many practical ways promoted international understanding and have encouraged the cause of peace; have shown how population can be controlled and people fed; have helped develop broadly trained leadership for business and government; have significantly aided the emerging nations; have. . . .[176]

Section 4942 has succeeded in Hawaii in furthering Congress' primary objectives of increasing foundation distributions to society and eliminating accumulations of income. This study has demonstrated that compliance with the minimum distribution requirement has resulted in increased annual disbursements to Hawaii's charities. At the same time, replacement of the vague "unreasonable accumulations" standard with fixed, objective criteria means that foundations no longer may hold vast sums of income in reserve. As a remedial measure aimed at abuse of the foundation's tax exempt status, section 4942 thus stands as a clear success.

Against the benefits of increased current distributions, however, must be weighed the serious threat section 4942 poses to the continued existence of private foundations themselves. Results of the study confirm critics' fears that smaller foundations, in particular, would be rendered incapable of long-term growth and be forced to make annual distributions out of their corpora by complying with section 4942. Foundation growth is now possible only through contributions or appreciation of existing assets. With the present double-digit inflation rate, only the largest foundations will be able to show significant increases in the value of their assets over time. Unless the inhibiting effect on formation and growth of foundations is somehow curtailed, the minimum distribution requirement may ultimately lead to the demise of the private, tax-exempt philanthropic system.

Ameliorating the present situation under section 4942 thus requires a recasting of the rules to strike a better balance between the need to curb abuse and the need to allow foundations to distribute without self-destruction. Certainly eliminating section 4942 would not provide the an-

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[175] *See* note 158 *supra*.

[176] W. Weaver, U.S. Philanthropic Foundations 448 (1967).

swer. History has shown that private foundations will not distribute their earnings unless forced to do so. The seriousness of past abuses has shown that little faith can be placed in the foundations themselves.

A more reasonable solution would be to modify the minimum distribution requirement to broaden the set-aside provision. The main problem with section 4942's current formula is that it does not allow a foundation to adequately plan its distributions. A foundation which increases its return on investment will not be able to counter the effects of inflation because it is not permitted to retain any of its earnings. If it makes no return on its investment, the present rule still requires annual distributions to be computed on the foundation's total assets' fair market value, which value could unpredictably fluctuate during any given year. In times of inflation and recession, it is impossible to foresee with any certainty how the value of stocks, real estate, and other assets will change.

Because the ability to plan investment strategies in advance is a prerequisite to change, the present rule should be modified to require that a foundation meet the minimum distribution requirement over a period of years. This could be accomplished by making the distribution requirement's base a weighted average of the value of a foundation's net worth over a period of five to ten years. Such a modification would enable foundations investing in appreciating assets to generate income for distribution in later years to offset a lack of income and distributions in the leaner years of the investment.

At the same time, however, the foundations' managers must undertake to achieve a more balanced investment portfolio. The study showed that while those foundations with appreciating but unproductive assets were able to increase their net worth, they were not able to meet the minimum distribution requirement. On the other hand, those foundations that were able to meet their current distribution requirements without touching their corpora, were not able to increase their net worth. Only if a foundation has an investment portfolio with both appreciating assets and investments with high current yields but low long-term growth can it expect to both meet its obligations under section 4942 and survive into the future.

Additionally, the foundation managers must focus on structuring more comprehensive distribution programs. The study clearly demonstrated that many of the foundations, especially the larger ones, failed to distribute the sums available under section 4942. In turning the money over to the government, private foundations again neglected their role in passing benefits to society through the private sector.

Private foundations have already provided hospitals with the most modern equipment,[177] subsidized experiments in faith healing,[178] and

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[177] For example, Duke Endowment (New York City, New York) and the Booth Ferris Foundation (New York City, New York).

[178] For example, Pew Memorial Trust (Philadelphia, Pennsylvania).

researched the diet and sexual practices of people in Harlem.[179] They have backed the Boston Symphony[180] and have supported experimentation with electronic music.[181] The foundations' unique freedom has led to some remarkable accomplishments—the eradication of hookworm, the development of vaccines, high yielding rice and a new blight resistant strain of cereal grain, a tenfold increase in the percentage of Third World students attending college, parole reforms, invaluable studies of public administration[182] . . . the list is endless.

The American people seem certain to face the 1980's with a sharp curtailment in government support for the private sector.[183] With the emphasis in governmental spending shifting to such areas as national defense and economic revitalization,[184] it is clear that areas traditionally supported by private foundations will receive a lower priority.[185] Private foundations have already had a profound impact on American society by redistributing economic resources within the private sector.[186] With slight adjustments to the present tax scheme and with a little more imagination by the private foundations, the impact foundations have on American society can be greater still.

J.H.Q.L.

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[179] For example, Field Foundation (New York City, New York).

[180] For example, Rockefeller Foundation (New York City, New York).

[181] For example, Julliard Music Foundation (New York City, New York).

[182] W. RUDY, *supra* note 1, at 2.

[183] *See generally Reagan to Slash Taxes, Cut Budget by $41.4 Billion*, Honolulu Advertiser, Feb. 4, 1981, at A-1, col. 3.

[184] *Id.*

[185] *The Budget Cuts in Summary*, N.Y. Times, Feb. 19, 1981, at B-6 col. 1, B-7 col. 5.

[186] Addressing a joint session of Congress, President Ronald Reagan stated:

> "Historically the American people have supported by voluntary contribution more artistic and cultural activities than all the other countries in the world put together. I wholeheartedly support this approach and believe Americans will continue their generosity. Therefore, I am proposing a savings of $85 million in the federal subsidy now going to the arts and humanities."

Reagan to Slash Taxes, Cut Budget by $41.4 Billion, supra note 207, at A-4, col. 5.

HAWAII'S CEDED LANDS*

I. INTRODUCTION

On August 12, 1898, the Republic of Hawaii ceded sovereignty to the United States,[1] together with absolute title to approximately 1,750,000 acres of Government and Crown lands constituting its public domain.[2] Under Hawaii's Organic Act,[3] these "ceded lands"—the public lands (and properties) transferred to the United States without compensation at an-

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* The author feels obligated to add a word of qualification at the outset. While the topic of Hawaii's ceded lands necessarily implicates broader issues of native Hawaiian rights, this comment is narrowly limited to a discussion of the federal-state relationship in the history of the administration of the ceded lands "trust." The author does not purport to define or discuss the rights of the beneficiaries of the trust, but rather focuses on the nature of the trustee's role as it passed from the federal government to the state.

[1] Formal transfer of sovereignty under the Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898) took place on August 12, 1898 [hereinafter Joint Resolution]. For an excellent compilation of documents, opinions and communications regarding Hawaii's annexation, *see* L. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAII (no date). *See generally* 3 R. KUYKENDALL, THE HAWAIIAN KINGDOM 523-650 (1967); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 861-62 (1975).

[2] J. HOBBS, HAWAII: A PAGEANT OF THE SOIL 118 (1935). Hobbs notes that the lands were valued at approximately $5,500,000, although other sources give conflicting figures. *See* L. THURSTON, *supra* note 1, at 24 (who gives the amount of acreage involved as 1,740,000 acres valued at $4,389,550 in 1894). Both Thurston and S. REP. No. 80, 86th Cong., 1st Sess. 2-3 (1959) note that the lands were mostly mountainous and waste lands of little value, since most of the arable portions had been sold or were under lease.

Congress' power over territories, including the power to acquire title (whether by purchase, treaty, gift or cession) to their public lands, exists in the United States government's sovereign capacity, although it has been traced to the article IV property clause or to the executive and legislative power to make treaties and declare war. *See* note 36 *infra*. The effect of this cession, as was that of the cession by the original thirteen states of their claims to western territories and as was explicitly described in the Joint Resolution, was to vest absolute fee title to the affected properties in the United States. "Cession" in other contexts has been used to describe a transfer of right or title to, or jurisdiction over public properties between governmental units and without need for compensation. *But see* City of Cincinnati v. Nussbaum, 14 Ohio Misc. 19, 233 N.E.2d 152 (1968) (mere suspension of state jurisdiction over certain properties until Congress abandons them and not an absolute and perpetual abandonment of jurisdiction); Interior Airways, Inc. v. Wien Alaska Airlines, Inc., 188 F. Supp. 107 (D. Alaska 1960) (irrevocable suspension of jurisdiction).

[3] Organic Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 [hereinafter cited as Organic Act]. An amended version of the Organic Act has also been enacted in Hawaii. HAWAII REV. STAT. §§ 1-107 (1976).

nexation[4]—were given a special trust status under the federal government's proprietorship, due in part to the unique circumstances surrounding Hawaii's annexation.[5] So special was this trust relationship between the federal government and Hawaii that upon Hawaii's admission to statehood in 1959, the federal government relinquished title to most of these lands to the new state[6]—an act without precedent in United States history and one wholly contrary to established congressional public land policy.[7]

Section 5 of Hawaii's Admission Act[8] reflects the special history of the islands' ceded lands in the obligations it imposed upon both federal and state governments regarding the lands' administration and disposition. Section 5's key provisions declare the state successor in title to the ceded lands held by the federal government in 1959,[9] with specific exceptions.[10] These exceptions left some 400,000 acres of ceded land in federal ownership following admission, and section 5's amended provisions bound the federal government to return these lands to Hawaii when declared to be surplus to federal needs.[11] The Act additionally required the state to hold the ceded lands returned to the state by the federal government, together with their income and the proceeds from their disposition,

> as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[12]

The state thus succeeded the federal government as trustee of the lands, and with its newly acquired status assumed the attendant responsibilities

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[4] Section 91 of the Organic Act incorporates by reference the definition of ceded lands and properties contained in the Joint Resolution. "Ceded" lands and properties, at the time of annexation, public buildings or edifices, ports, harbors, military equipment, and "all other public property of every kind and description belonging to the Government of the Hawaii Islands, together with every right and appurtenance thereto appertaining" to which Hawaii ceded and transferred absolute fee title in 1898. As used hereafter in this comment, "ceded lands" will be used to denote these public lands and properties enumerated in the Joint Resolution, together with lands subsequently acquired in exchange therefor. The latter received identical treatment under the Organic and Admission Acts as the properties actually ceded on annexation, and are therefore included in the definition.

[5] *See* text accompanying notes 82-121 *infra*.

[6] *See* Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5 (b), (c) & (d), 73 Stat. 4.

[7] *See* text accompanying notes 38-60 *infra*.

[8] Admission Act, *supra* note 6.

[9] *Id.* § 5(b).

[10] Admission Act, *supra* note 6, at §§ 5(c) & (d).

[11] Admission Act, *supra* note 6, § 5(c), *as amended by* Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

[12] Admission Act, *supra* note 6, § 5(f).

of holding and administering the lands for the exclusive benefit of the islands' inhabitants.[13]

In the twenty years since statehood, however, neither the federal government nor the State of Hawaii has fully met its respective obligations under the Act. As a direct consequence, the people of Hawaii have not received the full benefit of their public lands in the manner prescribed by the Admission Act. This fact is of particular significance to the state's native Hawaiian population, which is presently exerting an organized effort to claim a specific portion of the public trust for its use.[14]

This comment examines the roles assumed by the federal and Hawaii state governments with respect to the lands ceded by the latter upon its annexation. It draws together and contrasts the history of federal territorial acquisitions and the history of Hawaii's public domain to illustrate the reasons for Congress' special treatment of Hawaii's public lands. The comment then examines the brief provisions of the Admission Act in greater detail and seeks to define the current roles of both the federal and state governments vis-a-vis Hawaii's ceded lands. Finally, against this background, the comment examines and analyzes the legal and administrative problems currently impeding the effective administration of Hawaii's ceded lands under the Act.

II. BACKGROUND

A review of the historical relationship between Hawaii's public lands and the federal public domain, and the historical reasons for the special treatment accorded Hawaii's public lands outside the federal public domain is necessary to properly understand the current status of Hawaii's ceded lands.[15] Such a review provides not only the essential background

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[13] The Joint Resolution, *supra* note 1, required that the United States apply the income derived from the territory's ceded properties solely for the benefit of the islands' inhabitants "for educational and other public purposes."

[14] Amendments to Hawaii's State Constitution adopted in 1978 created the Office of Hawaiian Affairs and vested in its board the power to manage and administer "all income and proceeds from that pro rata portion of the trust . . . for native Hawaiians." HAWAII CONST. art. XII, § 6. *See also* HAWAII CONST. art. XII, § 5 (establishing the Office of Hawaiian Affairs). *See generally* T. CREIGHTON, THE LANDS OF HAWAII: THEIR USE AND MISUSE 220-24 (1978) (discussing the Hawaiian Native Claims Settlement Act of 1974 and the activities of the ALOHA organization—Aboriginal Lands of Hawaiian Ancestry); R. JONES, A HISTORY OF THE ALASKA NATIVE CLAIMS SETTLEMENT OF 1971 (1973) (comparing the native Hawaiian rights to those of the Alaskan natives to public lands); Levy, *supra* note 1 (generally discussing the numerous bases on which the native Hawaiians may make a claim for reparations in connection with the cession of public land occurring upon annexation).

[15] Authorities on the history of the federal public domain acknowledge the unique treatment accorded Hawaii's ceded lands, pointing out that Hawaii never became a part of the public domain except for its parks, public buildings and minor reservations. M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 20 (1957); P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 85 (1968); C. JAMES, PUBLIC LAND POLICIES OF THE

for studying the federal government's present relationship with respect to Hawaii's ceded lands, but also a basis for commenting upon the state's present role in administering the lands as successor to their title under the Admission Act.

This opening section briefly describes the acquisition by the United States of its public domain and Congress' constitutional power to do so to provide a context for distinguishing Hawaii's situation upon annexation.

A. The Federal Public Domain

The "federal public domain" (or "federal lands") has been variously defined depending upon the context of its use.[16] For the purposes of the ensuing discussion, "federal public domain" refers to all lands owned by the United States and subject to administration and disposal under the general public land laws of the federal government.[17] This definition primarily encompasses those lands remaining in federal ownership from the original public domain—i.e., those which had been ceded by the original thirteen states,[18] purchased from foreign countries,[19] or acquired by treaty.[20]

Federal public land ownership commenced with an era of acquisition,[21]

UNITED STATES AND THE MAINLAND STATES 13 (1961).

[16] For example, compare the definition ascribed by M. CLAWSON & B. HELD, *supra* note 15, at 13 ("all nonurban land, title to which is held by the federal government and for which the main purpose of ownership is the management of natural resources") with that rendered by C. JAMES, *supra* note 15, at 11-12 (original national domain acquired by conquest and treaty west of the original thirteen colonies, excluding after-acquired lands for federal agency use or for the management of other portions of the public domain) and with that of B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 7 (1939) (all lands to which the federal government held title and which were subject to sale or transfer of ownership under federal laws) [hereinafter HIBBARD].

[17] This is a slight variation of that given by B. HIBBARD, *supra* note 16.

[18] Consisting of approximately 237 million acres, this territory embraced the present states of Ohio, Indiana, Illinois, Michigan, Wisconsin, most of Alabama and Mississippi, and the portion of Minnesota lying east of the Mississippi River. The original states themselves were never a part of the national public domain, as they held their lands by outright grant from the British Crown. For detailed histories of the United States' acquisition of its public domain, *see generally* M. CLAWSON & B. HELD, *supra* note 15, at 18-20; P. GATES, *supra* note 15, at 49-85; B. HIBBARD, *supra* note 16, at 7-31; Treat, *Origin of the National Land System Under the Confederation*, in THE PUBLIC LANDS 7-14 (V. Carstensen ed. 1963).

[19] These included the Louisiana Purchase of 1803 (523 million acres purchased from France for $15 million); Florida Purchase (46 million acres from Spain in 1819 for $5 million); Texas Purchase (79 million acres from the State of Texas in 1850 for $15.5 million); Gadsden Purchase of 1853 (19 million acres from Mexico for $10 million) and the Alaska Purchase of 1867 (375 million acres from Russia for $7 million). B. HIBBARD, *supra* note 16, at 14-22, 31; P. GATES, *supra* note 15, ch. V.

[20] Red River Acquisition (30 million acres without cost); Oregon Compromise with Great Britain (1846, 183 million acres without cost); Mexico Treaty (1848, 335 million acres for $15 million). B. HIBBARD, *supra* note 16, at 19-22.

[21] The history of federal landownership has been broken down for convenience into four,

which began before the United States possessed a constitutional authority to manage or dispose of a public domain.[23] The thirteen original states, which had held often conflicting claims to western territories under the Articles of Confederation, transferred their claims to the national government under two land ordinances enacted in 1785 and 1787, respectively.[24] These western lands constituted the nucleus of the original public domain, and the ordinances governing their administration laid the basic policy framework for the federal government's rapid westward expansion.[24] By 1853, the United States held title to 1,462,000 acres of public domain—just over three-fourths of the country's total area at that time.[25]

The public domain has been held and administered by Congress in the exercise of its article I, section 8, clause 17[26] and article IV, section 3, clause 2[27] ("property clause") powers.[28] Generally, article I empowers

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overlapping eras: acquisition, disposal, reservation and management. Each of these eras is so labelled to characterize the dominant federal policy governing public land administration at the time. *See* C. JAMES, *supra* note 15, at 12-48; M. CLAWSON & B. HELD, *supra* note 15, at 16.

[23] P. GATES, *supra* note 15, at 72; Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 290-91 (1976); Treat, *supra* note 18.

[24] P. GATES, *supra* note 15, at 59-74 contains a detailed discussion of the passage of both ordinances. The Ordinance of 1785 and the Northwest Ordinance of 1787 may be found in full in DOCUMENTS OF AMERICAN HISTORY 123-24 and 128-32 respectively (Commager ed. 1973).

[24] M. CLAWSON & B. HELD, *supra* note 15, at 18. *See generally* P. GATES, *supra* note 15. Essentially, the ordinances provided for the survey and disposal of public lands to generate revenue for the Confederation. Land grants for schools, however, were authorized. The Northwest Ordinance additionally established the doctrine of equal footing—newly-created states were to be admitted to the Union on equal footing with the original thirteen in their ability to self-govern and hold title to land. P. GATES, *supra* note 15, at 72. *See also* T. DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY AND STATISTICS 155-56 (1970). The doctrine thus also embraced the principle that title and jurisdiction over appropriated public lands within a new state (including navigable waters and submerged lands below the high water mark) belonged to it, *see* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836), and that the United States could not exercise a general governmental jurisdictional over the public lands within the state's boundaries. *See* Engdahl, *supra* note 22, at 293-94. The same ordinance also established the principles that incorporated territories are inchoate states whose ultimate destiny is statehood. *Id. See also* H.R. REP. NO. 194, 80th Cong., 1st Sess. 10 (1947).

[25] C. JAMES, *supra* note 15.

[26] U.S. CONST. art. I, § 8, cl. 17 provides that Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

See 1 Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (1956); 2 Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (1957) (analyzes this constitutional provision).

[27] U.S. CONST. art. IV, § 3, cl. 2 provides as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regula-

Congress to legislate exclusively over the types of real property defined therein in which a state had ceded legislative jurisdiction either prior or subsequent to the federal government's acquisition.[29]

The bulk of the public domain is governed by article IV, which grants Congress power to acquire and administer the general public domain, including ceded property not being used for article I purposes and personal property. Under classic property clause doctrine, the states, by virtue of their sovereign status, enjoy general governmental jurisdiction, including civil and criminal jurisdiction, over federal article IV lands within their respective boundaries.[30] This allows the state to regulate the manner in which private persons with the federal government's permission can use the public lands affected. This power is limited by the principle of intergovernmental immunities, by the necessary and proper clause, and by the federal government's exclusive control over the creation of private rights in its public lands.[31]

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tions respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[28] The precise nature of these distinct though somewhat overlapping powers, traditionally the source of much confusion by scholars, is beyond the scope of this discussion. For a good analysis of the two provisions, *see* Engdahl, *supra* note 22. *See generally* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970). *See also* Haslam, *Federal and State Cooperation in the Management of Public Lands*, 5 J. CONTEMP. L. 149, 151-52 (1978); Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250-53 (1976).

[29] Engdahl, *supra* note 22, at 288-90, 296-98, 377. Under classic principles, power over article I property was "in essence complete sovereignty," S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946), and a federal enclave was treated as existing beyond the state's civil and criminal jurisdiction. Congress could exercise the full police and regulatory powers which reside in a state or municipal government for state or local purposes. *See* Palmore v. United States, 411 U.S. 388, 397 (1973) (construing Congress' power to legislate for the District of Columbia under article I). The implications of this principle of enclave extra-territoriality, for the enclave's resident's (e.g., regarding their right to vote) and the situs state (e.g., the validity of state court actions dependent on domicile; state taxes, probate laws), however, have been confusing as well as unfair. Engdahl, *supra* note 22, at 379-82 documents and discusses the Supreme Court's apparent abandonment of the classic principles in favor of treating the federal enclave as part of the situs state.

[30] Engdahl, *supra* note 22, at 368, citing Omaechevarria v. Idaho, 246 U.S. 343 (1918) and Bacon v. Walker, 204 U.S. 311 (1907). Haslam, *supra* note 28, at 151-52 traces the grant of police power in the states to the tenth amendment and the doctrine of enumerated powers. State law preempted federal laws where the management and protection of the federal government's proprietary interests were concerned, but not in the creation and recognition of rights in federal property. Engdahl, *supra* note 22, at 366. This preemptive capability was triggered whenever the federal government used its lands to promote extraneous ends, in contravention of one of its constitutionally enumerated powers. The Supreme Court's recent decision in Kleppe v. New Mexico, 426 U.S. 529 (1976), however, if read broadly could be construed as recognizing in Congress a broad, unrestricted legislative jurisdiction akin to that existing in the United States as sovereign over unincorporated territories. Engdahl, *supra* note 22, at 369-71; Haslam, *supra* note 28, at 152-53.

[31] Engdahl, *supra* note 22, at 341. *See also* note 36 *infra*.

The federal government's power over its article IV lands within state boundaries derives from its capacity as their proprietor and governmental sovereign.[32] Regarding the federal government's proprietary role, the Supreme Court in *Utah Power & Light Co. v. United States*[33] noted that

> [t]he inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.[34]

Thus while the states retain civil and criminal jurisdiction over article IV lands within their boundaries,[35] the federal government may continue to manage and protect its lands in a manner consistent with its enumerated federal powers.[36] As sovereign, the United States may exercise its consti-

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[32] Engdahl, *supra* note 22, at 290-96.

[33] 243 U.S. 389, 404-05 (1917). *See* Engdahl, *supra* note 22, at 310-12 (discussing the *Utah Power & Light Co.* decision).

[34] 243 U.S. at 405.

[35] *Id.* at 404. *See* note 30 *supra*.

[36] Engdahl, *supra* note 22, at 365-66. The necessary and proper clause, together with the doctrine of intergovernmental immunities, provides for the general preemptive capacity of the federal government in the exercise of an enumerated federal power, as long as that power is not used to promote a wholly extraneous objective. Engdahl, *supra* note 22, provides one of several instructive examples:

> For example, if Congress were to offer grants to farmers on the condition that they provide farm laborers with on-farm living facilities meeting federally prescribed standards, the federal policy represented by these standards would be incapable of preempting the more stringent standards which might be prescribed for such facilities by a state.

Id. at 366. As proprietor, the federal government generally may avail itself of existing state laws, judicial remedies, and in particular federal statutes representing self-help measures in order to protect its property interests. *See, e.g.*, Cotton v. United States, 52 U.S. (11 How.) 229 (1851) (United States entitled to relief under state trespass law for taking of timber from public land); United States v. Gear, 44 U.S. (3 How.) 120 (1845) (equitable relief granted for waste in unauthorized mining on federal property). This power was extended in the late 19th century to include the enactment of laws to protect public lands from nuisances on adjoining private properties. *See* United States v. Alford, 274 U.S. 264 (1927) (federal government may legislate to prohibit acts committed on privately owned lands, here a forest fire, which endanger public forests); McKinley v. United States, 249 U.S. 397 (1919) (Secretary of War could lawfully restrict establishment of prostitution houses around military bases); Camfield v. United States, 167 U.S. 518 (1897) (federal statute forbidding private enclosure of federal lands held constitutional as applied to private landowner who fenced his lands which were intermingled with federal lands). *See also* Sax, *supra* note 28; Note, *The Government as Proprietor: The Private Use of Public Property*, 55 VA. L. REV. 1079 (1969). However, as Engdahl observes, this right to protect federal property derives from the federal government's proprietary capacity and these cases "did not negate the general principle of the controlling force of state governmental [or police] power." Engdahl, *supra* note 22, at 317. *See also* McVay v. United States, 418 F.2d 615 (5th Cir. 1973). Indeed, the federal government's role of proprietor requires it to hold the lands for the public's benefit, not as "a monarch may, for private and personal reasons," Van Brocklin v.

tutionally enumerated powers over article IV lands as it may anywhere else in the nation.[37]

In acquiring and managing the public domain, the federal government was acting in its capacity as a sovereign entity,[38] possessing title as well as exclusive governmental jurisdiction.[39] It was the absence of any other sovereign in these areas that enabled Congress to exercise "the combined powers of the general, and of a state government"[40] in legislating for these territories and in managing the public lands. Congress exercised this power during the nation's formative period primarily by conveying of vast portions of the public domain[41] to private individuals and entities (e.g., railroads) and to new states to generate revenues for federal coffers,[42] to encourage homesteading and western migration,[43] public education,[44] rec-

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Tennessee, 117 U.S. 151, 158-59 (1886).

In addition to the general protective powers of a proprietor, the federal government also has exclusive control over the creation and recognition of private rights in its property. *See, e.g.*, United States v. Oregon, 295 U.S. 1, 27-28 (1935); Fasi v. King, 41 Hawaii 461 (1956); Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972). *See generally* Engdahl, *supra* note 22, at 362. The federal government is additionally empowered under article IV to obtain property by gift, bequest, devise, purchase, or by condemnation where necessary to effectuate a constitutionally enumerated federal power. *See* United States v. Burnison, 339 U.S. 87 (1950) (devise); Kohl v. United States, 91 U.S. 367 (1875) (condemnation).

[37] Engdahl, *supra* note 22, at 308. *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836).

[38] Delassus v. United States, 27 U.S. (2 Pet.) 117 (1829) (the sovereign acquiring an uninhabited country acquires full dominion over it). The federal government's power over territories, although traced by those relying upon the doctrine of enumerated powers to the article IV property clause, exists independently of the clause. Engdahl, *supra* note 22, at 290-91. In American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828), this power was implied in the federal government's power to make war and treaties. *See* Church of the Latter-day Saints v. United States, 136 U.S. 1, 44 (1890). *See also* Dorr v. United States, 195 U.S. 138, 142 (1904); Downes v. Bidwell, 182 U.S. 244, 279, 291 (1900); W.C. Peacock & Co. v. Republic, 12 Hawaii 27 (1899).

[39] *See* note 38 *supra*.

[40] Engdahl, *supra* note 22, at 292, quoting American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). As Engdahl notes, this rule, still prevailing today, *see* HMW Indus., Inc. v. Wheatley, 368 F. Supp. 915, 917 (D.V.I. 1973), is the result of the traditional construction given the article I property clause which is that the clause confers exclusive governmental jurisdiction in the United States over the lands affected. *See* Engdahl, *supra* note 22, at 289.

[41] This era of disposal, spanning over a hundred years (roughly 1787 to 1923) and involving the alienation of over 10 million acres each year, was indeed prompted by an attempt to promote and aid western settlement as well as by a recognition that the public lands were prime revenue producers. C. JAMES, *supra* note 15, at 17-31. *See generally* M. CLAWSON & B. HELD, *supra* note 15, at 22-27; B. HIBBARD, *supra* note 16, at 32-81, 116-43; P. GATES, *supra* note 15, at 61-63, 178-80, 210.

[42] *See* B. HIBBARD, *supra* note 16, at 33; P. GATES, *supra* note 15, at 51-63, 177-78.

[43] *See, e.g.*, Homestead Act, Act of May 20, 1862, 12 Stat. 392; B. HIBBARD, *supra* note 16, ch. XVII; P. GATES, *supra* note 15, ch. XV.

[44] The practice of reserving certain parcels of public land specifically for the maintenance of public schools when new states were formed started with the 1785 Land Ordinance. *See* B. HIBBARD, *supra* note 16, ch. XVI; P. GATES, *supra* note 15, at 22-27. Approximately

lamation of arid lands[45] and forestation of prairies,[46] and the development of mining[47] and railroads.[48] Public lands grants were also made to new states upon their admission.[49] When new states were created, they automatically acquired jurisdiction over the article IV properties within their respective boundaries under the doctrine of equal footing.[50] However, title only to those "common lands" vested with a public purpose, *i.e.*, navigable waters and submerged lands below the high water mark,[51] transferred to newly-admitted states under this doctrine.[52] The remainder of the public lands within the state boundaries remained in federal ownership "as a common fund for the use and benefit of the United States."[53] The federal government has continued to administer them through five principal agencies in both its proprietary and sovereign capacities.[54]

77,600,000 acres were thus granted to the states. U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 7-8 (1968).

[45] *See* Desert Land Act of 1877, ch. 107, 19 Stat. 377; B. HIBBARD, *supra* note 16, ch. XX; P. GATES, *supra* note 15, at 635-43.

[46] *See* Timber Culture Act of 1873, 17 Stat. 605; B. HIBBARD, *supra* note 16, ch. XXI; P. GATES, *supra* note 15, at 399-401.

[47] *See* Mining Law of 1872, 17 Stat. 91 (and the Mineral Leasing Act, ch. 85, 41 Stat. 437 (1920)); B. HIBBARD, *supra* note 16, ch. XXV; P. GATES, *supra* note 15, ch. XXIII.

[48] The Railroad Land Grants are discussed in B. HIBBARD, *supra* note 16, at 241-54 and P. GATES, *supra* note 15, ch. XIV.

[49] *See* Act of Sept. 4, 1841, 5 Stat. 453; B. HIBBARD, *supra* note 16, at 228-33; P. GATES, *supra* note 15, ch. XIII.

[50] *See* note 24 *supra*. Under practical application of the doctrine, states carved out of lands acquired by the United States were successors to all rights of sovereignty, jurisdiction and eminent domain, except as were diminished by the United States' retention of possession and control over federally appropriated public lands. Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-23 (1845). Title to common lands—all navigable waters and submerged lands below the high water mark—vested in new states by operation of the doctrine, since the original states came to hold them following the Revolution as sovereign, subject to rights surrendered by the Constitution to the United States. *Id.* at 229; Shively v. Bowlby, 152 U.S. 1, 57-58 (1894). *See* Engdahl, *supra* note 22, at 290-93; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970). [hereinafter cited as *Natural Resource Law*].

[51] Pollard v. Hagan, 44 U.S. (3 How.) at 229; Shively v. Bowlby, 152 U.S. 1 (1894).

[52] *See* note 37 *supra*.

[53] Shively v. Bowlby, 152 U.S. at 26, *citing* the Northwest Ordinance of 1787, ch. 28, 1 Stat. 549.

[54] The federal government presently owns approximately 761 million acres of land, U.S. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 10 (1974), of which approximately 760 million acres constitute the present federal public domain. The Bureau of Land Management administers more than 465 million acres of these lands which have not been set aside for specific use, and the remainder falls primarily under the purview of the Forest Service of the Department of Agriculture, the Fish and Wildlife Service and the National Park Service of the Department of the Interior, and the Bureau of Reclamation. The Atomic Energy Commission and Department of Defense also control significant portions of the public domain which have been set aside. U.S. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 20-22 (1970). Policies governing present administration of the federal public domain are generally discussed in M. CLAWSON & B. HELD, *supra* note 15, at 29-194; C. JAMES, *supra* note 15, at 39-48; U.S. PUBLIC LAND LAW REVIEW COMM'N, *supra*.

The United States' public domain was thus accumulated through this process of acquiring and retaining title to public lands. The public lands of Texas and Hawaii, however, were not subject to this process and consequently never became a part of the federal public domain in the sense of being subject to administration and disposition under the general public land laws.[55] Unlike any other acquired areas, Hawaii and Texas were independent, sovereign entities with established bodies of law governing the administration of their respective public domains. While both relinquished sovereignty to the United States,[56] Congress did not retain title to Texas' public lands, nor did it hold proprietary title to the lands of the Territory of Hawaii. Texas was allowed to retain title to its unallocated public lands because it entered the Union directly as a state, by-passing any territorial or unincorporated phase of political existence, and had an established land management system based on Spanish law.[57]

Hawaii, on the other hand, was to wait over sixty years after annexation before finally attaining statehood.[58] At the time of annexation, the islands had a history of monarchical rule[59] and a public land administration system geared towards the islands' specific landownership situation.[60] Congressional policies and laws governing the management of public lands on the continent were not immediately applicable. While the legislative history surrounding Hawaii's annexation is devoid of explicit reasons for Congress' treatment of Hawaii's lands, ultimately the federal government's refusal to embrace Hawaii's public domain into its own apparently had much to do with Hawaii's prior sovereign independence and its particular land situation.

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[55] The circumstances surrounding Texas' annexation and admission to the Union as a state, as they concern the status of its public lands at that time, are detailed by P. GATES, *supra* note 15, at 80-83; C. JAMES, *supra* note 15, at 59-61.

[56] *See* note 84 *infra*.

[57] P. GATES, *supra* note 15, at 82. The federal government was also reluctant to assume the new state's public debt during a period of relative national fiscal stability. The United States' debt, only a little more than Texas', was $15,925,000 while its surplus of income after expenditures amounted to $7,033,000. Texas' debt in fact forced the new state to sell 79 million acres west of its present boundaries to the United States only five years following annexation for a total of $16 million. M. CLAWSON & B. HELD, *supra* note 15, at 19-21; C. JAMES, *supra* note 15, at 60; B. HIBBARD, *supra* note 16, at 18-19. The new state government, optimistic that the public lands would yield large returns and ease its obligations, retained both title to its public lands and its substantial financial debt. P. GATES, *supra* note 15, at 82.

[58] *See generally* G. DAWS, SHOAL OF TIME (1968).

[59] Until Kamehameha I's unification of the islands under a single monarch in the late 18th and early 19th centuries, however, Hawaii actually consisted of several politically independent kingdoms. A kingdom typically consisted of one island, although it might have embraced several islands or only a part of one island, and it was ruled by the chief (*alii-aimoku*) who attained this status either by victory in battle or by standing next in line of succession to the throne. *See* 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM 9-10 (1938).

[60] *See* R. HORWITZ, J. CEASAR, J. FINN & L. VARGHA, PUBLIC POLICY IN HAWAII: AN HISTORICAL ANALYSIS 1-57 (1969) [hereinafter cited as PUBLIC LAND POLICY].

A brief digression at this point is thus necessary to lay the groundwork for a discussion of Hawaii's own annexation to the Union. The terms upon which Hawaii was finally annexed reveal the unique place occupied by its ceded lands in Congress' public land acquisition and ownership scheme. They also established a relationship between the federal government and the new territory's public lands which had significant consequences upon Hawaii's admission as a state.

B. Hawaii's Public Domain: Pre-Annexation

Hawaii's annexation and cession of its public lands to the United States occurred in 1898,[61] a mere one hundred and twenty years after the islands' "discovery" by the west. Until Captain James Cook's arrival in 1778, the islanders had subsisted for centuries[62] in relative isolation from outside civilization and had developed a land tenure system reflecting both the islands' political structure and agrarian economy.[63] A change in form of government from an absolute to a constitutional monarchy in 1840,[64] and shifts in socio-economic patterns due to the influx of westerners, however, precipitated a revamping of the landholding system.[65]

The concept of a public domain existing separately from privately-owned lands in fact did not exist in Hawaii until 1848, when the ancient system of land tenure was effectively terminated by the *Great Mahelé*.[66]

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[61] *See* note 1 *supra*.

[62] The Hawaiian islands were first settled by the Polynesian ancestors of the Hawaiian people between 500 and 750 A.D., with subsequent waves of immigrants arriving from the Marquesas and Tahiti between 900 and 1300. E. NORDYKE, THE PEOPLING OF HAWAII 7-10 (1977).

[63] A general discussion of ancient Hawaii and Captain Cook's arrival are found in 1 R. KUYKENDALL, *supra* note 59, at 1-20. The ancient land tenure system was in effect when the islands were discovered by Captain Cook. Under this system, the islands were divided into geographic districts (*mokus*) and further subdivided into administrative districts, the largest of which was the economically self-sufficient *ahupuaa* which ideally ran from mountain to sea. The lands were owned by the kings of the independent island kingdoms, and managed by a hierarchy of subordinates from the king's warrior chiefs to the tenant-commoners. As in feudal England, land was parcelled out by the sovereign to those chiefs who had rendered political favors, although unlike the traditional system, tenants were not bound to their landlords or to geographic locations. There was no notion of fee simple title, as initial acquisition was accomplished by conquest and allotment by the conquering sovereign, the latter being entirely revocable at will. For detailed descriptions of the ancient land system, *see generally* J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); J. HOBBS, HAWAII—A PAGEANT OF THE SOIL (1935); A. LIND, AN ISLAND COMMUNITY 24-39 (1938).

[64] The events leading up to and including Hawaii's switchover to a constitutional monarchy, and the subsequent reform of the previously unrecorded landownership system in Hawaii are described in 1 R. KUYKENDALL, *supra* note 59, at 227-68, and PUBLIC LAND POLICY, *supra* note 60.

[65] *See* 1 R. KUYKENDALL, *supra* note 59, at 269-98.

[66] *See generally* J. CHINEN, *supra* note 63; J. HOBBS, *supra* note 2, at 40-44; 1 R. KUYKENDALL, *supra* note 59, at 287-98.

Where previously all lands were owned by the conquering chief or reigning king, the *Mahele*—or division—was an unprecedented recognition and separation of rights in the kingdom's lands between the king, his chiefs, and the tenants.[67] Under the *Mahele* the king retained all of his private lands, subject to the rights of tenants to a fee simple title to a portion of those lands which they had occupied and cultivated.[68] These lands—the Crown lands[69]—consisted of approximately one million acres and were treated as the personal property of the ruling monarch until the overthrow of the monarchy in 1893.[70] One and a half million acres of land

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[67] J. CHINEN, *supra* note 63, at 15. The 1840 Constitution's Bill of Rights laid the groundwork for such a declaration by defining property rights in the people and by noting that the king's lands were not his own private property—a first recognition that the commoners had an interest in the kingdom's lands. *Id.* at 7-8; *see* L. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 1-9 (1904). In 1845, a Board of Commissioners to Quiet Land Titles was created to assess the validity of claims to lands presented to it and to make awards to successful claimants. To guide it in carrying out its discretionary function, the commission issued a set of seven principles, together with prefatory statements which laid out the commission's understanding of the nature of rights in the land existing at that time. It declared that the king (or the government), the chiefs, and the tenants were the three classes of people in the kingdom with vested rights in the land. *See* Act of Oct. 26, 1846, [1847] Hawaii Laws 81, in REV. LAWS OF HAWAII 1925 app. at 2124, 2126. It was not until the *Mahele*, however, that the actual division of lands along these lines occurred. *See* 1 R. KUYKENDALL, *supra* note 59, at 269-98; J. CHINEN, *supra* note 63, at 8-15.

[68] The two instruments by which Kamehameha III reserved the Crown and Government lands, recorded in The *Mahele* Book, Office of the Commissioners of Public Lands, Territory of Hawaii, appear translated in English in *In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864). These final acts of the *Mahele* were confirmed by the Act of June 7, 1848, [1848] Hawaii Laws 22, in REV. LAW HAWAII 1925 app. 2152-76.

The King had segregated his private lands from government lands in an attempt to protect them from foreign domination in the event of conquest. 4 PRIVY COUNCIL RECORD 250-308 (1847). *See In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864).

Regarding the tenants' rights in the lands, *see In re* Kakaako, 30 Hawaii 666 (1928); Harris v. Carter, 6 Hawaii 195 (1877); Act of Aug. 6, 1850, § 1, Hawaii Laws 202, in REV. LAWS HAWAII 1925 app. at 2141; Levy, *supra* note 1, at 848, 855-56 (1975). The 1850 Act authorized Hawaii's Land Commission to grant fee simple title to native tenants to any part of the Crown, Government or *konohiki* (those divided among chiefs) lands which they had really cultivated, together with a houselot of not more than a quarter of an acre in size. While thousands of small *kuleana* awards were made before 1855, J. CHINEN, *supra* note 63, at 31, notes, however, that the tenant-commoners actually received less than one percent of the kingdom's land despite earlier promises of one-third. The *kuleanas* totalled less than 30,000 acres. *See* Levy, *supra* note 1, and 1 R. KUYKENDALL, *supra* note 59, at 288-94.

[69] In the *Great Mahele*, the lands were designated as the "King's" lands. However, in the Act of January 3, 1865, they were re-designated the "Crown" lands to indicate that the lands belonged to the king as sovereign and not as an individual. J. Chinen, Crown Lands, in Encyclopedia of Hawaii (1976) (unpublished manuscript in the State of Hawaii Archives) [hereinafter cited as Crown Lands].

[70] *See* Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) (holding that the Crown lands belonged to the office and not the individual). J. CHINEN, *supra* note 63, at 27; Levy, *supra* note 1, at 855. Chinen notes that the Crown lands were freely sold, leased and mortgaged by Kamehameha III and his successors for the support of the Crown until rendered inalienable by Act of January 3, 1865, [1864] Hawaii Laws 70, in REV. LAWS HAWAII 1925 app. at 2178,

were set aside "to have and to hold to my chiefs and people forever" as Government lands.[71] These lands were to be "managed, leased, or sold, in accordance with the will of [the] Nobles and Representatives, for the benefit of the Hawaiian Government, and to promote the dignity of the Hawaiian Crown."[72] The remaining one and a half million acres of the kingdom's lands were awarded to the chiefs and again were subject to tenants' rights.[73]

Ultimately, it was only the Crown and Government lands which constituted the public domain ceded to the United States in 1898,[74] although

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which had been passed to "relieve the Royal Domain from encumbrances and to render the same inalienable." *Id.* at § 3. However, the lands were available for leases not to exceed thirty years under the Act which allowed the monarchs to realize income from them. PUBLIC LAND POLICY, *supra* note 60, at 6. As a result, some 76 lessees had leasehold arrangements controlling 752,931 acres of Crown and Government lands by 1890. *Id.* at 137.

When finally made available again for purchase or lease under the Constitution of the Republic, however, the Crown lands had been severed from the throne without compensation to the ruling line and had merged with the Government lands to become a part of the public domain. *See* Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) (holding that the former queen upon the overthrow of the monarchial government had become divested of her title to the Crown lands and was not entitled to compensation therefor under the new constitution); Constitution of 1894, art. 95, [1895] Hawaii Laws 118, in L. THURSTON, THE FUNDAMENTAL LAWS OF HAWAII 237; *see also* Territory v. Kapiolani Estate, Ltd., 18 Hawaii 640 (1908); Territory v. Puahi, 18 Hawaii 649 (1908) (title to Crown and Government lands may not be questioned by courts); PUBLIC LAND POLICY, *supra* note 60, at 5-6.

For a discussion of the history of Crown lands, *see* T. SPAULDING, CROWN LANDS OF HAWAII (Occasional Papers No. 1, University of Hawaii 1923).

[71] *See In re* Estate of His Majesty Kamehameha IV, *supra* note 68, at 723, quoting in translation one of two instruments entered into The *Mahele* Book, *supra* note 68. Between 1848 and Hawaii's annexation in 1898, the Government lands were rapidly alienated, PUBLIC LAND POLICY, *supra* note 60, at 161-63, 186-87, to produce revenues which were used by the government to finance its operation. J. CHINEN, *supra* note 63, at 27. Official acts of the Hawaiian Legislature in 1846 and 1850 had opened the door to sales of Government land and land purchases by aliens. *See* Law of Apr. 27, 1846, ch. 7, §§ 1-3, Hawaii Laws 99-103, in REV. LAWS HAWAII 1925 app. at 2190; Resolution of Nov. 7, 1846, § 6, 2 [1847] Hawaii Laws 71; and Act of Aug. 6, 1850, § 4, Hawaii Laws 203, in REV. LAWS HAWAII 1925 at 2142, respectively. Levy, *supra* note 1, at 857 n.62 states that thousands of acres of land fell into the hands of foreigners as a direct result. By May 1, 1850, over 27,000 acres of Government lands had been sold. J. HOBBS, *supra* note 2, at 54. By 1899, patents to over 728,000 acres had been issued. REPORT OF SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO ON LAND SYSTEM IN HAWAII WITH RECOMMENDATIONS OF COMMITTEE, 57th Cong., 2d Sess. 5 (1902) [hereinafter cited as SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO]. *See* M. Vause, Twenty Years of Contest Over the Public Lands: 1900-1921, at 137 (1962) (unpublished thesis in University of Hawaii Library). *See also* PUBLIC LAND POLICY, *supra* note 60, at 186-87.

[72] Keoni Ana, G.P. Judd, M. Kekauanaoa, I. Piikoi, Report on the Mahele (March 30, 1848) *quoted in* 1 R. KUYKENDALL, *supra* note 59, at 289. *See also* Kenoa v. Meek, 6 Hawaii 63 (1871).

[73] *See* note 68 *supra*.

[74] The public domain also consisted of land "that had come under the government's control by purchase, escheat, exchange, or through exercise of eminent domain." PUBLIC LAND POLICY, *supra* note 60, at 6.

by then a significant portion of the arable lands had either been sold or leased.[75] Subsequent to the kingdom's conversion to the Republic of Hawaii in 1893, the lands were administered by a Board of Commissioners of Public Lands[76] which was authorized to "lease, sell, or otherwise dispose of the public lands, and other properties, as [it] may deem best for the *protection of agriculture,* and the general welfare of the Republic."[77] (Emphasis added). The 1895 Land Act governing the lands' administration, hailed as a "great advance on all previous legislation in Hawaii,"[78] contained provisions reflecting a dominant homesteading policy and a commitment to the development of agriculture.[79] Restrictions were placed on leases as well as on sales of land to maximize family farming opportunities while at the same time to avoid haphazard and unbalanced disposition of the public domain.[80] Thus by 1898, Hawaii had a corpus of lands constituting its public domain administered under carefully considered public land policies.[81]

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[75] *See* note 2 *supra.*

[76] *See* CIVIL CODE OF 1897, § 169 (Hawaii). The Board consisted of three commissioners, including the U.S. Minister of the Interior and two members appointed by the Republic's president and approved by the cabinet.

[77] *Id.;* PUBLIC LAND POLICY, *supra* note 60, at 6.

[78] Dole, *Hawaiian Land Policy,* in HAWAIIAN ALMANAC AND ANNUAL FOR 1898, at 125 (1898).

[79] These objectives were shared by (or perhaps ultimately derived from) Republic President Sanford B. Dole, who was also to become the territory's first governor and whose recommendations for implementation of the policy favoring them came after a thorough assessment of Hawaii's land situation. Observing that the large plantations were typically awarded leases to the best available lands, and convinced the continental pattern of homesteading (rather than plantation development) was in Hawaii's best interest, Dole recommended a homesteading policy which was ultimately reflected in the Act. The Act made land available to families in various forms—homestead leases, right of purchase leases, cash freeholds and special sales agreements. *See* PUBLIC LAND POLICY, *supra* note 60, at 8. Homesteading, of course, had been a dominant theme of federal public land policy in the mid-19th century, *see* notes 39 & 41 *supra,* and the Homestead Act of 1862, *supra* note 41, has been described as one of the most far-reaching pieces of land legislation in its impact on the country's development. *See* C. JAMES, *supra* note 15, at 24, who also describes the Act and its impact at 24-27; for other descriptions and analyses of the Act *see* PUBLIC LAND POLICY, *supra* note 60, at 6-15; J. HOBBS, *supra* note 2, at 111-17; T. CREIGHTON, THE LANDS OF HAWAII: THEIR USE AND MISUSE 202 (1978). The Republic was also attempting to prevent the passing of title to the public lands to speculators. H.R. REP. No. 305, 56th Cong., 1st Sess. 14 (1900).

[80] *See* PUBLIC LAND POLICY, *supra* note 60, in which the authors describe the various restrictions, including a time limitation of 21 years on general leases and a requirement that public land could not be sold in parcels larger than 1,000 acres. Ninety-eight parcels of land containing 46,594.22 acres were disposed of either by long-term lease or sale under the 1895 Act before annexation. H.R. REP. No. 305, *supra* note 78, at 14-15. By 1898, the public domain had diminished to approximately 1,750,000 acres of Crown and Government lands. J. HOBBS, *supra* note 2.

[81] PUBLIC LAND POLICY, *supra* note 60, at 61. The land policy reflected in the 1895 Act had been debated for "well over half a century prior to annexation," and was specifically aimed at developing agriculture and making the most productive use of remaining public land. *Id.*

C. *Hawaii's Public Domain: Annexation*

The key event in the history of Hawaii's ceded lands is Hawaii's annexation to the United States as a territory in 1898.[82] It was at this time that

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[82] Others have pointed out that perhaps the *Great Mahele* and not annexation is the key event. *See* M. Vause, The Hawaiian Homes Commission Act, 1920: History and Analysis (1968) (unpublished thesis in University of Hawaii Library). This view is derived largely from congressional testimony and debate over the Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921). Briefly, it was urged by native Hawaiians testifying before Congress that the Crown lands at the *Mahele* were impressed with a trust in favor of the common people. The United States, as successor-trustee of the Hawaiian monarchy, was thus obligated to establish the Hawaiian Homes Commission to provide for the beneficiaries of the trust—the native Hawaiians. M. Vause, *supra*, at 25. However, there is also evidence that Congress rejected this trust theory and instead was motivated by humanitarian reasons in establishing the Hawaiian Homes Commission. M. Vause, *supra*, at 162. In any event, if the *Great Mahele* is indeed the source of the trust relationship, then the obligations and responsibilities of the federal and state governments, as successor-trustees, arguably go beyond the Organic Act or the Admission Act.

Based solely upon the *Great Mahele*, it would be difficult to argue that the King intended to give the common people, other than individual tenants-in-possession, any interest in the Crown lands. *See generally* Crown Lands, *supra* note 69. Unlike the chiefs' lands, for which the King was required to execute a quitclaim deed and the chief to register his claim with the Land Commission in order to vest title in the claimant, the Crown lands were not subject to any conveyancing process as it was believed that the King already owned them. J. CHINEN, *supra* note 63, at 27; Harris v. Carter, 6 Hawaii 195, 206 (1877).

King Kamehameha III treated Crown lands as personal property, freely alienating portions and using the revenues for personal needs. His heir, King Kamehameha IV, Liholiho, similarly treated the lands as personal property. In fact, Liholiho saw it necessary for his consort, Queen Emma, to sign all documents relating to the lands. J. Chinen, Hawaiian Lands 13, in Encyclopedia of Hawaii (1976) (unpublished manuscript in the State of Hawaii Archives). Liholiho in turn devised the lands to King Kamehameha V, whereupon Queen Emma sued for her dower rights. In *In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864), the Hawaii Supreme Court held that although the Crown lands vested fee simple title in the Crown, as distinguished from the personalty of the Crown, Queen Emma was "lawfully entitled to dower in the reserved lands." *Id.* at 726. Further, the sovereign was entitled to "regulate and dispose of the same according to will and pleasure, as private property." *Id.* The legislature, in response to the court's decision, established an annuity fund to compensate Queen Emma for the loss of her dower. 1864-65 Hawaii Sess. Laws 71.

Subsequently, in the Act of January 3, 1865, the legislature declared that the Crown lands "shall be henceforth inalienable and shall descend to the heirs and successors of the Hawaii Crown forever." 1864-65 Hawaii Sess. Laws 69, 70. Enacted to protect the King's estate, the Act also divested the King of whatever legal title or possession he had in the Crown lands. Liliuokalani v. United States, 45 Ct. Cl. 418, 426 (1910). With such enactment, the ability of the reigning sovereign to treat the Crown lands as his own personal property terminated. Clearly, a better case can be made for the Act of January 3, 1865 as creating a trust in the Crown lands for the benefit of the people of Hawaii than the *Great Mahele*.

However, others would argue that even the *Great Mahele* and subsequent legislative acts are irrelevant to creation of the trust—instead, that the ancient land tenure system and the Hawaii Constitution of 1840 must be examined. *See* Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagomori, & Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER MANAGEMENT IN HAWAII 148, 154 (1979). The argument is that the king in pre-Western Hawaii was seen as merely a trustee over the lands who derived his ultimate authority from the gods. *Id.*

Hawaii's public domain acquired its ceded status, and title thereto was transferred to the United States without cost. The Joint Resolution of Annexation,[83] which contained Congress' acceptance of Hawaii's cession of sovereignty and land, officially defined the original relationship between the federal government and Hawaii's public domain.[84]

The Joint Resolution of Annexation itself is a fairly brief document. It first announces the Republic's absolute cession of sovereignty.[85] It then declares the simultaneous cession and transfer "to the United States the absolute fee and ownership of all public, government, or Crown lands,

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at 148. This notion was codified in the Hawaii Constitution of 1840 which changed the government from an absolute to a constitutional monarchy. The Constitution read in part:

> Kamehameha I, was the founder of the kingdom, and to him belonged all of the land . . . though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and he had management of the landed property.

Thus, while the *Great Mahele* was promulgated by the king in conjunction with the Privy Council, by introducing the foreign concept of private land ownership, it reflected more the philosophy of the foreigners inundating the islands. In short, the trust relationship presently existing between the state and the people arose from the indigenous political system, and all subsequent events, including the annexation and admission, are irrelevant.

[83] Joint Resolution, *supra* note 1.

[84] Earlier treaty agreements had been drafted by both nations in 1851 (joint resolution), 1854, 1893, and 1897. H.R. REP. No. 1355, 55th Cong., 2d Sess. 1 (1898). By 1873, annexation had apparently become a dominant topic of interest between both countries because of a shared concern "that some measure should be taken up by the Hawaiian Government to effectively stay the decline in the prosperity of the country, evidenced in decreasing exports, revenues, population, whale fishing, and an increasing public debt." Letter from Henry A. Pierce, Minister at Honolulu, to Hamilton Fish, Secretary of State, (Feb. 17, 1873), *quoted in* H.R. REP. No. 1355, *supra*. Article 34 of the Republic's 1894 Constitution specifically authorized the government's president to negotiate for cession, which then President Sanford Dole did. These negotiations, however, coming after the ouster of Queen Liliuokalani from the throne, are themselves controversial. An investigation instigated by U.S. President Grover Cleveland and conducted by Special Commissioner to Hawaii James Blount revealed that the revolution that ultimately produced the Republic's 1894 Constitution was the result of a conspiracy between revolutionary leaders and U.S. Minister to Hawaii John L. Stevens. *See* H.R. REP. No. 1355, *supra*. Advocates of native Hawaiian rights have seized upon this conclusion to question the legality of the 1898 annexation resolution and 1897 treaty. These advocates claim that the annexation was negotiated by illegal revolutionaries who were not representative of the Hawaiian people, and consequently that Hawaii's lands were taken illegally without compensation by the United States government. The court in United States v. Mowat, 583 F.2d 1194 (9th Cir. 1978) rejected this claim on three grounds: (1) that Congress recognized the government of the Republic of Hawaii as the established government; (2) that the United States and Hawaii Supreme Courts accepted the validity of certain transfer agreements (*citing* United States v. Fullard-Leo, 331 U.S. 256, 270 (1947); Bishop v. Mahiko, 35 Hawaii 608 (1940)); and (3) that the defendants had failed to make a record of the argument at the trial court level. The question of whether the "Hawaiian Government" at the time of the final annexation negotiations truly represented the Hawaiian people is still open. *See generally* R. JONES, *supra* note 14, at 26-28; CREIGHTON, *supra* note 14, at 221-23.

[85] Joint Resolution, *supra* note 1. *See* C.A.B. v. United States, 235 F. Supp. 990 (D. Hawaii 1965), *aff'd*, 352 F.2d 735 (9th Cir. 1968) (cession of rights of a nation).

public buildings, or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands."[86] The document then notes Congress' acceptance of cession, declares annexation and the vesting of public property rights in the United States, and immediately thereafter states:

> [that] the existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition: *Provided,* That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.[87]

The Joint Resolution provided for an interim government and ordered that the Republic's municipal legislation not inconsistent with any existing federal laws, treaties or the United States Constitution was to remain in effect until Congress provided for a territorial government.[88]

Title to Hawaii's public domain thus passed to the United States, but on terms reflecting a significant departure from the usual federal practice of tucking newly-acquired public lands into the federal domain and securing their revenues for federal coffers.[89] By providing for the enactment of special public land laws, Congress sought to avoid a major disruption of the islands' land ownership and utilization schemes that would have resulted with the immediate application of existing federal policies and laws attuned to continental landholdings.[90] Moreover, by requiring that pro-

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[86] Joint Resolution, *supra* note 1.

[87] *Id.*

[88] Paragraph 4 of the Joint Resolution provided that the existing civil, judicial, and military powers of local officials be vested in United States presidential designees until Congress provided for a permanent territorial government.

The provision allowing Hawaii's municipal legislation to remain in force provided the basis for local officials' claims that they were authorized to continue disposing of the public lands until Congress dictated otherwise. *See* text accompanying notes 93-95 *infra.*

[89] *See* text accompanying notes 36-54 *supra;* PUBLIC LAND POLICY, *supra* note 60, at 61-62; H.R. REP. No. 305, 56th Cong., 1st Sess. (1900). This was not so, however, under the first treaty of annexation drafted in 1854, which provided in Article VI that the ceded public domain would be subject to the federal public land laws. Reprinted in H.R. REP. No. 305 *supra.*

[90] PUBLIC LAND POLICY, *supra* note 60, at 61. The policies underlying Hawaii's 1895 Land Act, giving rise to the specific provisions of the Act, did not of course precisely match those dominating at the federal level at the turn of the century. *See* M. CLAWSON & B. HELD, *supra* note 15, at 27-30, which describes the dominant federal public land policies of the late 19th and early 20th centuries as those of reservation and management. The specific pieces of legislation governing the disposition of the federal public domain, moreover, were not tailored to the circumstances then existing in the islands. The Homestead Act of 1862, *supra* note 43, for example, was intended to encourage an intense settlement and development of the largely unsettled west, which would ultimately lead to the admission of additional states

ceeds and revenues from the public lands be applied to local educational and public purposes, Congress stripped the federal government's title of its beneficial aspects and maintained the Hawaiian government's practice of using those proceeds and revenues for public and governmental purposes.[91] Thus the federal government had become in effect trustee of the lands ceded by Hawaii, holding absolute but "naked" title for the benefit of the people of Hawaii.[92]

The two-year interim between Hawaii's annexation and Congress' provision for its territorial government was a period of confusion over the precise status of title to the ceded domain.[93] Despite the clear language in which cession of the public lands was couched, Hawaiian officials maintained that the Joint Resolution did not expressly negate the force of Hawaii's land laws which existed at the time of annexation.[94] Believing that

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and continental unification. Its original terms allowed "almost any adult [to] acquire title to 160 acres of public domain by filing on it, improving it, and residing on it for five years." C. JAMES, *supra* note 15, at 24. By contrast, Hawaii's land laws immediately prior to annexation contemplated a more controlled disposition of the public lands for homesteads in light of a scarcity of arable agricultural land and its concentration in large plantation owners. PUBLIC LAND POLICY, *supra* note 60, at 5-12.

[91] H.R. REP. No. 80, 86th Cong., 1st Sess. 3 (1959). This proviso in fact had early been established as a term of annexation. See, for example, the letter from Henry A. Pierce, Minister at Honolulu, to Hamilton Fish, Secretary of State (Feb. 17, 1873), *reprinted in* H.R. REP. No. 1355, *supra* note 84. Therein Pierce discussed the possibility of annexation on terms which included, as "consideration of said cession," the federal government's assumption of Hawaii's public debt, pension for the King and his chiefs, and the bestowal "upon the cause and for the benefit of education, public schools, and the nation's hospitals the proprietorship and revenues of the Crown and public lands." The proviso had taken its final form by the last two annexation treaties drafted under President Harrison in 1893 and under President McKinley in 1897, respectively. The treaties are reprinted in H.R. REP. No. 1355, *supra* note 84. An interesting comparison may be made with the first formal treaty of annexation drafted in 1854. Article VI of that treaty provided that the United States would confirm the King's prior grants of land for educational purposes and match them in land grants for common schools, seminaries, and universities. *Reprinted in* H.R. REP. No. 305, *supra* note 89.

[92] 22 Op. Att'y Gen. 574 (1899); 22 Op. Att'y Gen. 627 (1899).

[93] The provision authorizing the continued use of the Republic's municipal legislation, including the land laws, was regarded as allowing those laws to remain in effect. PUBLIC LAND POLICY, *supra* note 60, at 16. *But see* 22 Op. Att'y Gen. 627, *supra* note 92, stating that after annexation, the Republic existed as an organized government only for the purposes of municipal legislation which governed relations among people, which did not include a power of dominion over the public domain.

[94] PUBLIC LAND POLICY, *supra* note 60, at 16. The authors of PUBLIC LAND POLICY analyze this period of uncertainty between annexation and the Organic Act and offer four reasons for the mistaken assumption of the Hawaiian officials: (a) the confusion over the Joint Resolution's provision regarding municipal legislation; (b) in appointing former Republic President Dole as temporary governor, President McKinley did not address the question of power over the public lands; (c) responses to Governor Dole's inquiries regarding his power to issue land patents and deeds under Hawaiian laws consisted of ambiguous references back to the uninstructive Joint Resolution; and (d) American officials in Hawaii apparently were under the same impression as the Hawaiian government that management power rested in the latter. *Id.* at 15-19. *See* H.R. REP. No. 305, *supra* note 89, at 4-5 in which the

the Hawaiian government continued to hold title to and administrative control over the public domain, Hawaiian authorities continued to sell and lease the lands contained therein under 1895 Land Act and 1897 Civil Code procedures until September 28, 1899. On that date, President McKinley issued an executive order immediately suspending Hawaiian public land transactions.[95] An opinion by the United States Attorney General maintained that the Joint Resolution had stripped the Republic of its title and interest in the public domain, and that Congress' failure to legislate immediately did not reinvest Hawaii's government with its former power of disposition.[96] The underlying basis of that order, however, was a documented concern that unbridled alienation of the public domain would result in the loss of choice lands eyed for federal military purposes.[97] This concern led to a second official response from President McKinley that was to have important consequences for the islands—the "setting aside" of certain large parcels of public land on Oahu for military use.[98]

Hawaii's Organic Act of 1900,[99] a lengthy document establishing Hawaii's territorial government, confirmed the cession of public lands effected by the Joint Resolution and provided the promised "special laws" for their administration. In empowering the territorial government to administer the lands, however, the Act also clarified Congress' intent to treat Hawaii's lands as an adjunct to rather than an integral part of the federal public domain. Section 91 of the Act, one of two sections directly

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Committee on Territories describes the visible consequences of this confusion and of the lack of legislative power in the Hawaiian government generally.

[95] PUBLIC LAND POLICY, *supra* note 60, at 19. The order had been prompted by a formal opinion by United States Attorney General Griggs, 22 Op. Att'y Gen. 574 (1899) which had been prepared in response to plans by the Hawaiian government to sell a 50-acre parcel of land on the island of Hawaii at a public auction. Griggs declared that disposal of the public domain was exclusively within Congress' power. He read the Joint Resolution's provision for the enactment of special land legislation as not extending life to Hawaii's previous land laws, but merely impressing on the United States' title a "special trust" which restricted the use to which the revenues could be put. *See also* Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (upon ceasing of sovereignty in former government, that goverment's laws based on public policy and regarding disposition of the public domain also cease to be in effect), *cited in* 22 Op. Att'y Gen. 574 (1899).

[96] 22 Op. Att'y Gen. 574 (1899).

[97] *See* Letters from Commander of United States Army in Hawaii (Feb. 7, 1899) and from United States Special Agent Sewall (Feb. 14, 1899) to the Secretary of State, in Archives of the United States, Army Records 213729, quoted in part and discussed in PUBLIC LAND POLICY, *supra* note 60, at 17-18.

[98] Five executive orders were issued between 1898 and 1900 setting aside land for use by the federal government. One of these, issued on July 20, 1899, reserved more than 15,000 acres of public land on Oahu including what eventually became Fort Shafter and Schofield Barracks. *See* REV. LAWS HAWAII 1915, at 20-22. Approximately 287,000 acres were set aside during this period. T. CREIGHTON, *supra* note 14, at 204. For a list of executive orders setting aside public lands between annexation and 1955, *see* Chronological Note of Federal Acts Affecting Hawaii, REV. LAWS HAWAII 1955, at 9-12.

[99] Organic Act, *supra* note 3.

pertaining to ceded lands,[100] provided in pertinent part:

> [t]hat, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.[101]

"Illegal" sales made by the Hawaiian government during the interim were ratified,[102] and the ban on territorial disposals of public lands lifted.[103] A proviso additionally required that revenues from lands set aside for federal use but which were instead leased, rented, or granted on revocable permit to private parties be placed in the territory's treasury for enumerated public purposes.[104] Most significantly, however, the Organic Act solidified the special trust status of the islands' ceded public lands by providing that the proceeds from the territory's sale, lease or other disposal of them be retained by the territory[105] and applied for uses beneficial to the islands' inhabitants "as are consistent with the joint resolution of annexation, approved July 7, 1898."[106] Finally, the Act stipulated that Hawaii's laws "relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards" would continue in effect until superseded by Congress.[107]

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[100] The other section, § 73, contained the "special laws" which detailed the procedures for the public lands' administration and disposition.

[101] Organic Act, *supra* note 3, § 91. The section also authorized the President to transfer to the territory title to those public lands being used "for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes."

[102] The Organic Act, *supra* note 3, § 73(4)(c) states:

> Subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the 7th day of July 1898, and the 28th day of September, 1899, are hereby ratified and confirmed.

[103] *Id.*

[104] Organic Act, *supra* note 3. *See* note 101 *supra* for the enumerated public purposes.

[105] Two separate funds were established for receipt of revenues and proceeds generated by the public lands in the territory's possession. A "land-reserve" fund held monies generated by leases and was applied to "public ways, schoolhouses, etc." SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO, *supra* note 70. A second fund, the "land-sales" fund, constituted a sinking fund administered by the treasury of the territory.

[106] Organic Act, *supra* note 3, § 73(4)(e). *See also* 1 REV. LAWS HAWAII 1955, at 566, § 99-20 which reaffirms the force of this section.

[107] A number of amendments to §§ 73 and 91 additionally allowed the President to restore the ceded status to lands previously set aside, authorized the President to transfer title to the territory for a number of public purposes, and authorized the territory to transfer

The territorial government had in effect become a conduit of Congress.[108] For all practical purposes the ceded lands had not changed hands. Building on Hawaii's existing land administration scheme,[109] Congress prescribed several significant changes in the Organic Act to insure widespread use of public lands for settlement and homesteading.[110] Otherwise, the territory was given direct control over the public lands and was authorized to dispose of them as a governmental entity where the federal government could not do so directly.[111] The federal government continued to hold absolute title to the public domain, but did so only "in trust" for the islands' people.

As used by the United States Attorney General in defining the relationship established between the United States and Hawaii with respect to its ceded lands,[112] "in trust" referred to the fact that the Organic Act had limited the uses of both the lands and their revenues to those beneficial to the islands' inhabitants and not to the nation as a whole.[113] In short, the federal government was holding the ceded domain in trust for the future state of Hawaii,[114] just as it had held entire territories (although

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title to any city or county. PUBLIC LAND POLICY, *supra* note 60, at 65. *See* Act of May 27, 1910, ch. 258, 36 Stat. 444 (amending Organic Act, *supra* note 3, at § 73) and 36 Stat. 447 (amending Organic Act, *supra* note 3, at § 91); Act of Jan. 31, 1922, ch. 42, 42 Stat. 360. *See also* United States v. Marks, 187 F.2d 724 (9th Cir. 1951) (leased public lands subject to taking under § 91 for national as well as for territorial uses); United States v. Chun Chin, 150 F.2d 1016, 1017 (9th Cir. 1945); 39 Op. Att'y Gen. 460 (1940) (President's authority to set aside land for military purposes was recognized by Congress by Act of Jan. 31, 1922, ch. 42, 42 Stat. 360, which allowed transfers for other public purposes).

[108] *See* National Bank v. Yankton, 101 U.S. 129, 133 (1879) (cession of absolute sovereignty at annexation puts the new territory into a relationship with the United States government analogous to that of a county to a state, and Congress may legislate for it as a state for its municipalities); United States v. Marks, 187 F.2d 724 (9th Cir. 1951) (territory has quasi-trustee relationship toward paramount owner of the public lands, though often their interests are indistinguishable); Alesna v. Rice, 69 F. Supp. 897 (D. Hawaii 1947), *injunction dissolved*, 74 F. Supp. 865, *cert. denied*, 338 U.S. 814 (1949) (Congress gave Hawaii, under its Organic Act, a form of organization more like that of a state than it had previously given to any like area, gave the local government broad domestic powers, and separated the local government from the operation within the territory of a federal government); County of Oahu v. Whitney, 17 Hawaii 174, 180-81 (1905).

[109] Congress adopted Hawaii's homesteading laws by reference, *see* Organic Act, *supra* note 3, at § 73(4)(C), and made certain changes which are discussed in PUBLIC LAND POLICY, *supra* note 60, at 21-25. *See Hearings Before the Senate Subcommittee on Territories & Insular Affairs*, 83d Cong., 1st Sess. 21 (1953) (remarks of Nils Tavares).

[110] Lease terms and restrictions and conditions were severely restricted in an apparent attempt to curb the accumulation of choice lands in the hands of plantation owners. *See* PUBLIC LAND POLICY, *supra* note 60; J. HOBBS, *supra* note 2, at 119-22.

[111] S. REP. No. 675, 88th Cong., 1st Sess. 1 (1963).

[112] 22 Op. Att'y Gen. 574 (1899); 22 Op. Att'y Gen. 627 (1899).

[113] *See* note 95 *supra*.

[114] This view is strengthened by the fact that Hawaii was annexed as an incorporated territory, Hawaii v. Mankichi, 190 U.S. 197, 211, 220 (1902); Downes v. Bidwell, 182 U.S. 244 (1900), which has generally been interpreted as putting a territory on the statehood track or as a declaration of intent to make the incorporated territory a state. *See* J. MATTHEWS, THE

not unappropriated public lands) on the continent for hypothetical future states.[115] This trust relationship, therefore, is not to be confused with that arising from the established common law public trust doctrine,[116] which recognizes that certain types of property owned by a government in its sovereign capacity are held in trust for the public's benefit.[117] The trust may be analogized to that by which the United States was ward of title to certain lands originally occupied by Indians,[118] although circumstances

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AMERICAN CONSTITUTIONAL SYSTEM 338 (2d ed. 1940); *Hearings on Territories and Insular Affairs, supra* note 111, at 102. As an incorporated territory, a government could not "disincorporate" itself from the Union, nor could the national government unilaterally separate the territory. J. MATTHEWS, *supra*.

[115] *See* note 50 *supra;* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (which describes the United States' temporary holding of title in terms of a trust).

[116] *See generally* Olson, *The Public Trust Doctrine: Procedural and Substantive Limitations on the Government Reallocation of Natural Resources in Michigan*, 1975 DET. C.L. REV. 161 (1975); *Natural Resource Law, supra* note 45; Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977) [hereinafter cited as *Proprietary Duties*]. The public trust doctrine generally protects the right of the public to natural resources or lands, including access and use of the property, and promotion of environmental and recreational objectives. *Proprietary Duties, supra*, at 598. *See also* County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973).

[117] Light v. United States, 220 U.S. 524 (1911); *Proprietary Duties, supra* note 118, at 598. Historically the doctrine has been applied to navigable waters and submerged lands up to the high water mark, *Natural Resource Law, supra* note 50 at 556; but the doctrine has been extended to also protect parklands, Stephenson v. County of Monroe, 43 A.D.2d 897, 351 N.Y.S.2d 232 (1974) and wildlife, Geer v. Connecticut, 161 U.S. 519 (1896).

[118] As the acquiring sovereign of lands originally occupied by Indians, the United States generally recognized the Indian's right of use and occupancy although fee remained in the United States. R. JONES, *supra* note 14, at 2. The United States additionally has often assumed the trustee role with respect to lands originally occupied by Indian tribes which the Indians ceded by treaty. In United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913), for example, the Court recognized the right of the Mille Lac Chippewas to damages for the United States' wrongful disposal of lands held in trust. The lands had been disposed of under the general federal public land laws, in violation of the trust which required deposit of the proceeds from their sale in the United States treasury to the credit of the tribe. The Court in Ash Sheep Co. v. United States, 252 U.S. 159 (1920) and Minnesota v. Hitchcock, 185 U.S. 373 (1902) recognized the nature of the trust created by document in which the Indians ceded their claims as follows:

> Whether or not the government became trustee for the Indians or acquired an unrestricted title by the cession of their lands depends in each case upon the terms of the agreement or treaty by which the cession was made . . . . It was obvious that the relation thus established by the act between the government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust.

Id. at 164.

> The cession was not to the United States absolutely but in trust . . . . The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the treasury of the United States to the credit of the Indians.

Id. at 394. As in the case of Hawaii's ceded lands, the lands affected by these treaties thus remained outside the federal public domain in that they were not subject to administration or disposition under the general federal public land laws and policies. *See* Ash Sheep Co. v.

surrounding acquisition of those Indian lands differ from those surrounding Hawaii's annexation.[119] Finally, the trust relationship here must be distinguished from that existing between the federal government and those "common lands" acquired from foreign powers or other states before new states succeeded to their title.[120] What was held in trust under the Organic Act was not title to common lands, but title to unappropriated public lands, the very type of property to which the United States normally retained title whenever new states were formed. Moreover, "in trust" here refers to the ability of the islands' inhabitants to make immediate use of the land and proceeds, and not merely prospectively to the vesting of title in the new state at the time of admission.

Congress thus did not treat Hawaii's ceded lands as part of the federal public domain. While title was in the United States, administration of the ceded lands was governed by a separate body of law enacted to accommodate Hawaii's specific land history and needs. Also, the sole beneficiaries of any income realized therefrom were the people of Hawaii. In fact, the legislative history of an amendment to Hawaii's 1959 Admission Act would indicate at least in retrospect a congressional view that Hawaii had retained a residual interest in its ceded domain.[121] Whether Congress in 1963 was accurate in its belief that the federal government had not received absolute title at annexation is not important here. What is significant is the special treatment accorded the ceded lands because it ultimately determined the relationship between the Hawaiian government and those lands upon statehood. When Hawaii entered the Union, it would become trustee of its "returned" ceded domain and specifically accountable to the federal government in the performance of its unique trust duties.

United States, 252 U.S. 159 (1920).

[119] Possessory rights of legal force in the Indians based on aboriginal occupancy have been subject entirely to their recognition by the sovereign owner of the land—the United States government. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-91 (1955) (in dictum). The United States became sovereign of whole sections of territory by transactions with foreign powers or through cession of claims by states, *see notes* 18-20 *supra*. Claims of native peoples for reparations have thus derived from the fact of their prior occupancy and the subsequent claim of legal title by the acquiring (or conquering) sovereign without compensation. *See generally* R. JONES, *supra* note 14; Levy, *supra* note 1, at 848; D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970). Both Levy and Jones argue in favor of reparations for the native Hawaiians, based on the fact that Hawaii's lands were taken without compensation and without consent of the indigenous population. Jones concedes, however, that the Hawaiians' claim is distinguishable from the other native peoples' (e.g., the Indians and the Alaskan native peoples) in that the Hawaiian people were able to own land in fee prior to annexation. *Supra* at 32-33. These rights were left untouched by § 73 of Hawaii's Organic Act, which provided in subsection (4)(c) that the land laws regarding the recognition of title in public land (thus implicitly existing title itself) would remain intact.

[120] *See* 4 Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Engdahl, *supra* note 22, at 292-94.

[121] *See* note 149 *infra*.

III. The Current Status of Hawaii's Ceded Lands

The federal government's role of trustee of Hawaii's ceded public domain ended for the most part in 1959—the year of Hawaii's admission to the Union. At that time, legal title to most of the ceded lands passed to Hawaii and the new state was given the responsibility of holding the conveyed ceded lands in trust for the benefit of the islands' inhabitants. The Admission Act of 1959[122] thus not only marks a pivotal point in the lands' history of ownership, but also stands as the document embodying the current status of title to the ceded domain and the state's responsibilities as successor trustee. The following subsections describe the Admission Act's provisions dealing with the lands and focus specifically on procedures for the conveyance of ceded lands remaining in federal ownership. The final section will deal with a major and perhaps the most controversial aspect of the state's role in administering the conveyed ceded lands—the public trust. These conveyance and public trust provisions of the Act—repositories of the current federal and state responsibilities towards the ceded domain, respectively—have given rise to several legal and administrative problems impeding proper administration of the lands. Resolution of these problems, as well as the formulation of any new policy regarding the lands and their use, must be based on a reading of the Admission Act which takes into account the special history of Hawaii's ceded domain.

A. The Admission Act of 1959

At least seventeen attempts had been made by Hawaii's territorial legislature since 1903 to secure Hawaii's admission to the Union,[123] making Hawaii's case the longest considered and most thoroughly studied in the history of statehood proposals.[124] The provisions of the 1959 Act covering the "return" of the originally ceded public lands to the new state[125] thus reflected a mixture of the public domain's history in federal hands, several decades of tabled statehood acts, and a considerable amount of compromise. They also marked a clear departure from the established federal practice of admitting new states without giving them title to unappropriated public lands within their boundaries.[126] These provisions require

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[122] Admission Act, *supra* note 6.

[123] 105 Cong. Rec. 3858 (1959). Since 1920, approximately 66 bills were introduced in Congress seeking the same end, and over 22 congressional investigations on the question of admission were conducted from 1935. *See* Appendix B, H.R. Rep. No. 32, 86th Cong., 1st Sess. 68-69 (1959). *See also* Appendix C, for a list of the 34 printed volumes of House and Senate hearings and reports on the subject of statehood for Hawaii from 1933.

[124] S. Rep. No. 80, 86th Cong., 1st Sess. 5 (1959).

[125] *See* Admission Act, *supra* note 6, §§ 5 and 6.

[126] *See* text accompanying notes 48-52 *supra*. The Admission Act's legislative history in

description at this juncture in order to delineate the federal government's duty to "return" ceded lands to the state and the state's responsibilities in administering them.

The earliest form of the 1959 Admission Act receiving serious congressional consideration appeared in 1947.[127] Its terms even then provided for returning ceded lands to the state, although they required Congress to retain title for five years after admission before it would revert to the state.[128] Some remainders of the federal practice of making land grants to newly-admitted states[129] were present: Hawaii was allowed to choose 180,000 acres of public land in lieu of "any and all grants provided for new states by provision of law other than this Act."[130] Congress' intent to perpetuate the special status of the ceded domain, however, was clear. Not only was it assumed most of the unreserved ceded domain would ultimately be returned to Hawaii,[131] but under the Act, the public lands chosen by Hawaii at admission would have been held as a public trust, together with their proceeds and income, for the benefit of Hawaii's people.[132]

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fact reveals a good amount of dispute within Congress and the federal agencies over whether Hawaii should be allowed to become such an exception. The Department of Interior vigorously opposed Hawaii's entrance on superior footing even in 1947 when the Admission Act did not provide for any outright conveyances of the entire ceded domain not previously set aside (except for the 180,000 acre grant). *See* Letter from the Department of Interior to the Committee on Public Lands (March 5, 1947), *reprinted in* H.R. REP. No. 194, 80th Cong., 1st Sess. 14-17 (1947). The Interior Department felt that the federal government should retain and administer the public domain in Hawaii as it had on the continent, making land grants for schools and other public purposes upon Hawaii's admission, but retaining general administrative power over both the lands and their revenues. *Id.* at 16. Similarly, in 1953, the prior federal practice of admitting states by requiring a relinquishing of their title and claims to the unappropriated public domain, and promising 5% of their proceeds to the state was noted, along with the fact that Hawaii would become the first exception to this practice. *Hearings on Territories & Insular Affairs, supra* note 109, at 731. Again the feeling was expressed that Hawaii should be admitted on equal footing and subject to federal public land policies and administration. *Hearings on Territories & Insular Affairs, supra,* at 732-33 (remarks of Senator Malone).

[127] H.R. 49, 80th Cong., 1st Sess. (1947).

[128] During this five-year period, Congress was to decide on the procedure for their disposition after the Senate Committee on Public Lands and the House of Representatives had jointly studied the situation. If no disposition was made, title would automatically vest in Hawaii except to those lands reserved by the federal government for specific federal use. *Id.* § 4(a). According to the chairman of Hawaii's Statehood Commission, this five-year period was in effect a compromise to pacify those who might otherwise delay statehood if the public domain was granted outright to the new state. *Hearings on Territories & Insular Affairs supra* note 109 (remarks of Nils Tavares).

[129] *See* note 49 *supra.*

[130] H.R. 49, *supra* note 127 at § 4(c). "Public lands" referred to those identified in § 73(3) of the Organic Act.

[131] *See* Letter to the Committee on Public Lands (March 5, 1947), *reprinted in* H.R. REP. No. 194, 80th Cong., 1st Sess. 14-17 (1947); *Hearings on Territories & Insular Affairs, supra* note 109.

[132] The trust provision in House Bill number 49 is virtually identical to that which was

The final version of the Admission Act of 1959 contained even stronger expressions of an intent to return the ceded lands to Hawaii.[133] Section 5, with which this discussion is primarily concerned, first names the new state as successor in title to lands and properties then held by the territory.[134] It then declares that

> [e]xcept as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property,[135] and to all lands defined as "available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of The State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.[136]

Specifically excepted from this grant were ceded lands and those acquired in exchange for ceded lands[137] which were set aside[138] as of the date of admission for federal use.[139] By implication, also excluded were lands ac-

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adopted as § 5(f) of the 1959 Admission Act, down to the very wording of the five enumerated trust purposes. *See* H.R. 49, *supra* note 129, at § 4(d). *See also* H.R. 2535, 84th Cong., 1st Sess. § 103(C) *reprinted in* H.R. REP. No. 88, 84th Cong., 1st Sess., at 24-25 (1955) (identical trust provision except that "native" Hawaiians shows here as "indigenous" Hawaiians).

[133] The 180,000 acre grant was dropped as a term of the Act in 1955 when the grant of all except set aside or controlled ceded land was added. *See* H.R. 2535, *supra* note 132.

[134] Admission Act, *supra* note 6, § 5(a).

[135] These included only those lands that had been ceded under the Joint Resolution of Annexation or those acquired in exchange for ceded lands. *See* Admission Act, *supra* note 6, § 5(g). Those lands acquired after annexation, whether by condemnation, purchase, donation, escheat, or otherwise, together with those lands set aside and retained by the United States or controlled by the United States at admission and not returned within five years are subject to disposal under the Federal Property & Administrative Services Act of 1949, 40 U.S.C. §§ 471-544. The Act allows for the free return of public lands to governmental entities when declared surplus to federal needs and when the entity can first demonstrate a planned permissible health, educational, or airport use proposed for the land. *See* 40 U.S.C. § 484(k)(1) (amended 1976). It also authorizes the grant of surplus land at 50% estimated market value for recreational and park purposes, and the return of surplus land at 100% market value for other purposes at public auction.

[136] Admission Act, *supra* note 6, § 5(b).

[137] Admission Act, *supra* note 6, § 5(g).

[138] The "setting aside" of lands for federal purposes was originally authorized by the Joint Resolution of Annexation and implemented by § 91 of the Organic Act. 24 Op. Att'y Gen. 600 (1903). It has generally been understood that the term in the Organic Act referred to ceded lands taken for the uses and purposes of the United States. *See* United States v. Marks, 187 F.2d 724, 730 (9th Cir. 1951); H.R. REP. No. 831, 77th Cong., 1st Sess. 1-2 (1941); S. REP. No. 576, 77th Cong., 1st Sess. 1-2 (1941). *See also* HAWAII CONST. art. XVI, § 6 (recognizing vesting of title in federal government to lands set aside immediately prior to admission).

[139] Admission Act, *supra* note 6, § 5(c). 287,078.44 acres of a total 4,105,000 acres comprising the state's area had been so set aside at the time of statehood by congressional act, executive order, or presidential or gubernatorial proclamation. PUBLIC LAND POLICY, *supra*

quired by the federal government after annexation.[140] Title to ceded lands that the federal government controlled by permit, lease or written or verbal permission was retained with the possibility of its vesting in the state if not set aside for federal use within five years.[141]

The ceded lands set aside by the federal government upon admission,

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note 60, at 68.

[140] The federal government acquired by purchase, condemnation, gift, or donation approximately 28,000 acres of land after annexation, PUBLIC LAND POLICY, *supra* note 60, at 68, the most important of which is presently a portion of Fort DeRussy located at the west end of Waikiki. Section 5 did not explicitly deal with the status of these lands, also known as "fee lands," upon admission. Moreover, the separate use of "public land and other properties" and "land and other properties" within the same section caused some to believe that a different meaning was intended the latter as distinct from the former, despite the identical definition given them in Admission Act, *supra* note 6, § 5(g). The state's desire to have after-acquired lands included in the reporting-free conveyance requirement of § 5(e) originally centered on a certain 203 acres of land acquired by condemnation which it desired for public housing units. The need for clarification of the status of these lands led to the issuance of two conflicting state and federal attorney general opinions, Legal Memorandum of the Attorney General of the State of Hawaii, October 18, 1960, *reprinted as* Exhibit J to Complaint, Hawaii v. Gordon, 373 U.S. 57 (1973) (*per curiam*) and 42 Op. Att'y Gen. of the United States No. 4 (1961), respectively, the latter denying that Admission Act, *supra* note 6, § 5(e) extended to anything other than ceded properties (and lands acquired in exchange therefor). The state followed with an original action in the United States Supreme Court, Hawaii v. Gordon, 373 U.S. 57 (1963) (*per curiam*) which was dismissed on sovereign immunity grounds. This suit was originally filed as State v. Bell, Bell then being the Budget Director. At the time of oral argument, however, Kermit Gordon replaced David E. Bell as Budget Director, and as a result, became the named defendant. *See* text accompanying notes 173-81 *infra*. Although state political leaders refused to allow the issue to rest, later attempts to modify the Admission Act, *supra* note 6, § 5(e) through direct legislation in Congress introduced by Senator Hiram Fong and strategies designed to gain the fee lands in other ways either failed or failed to materialize. The account of the state's internal battle over the fee lands given in PUBLIC LAND POLICY, *supra* note 60, at 84-91 indicates that some of this failure was attributable to differences between the Republican and Democratic parties on the question of proper strategy to be employed for obtaining the return of public lands.

[141] Admission Act, *supra* note 6, § 5(d). These lands amounted to 177,412.74 acres. PUBLIC LAND POLICY, *supra* note 60, at 68. The authors note on page 67 that "[t]he provisional character of the title to this land is extremely important since most of this land eventually went back to the federal government." However, the United States Attorney General, 42 Op. Att'y Gen. No. 4 (1961), at 56-57 denied that conditional title was held in the State of Hawaii or defeasible title in the United States.

The apparent intent of this provision was to allow the military sufficient time within which to safeguard its interests in Hawaii and to assess its need for more land. Letter from Navy Dep't to the Committee on Interior & Insular Affairs (Jan. 26, 1959) *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 1372-73. The Department of Defense, in 1963, proposed a three-year extension to the five-year period given Congress and the President within which to act. The department felt such an extension necessary due to legal problems impeding the issuance of executive orders setting aside lands for defense purposes. Letter from General Counsel of the Dep't of Defense to Kermit Gordon, Director, Bureau of the Budget (Aug. 7, 1963) (pertaining to the proposed Pub. L. No. 88-233). Congress did not adopt this proposal. *See* Pub. L. No. 88-233, *supra* note 11 (*amending* the Admission Act, *supra* note 6).

excluding after-acquired lands regardless of whether they were set aside, were subject to disposal under section 5(e) of the Admission Act.[142] Section 5(e) as originally drafted required that within five years of admission each federal agency controlling set aside ceded land in Hawaii report to the President the "facts regarding its continued need for such land or property."[143] If the President then determined that the United States did not further need the land or property, it was to be conveyed to the State of Hawaii. Guidelines governing the contents of the agencies' reports and the procedures for reporting were issued by the Bureau of the Budget.[144]

Section 5(e), however, was subsequently amended by Congress on December 23, 1963.[145] The amendment essentially abolished the five-year deadline, extending without limitation the possibility of the federal government's relinquishing title, without cost to the state, to section 5(c) and (d) ceded lands retained by the federal government.[146] Dispensing with all reporting or assessment requirements, the brief 1963 Act provided for the

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[142] PUBLIC LAND POLICY, *supra* note 60, at 70-71 contains a list of the parcels released to the state under § 5(e) between 1960 and 1964, together with the date of their return and acreage. According to its estimates, the federal government had returned approximately 595.4 acres of land.

[143] Admission Act, *supra* note 6, § 5(e).

[144] U.S. BUREAU OF THE BUDGET, BUDGET CIRCULAR No. A-52 (Nov. 14, 1960) [hereinafter BUDGET CIRCULAR] By Exec. Order No. 10530, 19 Fed. Reg. 2709 (1954) and subsequent amendments, *see* Exec. Order No. 10889, 25 Fed. Reg. 9633 (1960) and Exec. Order No. 10960, 26 Fed. Reg. 7823 (1961), the President generally delegated his final authority in matters concerning § 5(e) disposals to the Director of the Bureau of the Budget. This delegation included that of authority vested in the President by § 40 of the Hawaii Omnibus Act of July 12, 1960, Pub. L. No. 86-624, 74 Stat. 422, to prescribe reporting procedures, and also final authority to determine whether lands were no longer needed by the United States.

The Bureau's policy guidelines provided generally that land would not retained when:

a. It is not being used by the controlling agency and there are no firm plans for future use;

b. The costs of operation and maintenance are substantially higher than for other suitable properties of equal or less value which are, or can be made, available to the Federal Government without direct cost;

c. It is being leased to private individuals or enterprises and there are no firm plans for future Federal use; or

d. It is being used by the Government to produce goods or services which are available from private enterprise, except when it is demonstrated clearly in each instance that it is not in the public interest to obtain such requirements from private enterprise.

BUDGET CIRCULAR, *supra*. The federal government was to give priority to requests for specific parcels of land made by the Governor of Hawaii. Also, the state was allowed to offer sites for the relocation of federal facilities if the land upon which they were originally situated was desired by the state. These guidelines have continued in force since their issuance. Interview with James Detor, Land Management Division, State of Hawaii Dep't of Land & Natural Resources (March 27, 1980).

[145] Pub. L. No. 88-233, *supra* note 11. *See* Appendix.

[146] Pub. L. No. 88-233, *supra* note 11, also applied to Sand Island and the "reefs in connection therewith." For a full illustration of the lands affected by the change in § 5(e), see PUBLIC LAND POLICY, *supra* note 60, at 73-78.

conveyance of lands to Hawaii "[w]henever . . . [they] are determined to be surplus property by the Administrator of General Services with the concurrence of the head of the department or agency exercising administration or control over such lands."[147] The most important effect of the Act, and not coincidentally the intent of its drafters, was the rescue from extinction of Hawaii's "long-recognized residual interest in such lands."[148] Otherwise, at the end of the five-year period, title to lands not conveyed would vest absolutely in the federal government.[149]

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[147] Pub. L. No. 88-233, *supra* note 11, at § (a)(i). Governor John A. Burns, responding to a draft of S. 2275, 88th Cong., 1st Sess. (1963) which eventually became Pub. L. No. 88-233, *supra*, expressed his concern over the lack of any such reporting provision in a letter to Mr. Harold W. Seidman, Bureau of the Budget, dated July 16, 1963. Therein he proposed the following amendment to § (a)(1):

> At every five-year interval from August 21, 1964, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of Section 5 of the Hawaii Statehood Act (Public Law 86-3, 86th Congress) shall report to the Administrator the facts regarding its continued need for such land or property, and if the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii as hereinafter provided.

Congress did not accept his proposed change. In fact, the legislative history of the Senate bill is devoid of any stated concern for mandatory reporting procedures that would provide some measure of accountability to the General Service Administrator's discretionary task. S. REP. No. 675, 88th Cong., 1st Sess. (1963).

[148] S. REP. No. 675, *supra* note 147.

[149] Governor Burns apparently had acquiesced in the original five-year limitation of the Admission Act, *supra* note 6, § 5(e) when negotiating for statehood, reasoning that once statehood had been attained, Hawaii's congressional delegation could secure the needed changes. Interview with Hawaii Supreme Court Chief Justice William Richardson (Feb. 29, 1980). They were, of course, only partly successful.

The legislative history of Pub. L. No. 88-233, *supra* note 11, is replete with references to this Act as being grounded in the special status given the ceded domain by the federal government upon annexation. The Director of the Bureau of the Budget, for example, states in its communication to the President concerning Draft 1 of S. 2275 that:

> [a]bsent new legislation, the State of Hawaii will be denied those lands to which the territory was entitled during its 60 years of existence, and there will be a significant departure from the heretofore accepted concept of the special trust status of those lands.
>
> We believe such action is fully justified in keeping with the manner in which the lands and properties were acquired and the history of the special trust status in which they were held.

Letter from Director, Bureau of the Budget to the Honorable Lyndon B. Johnson (Oct. 18, 1963). S. REP. No. 675, *supra* note 147, itself states that:

> [i]f S. 2275 is not enacted, the above-described lands, which the Federal Government received by the voluntary cession and donation of the people of Hawaii and for which it paid no compensation, would be subject to disposal under the Federal property laws after August 21, 1964, when they became surplus. Under the terms of the statehood act, Hawaii would thus lose its *long-recognized residual interest* in such lands, and the 60-year practice of returning such lands to Hawaii when they are no longer needed would be terminated. Such a result would in effect be a "reverse land grant" that would be *highly inequitable in view of the history of the subject lands and the spirit and intent of the statehood act.* (emphasis supplied)

The final major subsection of section 5 spells out the state's role in the administration and disposition of lands conveyed to Hawaii under subsections (b) and (e). Perhaps the single most controversial provision of the Admission Act, section 5(f) requires the state to hold the lands conveyed, as well as the proceeds from their disposition and income they generate,

> as a public trust for the support of the public schools and other educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[150]

Thus, up until 1980, the Department of Land and Natural Resources, the state agency charged with the administration of the public domain,[151] utilized two separate accounts as repositories for revenues derived from dispositions of ceded lands.[152] Such dispositions were made pursuant to the statutorily prescribed procedures applicable to dispositions of the public domain in general.[153]

Section 5 of the Admission Act thus transferred legal title to the ceded domain not appropriated for federal use to Hawaii. The current status of

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[150] Admission Act, *supra* note 6, § 5(f). *See generally* V. BLOEDE, PUBLIC LANDS AS A PUBLIC TRUST (1962); M. UYEHARA, THE HAWAII CEDED LAND TRUSTS: THEIR USE AND MISUSE (1977); FINANCIAL AUDIT OF THE DEPARTMENT OF LAND & NATURAL RESOURCES with the assistance of Office of the Legislative Auditor, State of Hawaii, Peat, Marwick, Mitchell & Co., (No. 79-1, January 1979) [hereinafter cited as AUDIT]. HAWAII CONST. art. XVI, § 7 requires compliance with the public trust terms of § 5(f).

[151] HAWAII REV. STAT. § 171-3 (1976). *See also* HAWAII REV. STAT. § 26-13 (describing the department under the heading of executive departments, defining its composition, functions and authority).

[152] HAWAII REV. STAT. § 171-18, passed in 1962 as implementing legislation for § 5 of the Admission Act, established the public land trust (fund) for the receipt of funds derived from the sale, lease or other disposition of ceded-reconveyed or §§ 5(c) and 5(d) reconveyed land. The section also repeats the trust provision of § 5(f). HAWAII REV. STAT. § 171-19 designates a special land and development fund as recipient of proceeds from the disposition of "public lands," subject to the provisions of the Hawaiian Homes Commission Act of 1920, as amended (requiring 30% of receipts derived from leasing of ceded and non-ceded sugar cane lands and water licenses to be deposited in the Hawaiian Home loan fund, § 213), and § 5(f) of the Admission Act (all proceeds from ceded lands essentially to go to the public trust fund).

[153] Interview with James Detor, Land Management Division, State of Hawaii Dep't of Land & Natural Resources, in Honolulu (March 27, 1980). The laws concerning the administration of the state's general public domain, which includes fee lands and condemned lands of which the state is now owner (not as trustee), are contained in chapter 171 of the Hawaii Revised Statutes.

ceded land remaining in federal ownership, however, is unclear despite the relatively unambiguous language of section 5(e)'s amended conveyance provision. A literal reading of the provision may in fact produce a result inconsistent with Congress' intent and the lands' history of ownership in federal hands. Section 5(e), as amended, thus merits closer attention in establishing the current status of ceded lands, especially since the federal government has retained title to a considerable portion of the ceded domain.

B. Current Conveyance Procedures Under the Admission Act

Pursuant to section 5 of the Admission Act, the federal government in 1959 granted title to Hawaii to all but approximately 400,000 acres[154] of the originally 1,750,000 acres of ceded land.[155] Of the 400,000 acres, approximately 220,000 acres were administered as national parks,[156] 60,000 acres were located in military installations,[157] and the remaining 120,000 acres or so, held under permission, permit or license by the federal government under section 5(d) of the Act, were controlled exclusively by the Defense Department.[158] Technically, the Admission Act terminated the federal government's trustee role vis-a-vis the public domain ceded by Hawaii. The federal government had transferred the trust corpus, and the only lands remaining under its control and ownership were those it set aside or retained for its use as sovereign as specifically authorized by the Joint Resolution, the Organic Act, the Admission Act and the Hawaii State Constitution.[159] Thus it might be concluded that section 5(e)'s conveyance procedure, as revised by Pub. L. No. 88-233, did not impose any

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[154] PUBLIC LAND POLICY, *supra* note 60, at 105 (after subtracting the 28,234.73 acres of after-acquired land from the total). The rounded figure represents 287,078 acres of ceded lands set aside by the federal or territorial governments for federal use, and some 117,412 acres of ceded lands controlled by the federal government at statehood, title to which had been retained in the United States.

[155] *See* J. HOBBS, *supra* note 2 and accompanying text.

[156] These lands were set aside by Act of Sept. 13, 1960, Pub. L. No. 86-774, 74 Stat. 881 (Haleakala National Park); Act of July 26, 1955, Pub. L. No. 177, 376 (City of Refuge National Historical Park); Act of Aug. 1, 1916, Pub. L. No. 171, 39 Stat. 432 (Hawaii National Park).

[157] PUBLIC LAND POLICY, *supra* note 60, at 68.

[158] *Id.* at 72-75. The authors, at page 75, note the tenacity of the Defense Department in its intention to retain control of all of this acreage, whether by setting the lands aside before the deadline or through 65-year leases to the federal government. 87,236 acres of the total 120,000 acres were indeed set aside, and became susceptible to the provisions of the Pub. L. No. 88-233, *supra* note 11, requiring conveyance at no cost to the state when declared surplus. For a complete inventory of lands held by the federal government upon Hawaii's admission, *see* Office of the Commissioner of Public Lands, *Inventory of Public Lands Set Aside to the United States by Acts of Congress, Executive Orders and Proclamations* (updated).

[159] *See* note 138 *supra*.

extra conditions either on the federal government's retained ceded landholdings or on their return.

The Admission Act, its legislative history, and history itself, however, dictate otherwise. While the scope of section 5(e)'s reporting requirement was contested by the state and federal governments in the early 1960's[160] (and never resolved), it was generally accepted through acquiescence by both that section 5(e) extended exclusively to ceded lands or lands received in exchange therefor. The very exclusion of after-acquired or fee lands from the reporting requirement and their exclusion from section 5(f)'s trust provision reflects Congress' historical view that the public lands ceded by Hawaii at annexation did not become a part of the federal public domain and instead "belonged" to the islands' people.[161] This view has more recently been articulated by Congress and United States Attorney General Robert Kennedy as Hawaii having had a "long-recognized residual interest"[162] in those lands, "and possibly even had acquired the legal title" upon annexation.[163] Hence the need to set aside lands for federal use arose, for if legal title to the ceded domain had vested in the United States, the act of setting aside lands would be redundant. Indeed, no such setting aside was necessary for after-acquired or fee lands:[164] legal title vested with no trust strings attached, and today these lands are subject to disposal as part of the federal public domain under the Federal Property and Administrative Services Act of 1949.[165] The greatest evidence of a continuing congressional recognition that the ceded domain ultimately belonged to the Hawaiian people, however, was the abolition of the five-year limitation on the return of surplus ceded lands originally contained in section 5(e).[166] The legislative history of Pub. L. No. 88-233 in fact contains clear expressions of an intent to prevent inequitable federal retention of lands that were ceded at no cost to the federal government and which had thus acquired a special trust status.[167]

In sum, the federal government continues to hold the remaining ceded lands within its ownership under the amended section 5 "in trust." It thus has an affirmative obligation to review federal needs for and to return unused lands, both in good faith and on an ongoing basis, to the state. The problem, however, is that Pub. L. No. 88-233 which provides for the return of surplus ceded land is not couched in those terms.[168] While the law requires the General Services Administrator [hereinafter

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[160] *See* note 140 *supra*.

[161] *See* 42 Op. Att'y Gen. No. 4 at 46, 55 (1961); .S. REP. No. 675, *supra* note 147.

[162] S. REP. No. 675, *supra* note 147.

[163] 42 Op. Att'y Gen. No. 4 at 51 (1961).

[164] *Id.* The Attorney General observed that no instances of "setting aside" after-acquired property have ever been recorded.

[165] 40 U.S.C. §§ 471-544 (1949). *See* note 137 *supra*.

[166] Pub. L. 88-233, *supra* note 11.

[167] S. REP. No. 675, *supra* note 147.

[168] Pub. L. No. 88-233, *supra* note 11, at § (a)(i). *See* Appendix.

referred to as Administrator] to convey to the state title to ceded lands "whenever" they are declared surplus to federal needs, there is no express requirement that the Administrator review agency needs for lands within a certain time frame.[169] Also, there is no provision rendering the Administrator otherwise accountable in its decision-making.

These loopholes in the law have several important consequences for the State of Hawaii. First the absence of a time limitation on reporting and assessment means that the Administrator may effectively hold off state requests or conveyances indefinitely, as transfer of title must occur only when the lands are declared surplus. "When" is not limited, nor is there now any requirement that federal agencies assess and report their need for ceded land under their control. The declaration of surplus and subsequent conveyance of lands is thus wholly within the discretion of the Administrator.[170] Second, it may encourage federal agencies to use ceded lands no longer needed for purposes other than those for which they were originally set aside and thereby unduly delay the return of essentially surplus lands to the state. While it is standard federal procedure to grant any federal agency an opportunity to use general public domain land no longer needed by its former controlling agency before it is offered for sale,[171] this practice does not comport with Congress' intent with respect to the ceded domain—to reserve the lands and their proceeds exclusively for their sole beneficiaries, the Hawaiian people.

Finally, the non-mandatory nature of Pub. L. No. 88-233 makes it difficult for the State of Hawaii to hold the Administrator legally accountable for a perceived failure to perform its functions. While it is conceivable that the Administrator might be charged with an abuse of discretion in failing to declare unused lands surplus and conveying them, or with failing to act in good faith and with best efforts in accordance with the intent and purpose of the law, evidentiary problems would be insurmountable. Moreover, Hawaii's ability to sue the executive branch to compel administrative action regarding public lands has been severely limited by the decision of the United States Supreme Court in *Hawaii v. Gordon*.[172]

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[169] *See* note 148 *supra*. By contrast, the Federal Property & Administrative Services Act of 1949, 40 U.S.C. §§ 471-544, which governs lands in the general federal public domain requires the maintenance of inventory controls, "continuous survey" of property for determination of possible excesses, and immediate reporting and transfer out of such excess property. 40 U.S.C. §§ 483(b)-483(c), *supra*.

[170] Dep't of Land & Natural Resources Land Management Division Head, James Detor, in an interview on March 27, 1980, represented that the Administrator and the federal agencies are guided in the determination of surplusage by the same criteria established by the Bureau of the Budget when § 5(e) (original unamended version) was in force. *See* note 144 *supra*. Like Public Law 88-233, however, the circular containing these guidelines did not prescribe a reporting deadline since such dealine was set out in the Admission Act, § 5(e).

[171] This is normal procedure under the Federal Property & Administrative Services Act of 1949, *supra* note 165, at § 483(b)-483(c); GENERAL SERVICES ADMINISTRATION, DISPOSAL OF SURPLUS REAL PROPERTY FOR PUBLIC AND PRIVATE USE 2 (April 1978).

[172] 373 U.S. 57 (1963). *See* note 140 *supra*.

Gordon was an original action filed by the state against the Director of the Bureau of the Budget,[173] precipitated by a disagreement between the state and federal government over the types of land affected by section 5(e)'s reporting and conveyance requirement. United States Attorney General Robert Kennedy had issued an opinion in 1961 stating that only ceded lands and those acquired in exchange therefor would be subject to section 5(e).[174] The Director of the Bureau of the Budget so advised federal agencies in its circular detailing the reporting requirements under section 5(e).[175] The opinion and advice conflicted with the state's position, reflected in an earlier state attorney general's opinion,[176] that section 5(e) applied additionally to after-acquired lands—those acquired through purchase, condemnation or gift. The state's complaint thus sought an order requiring the Bureau to withdraw its advice to the federal agencies, to determine whether a certain 203 acres of condemned land was needed by the United States, and if not, to convey the land to the state.[177] The Supreme Court, in a per curiam opinion, however, dismissed the suit on the basis of the sovereign immunity doctrine:

> We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.[178] [citations omitted][179] Here, the order requested would require the Director's official affirmative action,

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[173] The Budget Director, under the unamended § 5(e), had been delegated the power by the President to receive and assess the agency reports and to determine whether unused lands were to be declared surplus and returned to the state. It also had the power to promulgate guidelines to guide it in its functions. *See* note 144 *supra*.

[174] 42 Op. Att'y Gen. No. 4 (1961), *see* note 140 *supra*.

[175] BUDGET CIRCULAR No. A-52, *supra* note 144.

[176] Legal Memorandum of the Attorney General of the State of Hawaii, October 18, 1960, *reprinted as* Exhibit J in Complaint, Hawaii v. Gordon, 373 U.S. 57 (1963) (per curiam).

[177] 373 U.S. 57, 58.

[178] The rationale behind the rule, articulated in Minnesota v. Hitchcock, 185 U.S. 373 (1901), is that

> [t]he officers named as defendants have no interest in the lands or the proceeds thereof . . . . If whether a suit is one against a State is to be determined, not by the fact of the party name as Defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the U.S. is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

Id. at 387. *See generally* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Cranston, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and the Parties Defendant*, 68 MICH. L. REV. 389 (1970); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-lands Cases*, 68 MICH. L. REV. 867 (1970).

[179] The Court cited as support Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); and Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949).

> affect the public administration of government agencies, and cause as well the disposition of property admittedly belonging to the United States. The complaint is therefore dismissed.[180]

Just as in *Oregon v. Hitchcock*,[181] cited by the Court as support for its dismissal of the complaint, the state here could not sue absent an act of Congress waiving immunity of the United States or consenting to suit. Following *Gordon*, Hawaii Senator Hiram Fong attempted to secure the United States' consent to suit by Hawaii in protection of its interest in the ceded lands.[182] This attempt consisted of a proposed additional section to Pub. L. No. 88-233 declaring such consent, but apparently the proposal was quashed before reaching the floor of the Senate due to party differences.[183]

While an examination of the intricacies of the sovereign immunity doctrine is outside the scope of this discussion, it may be concluded that *Bell* would pose a major obstacle to an original suit against the Administrator for the conveyance of specific ceded properties to Hawaii.[184] The state's

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[180] Citing Oregon v. Hitchcock, 202 U.S. 60 (1906).

[181] *Id.*

[182] PUBLIC LAND POLICY, *supra* note 60, at 91.

[183] *Id.* Senate President Mansfield removed Fong's bill from the Senate consent calendar at the request of Daniel Inouye, the then junior senator from Hawaii, notwithstanding the Senate Judiciary Committee's unanimous support for the bill. "On this point the Honolulu Star Bulletin, Nov. 1, 1963, reported: '. . . The Executive Committee of the Oahu Republican County Committee characterized this as partisan politics at its ugliest.' " *Id.*

[184] The recent cases cited in *Gordon* dealing with the sovereign immunity doctrine in the context of judicial review of administrative action recognized an exception to the bar of sovereign immunity—where the case involved action which either exceeded the officer's statutory authority or was unconstitutional. *See supra* note 179. The facts of State v. Gordon, however, indicate that neither was involved.

The Administrative Procedure Act additionally would probably not afford the state standing to sue the federal government. *See* 5 U.S.C. §§ 701-706, Pub. L. No. 89-554, 80 Stat. 392 (1966). Section 701 of the Act provides that action of "each authority of the Government of the United States" is subject to judicial review except where a statute explicitly prohibits it or where "agency action is committed to agency discretion by law." The Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) noted that the latter exception was to be narrowly construed, *citing* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COL. L. REV. 55 (1965): "The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)." 401 U.S. at 410. Statutory directives involving discretionary determinations by the Director of Transportation were held to be "law", thus giving plaintiffs standing to sue under the Act. Arguably, the state here would be able to claim that its suit is not barred by section 701 since there is no indication of a congressional intent to restrict access to judicial review since the General Services Administrator may be bound by "law", i.e., Pub. L. No. 88-233, § (a)(i). 401 U.S. at 410 (*citing* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) and Brownell v. We Shung, 352 U.S. 180 (1956); *see* Barlow v. Collins, 397 U.S. 159 (1970). The nature of the Administrator's discretion here, however, differs in extent from that possessed by the Transportation Department Director in *Citizens of Overton Park*. The Administrator's duty to convey lands declared surplus is not governed

only real alternative, other than direct appeal to the President, would lie in attempts by its congressional delegation to promote the return of desired ceded lands through legislation.[185]

This is not to say, however, that the federal government has in fact been negligent in performing its legal and historical obligations towards the ceded lands under its control. In 1970, President Richard Nixon issued an executive order[186] to each executive agency requiring a complete survey and assessment of need for all federally-owned lands within its control. The resulting Department of Defense's analysis of Hawaii lands under its control[187] included the identification of some nine thousand acres of ceded and non-ceded land which could eventually be released.[188] A fairly thorough update of long-range military property requirements in Hawaii [hereinafter referred to as MILPRO-HI],[189] made at the request

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by any time restraints or guidelines in Pub. L. No. 88-233 itself (although arguably the circular could constitute the "law"). Moreover, it has been held that § 701 of the Act does not constitute a blanket waiver of sovereign immunity or consent to suit. *See* Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir. 1972), *cert. denied*, 411 U.S. 928 (1973); Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971); State v. Udall, 417 F.2d 1310 (9th Cir. 1956). *But see* Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) (§ 701 waives sovereign immunity in actions to which it applies).

[185] Interview with Hawaii Supreme Court Chief Justice William Richardson, in Honolulu (Feb. 29, 1980). Not even this route has proven successful in putting forth the state's case. For example, Hawaii's congressional delegation did attempt to secure the return of some Bellows Air Force Station land, *see* text accompanying notes 196-201 *infra*, when informed that such land was not programmed for release in MILPRO-HI, the Defense Department's 1976 study of military needs for public lands in Hawaii. *See also* note 189 and accompanying text *infra*. Interview with Jack Kaguni, Dep't of Land & Natural Resources, in Honolulu (Apr. 2, 1980).

[186] Exec. Order No. 11,508, 35 Fed. Reg. 2855 (1970), which was superseded by Exec. Order No. 11,724, 38 Fed. Reg. 16837 (1973) and then Exec. Order No. 11,954, 42 Fed. Reg. 2297 (1977). However, these orders were not the result of any diligent attempt to facilitate land conveyances under Pub. Law No. 88-233. Rather, they were a part of President Nixon's scheme to leave a legacy of parks by requiring a 10% cutback in federal land holdings in the state. Interview with Jack Kaguni, *supra* note 185.

[187] The study, entitled Facilities Requirements Evaluation, State of Hawaii (Project FRESH) represents the first of such comprehensive assessments of military property needs in Hawaii. It considered projected force levels, availability of housing and other facilities, the opportunities for consolidating military facilities, and the feasibility of releasing unused real estate. *Cf.* U.S. DEP'T OF DEFENSE, QUESTIONABLE ASPECTS OF THE MILITARY'S STUDY OF LAND NEEDS IN HAWAII (1975) (questioning methodological inconsistencies in the arrival at statistics regarding land use and criticizing the study generally for failing to accurately project land use needs).

[188] *See* Appendix C, MILPRO-HI, *supra* note 185, quoting from Project FRESH. Approximately 4,3000 acres of land was ceded, and of that total only 1,385 acres were returned to the state between 1972 and 1979.

[189] MILPRO-HI is perhaps the single most complete inventory of federal ceded landholdings in Hawaii which is readily accessible to the general public. It can be obtained through the Legislative Reference Bureau at the State Capitol. Most of the retained ceded lands, excluding those administered as national parks, are controlled by the Department of Defense. Land statistics available from the BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS (1974) fail to distinguish between ceded and non-ceded lands, and the Department's

of the Deputy Assistant Secretary of Defense in 1976, recommended the release of twenty-seven parcels of land totalling 2,944 acres.[190] While concededly neither of these efforts was made pursuant to the federal government's section 5(e) responsibilities, and while the resulting net return of ceded land has been relatively small,[191] the significant fact remains that the Defense Department has had to justify its retention of ceded land twice within the past decade. This is essentially what Governor John Burns had sought by way of a reporting requirement for Pub. L. No. 88-233.[192] Moreover, State Department of Land and Natural Resources officials have commented favorably on the federal government's general willingness to cooperate in returning surplus lands, whether ceded or not, and whether or not requested to do so by the state.[193]

There are, however, a few exceptions which illustrate both the deficiency of section 5(e), as amended, and the need to read the federal government's obligation to return the lands in light of its prior relationship with them.[194] The most important of these exceptions in terms of location, size and use potential, is situated on the southeast coast of Oahu. Bellows Air Force Station consists of 1,495 acres of land, of which 1,457 acres, or roughly ninety-seven percent, is ceded.[195] Aside from Air Force transmitter facilities that are being considered for consolidation elsewhere,[196] Bellows is not used by the federal government except for infrequent and spacially-confined Marine Corps amphibious assault training.[197] Apart from the transmitter facilities, beach cottages, minor

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own inventory exists as the only copy. *See* note 158 *supra*.

[190] MILPRO-HI, *supra* note 185, at 5. All but approximately 700 acres of the lands, however, were classified as fee lands.

[191] *See* note 188 *supra*.

[192] *See* note 147 *supra*.

[193] Interview with James Detor and Jack Kaguni, Land Management Division of the Dep't of Land & Natural Resources, in Honolulu (March 27, 1980); Interview with Jack Kaguni, *supra* note 186.

[194] *Id.*

[195] MILPRO-HI, *supra* note 185, at E-66. Of the remaining land, 36 acres are owned in fee (having been condemned) and two acres are held under easement.

[196] A relocation of the facilities to consolidate them with those presently located at Lualualei, Oahu, has been determined technically feasible although costly at this time. Such a move would leave Bellows at the sole disposal of the Marine Corps. MILPRO-HI, *supra* note 186, at E-67.

[197] This training takes place roughly twice a year and over approximately 600 acres of Bellows land. Interview with Jack Bauer, General Services Administration Representative in Hawaii (March 10, 1980); *see* MILPRO-HI, *supra* note 185, at E-66 to 67. The Marine Corps bases its claim of need on the loss of a lease and permit to former training areas and restrictions on uses of others. MILPRO-HI, *supra*. Moreover, Bellows is adjudged as the only suitable Defense Department site in Hawaii suitable for amphibious training. While MILPRO-HI notes other military users of Bellows such as the 25th Infantry Division and the Hawaii Army National Guard, the study does not indicate the amount of time spent using the area, or the amount of acreage used. Indeed, MILPRO-Hi indicates that the Marine Corps is the dominant user.

facilities, a National Guard Armory and Marine Corps vehicle maintenance facilities, the bulk of Bellows' land remains unoccupied and unused throughout the year.

The State of Hawaii, on the other hand, has an active interest in the Waimanalo lands. Apart from the immense, unutilized acreage for which the state has already proposed uses, Bellows contains a two and a half mile strip of white sand beach to which the public presently has only limited access.[198] Yet, despite the planned transmitter relocation, the absence of long-range federal plans for use of the entire acreage,[199] and the unused status of a substantial portion of these lands, the federal government has categorically denied specific requests by the state for a grant or lease of even negligible parcels of Bellows land.[200] At the very least, any unnecessary retention of these ceded lands violates their special trust status and the spirit of the law under which they were originally received by the federal government.

The Admission Act's conveyance procedure must therefore be construed, like any other provision of the Act, in light of Congress' intent and the lands' special history of ownership. The state's probable inability to render the Administrator accountable for its action or inaction heightens the federal government's obligation to interpret its duty accordingly. The federal government's commitment to returning all surplus ceded lands is apparent not only from the legislative history of section 5 and Pub. L. No. 88-233, but also from the unique treatment given the lands when they were first transferred to the federal government. The one thread binding the annexation and admission acts in the treatment of ceded lands, in fact, has been the federal government's position that the benefits of the land and proceeds therefrom must inure solely to the people of Hawaii. Section 5(e), as amended, should thus be read as requiring a good faith effort to continually assess the need for ceded lands in federal ownership and also a prompt return of lands declared surplus.

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[198] The beach is open to the public on weekends and holidays under permit issued by the federal government to the City and County of Honolulu.

[199] The only future use planned thus far is the present Marine Corps activity on an increased scale. MILPRO-HI, *supra* note 186, at E-66 to 67.

[200] Interview with Jack Kaguni, *supra* note 185, in which he also noted an attempt by the department two years ago to secure a ten-acre parcel of Bellows land for a parking area to service the Waimanalo Civic Center. The federal government refused to convey, much less to lease, the area despite the fact that the lands requested were not being used or occupied. Other unsuccessful attempts through Hawaii's delegation to Congress were made four to five years ago to secure the return of larger portions of Bellows. *See also* note 185 *supra*.

It must be noted, however, that the federal government did voluntarily return approximately 77 acres of ceded land, including the beach area at the Waimanalo end of Bellows in 1974. The area has since been developed by the state as a public park.

IV. State Administration of the Public Trust: The Trust Fund

At statehood title to most of the ceded public domain returned to the islands, putting it exclusively under state jurisdiction. Section 5(f) of the Admission Act requires the state to hold ceded lands and their proceeds and income as a public trust for five enumerated purposes.[201] The state's role thus virtually mirrors that assumed by the federal government at annexation; *i.e.*, the state, as proprietor-trustee, is required to manage the corpus and use its income for the benefit of Hawaii's people. That this relationship derived ultimately from the federal government's prior treatment of the land is seen not only in the similarity of roles, but also in the provisions of section 5(f) which allow the federal government to hold the state accountable for a breach of trust.[202] V. Carl Bloede, Assistant Researcher at the Legislative Reference Bureau, in 1962 summed up the state's duty as trustee in this manner:

> The public trust concept applicable to Hawaii state lands may be reasonably compared to a charitable trust, e.g. the Bishop Estate Trust, wherein the obligation is imposed upon the trustee to manage the corpus of the trust and make the net benefits therefrom available to the Cestui Que Trust (beneficiary). Although the corpus may be invested, or sold and the proceeds reinvested, every precaution must be employed by the trustee in the administration of the trust to preserve the value of the corpus. And this trust concept requires on the part of the State, acting as trustee, proper conservation, development and utilization of the public lands, and that they be held or used, or the proceeds therefrom if alienation were deemed desirable in the interests of the public, for the development of the public schools and other public projects, for the benefit and improvement in conditions of the native Hawaiians, and the development of or stimulus to farm and homeownership wherever required, and the making of public improvements.[203]

The State Department of Land and Natural Resources was statutorily charged with the receipt and administration of ceded lands as a part of

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[201] *See* text accompanying note 150 *supra*.

[202] Admission Act, *supra* note 6, § 5(f). *See generally* V. Bloede, *supra* note 150; *M. Uyehara*, *supra* note 150. *See also* S. Rep. No. 675, 88th Cong., 1st Sess. 1 (1963), quoted in part at note 150 *supra*.

Governor William Quinn's address to the first state legislature on April 25, 1961 also conveyed his understanding that the trust had passed from federal to state hands:

> It is our position that the ceded lands of Hawaii are a public trust to be held and managed in trust for the people of Hawaii. Up to the time of statehood, the United States was the trustee of this public trust, and now the State of Hawaii has assumed this responsiblity. Under accepted trust doctrine, the trustee must hold the trust inviolate and cannot convert it to his own benefit.

Special Message on Federal Lands in Hawaii by Governor William F. Quinn to the First Legislature of the State of Hawaii, April 25, 1961.

[203] V. Bloede, *supra* note 150, at 9-10.

its larger role of managing the state's general public domain.[204] The Department's functions, as they pertain to ceded lands, are thus limited by section 5. Until recently, however, the Department had not been administering the public trust in conformance with the spirit of the Admission Act, the letter of its implementing statutes, or general trust principles.

The *Financial Audit of the Department of Land and Natural Resources* [hereinafter referred to as *Audit*],[205] completed by the Office of the Legislative Auditor and Peat, Marwick, Mitchell & Co. in 1979, identified errors by the state which have led to the virtual frustration of the public trust mandated by section 5(f).[206] The primary malfeasance consists of a failure to properly earmark the revenues and income from ceded lands.[207] Section 5(f) clearly requires that they be held as a public trust, and Hawaii Revised Statutes section 171-18, which implements section 5(f), directs that these monies be set aside from funds received from the disposition of general public lands.[208] A special public trust fund was in fact created.

At the same time, Hawaii Revised Statutes section 171-19 established a special land and development fund for all proceeds from the disposition of the general public domain, subject to the restrictions of the Hawaiian Homes Commission Act of 1920, as amended, and section 5(f).[209] The discretionary purposes for which this fund could be used without legislative authorization relate to the maintenance and disposition of the lands themselves and not the public benefits under sections 171-18 and 5(f).[210]

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[204] The Department of Land & Natural Resources was officially established by the first state legislature in 1962. *See* 1962 Hawaii Sess. Laws ch. 32, §2. Its function and powers are prescribed in HAWAII REV. STAT. ch. 171 (1976) and HAWAII REV. STAT. § 26-15 (1976).

[205] A Report to the Governor and the Legislature of the State of Hawaii, AUDIT, *supra* note 150.

[206] The AUDIT focused on a number of deficiencies in the Department's management and control of the public domain, all stemming from what the report characterizes as its assumption of a "passive and reactive" role in caring for the domain and unsystematic management. *An Overview by the Legislative Auditor of the Financial Audit of the Department of Land and Natural Resources* 1. These deficiencies, all of which adversely affect the manner in which the public trust is administered, include:

> the absence of an accurate inventory of public lands, and inadequate land classification system, the lack of assurance that the State is receiving a fair return for the use of its lands, the extensive and questionable use of permits for the use of public lands, and the inadequate monitoring and enforcement of lease contract terms and conditions.

Id. at 1. The remainder of the present discussion, however, is confined to an examination of one of the problems identified by the AUDIT not mentioned in its *Overview* though amply discussed in the main report, namely, the improper disposition of revenues and income from ceded lands.

[207] AUDIT, *supra* note 150, at 31-37.

[208] *See* note 152 *supra*. Revenues from sales of ceded remnants to abutting landowners were also to be placed in the public trust fund.

[209] *Id.*

[210] HAWAII REV. STAT. § 171-19 (1976) authorized the Board of Land and Natural Resources to use the special fund for the following purposes (where used without prior legisla-

The two funds were clearly intended for distinct and separate purposes. The criteria for determining whether proceeds from the disposition of public lands are to be deposited into the public trust fund or into the special land and development fund is solely whether the lands are ceded.

The Department, however, has failed to make this distinction since statehood,[211] and instead has been depositing monies from the leases of public lands (whether ceded or not) into the public trust fund, and those from sales of the same into the special land and development fund.[212] In fiscal year 1978-79, for example, approximately $5.4 million was received by the public trust fund, representing receipts from leases, licenses and sales of wood, rock and sand.[213] Of that figure, approximately $122,000 was transferred to the Hawaiian Homes administration fund, and the remainder was deposited in the state general fund in reimbursement for general fund monies it advanced for educational purposes.[214] $1.5 million in land sale receipts and interest, on the other hand, was placed into the special fund, and approximately $850,000 of that sum was appropriated

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tive consent):

(1) To reimburse the general fund of the State for advancements heretofore or hereafter made therefrom, which are required to be reimbursed from the proceeds of sales, leases, licenses, or permits derived from public lands;

(2) For the incidental maintenance of all lands under the control and management of the board, including the repair of improvements thereon, not to exceed $100,000 in any fiscal year;

(3) To repurchase any land, including improvements thereon, in the exercise by the board of any right of repurchase specifically reserved in any patent, deed, lease, or other documents or as provided by law;

(4) For the payment of all appraisal fees; provided, that all such reimbursable fees collected by the board shall be deposited in a separate fund;

(5) For the payment of publication notices as required under this chapter, provided that all or a portion of the expenditures may be charged to the purchaser or lessee of public lands or any interest therein under rules and regulations adopted by the board;

(6) For the planning and construction of roads and trails along state rights-of-way not to exceed $5,000 in any fiscal year;

(7) For the payment to private land developer or developers who have contracted with the board for development of public lands under the provisions of section 171-60.

Id.

[211] AUDIT, *supra* note 150, at 32-33.

[212] Additionally, revenues from the sales of non-ceded remnants made to abutting landowners, required by HAWAII REV. STAT. § 171-19 (1976) to be placed in the general fund, were instead being deposited into the special land and development fund. *See also* AUDIT, *supra* note 150, at 32.

[213] DEP'T OF LAND & NATURAL RESOURCES, STATE OF HAWAII, ANNUAL REPORT TO THE GOVERNOR FOR 1978-79, at 66 (1980) [hereinafter cited as ANNUAL REPORT].

[214] *Id.* The transfer in 1979 of the approximately $5.3 million to reimburse the fund for educational expenditures and the consistent practice of the Department and the legislature was verified by James Detor, Head of the Department's Land Management Division. Interview with James Detor, *supra* note 153; AUDIT, *supra* note 150, at 34 n.10.

for uses as prescribed in section 171-19.[215]

The confusion surrounding the funds is traceable in great part to dicta in a 1961 state attorney general opinion.[216] The dicta addressed the prior applicable law pertaining to public land sales which required that proceeds from sales of public lands be placed in a special fund for each county.[217] Observing that no provision had been made for the disposition of monies from leases and licenses from ceded lands, the attorney general concluded that those funds would have to be held in the trust fund until appropriated by the legislature in accordance with section 5(f) of the Admission Act. The Department of Land and Natural Resources apparently read this interpretation of section 99-21 as requiring two funds based on a sale-lease dichotomy. The use of two such funds for receipt of ceded land proceeds under the territorial government[218] may have reinforced this view. However, the mistaken impression should have been finally corrected by the repeal of section 99-21,[219] and the establishment of two separate funds distinctly defined in content and purpose.

The practice of depositing monies according to the sale-lease dichotomy, however, continued up until the year the *Audit* was released—1979.[220] The reason given for this failure to conform to both the statutes and the Admission Act is most disturbing: the "DLNR is unable to distinguish ceded public lands from non-ceded public lands."[221] In fact, between statehood and 1979, no attempt had been made by the Department to compile a comprehensive inventory of the state's public lands, much less one distinguishing between its ceded and non-ceded portions.[222] Notwithstanding the difficulty of assembling such an inventory

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[215] ANNUAL REPORT, *supra* note 213, at 68. It is worth noting that the special land and development fund steadily increased from approximately $1.7 million in 1970 to approximately $6.8 million in 1977. In February, 1978, however, over $6 million was transferred into the general fund following the issuance of an attorney general's opinion that Act 195, 1975 Hawaii Sess. Laws 447 required such transfer of excess unless the Department could prove a specific need for the funds. *See* Memoranda from the State Attorney General to the Board of Land and Natural Resources (Nov. 3, 1977; Dec. 22, 1977; March 4, 1977; and Feb., 1978).

[216] Letter from Attorney General to Dep't of Accounting and General Services Comptroller (May 1, 1961); AUDIT, *supra* note 150, at 34-35.

[217] 1 REV. LAWS HAWAII 1955 § 99-21.

[218] *See* note 105 *supra*.

[219] The repeal was effected in 1962 by passage of HAWAII REV. STAT. §§ 171-18 to -19 (1976).

[220] In fact, the Department may have to continue its present manner of disposing of revenues until its proposal for changing it is adopted by the legislature. *See* text accompanying note 230 *infra*.

[221] AUDIT, *supra* note 150, at 35.

[222] *Id.* The Department does have a rough knowledge of total acreage involved and a fairly detailed knowledge of the land owners. AUDIT, *id.* at 6-13. It also keeps tabs on the amount and general location of public land returned by the federal government. *See* note 158 *supra*. The Department keeps its inventory updated, although no official updated version has appeared since statehood. However, there is no single inventory containing accurate descriptions of the parcels, adequately classifying them, and distinguishing them on a

given the deficiencies in existing records,[223] it is still curious, in light of the requirements of section 5(f), that such an inventory does not exist at the present time.

Moreover, this absence of an inventory and confusion of funds have impeded the very administration of the public trust described in section 5(f). First, because the Department cannot use the ceded/non-ceded distinction in recording receipts (as there is no inventory), there is no way of verifying the accuracy of its figures for each fund,[224] much less of determining which monies belong to each of the respective funds. This works to the particular disadvantage of the public trust fund as most of the public lands' income derive from ceded lands.[225] Thus, secondly, the wrongful deposits may have resulted in expenditures of public trust monies for the purposes of the special land and development fund, or vice versa. In fact, monies available for the trust purposes may have been completely lost when the special fund was stripped of its $6 million "excess" by the Department of Budget and Finance in 1978.[226] Again, however, it is impossible to assess the extent to which the expenditures may have been wrongfully applied or lost. Finally, until a comprehensive inventory of ceded and non-ceded land is completed, the monies (and their total amount) available for section 5(f) public purposes cannot be precisely determined. Moreover, because section 5(f) requires the state to hold the ceded lands separately in trust, the state's failure to identify its trust corpus is yet another facet of its breach of its section 5(f) obligations.

When faced with its scorecard of deficiencies in 1979, however, the Department quickly admitted to its past failings and set out to rectify them. During the 1979 legislative session, it sponsored a bill that became law authorizing the expenditure of funds to develop an accurate land inventory system on magnetic tape. At this writing, the system design is about

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ceded/non-ceded basis.

[223] *See* AUDIT, *supra* note 150, at 35-36. The report notes the difficulty, for example, of ascertaining boundaries which were only roughly defined at annexation and in some cases defined by geographic features (*e.g.* certain trees, streams) which are difficult or impossible to identify and locate today. Records or maps which might have provided some aid are largely nonexistent. Indeed, the difficulty may be traced to the time of the *mahele* when rights of the people in the land were identified for the first time in Hawaii. *See* text accompanying notes 67-73 *supra*, as the *mahele* was made without a survey. J. CHINEN, THE GREAT MAHELE 20 (1957).

[224] AUDIT, *supra* note 150, at 33. This was proven by the inability of Peat, Marwick, Mitchell & Co. to attest to the fairness and accuracy of the Department's financial statements for fiscal year 1975-76 in the AUDIT. AUDIT, *id.* at 51.

[225] Interview with James Detor, *supra* note 193. Mr. Detor also testified to this fact at a hearing before the Senate Committee on Economic Development, Energy and Natural Resources on February 29, 1980, concerning Senate Concurrent Resolution No. 21 (Requesting the DLNR to Make as One of Its Priorities the Development of an Accurate Land Inventory That Includes a Categorization of Ceded and Nonceded Lands).

[226] *See* note 215 *supra*.

ten percent complete, and the Department estimates that it will take approximately two more years to finish.[227] The prospect of accomplishing a classification of ceded and non-ceded lands in the immediate future, however, remains bleak. Echoing the *Audit*'s observations, the Department points out that records, land maps or other documents that may otherwise aid in such a classification are virtually non-existent, and that where they do exist, they are often inadequate and inaccurate.[228] It may thus be some time before the precise extent of the lands and revenues subject to the section 5(f) public trust can be ascertained.

In addition to the land inventory, the Department has taken steps to eliminate the improper disposition of ceded and non-ceded land revenues. Its solution, which was debated but later tabled during the 1980 legislative session, calls for the elimination of the special land and development fund and the deposit of proceeds from the disposition of all public lands, whether ceded or not, into the public trust fund.[229] Because most of the proceeds received are traceable to ceded lands, it is reasoned that the merging of funds into the public trust is the most expedient way of resolving the current mishandling of funds which allows the continued fulfillment of section 5(f) trust obligations.[230] Indeed, the *Audit* itself had recommended this solution as a means of avoiding the necessity of distinguishing between ceded and non-ceded lands.[231] It had also concluded that the special fund's abolition should not cause serious disturbance to state programs as neither the legislature nor the Department had made extensive use of its funds in the past.[232]

If eventually passed into law, the Department's proposal could mean immediate life for the public trust contemplated by the Admission Act. The trust corpus itself will have been enlarged beyond the limits defined by the Act, but surely its drafters would not argue against such an addition and the concommitant increase of income available for the section 5(f) beneficiaries. As observed by the *Audit*, even in the absence of an inventory which distinguishes between ceded and non-ceded lands, the public trust fund could be administered so as to protect the public. In fact, this solution would appear to insure the beneficiaries against a sweeping transfer of "excess" funds into the general fund such as that which occurred in 1978. Completion of the inventory being developed at the moment will only increase the level of efficiency with which the trust fund and public domain itself are managed, and perhaps increase the trust corpus and its available benefits.

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[227] Interview with Susumu Ono, Director of the Dep't of Land & Natural Resources (Feb. 29, 1981).

[228] *See* note 223 *supra*.

[229] S.B. 2170, 10th Hawaii Leg., 2d Sess. (1980).

[230] Written testimony submitted by Susumu Ono in support of Senate Concurrent Resolution No. 21, *supra* note 225, dated February 29, 1980.

[231] AUDIT, *supra* note 150, at 37.

[232] *Id.*

V. CONCLUSION

The federal government's unique treatment of Hawaii's ceded lands at annexation has shaped the current relationship between the federal and state governments, and Hawaii's ceded domain. The federal government's remaining legal obligation to return unused ceded land must be broadly interpreted in light of Congress' intent to reserve them exclusively for the benefit of the people of Hawaii. The state, now trustee, must tend to their proper administration and disposition to insure that the benefits of the land in fact inure to the people as prescribed by the Admission Act.[333] Not only must it maintain a proper trust fund, but it must insure that its actions with regard to the administration and disposition of the lands themselves comport with its fiduciary obligation to maintain and preserve the trust corpus for its beneficiaries.[334]

The beneficial use of the proceeds themselves will ultimately involve policy decisions to be made by the Department of Land and Natural Resources, the state legislature, and the people of Hawaii. The language of section 5(f) of the Admission Act allows the state to choose the manner in which the proceeds are allocated between the listed purposes.[335] Since statehood, the public trust proceeds have been transferred to the state's

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[333] *But see* note 82 *supra*.

[334] The Department of Land & Natural Resources disposes of the ceded domain under the same laws applicable to the general public domain. *See* note 153 *supra*. The problems discovered by the authors of the AUDIT concerning the Department's disposition of the general public domain encompass ceded lands. *See* note 206 *supra* and the AUDIT generally.

[335] Admission Act, *supra* note 6, § 5(f). The legislative history of section 5(f) indicates that these purposes were merely an expansion of the Joint Resolution's general prescription that the ceded lands proceeds be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." Joint Resolution, *supra* note 1. The Congressional reports which accompanied their respective statehood bills in 1959 perfunctorily stated, with reference to section 5(f)'s purposes, that "[t]he use of and benefits from the granted lands will remain the same as they now are." S. REP. No. 80 at 3; H.R. REP. No. 32 at 5, 86th Cong., 1st Sess. 5 (1959). On paper in 1959, the benefit and uses referred to were those originally declared in the Joint Resolution and adopted by reference in the Organic Act and later in territorial laws. *See* Organic Act, *supra* note 3, § 73(e); REV. LAWS HAWAII 1955 § 99-21, *reprinted in* 1 HAWAII REV. STAT. 28 (1976). In practice, the territory had been applying the ceded lands revenues and proceeds for the support of its public schools and other public purposes, including the betterment of the conditions of native Hawaiians. See, for example, H.R. REP. No. 88, 84th Cong., 1st Sess. 8 (1955) ("At present, the Territory administers these lands and receives all income from them for the support of public schools and for the betterment of indigenous Hawaiians.").

The legislative history of the section is equally void of any language suggesting a mandatory duty on the state's part to use the proceeds for each of the purposes each year, if at all. *See* M. UYEHARA, *supra* note 150. Indeed, the preoccupation of statehood proponents in Congress lay with securing the lands and proceeds in the first place for the new state so that it might continue using them for the public benefit as it had as a territory. No single purpose was mandatory, and moreover, each purpose was so broadly phrased that the public at large would certainly benefit from the application of funds to any particular one.

general fund to reimburse it for educational expenditures.[236]

However, recent constitutional amendments have reserved a pro rata portion of the public trust fund for the state's new Office of Hawaiian Affairs (OHA).[237] These monies will be applied to cover OHA's annual operating expenditures and thus will allow the native Hawaiians to have "a receptacle for any funds, land, or other resources earmarked for or belonging to native Hawaiians and to create a body that could formulate policy relating to all native Hawaiians to make decisions on the allocation of those assets belonging to native Hawaiians."[238]

The allocation of funds to OHA falls squarely under section 5(f) as a proper trust purpose. Most significantly, however, the initiative taken by the native Hawaiian population to secure monies available to them is illustrative of the manner in which the benefit of the ceded lands may be channelled to the public. As the sole legal beneficiaries of Hawaii's ceded domain, Hawaii's people must take an active part in seeing to a complete return of the ceded lands, and deciding the uses to which the ceded lands and their proceeds will be put in the future.

S.L.M.

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[236] *See* AUDIT, *supra* note 150, at 34.

[237] HAWAII CONST. art. XII, § 4, facilitates the reservation of funds by first redefining section 5(f)'s trust provision in terms of beneficiaries, not uses, as follows:

> *Section 4.* The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Article XII, section 5, establishes the Office of Hawaiian Affairs, and section 6 empowers the Board of Trustees to hold "all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians."

[238] STAND. COMM. REP. No. 59, 3d Hawaii Const. Conv. 4 (1978).

Appendix

LAND CONVEYANCE—HAWAII

PUBLIC LAW 88-233; 77 STAT. 472

[S. 2275]

An Act to revise the procedures established by the Hawaii Statehood Act Public Law 86-3, for the conveyance of certain lands to the State of Hawaii, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) (i) Whenever after August 21, 1964, any of the public lands and other public property as defined in section 5(g) of Public Law 86-3 (73 Stat. 4, 6), or any lands acquired by the Territory of Hawaii and its subdivisions, which are the property of the United States pursuant to section 5(c) or become the property of the United States pursuant to section 5(d) of Public Law 86-3, except the lands administered pursuant to the Act of August 25, 1916 (39 Stat. 535), as amended, and (ii) whenever any of the lands of the United States on Sand Island, including the reef lands in connection therewith, in the city and county of Honolulu, are determined to be surplus property by the Administrator of General Services (hereinafter referred to as the "Administrator") with the concurrence of the head of the department or agency exercising administration or control over such lands and property, they shall be conveyed to the State of Hawaii by the Administrator subject to the provisions of this Act.

(b) Such lands and property shall be conveyed without monetary consideration, but subject to such other terms and conditions as the Administrator may prescribe: *Provided,* That, as a condition precedent to the conveyance of such lands, the Administrator shall require payment by the State of Hawaii of the estimated fair market value, as determined by the Administrator, of any buildings, structures, and other improvements erected and made on such lands after they were set aside. In the event that the State of Hawaii does not agree to any payment prescribed by the Administrator, he may remove, relocate, and otherwise dispose of any such buildings, structures, and other improvements under other applicable laws, or if the Administrator determines that they cannot be removed without substantial damage to them or the lands containing them, he may dispose of them and the lands involved under other applicable laws, but, in such cases he shall pay to the State of Hawaii that portion of any proceeds from such disposal which he estimates to be equal to the value of the lands involved. Nothing in this section shall prevent the disposal by the Administrator under other applicable laws of the lands subject to conveyance to the State of Hawaii under this section if the State of Hawaii so chooses.

Sec. 2. Any lands, property, improvements, and proceeds conveyed or paid to the State of Hawaii under section 1 of this Act shall be considered a part of public trust established by section 5(f) of Public Law 86-3, and shall be subject to the terms and conditions of that trust.

Approved December 23, 1963.

ONO v. APPLEGATE: COMMON LAW DRAM SHOP LIABILITY

I. INTRODUCTION

In *Ono v. Applegate*,[1] the issue before the Hawaii Supreme Court was whether, in the absence of dram shop legislation,[2] a tavern owner could be held liable for injuries to a third person inflicted by a person who had been served liquor at the tavern in violation of Hawaii's liquor control law.[3] The Hawaii Supreme Court held that a tavern owner could be held

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[1] 62 Hawaii ___, 612 P.2d 533 (1980).

[2] Dram shop statutes basically allow a civil action to be brought by a third party, injured by an intoxicated person, against the person who contributed to the intoxication. For a general discussion of dram shop legislation *see* Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995 (1969).

Sixteen states have dram shop statutes currently in force: ALA. CODE § 6-5-71 (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); DEL. CODE ANN. tit. 4, § 713 (1974 & Supp. 1980); ILL. ANN. STAT. ch. 43, §§ 135-136 (Smith-Hurd Supp. 1980-1981); IOWA CODE ANN. § 123.92 (West Supp. 1980-1981); LA. REV. STAT. ANN. § 26:683 (West 1975); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS ANN. § 436.22 (1978); MINN. STAT. ANN. § 340.95 (West Supp. 1980); N.Y. GEN. OBLIG. LAW § 11-101 (MCKINNEY 1978 & SUPP. 1980-1981); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); R.I. GEN. LAWS § 3-11-1 (1976); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1980-1981).

Also, the District of Columbia has a dram shop statute located at D.C. CODE ENCYCL. § 25-121 (West 1967).

A dram shop statute was passed in Hawaii in 1907 imposing liability on liquor suppliers under limited circumstances for injuries inflicted by an intoxicated person. Act 119, 1907 Hawaii Sess. Laws. The dram shop statute stated:

> A husband, wife, child, parent, guardian, employer or other person, or the legal representative of such person, who is injured in person, property, or means of support by an intoxicated person who shall have been twice convicted of drunkenness or in consequence of the intoxication of such person convicted, may bring either a joint action against the person intoxicated, and the person or persons who furnished the liquor and thereby in whole or in part caused such intoxication, or a separate action against either or any of them.

This act was repealed in 1933. Act 197, 1933 Hawaii Sess. Laws. Thus, the state of Hawaii is presently without any dram shop statute.

[3] Dram shop statutes are distinguishable from liquor control statutes which basically prohibit the sale of intoxicating liquor to certain individuals, and provide either fines or criminal penalties for violating the statute.

Hawaii's liquor control statute is HAWAII REV. STAT. § 281-78(a)(2)(B) (1976) which states in pertinent part:

liable; the resolution of this issue in favor of liability involved consideration of all the elements of a common law negligence action, with primary attention focused on the areas of duty and proximate cause.[4]

This casenote critically examines the Hawaii Supreme Court's analysis of these key elements in a common law dram shop action and the ultimate impact that *Ono v. Applegate* may have on liquor store owners as well as non-commercial suppliers of liquor.

II. Facts of the Case

On May 19, 1973, on the island of Maui, there was a head-on collision between a car driven by Samantha Scritchfield and a car in which the plaintiff, Masaichi Ono, was a passenger.[5] Prior to the accident, Scritchfield had been drinking at the Sand Trap—a tavern owned by the defendant, H. Jon Applegate.

At the ensuing trial[6] the plaintiffs alleged, in addition to Scritchfield's negligence, that the Sand Trap had negligently served liquor to Scritchfield when she was already intoxicated, thus violating Hawaii's liquor control law,[7] and that the Sand Trap had negligently allowed Scritchfield to leave the premises intoxicated.[8]

The jury returned a special verdict in favor of the plaintiff, finding Scritchfield 75% at fault and the Sand Trap 25% at fault.[9] Defendant, H. Jon Applegate, appealed the verdict to the Hawaii Supreme Court.[10]

At no time under any circumstances shall liquor:

. . .

Be sold or furnished by any licensee to:

(A) Any minor,

(B) Any person at the time under the influence of liquor, ...

[4] 62 Hawaii at ___, 612 P.2d at 539-40.

[5] Samantha Scritchfield and Jose Montez, a passenger in the Scritchfield auto and the driver of the other car, Thomas Tagawa, were killed; Ono and James Tagawa sustained serious injuries. *Id.* at ___, 612 P.2d at 536.

[6] Separate actions were brought by the relatives of Thomas Tagawa, the deceased driver (Civil No. 2293) and by Ono (Civil No. 2311) against Samantha Scritchfield's estate and Applegate, doing business as the Sand Trap. These actions were consolidated for a jury trial. *Id.* at ___, 612 P.2d at 536.

[7] *See* note 3 *supra*.

[8] 62 Hawaii at ___, 612 P.2d at 536. Prior to the trial, the Sand Trap had filed a motion to dismiss, contending that in the absence of a dram shop statute, an injured third party could not recover against a tavern. The trial court denied the motion, thus allowing the trial to proceed as a common law dram shop action. *Id.* at ___, 612 P.2d at 536.

[9] *Id.* at ___, 612 P.2d at 536.

[10] The Sand Trap appealed the judgments in both actions, but in February, 1976, the Tagawas filed a satisfaction of judgments and a stipulation for withdrawal of appeal and cross-appeal, thereby making Ono the sole appellee. *Id.* at ___, n.1, 612 P.2d at 537 n.1.

III. ANALYSIS

The implications of the Hawaii Supreme Court's ruling in this case are best understood by analyzing the court's decision as it applies to the elements of a cause of action for negligence. As indicated by the court[11] the four necessary elements of a negligence action are as follows:[12]

1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks;
2. A failure on his part to conform to the standard required;
3. A reasonable close causal connection between the conduct and the resulting injury;
4. Actual loss or damage resulting to the interests of another.

These elements are examined as they were applied by the Hawaii Supreme Court.

1. *Duty.* The duty element, was established by reference to section 281-78(a)(2)(B) of the Hawaii Revised Statutes (1976),[13] which is Hawaii's liquor control law. In accordance with the provisions of the statute, the court held that a tavern keeper has a duty not to serve a person already under the influence of liquor.[14] By basing the duty element on a legislative enactment, the court was confronted with the question of whether violation of the statute constituted negligence per se or only evidence of negligence. This point is considered in the following section.

2. *Failure to conform to the standard required.* Inasmuch as the duty derives from a statute, the standard for determining whether a breach of duty has occurred is linked to the standard for determining whether the statute has been violated.[15] The court held that the standard for section 281-78(a)(2)(B) is that before a violation of the statute can be found, notice or knowledge on the part of the defendant that a customer was intoxicated at the time the customer was served must be established.[16] This notice requirement is met upon proof that the defendant tavern keeper knew or reasonably should have known that the customer was under the influence of liquor at the time served.[17]

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[11] 62 Hawaii at ___, 612 P.2d at 539.

[12] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143 (4th ed. 1971).

[13] *See* note 3 *supra.*

[14] 62 Hawaii at ___, 612 P.2d at 539.

[15] The Hawaii Supreme Court stated that, "Generally, a standard of conduct may be determined by reference to a statute." *Id.* at ___, 612 P.2d at 539.

[16] *Id.* at ___, 612 P.2d at 539.

[17] *Id.* at ___, 612 P.2d at 540. The defendant-appellant objected to jury instruction number 20 on the grounds that the standard was not clearly stated, and that the instruction would impose liability after the tavern customer had consumed only one drink. Jury instruction number 20 stated as follows:

"[T]he statutory law of Hawaii and Maui Liquor Regulations provide that the holder

In this case, evidence concerning the amount of liquor that Scritchfield had consumed before she arrived at the defendant's tavern was deemed admissible for purposes of proving the defendant's knowledge of her state of intoxication.[18] The defendant had objected to the admission of such evidence, contending that it was irrelevant and lacked proper foundation.[19] The Hawaii Supreme Court, however, upheld the trial court's admission of the evidence, stating that Scritchfield's prior drinking was a factor from which the jury could determine whether the defendant knew or reasonably should have known that Scritchfield was under the influence of liquor when served.[20]

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of a liquor license such as defendant Sand Trap, shall not sell liquor to any person under any circumstance who is at the time of such sale under the influence of liquor. That law further defines the terms 'under the influence of liquor' as follows:

" 'Under the influence of liquor means that the person considered has consumed intoxicating liquor sufficient to impair, at the particular time under inquiry, his normal mental faculties or ability to take care of himself, and guard against casualty, or sufficient to substantially impair at the time under the inquiry that clearness of intellect and control of himself, which he would otherwise normally possess.'

"Plaintiffs in order to prove a violation of this law have the burden of establishing by a preponderance of the evidence that Samantha Scritchfield was under the influence of intoxicating liquor at any time she was served by defendant Sand Trap; and *that defendant Sand Trap knew or reasonably should have known that Samantha Scritchfield was under the influence of intoxicating liquor at the time she was so served.* (emphasis added)."

Id. at ___, 612 P.2d at 539-40. The defendant claimed that the jury instruction would impose liability after the tavern customer had consumed one drink because the term "under the influence of liquor" was defined by the trial court to include a person who had consumed intoxicating liquor sufficient to impair his normal mental faculties. Therefore, the defendant argued that the jury could only have reached the conclusion that even one drink of intoxicating liquor is sufficient to render a person under the influence of liquor. Brief for Defendant at 30, Ono v. Applegate, 62 Hawaii ___, 612 P.2d 533 (1980).

The Hawaii Supreme Court, however, found that jury instruction number 20 was clear and that jury instruction number 21 resolved the contention that liability would be imposed after one drink of intoxicating liquor. *Id.* at ___, 612 P.2d at 540. Jury instruction number 21 stated as follows:

"[O]ne is not necessarily under the influence of intoxicating liquor while operating a motor vehicle as a result of taking one or more drinks. The circumstances and effects must be considered. Whether a person was under the influence of intoxicating liquor while operating a motor vehicle is a question of fact for the jury to decide."

Id. at ___, 612 P.2d at 540.

[18] There was testimony at the trial that prior to arriving at the defendant's tavern, Scritchfield had a bloody mary, bourbon and water, and a beer. When Scritchfield and members of her party arrived at the defendant's tavern, the plaintiff alleged that it was obvious to the bartender that Scritchfield and members of her party had been drinking. While at the defendant's tavern, Scritchfield had approximately five drinks over the course of two to three hours. Brief for Plaintiff at 6-10, Ono v. Applegate, 62 Hawaii ___, 612 P.2d 533 (1980).

[19] The objection was based on the lack of proof that the Sand Trap's employees had actual knowledge of Scritchfield's earlier drinking. *Id.* at ___, 612 P.2d at 540.

[20] *Id.* at ___, 612 P.2d at 540. *See generally*, Rule 401, HAWAII R. EVID., chap. 626, HAWAII REV. STAT., commentary at 21 (Special Pamphlet 1980); "In *State v. Smith*, 59 Hawaii 565,

In establishing the standard imposed by section 281-78(a)(2)(B), the court cited section 285 of the RESTATEMENT (SECOND) OF TORTS which provides that, "The standard of conduct of a *reasonable* man may be . . . adopted by the court from a legislative enactment."[21] It would appear then, that a tavern owner under a duty to refrain from serving liquor to an intoxicated customer must conform to the reasonable man standard. Other jurisdictions, establishing such a duty, have similarly adopted a reasonable man standard,[22] and there was no indication in *Ono v. Applegate* that the Hawaii Supreme Court would impose a higher standard.[23]

The court did not specifically state that the plaintiff was within the class of persons protected by section 281-78(a)(2)(B). However, since a violation of Hawaii's liquor control law would increase the chances of alcohol-related injuries, Hawaii's liquor control law is apparently designed to benefit all members of the public. Once it is established that a statute is designed to protect the class of persons in which the plaintiff is included, against the harm which has occurred as a result of the violation, the majority rule is that a violation of the standard of care as prescribed by the statute is negligence per se.[24] Despite its reliance on section 281-78(a)(2)(B) in establishing both a duty and the required standard of conduct, however, the Hawaii Supreme Court did not hold that violation of the statute constituted negligence per se. Instead, the court held that violation of the statute constituted evidence of negligence to be submitted to the jury.[25]

567, 583 P.2d 347, 349 (1978), the court defined the concept of relevance: 'Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable.' "

[21] *Id.* at ___, 612 P.2d at 539 (emphasis added). The Hawaii Supreme Court also cited comment (c) to RESTATEMENT (SECOND) OF TORTS § 285 (1965) which states that a standard may be implied even where an enactment "contains no express provision that its violation shall result in tort liability." *Id.* at ___, 612 P.2d at 539.

[22] Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (reasonably foreseeable risk of injury on highway by serving alcohol to intoxicated person intending to drive); Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (court adopted restatement standard); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (standard of care is conduct of a reasonable man).

[23] *But cf.* Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (1972) (corporate defendant not held to the same standard of a licensed tavern owner with respect to liability for death of employee to whom corporation served liquor).

[24] Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) (plaintiff violated statute requiring motorists to travel with lights); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966) (sale of alcoholic beverage to a minor in violation of a state statute prohibiting sale to minors constituted negligence per se); RESTATEMENT (SECOND) OF TORTS § 288 (B) (1965); *See, e.g.*, Note, *Negligence Per Se in Alaska*, 2 U.C.L.A.-ALASKA L. REV. 54 (1972); Note, *Statutory Negligence in Oregon*, 7 WILLAMETTE L. J. 469 (1971).

[25] 62 Hawaii at ___, 612 P.2d at 539. *Accord*, Michel v. Valdastri, 59 Hawaii 53, 575 P.2d 1299 (1978) (violation of Hawaii Occupational Safety and Health Law is not negligence per se); Sherry v. Asing, 56 Hawaii 135, 531 P.2d 648 (1975) (violation of traffic code is only evidence of negligence); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965) (violation of statute is evidence of negligence); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959)

This holding is in accordance with Hawaii Supreme Court's treatment of traffic ordinance violations in *Char v. Honolulu Rapid Transit Co.*[26] and *Young v. Honolulu Construction & Draying Co.*[27] — two cases cited by the Hawaii Supreme Court in *Ono v. Applegate.*[28]

In *Char,* the plaintiff was injured in a collision with a streetcar which was owned and operated by the City and County of Honolulu. The jury returned a verdict in favor of the defendant primarily because of a finding that the plaintiff was guilty of contributory negligence and, thus, barred from recovering. The plaintiff excepted to one of the jury instructions which stated that violation of a municipal ordinance constituted negligence. Based on this instruction, the jury found that the plaintiff was negligent because he violated the ordinance by failing to give proper signals when turning and stopping. The Hawaii Supreme Court held that violation of a municipal ordinance does not constitute negligence per se, and the trial court erred in not allowing the jury to decide the question of negligence even after the jury had found a violation of the statute.[29] Apparently then, when the Hawaii Supreme Court stated in *Ono v. Applegate* that violation of section 281-78(a)(2)(B) was properly submitted as "evidence of negligence,"[30] the court meant that the jury was free to decide in favor of the defendant tavern owner notwithstanding the tavern's service of liquor to an intoxicated person.

The Hawaii Supreme Court had elaborated upon this evidentiary rule in *Young.* There, the plaintiff was killed when the auto he was driving collided with a truck which was stalled on the highway. Noting that the defendant had violated a municipal ordinance,[31] the Hawaii Supreme Court held that the violation created only a presumption of negligence:

> [A] municipal ordinance prescribes a duty for the protection and safety of others and there is a reasonable and logical connection between the failure to observe the requirements of the ordinance and the omission claimed to have caused the injury, the *neglect of duty imposed by the ordinance is evidence of negligence sufficient to require the question of negligence to be*

(questions of proximate and intervening causes are left to the jury's determination).

[26] 31 Hawaii 53 (1929).

[27] 34 Hawaii 426 (1938).

[28] 62 Hawaii at ___, 612 P.2d at 539.

[29] 31 Hawaii at 58.

[30] 62 Hawaii at ___, 612 P.2d at 539.

[31] The municipal traffic code at the time required that whenever the load of any motor vehicle extended more than four feet beyond the rear of the vehicle, there must be displayed at the end of such load a red flag not less than twelve inches in length and width. The defendant's truck was loaded with a bundle of steel rods which projected from the rear of the truck. The plaintiff approached the rear of the truck, and collided with the rods. Although there was testimony that a red flag was attached to a wooden staff and placed in the rear of the defendant's truck prior to the accident, either the red flag was removed or was not clearly visible at the time of the accident. 34 Hawaii at 431.

submitted to the jury.[32]

The Hawaii Supreme Court's citation of *Young* would seem to indicate that the *Young* requirements, for a statutory violation to constitute evidence of negligence, were met in *Ono v. Applegate*. In other words, it was inherent in the Hawaii Supreme Court's use of section 281-78(a)(2)(B) that the duty imposed by this liquor control statute was for the protection and safety of others, and that there was a reasonable connection between serving liquor to an intoxicated person and that person's subsequent negligent conduct. Thus, in regard to the relevance of a statutory violation, the Hawaii Supreme Court in *Ono v. Applegate* reaffirmed the established Hawaii rule.

3. *Causal Connection.* Under the old common law rule, in the absence of dram shop legislation,[33] a party could not recover in an action for negligence against a commercial supplier of liquor for injuries inflicted by an intoxicated person.[34] The consumption of liquor, rather than its sale or service, was deemed to be the proximate cause of the drinker's intoxication and any subsequent injury to a third party.[35] Thus, injury inflicted upon a third party was characterized as an unforseeable event, relieving the commercial liquor supplier of liability.[36]

Courts have also noted several policy considerations in refusing to impose liability on commercial liquor suppliers. Among these were the perceived difficulty in determining the limits of such liability;[37] the fear of

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[32] *Id.* at 435 (emphasis added).

[33] See note 2 *supra*.

[34] Profitt v. Canez, 118 Ariz. 235, 575 P.2d 1261 (1977) (In absence of a dram shop statute, plaintiff did not have a claim for damages against a tavern owner who sold intoxicating liquor to a person already in an intoxicated state.); Graham v. General U.S. Grant Post No. 2665, 43 Ill. 2d 1, 248 N.E. 2d 657 (1969) (Court sustained a judgment dismissing the plaintiff's cause of action based on common law negligence for injuries sustained as a result of being struck by the automobile of an intoxicated driver who had been sold liquor by the defendant. Court held that under Wisconsin law, there was no common law dram shop liability.); *Accord,* Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978) (Defendant tavern owner who knowingly sold intoxicating liquor to a minor was not liable for injuries inflicted by minor on the plaintiff since under Missouri law, the drinking and not the furnishing of the intoxicating liquor was the proximate cause of the injury.).

[35] Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966) (no cause of action against bar owner for fatal auto collision caused by intoxicated patron); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971) (no cause of action against commercial supplier for injuries caused by minor driver, who was sold liquor in violation of state statute).

[36] *See* 44 Mo. L. Rev. 757, 763 (1979) [hereinafter cited as Missouri article].

[37] Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W. 2d 566 (1970) (Bar operator's sale of liquor to intoxicated person who subsequently injured another in an auto collision did not give rise to an action for negligence. The court in this case noted that if dram shop liability were imposed only on commercial suppliers of liquor it would create the illogical result of liability for tavern owners who sold liquor, but not for social hosts who gave liquor away.); *But see* Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (The California Supreme Court which had previously imposed liability on commercial suppliers of intoxicating liquor, held that the danger was equally foreseeable

substantial increase in litigation;[38] the placing of an unfair financial burden on liquor vendors;[39] and the argument that creation of dram shop liability should be a legislative decision, not a judicial one.[40]

Increasingly, however, modern authority has rejected the old common law approach and has allowed injured parties to recover from negligent commercial liquor suppliers.[41] This trend was noted by the Hawaii Supreme Court and was an important factor in *Ono v. Applegate* to allow a common law dram shop action.[42] One case of particular importance to the Hawaii Supreme Court in allowing a common law dram shop action to proceed was the California Supreme Court's decision in *Vesely v. Sager*.[43] In *Vesely*, the plaintiff was injured by a motorist who consumed large quantities of liquor at a lodge owned by the defendant. The California Supreme Court held that the service of the liquor could be the proximate

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and as great where a social host supplies the liquor.).

[38] Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964) (Dram Shop Act held not applicable to employer for injuries sustained because of auto accident caused by intoxicated employee. Employer furnished intoxicating liquor to the employee at a company picnic.); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (Court refused to hold bar operator liable to third party fearing that such a ruling would multiply litigation.).

[39] The court in Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) stated that "The multiplicity of ways in which such claims would arise and the defense thereof would in many instances be impossible and require the imposition of an unjust financial burden." *Id.* at 736, 176 N.W.2d at 571.

[40] Meade v. Freeman, 93 Idaho 389, 395, 462 P.2d 54, 60 (1969) (if dram shop liability is to be created, it should be done by the legislature wherein all of the policy considerations can and should be carefully weighed); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966) (whether legislation in the form of a dram shop statute should be part of the state's liquor control act is a question for the legislature); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971) (since the legislature has not changed the common law rule barring a cause of action against a vendor of liquor, the court dismissed the plaintiff's case).

[41] Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) (Plaintiff brought action against bar owner for damages when he was shot by an off-duty police officer after the police officer had consumed large quantities of intoxicating liquor at the defendant's bar. Court held that plaintiff had a common law dram shop action against the defendant.); Taylor v. Ruiz, 394 A.2d 765 (Del. 1978) (Plaintiff was injured when she was struck by a customer who was leaving the defendant's tavern. The customer had been drinking at the defendant's tavern prior to leaving. Court held that if the defendant knew or should have known that the customer was intoxicated and continued to serve the customer liquor, plaintiff would be entitled to recover damages from the defendant tavern owner.); In the Missouri article, *supra* note 36, the commentator supported the proposition of imposing liability on commercial suppliers:

> Considering the well-documented role of liquor in accidental and violent injuries, it is clear that supplying alcohol can be a dangerous act in some situations. Commercial suppliers, who know or have a duty to know the laws governing sales of alcohol, and who benefit economically from violations of the laws, should be economically responsible for resulting injuries.

Id. at 770.

[42] 62 Hawaii at ___, 612 P.2d at 538.

[43] 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

cause of injuries to a third person,[44] and that such injuries are a reasonably foreseeable consequence of serving liquor to an intoxicated person:

> Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication . . . . [I]t is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishings negligent.[45]

Having thus rejected the primary rationales supporting the old common law rule, the California Supreme Court proceeded to find a duty of care imposed on tavern owners by California's liquor control law.[46]

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[44] *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631. *See also* Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1959) (service of liquor to an intoxicated patron at an Air Force N.C.O. club, in violation of Montana liquor control statute, was the proximate cause of the accident and resultant injuries to the plaintiff); Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (sale of liquor to a minor by a state-liquor-store employee, in violation of state liquor control statute, may be the proximate cause of injuries sustained by third party as a result of the minor's tortious conduct); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (a cause of action against a tavernkeeper for the death of a person resulting from the intoxication of a customer was supportable on the basis of negligence).

[45] 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

[46] CAL. BUS. & PROF. CODE § 25602 (West 1964), in effect at the time of the decision in *Vesely*, stated in relevant part: "Every person who sells, . . . any alcoholic beverage . . . to any obviously intoxicated person is guilty of a misdemeanor." In 1978, the California Legislature severely limited a common law dram shop action. An amendment to the statute specifically states that the holding of *Vesely* is abrogated:

> The Legislature hereby declares that [section 25602] shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (___ Cal.3d ___) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1980). *See* Gonzales v. United States, 589 F.2d 465 (9th Cir. 1979) (applying California law after *Vesely* was abrogated by legislature). The other amendment by the California Legislature, however, allows a dram shop action against any person who sells alcoholic beverages to a minor:

> [A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1980). The Hawaii Supreme Court noted that the California Legislature specifically reversed *Vesely*, but the Hawaii Supreme Court stated that the rationales in *Vesely* were still helpful in the resolution of Ono v. Applegate.

In *Ono v. Applegate,* the Hawaii Supreme Court also readily recognized that a tavern owner's sale of alcohol to an intoxicated automobile driver may be the proximate cause of injuries inflicted by the driver upon a third person.[47] Foreseeability was used by the court as a determining factor to establish the element of proximate cause in this negligence action. Noting the "universal use of automobiles, and the increasing frequency of accidents involving drunk drivers,"[48] the Hawaii Supreme Court also concluded that the consumption of liquor, resulting inebriation, and the injurious conduct were all foreseeable intervening acts which would not relieve a tavern owner of liability for serving liquor to an intoxicated motorist who subsequently injures a third person.[49]

While the Hawaii Supreme Court did not explicitly articulate any policy considerations in its brief proximate cause analysis, policy has played a significant role in the decisions cited by the Hawaii Supreme Court in its opinion. In these decisions, the issue of proximate cause had evoked discussions about the need to protect both the intoxicated individual and the public from alcohol-related injuries,[50] and to ensure that liquor licensees would honor their responsiblities to the public in return for the privilege of operating their businesses.[51] The Hawaii Supreme Court's own reference to the increasing frequency of drunk-driving accidents indicates that concern for public safety played some role in the court's decision, and may have been a factor in allowing a common law dram shop action.[52]

4. *Actual loss or damage.* Since the action for negligence developed from the old form of action on the case, the negligence action has retained the rule that proof of damage is an essential element of the plaintiff's case.[53] The element of actual loss or damage was not an issue before the Hawaii Supreme Court, nor did the court discuss this issue in its opinion. However, based on the fact that the plaintiff Ono suffered seri-

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62 Hawaii at ___ n.4, 612 P.2d at 537 n.4.

[47] 62 Hawaii at ___, 612 P.2d at 540.

[48] *Id.*

[49] *Id.* at ___, 612 P.2d at 541.

[50] In Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) the court stated:

> It seems obvious that regulations governing the sale of liquor are intended to enhance public safety; such statutes serve "the well-being of the community" by guarding against "the dangers attending the indiscriminate sale of intoxicating liquors." It is also obvious that the statute imposes duties upon tavern owners such as DeMiers [the defendant].

Id. at 834 (footnote omitted). *See also* Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) (waste of human life due to drunk driving is a foreseeable risk created by sale of liquor to an intoxicated person).

[51] Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959) (liquor licensees operate their businesses by privilege rather than by right and have strict obligations not to serve minors or intoxicated persons).

[52] 62 Hawaii at ___, 612 P.2d at 540.

[53] *See* PROSSER, *supra* note 12.

ous bodily injuries as a result of the auto accident, it was apparently obvious to the court that the element of actual loss and damage was clearly established.[54]

IV. IMPACT

Several issues arise in the wake of the decision in *Ono v. Applegate:* (1) Will liquor store owners be subject to common law dram shop liability? (2) Will non-commercial suppliers of liquor be subject to common law dram shop liability?

The Hawaii Supreme Court specifically named tavern owners as the class of defendants to which liability may attach in a common law dram shop action.[55] As liquor licensees, however, liquor store owners are also subject to the regulatory measures of Hawaii's liquor control law.[56] Thus, the duty derived from Hawaii's liquor control law should also be applicable to liquor store owners. Arguably, liquor consumption, resulting intoxication, and injurious conduct are less foreseeable to a liquor store owner than to a tavern owner because the customer of a liquor store would not usually consume liquor on the premises immediately after purchasing the liquor. However, in support of its decision, the Hawaii Supreme Court cited cases from other jurisdictions in which liability was imposed on liquor store owners.[57] The Hawaii Supreme Court noted no distinction between taverns and liquor stores in its citation of such cases, and that could be interpreted as implicit approval of extending liability to liquor store owners.

With respect to non-commercial suppliers of liquor, the Hawaii Supreme Court cautioned that the liability of a non-commercial supplier of liquor was not decided in *Ono v. Applegate.*[58] Clearly, Hawaii's liquor control law[59] could not impose a duty upon the social host to refrain from serving liquor to an intoxicated individual — a social host is not a liquor

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[54] The serious injuries suffered by plaintiff Ono clearly established the element of damage in this case. 62 Hawaii at ___, 612 P.2d at 536.

[55] The Hawaii Supreme Court stated that, "We hold that this jurisdiction's liquor control statute does impose a duty upon a tavern keeper not to serve a person under the influence of liquor." 62 Hawaii at ___, 612 P.2d at 539. The court later stated that, "A tavern's sale or service of alcohol to an intoxicated automobile driver may be the proximate cause of injuries inflicted upon a third party by the inebriated driver." 62 Hawaii at ___, 612 P.2d at 540.

[56] *See* note 3 *supra.*

[57] Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (negligence action allowed against state for state-liquor-store employee's sale of liquor to a minor); Pike v. George, 434 S.W.2d 626 (Ky. 1968) (action allowed against owners of liquor store who sold liquor to a minor who became intoxicated and injured plaintiff in an auto accident). Note, however, that the cases cited by the Hawaii Supreme Court involved violation of the sale to minor statute. *See* note 3 *supra.*

[58] The Hawaii Supreme Court stated that, "We do not decide in this appeal whether a non-commercial supplier of liquor may be held liable for injuries caused by the intoxicated person." 62 Hawaii at ___ n.5, 612 P.2d at 538 n.5.

[59] *See* note 3 *supra.*

licensee and thus is not subject to the statutory regulation.

Despite the Hawaii Supreme Court's reticence concerning the social-host-liability issue, the court quoted a significant passage[60] from *Jardine v. Upper Darby Lodge*[61] in which the Pennsylvania Supreme Court stated that the duty not to serve liquor to an intoxicated person is owed by everyone to society, it exists "entirely apart from any statute."[62] In conjunction with this quotation from *Jardine*, the Hawaii Supreme Court also took note of the fact that courts in other jurisdictions have allowed recovery from social hosts, and that once the duty element was established, the analysis was similar to that used by the Hawaii Supreme Court in this decision.[63]

Given the inapplicability of Hawaii's liquor control law to the social-host situation[64] the duty of a social host to refrain from serving liquor to an intoxicated guest would have to be derived directly from the common law. Such an approach was discussed in *Colligan v. Cousar*[65] which was cited in *Ono v. Applegate*.[66] In *Colligan*, the plaintiff brought an action against certain Illinois tavern owners for injuries sustained when the plaintiff was struck in Indiana by an automobile being driven by an intoxicated driver who was furnished liquor by the defendant tavern owners. The plaintiff brought his action under two theories, one based on the Illinois Dram Shop Act[67] and one based on common-law negligence. The trial court rendered judgment for the defendant tavern owners. However, on appeal, the court held that while the Illinois Dram Shop Act had no extraterritorial effect and was therefore inapplicable, under Indiana's common law, which was presumed to be the same as that of Illinois, the plaintiff could maintain a cause of action based on common law negligence principles against the defendant tavern owners.[68] The court stated

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[60] 62 Hawaii at ___ n.5, 612 P.2d at 538 n.5.

[61] 413 Pa. 626, 198 A.2d 550 (1964) (negligence action against the owner of a liquor establishment for serving liquor to an already intoxicated customer in violation of the liquor code).

[62] The supreme court of Pennsylvania specifically stated that, "The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute." 413 Pa. at 631, 198 A.2d at 553.

[63] 62 Hawaii at ___, n.5, 612 P.2d at 538 n.5. Specifically, the court cited the case of Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (negligence action allowed against woman who furnished liquor to her minor brother and another minor in violation of state statute).

[64] *See* note 3 *supra*.

[65] 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

[66] 62 Hawaii at ___, 612 P.2d at 538.

[67] ILL. ANN. STAT. ch. 43 § 135 (Smith-Hurd 1944).

[68] The Illinois court stated:

> [W]e hold that the acts of the defendants in furnishing the intoxicating liquor to the tortfeasors were acts which, had there been no Dram Shop Act in existence in the State of Illinois, would give rise to a common law cause of action in this State on

that a common law dram shop action could be based on the common law duty imposed on every person to refrain from doing any act, which is known or could be reasonably anticipated, to result in harm to another.[69]

Other cases, however, make strong arguments against imposing social-host liability.[70] In *Edgar v. Kajet*,[71] a New York court noted the "vast and far-reaching" implications of imposing civil liability on social hosts, and concluded that imposition of such liability was a matter for the legislature.[72] One of the problems of social-host liability pointed out in *Edgar* is that of determining the applicable standard of care; i.e. at what point and to what extent must a social host refuse to serve liquor to a guest in order to avoid liability for the guest's subsequent acts?[73]

Arguably, the social host should be subject to the same reasonable man standard used by the Hawaii Supreme Court in *Ono v. Applegate* with liability being imposed whenever it can be established that the social host knew or reasonably should have known that his guest was under the influence of liquor. However, such a standard seems somewhat inappropriate in a social setting since a social host is not in the business of serving liquor and would have a difficult time monitoring the liquor consumption of his individual guests.

A slightly lower standard of care, applied in some jurisdictions, imposes liability only when liquor is served to a person who is obviously intoxicated as opposed to merely "under the influence of liquor."[74] The problem with this lower standard is that once a person has reached the point of obvious intoxication, that person already constitutes a danger to the public if they attempt to operate a motor vehicle.[75] However, this lower

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behalf of the plaintiff allegedly subsequently injured by the acts of the said tortfeasors as a result of their intoxicated condition. We must presume that the common law of Indiana, where the accident occurred, was the same as the common law of Illinois. The genius of the common law is that it is constantly expanding to meet new and unique conditions.

38 Ill. App. 2d at 414, 187 N.E.2d at 302.

[69] *Id.* at 401, 187 N.E.2d at 296.

[70] *See, e.g.*, Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975) (no cause of action under Dram Shop Act against corporations which had hosted a party at which the decedent became intoxicated before becoming involved in an auto accident); Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964) (employer not liable under Dram Shop Act for injuries sustained by persons involved in auto accident caused by employee who became intoxicated when given liquor at a company picnic); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969) (no cause of action against an employer who hosted a Christmas party at which an employee allegedly became intoxicated before hitting plaintiff).

[71] 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975).

[72] *Id.* at ___, 375 N.Y.S.2d at 552.

[73] *Id.*

[74] *See* Note, *One More For the Road; Civil Liability of Licensees and Social Hosts for Furnishing Alcoholic Beverages to Minors*, 59 B.U.L. REV. 725, 734-5 (1979).

[75] "The 'obviously intoxicated' standard is inadequate because at the point of 'obvious intoxication' the drinker is already dangerous." 59 B.U.L. REV. 725, 738.

standard is arguably a fairer standard to apply in social-host situations since a social host should know when one of his guests has become obviously intoxicated.[76]

Notwithstanding these difficulties in imposing social host liability, the citations and commentary by the Hawaii Supreme Court in *Ono v. Applegate* seem to indicate that although the court refrained from directly addressing the issue in this case, the Hawaii Supreme Court would not be opposed to allowing recovery from a social host in a common law dram shop action.

V. Conclusion

Ono v. Applegate represents a significant step by the Hawaii Supreme Court in imposing civil liability, both in terms of its immediate impact on future litigation, and the long term consequences which may eventually follow from it. It seems likely that the Hawaii case law in this area will develop rapidly—given the number of auto accidents involving drunk driving[77] —thus, providing further details of the specific elements which make up a common law dram shop action in this state. Whether the reasoning and policy considerations which brought about this original finding of a tavern owner's liability to third parties will extend that liability to social hosts is perhaps the most important question to be answered by future litigation in Hawaii.

[B.B., S.S.]

Addendum

In March 1981, representatives of the restaurant and liquor industry approached the Senate Judiciary Committee of the 1981 Hawaii State Legislature to lobby for legislation which would limit the dram shop liability of a restaurant or tavern owner.[78] According to these representatives, *Ono v. Applegate* had put an unreasonable burden on the restau-

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[76] The commentator stated:

> In view of the subtleties involved in assessing the effects of alcohol on adults, fairness requires that neither civil nor criminal liability accrues to the furnisher until he has sufficient notice of the drinker's condition. Only at the point of "obvious intoxication" would a reasonable person know that a drinker who may drive threatens her own safety and the safety of third persons.

Id. at 735 (footnote omitted).

[77] In a study by Congress, it was estimated that nearly 800,000 times each year in the United States, a collision occurs that can be directly caused by intoxicating liquor. Staff of House Comm. on Public Works, 90th Cong., 2d Sess., 1968 Alcohol And Highway Safety Report 1 (Comm. Print 1968); *See also* President's Commission On Law Enforcement And Administration Of Justice, Task Force Report: Drunkenness (1967).

[78] *Liquor Salespeople Hope to Shift Liability for Intoxication,* Honolulu Star-Bulletin, March 10, 1981, § A, at 2, col. 1.

rant or tavern owner in trying to identify a customer who had too much to drink.[79] Another concern of this group was the prospect of the courts extending common law dram shop liability to a wide variety of suppliers of alcohol.[80]

The restaurant and liquor industry representatives sought legislation which would place the responsibility for intoxication back on the adult drinker and not on the restaurant or tavern owner. However, at the time this casenote went to publication, there was no indication from the Hawaii State Legislature that it was ready to pass such a law which would, in effect, abrogate *Ono v. Applegate.*

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[79] *Id.*
[80] *Id.*

BOOK REVIEW

ENVIRONMENTAL LAW IN JAPAN*
Julian Gresser, Koichiro Fujikura, & Akio Morishima. The MIT Press, Cambridge, Massachusetts and London, England. 1980. Pp. 515. $60.00

This is a book of ideas about preserving the environment. In an increasingly complicated and interdependent international community, the creation and nurturing of national responses to environmental degradation becomes a moral imperative. In second place, but not by much, is the need to disseminate and exchange these responses for potential use in solving similar problems in other areas of the world. The task is complicated by linguistic, institutional, and cultural barriers—to name a few—and by the Herculean task of making such an intra-national experience internationally relevant. ENVIRONMENTAL LAW IN JAPAN takes on the task and succeeds.

The authors' principal purpose is to describe and analyze Japan's legal and institutional framework for dealing with its environmental degradation, and to draw conclusions relevant to other nations, primarily western and especially the United States. Their audience is broad: scholar, decisionmaker, and citizen, whether lawyer, planner, tinker or tailor. To reach such a diverse audience is not easy, and the authors have succeeded remarkably well. The book is not only understandable, but extremely well-written. Indeed, in many chapters, especially those describing particularly colorful or devastating case histories, it is often difficult to put the book aside.

The structure of the book is a blend of case study, summary, and analysis. The authors introduce Japanese environmental law to the reader in a lengthy but lively section outlining the modern history and development of the public's environmental awareness and the government's response to such consciousness. Here we meet Japan's 19th and early 20th century "robber barons." Here we also agonize with the victims of mid-century environmental pollution so terrible and so far beyond anything

* This review was initially prepared in substantially the same form for the JOURNAL OF THE AMERICAN PLANNING ASSOCIATION which has kindly consented to its modification for reproduction here.

yet reported in the United States that we flinch, but in fascination, read on:

> When I recovered a little and began to be able to walk again I was walking down the corridor to go to be examined by the doctor, when I found a cigarette end on the floor. I had not smoked since I lost my mental balance, so I was very pleased. "Oh, there's a cigarette end! How lovely! Lovely! Just let me get my hands on it!" With these thoughts in mind, I began to direct my steps carefully toward it. But I could only walk in a zigzag way. I tried to stand still, but the top half of my body kept swaying. Anyhow, I tried to make straight for the butt. "It's about twenty feet away. I must walk straight ahead or I shall miss it."
>
> Without my wanting them to, my legs suddenly began to dash in all directions. I couldn't stop it. I ran right past the cigarette end. "Oh, no! These convulsions! Not again!" In the midst of these thoughts, I began to feel dizzy. I stopped for a moment and looked back. I wanted to go in that direction but my legs wouldn't let me. . . . I was falling down, my dear! My husband took hold of my back. My body was sticking out backwards. When I fall, I fall backward as if I were starting back from something. But before I fell the convulsions came on again and suddenly I started forward again.
>
> (From a victim of Minamata disease - p. 31.)

In a later chapter, we see the clash of values as "modern" jurisprudence fails to satisfy traditional needs. The authors tell of victims who, even after compensation awards, feel cheated because the presidents of the offending companies never once appeared in court to apologize in the time-honored way for pain and suffering caused. We finally share the frustration of the victims of industrial pollution who were forced to pursue chimerical remedies for years before either the private sector or the political system so much as acknowledged that a wrong needed redressing.

But slowly, a responding environmental ethic takes form. The authors describe how the Japanese system first recognizes and then supports, through caselaw and statute, the need to both stop pollution and compensate for the losses and injuries caused by the pollution. Section II delineates the initial barriers to relief and then indicates on a case-by-case basis how such barriers are ultimately overcome. Although the writing continues at its initial quality and pace, the story at this point nonetheless bogs down. The authors do an excellent job of summarizing the major pollution cases and distilling for us the critical issues and their resolution—the development in Japanese environmental law of due process, ripeness, standing, and so forth. It will require, however, a real devotee of Japanese environmental law to take the time to plow through the many decisions which are set out verbatim, page after page after page. While this might make the book an excellent and authoritative reference for environmental law in Japan, the litany of cases detracts from the authors' extremely succinct identification and analysis of the germane issues in the environmen-

tal protection field. Indeed, this section reads like a casebook. The decisions would be more appropriately placed in the appendix, along with the record summaries, laws, and model agreements which are already there.

Nonetheless, there is much in the cases that (whether or not due to the authors' translating skills) are an absolute joy to read, largely free of legal jargon, humanely written and finely reasoned. One comes away with considerable respect for a High Court that can state its case with such simple eloquence:

> In discussing the public nature of air transportation and the operation of the airport, however, it is necessary to consider not only the social and economic benefits that they create, but also the costs they impose. We find that the impact of noise and other nuisances from airplanes using the airport has extended over a large area inflicting serious injuries on many people including the plaintiffs, and that the use of the airport has been continued without the adoption of other measures to alleviate injuries. Under these circumstances, there is a limit to the defendant's argument of the public nature, especially when airport operations are still inflicting injuries on local residents. It cannot be helped that restrictions on the use of the airport to curtail injuries may create some inconvenience to others.
>
> (The High Court of Japan, from an airport noise pollution decision - p. 185.)

This concern for the public welfare stands in stark contrast to Japan's environmental conduct in an international setting, which is described in the authors' last chapter. Using the Palau superport controversy as the set piece, but expanding their analysis to discuss Japan's position on marine pollution and protection of the whales, the authors recount incident after incident of insensitivity, chicanery and outright dishonesty by Japan's public and private sector representatives in their protection and promotion of Japan's commercial and industrial activity. This section is marked by a more militant and strident tone than those preceding it and lacks the careful referencing essential for such a partisan attack. Nonetheless, the section stands as a chilling exposé of Japan's schizophrenic attitude toward environmental protection and serves as a cogent indictment of one of the world's leading powers.

Finally, the authors describe in fascinating detail Japan's use of conciliation, mediation, and arbitration in the settlement of its environmental disputes. This dispute-resolving mechanism represents perhaps the most significant contribution of Japanese environmental law to the international body of ideas in this area, and the authors are to be commended for their comprehensive presentation. Here, and here alone, every word, every quote from a key agreement, every standard is well worth reading and rereading. The statutory framework and the working of the system in practice stands as a model worth reviewing, if not emulating, in every industrialized nation. One wishes it occupied yet a more prominent place

in the authors' panoply of environmental remedies.

At a time when Japan—and especially Japan's industrialization—is often held up as a model for the world (for example, Vogel, JAPAN IS NUMBER ONE), it is refreshing to read a thorough and well-written work that declares that all is not right with Japan. Rapid industrialization has a price, and in many ways, that price in Japan was very, very high. The faults of the book are at most technical, not analytical, and readers with an encyclopedic and technical bent (lawyers, for example) may well find these faults to be virtues: mines of useful precedents and examples, forms and formulae. It will be impossible to omit ENVIRONMENTAL LAW IN JAPAN from any future discussion of national and international environmental planning, policy, and law. It is a benchmark, if not a landmark, in the field.

David L. Callies†

† David Callies is a Professor of Law at the University of Hawaii Law School, and chairman of the American Bar Association's Committee on Land Use, Planning, and Zoning. He is the author of many publications on national and international land use law and policy, including (with Fred Bosselman) THE QUIET REVOLUTION IN LAND USE CONTROL and (with Bosselman and John Banta) THE TAKING ISSUE.

THE HAWAII BUSINESS CORPORATION ACT

During the 1980 session of the Hawaii State Legislature,[1] the members of both the Senate and the House of Representatives undertook the task of reviewing and revising the current laws of Hawaii governing corporations.[2] To this end, the Senate Judiciary and Ways and Means Committees jointly considered "A Bill for an Act Relating to the Hawaii Business Corporation Act."[3] This legislation, to a great extent, incorporated the provisions of the Model Business Corporation Act (Model Act) authored by the Committee on Corporate Laws of the American Bar Association.[4] The Model Act has been adopted, in whole[5] or in part,[6] by the majority of states.

Given the complexity of the subject matter and the far-reaching impact adoption of such a measure would have on Hawaii's business community, however, the bill was not adopted into law. It was the opinion of the legislature that more time was needed to assess the measure's desirability and utility. The University of Hawaii Law Review was asked to assist in this interim study.

As part of this task, the Law Review has compiled in this issue three pieces relating to the Hawaii Business Corporation Act. First, Professor Williamson B. C. Chang, of the University of Hawaii Law School and a member of the Hawaii State Bar Association committee that assisted the legislature in reviewing the bill, has written an article on the role of the courts in the event Hawaii adopts the new corporation code. Professor

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[1] 10th Leg., 2d Sess. (1980).

[2] HAWAII REV. STAT. chs. 416-418 (1976 & Supp. 1980).

[3] S.B. 1829-80, S.D. 2, 10th Leg., 2d Sess. (1980).

[4] ABA-ALI MODEL BUS. CORP. ACT (1979).

[5] According to the editors of the Model Business Corporation Act Annotated, the Model Act was used as the basis for the corporation statutes of Wisconsin (1951), Oregon (1953), District of Columbia (1954), Texas (1955), Virginia (1956), North Dakota (1957), Alaska (1957), Colorado (1958), Iowa (1959), Utah (1961), Wyoming (1961), Mississippi (1962), Nebraska (1963), South Dakota (1965), Washington (1965), Arkansas (1965), New Mexico (1967), Georgia (1968), Montana (1968), Tennessee (1968), Rhode Island (1969), Vermont (1971), Kentucky (1972), West Virginia (1975), Arizona (1976), and Florida (1976). *See* MODEL BUS. CORP. ACT ANN. (2d ed. 1971 & Supp. 1973 & 1977).

[6] The Model Act was used to a great extent in revising the corporation laws of Maryland (1951), North Carolina (1955), Alabama (1959), Connecticut (1959), South Carolina (1962), New York (1963), Massachusetts (1965), Louisiana (1968), New Jersey (1968), Maine (1972), and Michigan (1973). *See* MODEL BUS. CORP. ACT ANN., *supra* note 5.

Chang makes it clear in his article that he believes that the Model Act does not go far enough in protecting a corporation's shareholders and the public. Thus, he concludes that notwithstanding the legislature's actions, the State's courts must remain active in the policing of corporate action to assure basic common law notions of fairness.

Second, Professor Larry Soderquist of the University of Notre Dame makes some general comments and recommendations in regard to Hawaii's current corporation laws. Professor Soderquist suggests that the present statute does require revision to eliminate its archaic provisions and to encourage businesses to incorporate in Hawaii. He observes that there are three alternatives available in revising the statute: a piecemeal revision, the custom drafting of a new statute, or the adoption of a statute that has been drafted by others. Professor Soderquist would opt for the third alternative by adopting the Model Business Corporation Act without major alterations. He points out that not only has the Model Act been carefully drafted and amended by a committee of the American Bar Association, but its adoption would facilitate interpretation as a number of decisions and secondary sources exist clarifying and construing the Act's provisions.

Finally, the University of Hawaii Law Review has prepared an index to the Hawaii Business Corporation Act (HBCA). This index compares the provisions of the bill[7] as originally introduced, with the current statutory provisions of the Hawaii Revised Statutes, and analyzes and explains the effect the adoption of the HBCA would have on the present law.[8] The Law Review itself does not take any position on whether the HBCA, or any of its provisions are desirable over current Hawaii law. Rather, the Law Review hopes that by presenting a comprehensive and clear overview of the proposed measure, the legislature, members of the Hawaii bar, and the public as a whole can make a more reasoned determination as to the future of Hawaii's corporation laws.

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[7] S.B. 796-81, 11th Leg., 1st Sess. (1981).

[8] S.B. 1829-80, *supra* note 3, was replaced during the 1981 session of the Hawaii State Legislature by S.B. 796-81, *supra* note 7, which in form and substance exactly mirrors S.B. 1829-80. Like S.B. 1829-80, S.B. 796-81 contains a corresponding provision for each provision of the Model Act. During the same legislative session, however, the State House of Representatives also enacted a similar measure, H.B. 1242-81, 11th Leg., 1st Sess. (1981), entitled "A Bill for an Act Relating to the Hawaii Business Corporation Act," which does not follow sequentially the provisions of the Model Act as does the Senate bill. Furthermore, this House bill incorporates the most recent amendments to the Model Act.

Despite these differences, this index is also intended for use in analyzing the provisions of H.B. 1242-81. Easy reference to the corresponding Model Act section for each provision of the House bill is made possible by cross-reference tables contained in Part XVIII, § 20 of the bill.

THE ROLE OF THE STATE COURTS AFTER THE MODEL BUSINESS CORPORATION ACT

Williamson B. C. Chang*

The enactment of the Model Business Corporation Act would represent the most significant legislative development in the corporation law of Hawaii. There is, however, a judicial component to corporation law. State courts have played, and will continue to play, an important role in the development of corporation law.[1] One critical issue that must be analyzed subsequent to the implementation of the Model Act is how the state courts should interpret those sections of the Act which attempt to foreclose the courts' traditional common law role.[2] This article asserts that for

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* Assistant Professor of Law, University of Hawaii. A.B., Princeton University, 1972; J.D. Boalt Hall School of Law, University of California, Berkeley, 1975.

[1] The courts, in comparison to state legislatures, have been almost solely responsible for the development of protective doctrines in corporation law. One need only look so far as the obvious examples such as the doctrine of "piercing the corporate veil," *see generally* Pepper v. Litton, 308 U.S. 295 (1939); Zubik v. Zubik, 384 F.2d 267 (3d Cir. 1967) *cert. denied*, 390 U.S. 988 (1968); Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961); Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971), or the obligation of majority shareholders to minority shareholders, Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); Katzowitz v. Sidler, 24 N.Y.2d 512, 249 N.E.2d 359, 301 N.Y.S.2d 470 (1969), or common law prohibitions on insider trading, Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969), for examples of judicial creation of equitable doctrines. The legislatures have tended to enact provisions which lower the standards applying to corporate or management conduct. *See, e.g.*, HAWAII REV. STAT. § 416-35 (Supp. 1980) which adopts the least stringent standards in terms of indemnification of directors. Another example is section 35 of the ABA-ALI MODEL BUS. CORP. ACT (1979) [hereinafter cited as MBCA], which uses the lower of the two prevailing common law standards as to the duty of care of directors. Hawes & Sherrard, *Model Section 35—New Vigor for the Defense of Reliance on Counsel*, 32 BUS. LAW. 119, 120 (1976).

[2] Many sections in the Model Act attempt to codify and replace the common law. The sections dealing with fiduciary duties are of greatest concern to this article: section 35 (director's standard of care), section 41 (director's conflicts of interest with corporation; corporate opportunity) and section 80(d) (limitation of shareholder's remedy in a fundamental corporate change). Other sections of the Model Act seek to displace the common law: section 7 (replacing the common law doctrine of ultra vires), section 52 (shareholder rights to inspect corporate books and records at common law displaced), section 39 (removal of directors), section 38 (filling vacancies), section 34 (voting trusts and shareholder agreements, status unclear under common law), sections 26 and 26A (preemptive rights, sometimes allowed under common law), section 25 (liability of shareholders to pay the full consideration

various reasons,[3] primarily the institutional inability of the legislature to perform its usual law-making function in the area of corporation law, state courts should disregard statutory corporate norms[4] when necessary and equitable.[5]

Some of the most controversial provisions in the Model Act are those concerning the directors' and officers' fiduciary obligations toward the corporation and minority shareholders. It is generally recognized that the Model Act has followed the trend in lowering the standards of fiduciary duty.[6] For example, section 35, relating to the "duty of care" of directors, adopts the lower of the two prevailing standards.[7] Section 41 permits directors to contract with the corporation under any of three circumstances, one of these being a ratification by the shareholders notwithstanding that such shareholders themselves may be "interested" directors.[8] Addition-

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for shares), section 6 (right of corporation to acquire its own shares), and section 5 (indemnification of directors and officers, status unclear under common law).

[3] *See* pp. 175-90 *infra*.

[4] The term "statutory corporate norm" refers to the standards set forth in the statute. For example, section 35 states that directors shall perform their duties "with such care as an ordinarily prudent person in a like position would use under similar circumstances." Other examples of statutory corporate norms include section 35's command that the board of directors manage the corporation, and section 41 concerning a director's conflicts of interest.

[5] Judicial doctrines that protect shareholder and corporate interests have been created under the courts' equitable powers. *See* Pepper v. Litton, 308 U.S. 295, 305-12 (1939); Cranson v. International Business Machs. Corp., 234 Md. 477, 200 A.2d 33 (1964). Thus, the usual limitations on equitable relief, such as the availability of relief at law or the defenses of unclean hands or *in pari delicto* would apply.

[6] Indications that the Model Act has followed the trend in lowering the standards of care are found in the following sections. Section 5, "Indemnification of Officers, Directors, Employees and Agents," follows almost verbatim the California and Delaware provisions which have adopted less stringent standards. *See generally* Heyler, *Indemnification of Corporate Agents*, 23 U.C.L.A. L. REV. 1255 (1976); ABA, Committee on Corporate Laws, *Changes in the Model Business Corporation Act Affecting Indemnification of Corporate Personnel*, 34 BUS. LAW. 1595 (1979). Section 41, "Director Conflict of Interest," has been described by Professor Hamilton of the University of Texas as "an abomination." *See* TEACHERS' MANUAL to R. HAMILTON, CORPORATIONS 136 (1976). *See also* Bulbulia & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME LAW. 201 (1977); 58 NEB. L. REV. 909 (1979). Section 53 adopts the lower of the American standards as the standard of care for directors. *See, e.g.*, Hawes & Sherrard, *supra* note 1; ABA, Committee on Corporate Laws, *Changes in the Model Business Corporation Act*, 29 BUS. LAW. 947, 949-55 (1974). Section 27 gives the directors the power to change bylaws, formerly a right reserved to shareholders unless expressly stated otherwise.

[7] *See* text accompanying note 15 *infra*.

[8] Section 41 allows a contract between a corporation and its director if at least one of the following requirements are met: (a) the conflict is disclosed and the contract is approved by disinterested directors; (b) the conflict is disclosed and approved by a majority of all shareholders, whether or not they have a conflict of interest; (c) the contract is fair and reasonable. A disinterested minority would not be able to prevent a contract favored by an interested majority because only one of the requirements need be fulfilled. Thus, even though all of the disinterested directors vote against the contract, it could still be approved by a vote of the interested majority of shareholders. The application of this second provision was struck down as inherently unfair under the facts in Remillard Brick Co. v. Remillard-

ally, one of the most significant, new provisions is section 80(d), relating to the shareholder remedies in a fundamental corporate change. Section 80(d) makes the statutory appraisal remedy, absent unlawful conduct or fraud, the shareholder's exclusive remedy.[9] The implementation of section 80(d), as an attempted legislative repeal, would cast doubt on the continued validity of *Perl v. IU International Corp.*[10] In that case, the Hawaii Supreme Court held that, despite a purportedly exclusive appraisal remedy set forth in the statute, a shareholder can set aside a corporate transaction on the grounds that it lacks a justifiable "business purpose," or is not "entirely fair" to all shareholders.[11]

The *Perl* decision points out that courts, in spite of the statutory norms set by the legislature, will develop and expand the requirements of fiduciary obligations toward noncontrolling shareholders.[12] Thus, these provisions bring into question the legitimacy of legislative attempts to displace and limit the courts' traditional equitable role of scrutinizing corporate transactions for fairness.[13] This issue focuses on fundamental jurispru-

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Dandini Co., 109 Cal. App. 2d 405, 241 P.2d 66 (1952). *See* note 23 *infra*. The usual rule has been to allow interested shareholders to vote. Kentucky Package Store, Inc. v. Checani, 331 Mass. 125, 117 N.E.2d 139 (1954). *See generally* Sneed, *The Stockholder May Vote as He Pleases: Theory and Fact*, 22 U. PITT. L. REV. 23, 52-54 (1960).

[9] *See* Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80 and 81)*, 33 BUS. LAW. 2587 (1978).

[10] 61 Hawaii 622, 607 P.2d 1036 (1980).

[11] *Id.*

> The central question remaining in this case, then, is whether behavior short of fraud is actionable where the controlling statute states that, except for an action testing the sufficiency or regularity of the vote, appraisal is the exclusive remedy of any stockholder objecting to a merger.

Id. at 638, 607 P.2d at 1045.

In *Perl*, the Hawaii Supreme Court held that, despite the statute, a shareholder had a right to bring an action for a breach of fiduciary principles. The question is likely to be raised again if section 80(d) of the Model Act is enacted and such enactment is considered to be legislative evidence to limit a shareholder's remedies to an appraisal in the absence of fraud. *See* notes 67-82 and accompanying text *infra*.

[12] For a discussion of the development of judicial doctrines governing directors' dealings with their own corporation, *see* New York Trust Co. v. American Realty Co., 244 N.Y. 209, 155 N.E. 102 (1926); Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35 (1966). As for the development of the director's duty of care, *see* Bates v. Dresser, 251 U.S. 524 (1920); Hun v. Cary, 82 N.Y. 65 (1880); Litwin v. Allen, 25 N.Y.S.2d 667 (Sup. Ct. 1940); Selheimer v. Manganese Corp. of America, 423 Pa. 563, 224 A.2d 634 (1966) (discussing the application of the statute in the context of the common law history). As for judicial doctrines insuring a shareholder an action in equity despite a statute purporting to make the appraisal remedy exclusive, *see* Singer v. Magnavox, 380 A.2d 969 (Del. 1977); Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977).

[13] The courts have been the institutions which have developed equitable doctrines to protect shareholders. *See, e.g.*, Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955) (sale of control); Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (majority shareholder's duty to the minority); Cranson v. International Business Machs. Corp., 234 Md. 477, 200 A.2d 33 (1964) (corporation by estoppel); Farris v. Glen Alden, 393 Pa. 427, 143 A.2d 25 (1958) (de facto merger doctrine).

dential questions concerning the balance of power between the courts and the legislature and whether a state legislature has the power to completely foreclose a party's access to the judicial system.[14]

Moreover, the legitimacy of a legislative attempt to nullify the common law standards of fiduciary duty by enacting lower statutory standards is brought into question. For example, section 35 of the Model Act states that a director acting as an "ordinarily prudent person in a like position" insulates himself from a shareholder action for waste or breach of his duty of care.[15] Such a section presents the question of whether the courts should be prohibited from holding a defendant to the higher standard.[16]

One might initially challenge any judicial deviation from the standards expressed in statutes.[17] Ordinarily, the division between judicial and legislative functions can be expressed by the belief that the legislature makes the laws and courts merely interpret such laws.[18] However, the courts' obligation to apply a statute as written is purely self-imposed. There is no institution which can compel the courts to read statutes as intended by the legislature.[19] Granted, courts do not normally refuse application of statutes as written,[20] and compelling reasons are needed to

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[14] This is the problem presented by the "exclusivity" provision in section 80(d) and other state corporation codes which go even further in limiting the relief which a minority shareholder may obtain in state court. The most exclusive statutes preclude a resort to the courts where the cash-out remedy exists, absent "fraud or illegality." *See, e.g.*, MASS. GEN. LAWS ANN. ch. 156B, § 98 (West 1970); TEX. BUS. CORP. ACT ANN. art. 5.12(G) (Vernon 1980). *See* notes 67-82 and accompanying text *infra*.

[15] *See* MBCA, *supra* note 1, at § 35.

[16] In regards to section 35, the higher standard would be "that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in their personal business affairs." Selheimer v. Manganese Corp. of America, 423 Pa. 563, 224 A.2d 634, 640 (1966).

Another example of an attempted statutory displacement of a common law remedy is contained in section 41. *See* note 8 *supra*.

[17] Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962):

> It is easy to agree that the legislature is preeminently qualified to cope with such problems . . . . There are many such problems whose resolution entails extensive study or detailed regulation or substantial administration that a court cannot appropriately or effectively undertake. A judge must assume that in the main a legislature will take its share of responsibility for the liquidation of bad law.

Id. at 233.

[18] *Cf.* W. FRIEDMANN, LEGAL THEORY 501-03 (5th ed. 1967) for a discussion of problems arising from legislative inaction and judicial reform.

[19] The true lawmaker is the person who has the last word. Being the last word, there is no institution which can force the courts to interpret statutes as plainly written or intended. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). *See* McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973) (interpreting an 1848 statute that vests "ownership" of water in the state). *But see* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed*, No. 78-2264 (9th Cir. Nov. 28, 1978) as an attempt to use the federal district courts as an institution to prevent an allegedly "new" interpretation of the 1848 statute by the Hawaii Supreme Court in *McBryde*.

[20] In interpreting a statute, courts are expected to apply the statute's plain meaning or

justify a court's refusal to apply the "plain meaning" of any statute.[21]

While this article argues that the courts should not always be bound by the Model Act's limitations, it should not be viewed as justifying the courts in totally disregarding the statute. Indeed, only when a court is convinced that, as applied to the facts, the statute will produce an inequitable result should it refuse to apply the statutory norms.

I. JUDICIAL DISREGARD OF CORPORATION STATUTES.

Given the "race of laxity"[22] between the states regarding statutory standards of fiduciary duties governing corporations, it is not surprising that state courts have actively scrutinized corporate transactions for fairness. Particularly in regard to fiduciary obligations, it has been the state courts which have created and expanded the obligations of management and controlling shareholders to minority shareholders.[23] In adopting this interventionist role, the state courts have often been disdainful of applying statutory standards. On occasion, the courts have simply ignored a statute's clear language.[24] When statutes are not clear, courts have disre-

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read the statute consistently with the legislature's intent. Caminetti v. United States, 242 U.S. 470, 485-86 (1917); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 1144-46 (Tent. ed. 1958).

[21] *See* Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944): "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy. In such cases courts must find the meaning within the statute itself." *See also* Caminetti v. United States, 242 U.S. at 485-86: "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

[22] *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (Brandeis, J., dissenting):

> Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was one not of diligence but of laxity. Incorporation under such laws was possible; and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

Id. at 557-60 (footnotes omitted).

[23] *See* note 12 *supra*. This is not to say that the state legislatures have been totally inactive. *See, e.g.*, N.C. GEN. STAT. § 55-35 (1975) that requires of the management "that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions."

[24] The "plain meaning" rule was explained in Caminetti v. United States, 242 U.S. 470, 485 (1917): "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." An example of a state court ignoring a statute's apparent plain meaning is Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal. App. 2d 405, 241 P.2d 66 (1952). In that case, the court was required to interpret a California statute that allowed a director to enter into a contract with his corporation if there was either (a) ratification by a disinterested board after disclosure; (b) ratification by the shareholders, whether

garded norms of statutory interpretation to avoid inequitable results.[25] One example of this judicial unwillingness to follow familiar rules of stat-

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or not interested, after disclosure; or (c) the contract was just and reasonable. The "plain meaning" of the statute was that a contract was valid if it met any of the three criteria. The California Supreme Court, protecting the minority shareholders from an unfavorable contract, held that the third part of the statute—fairness—was required in all contracts. In explaining its decision, the court stated: "But neither section 820 of the Corporations Code nor any other provision of the law automatically validates such transactions simply because there has been a disclosure and approval by the majority of the stockholders. . . . Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable may be avoided." *Id.* at 418, 241 P.2d at 74. The court did not state its grounds for refusing to apply the "plain meaning rule." Either the court reasoned that the legislature actually intended the statute to be construed contrary to its clear meaning, or, as urged in this article, the legislature did not have the power to nullify common law doctrines of fiduciary duty.

Exclusivity statutes are another example of statutes which have been interpreted contrary to their plain meaning. For example, Pennsylvania's exclusivity provision states that "rights and remedies . . ., shall be limited to the rights and remedies prescribed under this section, and the rights and remedies prescribed by this section shall be exclusive." PA. STAT. ANN. tit. 15, § 1515K (Purdon 1967). Despite this language, Pennsylvania law has been interpreted as allowing a shareholder to attack a merger for fraud. Miller v. Steinbach, 268 F. Supp. 255, 268-71 (S.D.N.Y. 1967). Moreover, Hawaii's exclusivity provision reads:

> The rights and remedies of any stockholder to object to or litigate as to any such merger or consolidation are limited to the right to receive the fair market value of his shares in the manner and upon the terms and conditions provided in sections 417-19 to 417-30 except suits or actions to test the sufficiency or regularity of the votes of the stockholders . . . .

HAWAII REV. STAT. § 417-29 (1976). However, indicative of a judicial attitude encouraged by this article, the Hawaii Supreme Court in Perl v. IU Int'l Corp., 61 Hawaii 622, 607 P.2d 1036 (1980), allowed a suit to challenge a merger for fairness despite the clear prohibition on such actions in the statute.

[25] Of course, since for every rule of statutory construction, there is an equally persuasive countervailing rule, *see* Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950), one person's "norm of statutory construction" is another person's exception to the rule. This conflict is found in the "de facto" merger doctrine. Under the Delaware cases, a corporate transaction that complies with the appropriate sale of assets provision will not be recharacterized as a "de facto" merger. Instead, Delaware courts hold that the sale of assets and the merger provisions are of equal dignity. *See* Orzeck v. Englehart, 41 Del. Ch. 223, 192 A.2d 36 (1963); Hariton v. Arco Elec., Inc., 41 Del. Ch. 74, 188 A.2d 123 (1963); Heilbrunn v. Sun Chem. Corp., 38 Del. Ch. 321, 150 A.2d 755 (1959). On the other hand, the Pennsylvania Supreme Court in Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958) held a sale of assets to be a "de facto" merger, thereby giving the minority shareholders the protections they would have received under the merger provision.

The statutory norm employed by the Delaware courts was that two sections of the same statute should be construed independently. In other words, the existence of the two different provisions meant that mergers were governed by the merger provision and sales of assets, regardless of their similarity with a merger, were governed by the sale provision. However, those courts following the "de facto" merger doctrine could cite with equal force the maxim that: " 'One part [of a statute] must not be so construed as to render another part nugatory, or of no effect.' People v. Burns, 5 Mich. 114." City of Grand Rapids v. Crocker, 219 Mich. 178, 183, 189 N.W. 221, 222 (1922). A "norm of statutory construction" is truly a relative standard.

utory construction is the evolution of the "de facto" merger doctrine.[26] Moreover, even where the statute explicitly or implicitly commands a result, the courts have created doctrines that avoid such results. For example, the "piercing the corporate veil" doctrine holds that notwithstanding actual compliance with statutes that create a corporation and give it limited liability, the courts may ignore the effect of such statutes to "pierce" the shield of limited liability in certain circumstances.[27]

More specifically, it is where statutes have set standards for fiduciary conduct that the courts have "rewritten" statutes to give them a different meaning. Thus, in *Remillard Brick Co. v. Remillard-Dandini Co.*,[28] the California Supreme Court interpreted a disjunctive statute concerning director's contracts as a conjunctive statute to protect the minority shareholders. In other cases involving alleged unfair treatment of the corporation and minority shareholders, statutory compliance has not barred a judicial inquiry into fairness. Mergers,[29] stock repurchases,[30] the issuance of shares[31] and step transactions such as redemptions followed by liquidations,[32] are not immune from judicial attacks simply because the parties complied with the applicable corporate statutes. If the transaction results in a breach of a fiduciary duty, the courts have set the transaction aside.

One reason why courts have taken this activist role is that the primary function of corporation statutes is to create or "enable" the legal fiction of a corporation and its various concomitant powers to exist.[33] Since the

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[26] Under the "de facto merger" doctrine, fundamental changes, such as the sale of substantially all the assets of a corporation, which have the effect of a merger, must comply with the statutory requirements for mergers. Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958). For a decision holding the doctrine inapplicable, *see* Hariton v. Arco Elec., Inc., 41 Del. Ch. 74, 188 A.2d 123 (1963). *See generally* Folk, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 VA. L. REV. 1261 (1963).

[27] The intent of the Model Act's drafters was that sections 56 "Effect of Issuance of Certificate of Incorporation" and 146 "Unauthorized Assumption of Corporate Powers" would combine to displace the judicially created doctrines of "corporation by estoppel" and "de facto corporation." Under these sections, corporate existence commences only when the certificates are issued by the state. Prior to that, there is no corporate existence, de facto or otherwise. 2 MODEL BUS. CORP. ACT ANN. § 56, ¶ 2 (2d ed. 1971) [hereinafter cited as 2 MBCA ANN.]. *See* Robertson v. Levy, 197 A.2d 443 (D.C. 1964). Therefore the question is raised as to whether a court may "pierce" the corporate shell and deny that it exists in order to hold shareholders liable. Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal. Rptr. 641 (1961).

[28] 109 Cal. App. 2d 405, 241 P.2d 66 (1952). *See generally* note 8 *supra*.

[29] Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Perl v. IU Int'l Corp., 61 Hawaii 622, 607 P.2d 1036 (1980); Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958); Matteson v. Ziebarth, 40 Wash. 2d 286, 242 P.2d 1025 (1952).

[30] Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975); Williams v. Nevelow, 513 S.W.2d 535 (Tex. 1974).

[31] *E.g.*, Katzowitz v. Sidler, 24 N.Y.2d 512, 249 N.E.2d 359, 301 N.Y.S.2d 470 (1969).

[32] *E.g.*, Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947); Miller v. Steinbach, 268 F. Supp. 255 (S.D.N.Y. 1967).

[33] *See generally* Katz, *The Philosophy of Mid Century Corporation Statutes*, 23 L. & CONTEMP. PROB. 177 (1958); Latty, *Why Are Business Corporation Codes Largely Ena-*

statutes are primarily "enabling" and not regulatory, they should not be construed so as to preempt the common law.[34]

A second reason for this interventionist posture is the United States Supreme Court's position that corporation law is substantially a state concern.[35] In recent years, the Supreme Court has curtailed the development of Rule 10b-5 as a source of a federal common law of corporations. Thus, in *Santa Fe Industries v. Green*,[36] the Supreme Court held that Rule 10b-5 should not be extended to cover breaches of fiduciary duty; this was an area traditionally regulated by state law.[37] Moreover, in determining the existence of implied private remedies under the federal securities acts, the Court has held that an important consideration is whether the remedy sought is traditionally provided by state law.[38] If so, a cause

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bling?, 50 CORNELL L.Q. 599 (1965).

[34] The corporation is a legal fiction; its characteristics and powers granted by state statute. Thus, simply because a statute grants the corporation some power, it should not be considered as the only applicable "law." In other words, the absence of explicit statutory language as to whether equitable doctrines should apply, should not be interpreted as negating such common law equitable doctrines. For example, in Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947), the defendants relied, in part, on a defense that the redemption followed by a liquidation complied with the corporation codes. But the statute in that case allowing a corporation to redeem its stock and allowing a corporation to liquidate, was read as merely granting a corporation the power to effect those transactions. Such enabling provisions should not be interpreted as implicitly negating the application of common law equitable doctrines. The failure of the legislature to include a remedy in a statutory scheme that purports to be regulatory has justified the refusal to imply remedies that are not consistent with legislative intent. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). Thus, where provisions have an enabling purpose, as do many in corporation codes (amendment of the articles, repurchases of stock, mergers and other fundamental corporate changes), such provisions should not be viewed as though they were regulatory, thus raising an inquiry as to whether they displace "implied" remedies under the common law.

[35] "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." Cort v. Ash, 422 U.S. 66, 84 (1975). *See also* Burks v. Lasker, 441 U.S. 471 (1979).

[36] 430 U.S. 462 (1977).

> The result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. . . . Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.

Id. at 478-79.

[37] *See generally* Campbell, *Santa Fe Industries, Inc. v. Green: An Analysis Two Years Later*, 30 ME. L. REV. 187 (1979).

[38] Cort v. Ash, 422 U.S. 66, 84-85 (1975): "We are necessarily reluctant to imply a federal right . . . where the [state] laws governing the corporation may put a shareholder on notice that there may be no such recovery."

This same deference to states is evidenced by the Supreme Court's consistent approval of the apportionment method selected by the state in its corporate tax scheme. *See, e.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). "Although the adoption of a uniform [tax] code

of action is not likely to be implied from the federal statutes.[39] The state courts must act to fill the void.

In determining whether a state court may disregard a statutory standard, the initial question is one of legislative intent; did the legislature, in enacting this provision, intend to preempt common law standards or remedies? In this regard, the Model Act is a "mixed bag." Some sections are aimed at prohibiting the courts from applying common law standards. Other "enabling" provisions show no intent of barring judicial scrutiny.[40]

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would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from State to State." *Id.* at 279. *See also* Exxon Corp. v. Department of Revenue, 477 U.S. 207 (1980).

[39] If one views a corporation and shareholders' rights in a corporation as a creation of state statute, then the Supreme Court's deference to state law in determining the shareholders' rights is consistent with its deference to state law in determining the scope and nature of other state-created rights. For example, in determining whether a nontenured teacher had a "property" interest in continued employment for the purposes of the fourteenth amendment, the Supreme Court stated in Board of Regents v. Roth, 408 U.S. 564, 577 (1971): "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *See also* Perry v. Sindermann, 408 U.S. 593, 602-03 n.7 (1971): "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." One must question, however, the appropriateness of the Court's similar treatment of corporation and other areas of state law. Unlike traditional areas of state law, *e.g.*, real property law, the state legislatures cannot truly formulate sound policies to regulate corporations. They lack the meaningful ability to choose corporate policy. As asserted later, this argues for an expanded role for the state courts in setting forth a common law of corporations. *See* note 53 and accompanying text *infra*.

[40] Within the Model Act, there are also those sections that contain both enabling and regulatory components. For example, section 5, relating to indemnification of directors and officers, enables the corporation to indemnify in situations prohibited under common law. *See* New York Dock Co. v. McCollom, 173 Misc. 106, 16 N.Y.S.2d 844 (1939) (corporate indemnification of officer who successfully defended himself in a derivative action held to be ultra vires). At the same time, the Model Act provides that the court, at its discretion, may nullify any such indemnification upon a finding of negligence or misconduct.

This duality is further evidenced in the combined application of sections 56 and 146 which create or "enable" the existence of a corporation. *See* Robertson v. Levy, 197 A.2d 443 (D.C. 1964). *See generally* note 25 *supra*. At the same time, the commentary indicates that the sections, read together, were designed to eliminate the common law doctrines of corporation by estoppel and de facto corporation. 1 MODEL BUS. CORP. ACT ANN. § 46, ¶ 2 (2d ed. 1971) [hereinafter cited as 1 MBCA ANN.].

However, if the intent was to eliminate these two judicial doctrines, arguably there should have been similar intent to eliminate the "piercing the corporate veil" doctrine. *See* note 27 *supra*. The commentary to the Model Act does not address this point and no commentator or court has interpreted these sections as intending to displace this latter doctrine. Similarly, it is not clear whether section 50, in setting forth the make-up of executive management, attempted to implicitly set or reject any common law standards relating to officers' duty of care. *See* 2 MBCA ANN., *supra* note 27, at § 50, ¶ 2. Kentucky and Minnesota do provide by statute that officers must exercise their duty in good faith and with diligence, care, and skill. *Id.* ¶ 3.03(9). Confusion is one of the unfortunate by-products of these types of provisions.

Examples of intentionally preclusive sections—section 35,[41] setting forth the duty of care, and section 41,[42] establishing the conditions under which directors may contract with their corporations—have already been discussed.

Examples of the enabling type of provision are those allowing the by-laws to fix the date of the annual shareholders' meeting and granting the board of directors the power to change the by-laws.[43] Such enabling provisions should not be read as immunizing every attempt to set the date of annual meeting from judicial scrutiny. Thus, in *Schnell v. Chris-Craft Industries, Inc.*,[44] the by-laws set forth the date of the shareholders' annual meeting. State law allowed the directors to amend the by-laws. To block a shareholders' attempt to stop the re-election of incumbent management, the board of directors amended the by-laws to advance the meeting date. Since the advancement would have prejudiced the attempt to remove the incumbents, the shareholders sought injunctive relief in state court. Defendants pointed out that they complied with the Delaware statutes allowing the annual meeting to be fixed by the by-laws and the directors to amend the by-laws. The Delaware Supreme Court, however, disagreed with the reasoning and held the meeting must occur on the date originally set in the by-laws. In response to the defendants' argument, the court stated: "Management contends that it has complied strictly with the provisions of the new Delaware Corporation Law in changing the by-law date. The answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible."[45] This article urges a more formal recognition of this judicial attitude; enabling provisions such as those involved in *Schnell* do not negate common law doctrines requiring fairness or the fulfillment of fiduciary obligations.[46]

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[41] Note 15 and accompanying text *supra*.

[42] Note 8 and accompanying text *supra*.

[43] *See* MBCA, *supra* note 1, at §§ 27, 4(1). *See also In re* Auer v. Dressel, 306 N.Y. 427, 118 N.E.2d 590 (1954).

[44] 285 A.2d 437 (Del. 1971).

[45] *Id.* at 439.

[46] In essence, enabling statutes should not be construed as regulatory statutes designed to nullify common law doctrines regarding the fairness of the use of such powers. Numerous enabling provisions in corporate statutes are also illustrative of the problem presented in *Schnell*. For example, section 59 of the Model Act, granting corporations the power to amend the articles of incorporation, should not preclude actions to challenge the fairness of such amendments. In Brown v. McLanahan, 148 F.2d 703 (4th Cir. 1945), the state statute permitted amendment of the articles without reference to permissible or impermissible amendments. However, the court negated the attempt of voting trust trustees to give themselves power through an amendment of the articles, holding such an amendment amounted to a breach of the trustees' fiduciary duties to the shareholders.

Similarly, section 6 of the Model Act, allowing the corporation to repurchase its own stock, does not sanctify all repurchases of stock. Such transactions are still open to attacks based on fairness or fiduciary obligations. *See* Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975) (controlling shareholders must cause the corporation to offer

There are three justifications for state courts disregarding purportedly exclusive statutory standards: rules of statutory construction,[47] the institutional failure of the legislature in terms of corporation law,[48] and the state courts' concurrent responsibility with the legislature to define what is "property" under state law.[49]

Various canons of statutory interpretation can be used to justify judicial disregard of enabling type provisions. In particular, state courts can rely on those rules which imply that enabling provisions should not be construed to nullify common law remedies.[50]

However, justifications for disregarding provisions which specifically attempt to regulate the internal affairs of corporations through statutory standards cannot be based solely on rules of statutory construction. Such arguments must rest upon other grounds, primarily, the legislature's institutional weakness in corporation law and, moreover, the courts' responsibility in defining property.

II. Disregard of Statutory Norms: The Lack of Legislative Choice.

The legislature's institutional weakness in the area of corporation law arises from the legislature's lack of a "true" choice[51] in selecting the appropriate policies to apply to the corporation's internal affairs. This situation must be compared to other areas where the legislature makes law.[52] The "internal affairs rule"[53] deprives the legislature of meaningful choices

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each stockholder an equal opportunity to sell shares to the corporation at an identical price); *cf.* Williams v. Nevelow, 513 S.W.2d 535 (Tex. 1974) (stock repurchase valid as long as the corporation was solvent at the time of repurchase, there was no bad faith, the repurchase did not contribute to the corporation's bankruptcy or harm future creditors, and there was an excess of unrestricted surplus).

[47] *See* note 34 *supra*.

[48] *See* pp. 181-84.

[49] *See* pp. 184-90 & note 39 *supra*.

[50] *See* note 34 *supra*.

[51] The legislative choice in the area of regulating the internal affairs of corporations may be described as a Hobson's choice—one without a real alternative. Or, as my colleague John Barkai once described it, such choices are reminiscent of "dorm food."

[52] For example, a New Jersey corporation which did business in Hawaii and had employees in Hawaii would, as to those employees, be subject to Hawaii's employment discrimination laws. The Hawaii legislature could formulate its employment discrimination policy in a meaningful manner. A particularly stringent Hawaii statute could not be avoided by incorporating in a state with a lax policy. In almost every other area other than the internal affairs of corporations, state legislatures have a similar ability to exclude undesirable policies.

[53] The "internal affairs rule" mandates that the internal affairs of a corporation shall be determined by the laws of the state of incorporation. See Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933), where the Supreme Court held that it was proper for the district court to dismiss a suit to recover shares sold to directors, because the suit involved the internal affairs of a foreign corporation. Some inroads have been made on this rule, particularly

in corporation law. Since the legislature cannot fulfill its usual institutional role in this area, the courts must play the major role in setting state corporate policy. State courts should not always be required to defer to legislative norms in the area of corporation law.

Ultimately, however, no state can completely prevent application within its borders of another state's corporate laws.[54] In essence, it is not that the Model Act is coming to Hawaii; it has already arrived. True, the legislature has not yet implemented the Model Act, and there would be some real significance to this actual "implementation," but in an objective sense, the Model Act is already part of Hawaii's "law."

To illustrate this point, imagine a Martian sent to Earth to study Hawaii's law. His mission is to report to his superiors on the "law" that applies to various types of rights found in Hawaii—land, contractual interests, employment rights and, lastly, a shareholder's interest in a corporation.

Suppose that in studying the law affecting shareholder rights he encountered a corporation incorporated in a jurisdiction which has adopted the Model Act, let us say New Jersey. Assume further that this corporation had its principal place of business and its property in Hawaii and most of its shareholders were Hawaii residents. To our Martian, this is a "Hawaiian" corporation in the same sense that a parcel of land in Hawaii is "Hawaiian" property. Our Martian then observes several events in this corporation's life—dividend payments, the elimination of cumulative voting, a merger, an amendment of the articles, and so on.

When asked to report on the law governing real property in Hawaii, our Martian handed his superiors a book titled "Hawaii Revised Statutes—Property." When asked to report on an unemployed worker's rights to receive compensation, he gave his superiors "Hawaii Revised Statutes—Unemployment Compensation." When asked to describe the law governing a shareholder's property interest in this particular corporation, our Martian hands in a book entitled "New Jersey Corporation Law." Is he wrong? Is it improper to describe Hawaii corporation law by reference to New Jersey corporation law? His method of analysis has been consistent. In a sense, he is not wrong. New Jersey law "explains" the pertinent law the same way the Hawaii Revised Statutes describe the law of other interests.

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where a foreign corporation does most of its business in the forum state, as opposed to the state of incorporation. Perhaps the strongest case following this view is Western Airlines Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961), where a California court applied California law to a corporation incorporated in Delaware to prevent the corporation from eliminating the right of cumulative voting.

The Model Act seeks to foreclose the forum state's ability to apply its own laws. Section 106 states "and nothing in this Act contained shall be construed to authorize the State to regulate the organization of the internal affairs of such corporation." *See* MBCA, *supra* note 1, at § 106.

[54] *See* note 53 *supra*.

After examining other corporations located in Hawaii, our Martian would see that his description of Hawaii law as to corporations was underinclusive. He should subsequently hand in a book titled "Hawaii Revised Statutes—Corporations," another book titled "Delaware Corporation Law" and so forth. In fact, he would soon realize that to accurately describe the corporation "law" that applies in Hawaii, he needs a corporation code for every state and territory of the United States.

The purpose of this illustration is to show that the legislative choice regarding corporations is not the same choice that the legislature has in other areas. The legislative body's ability to select certain policies normally entails the equal ability to preclude the application of other policies within the state. This is not true in regulating the internal affairs of a corporation. The power to determine what law governs a corporation rests with those who control its ability to incorporate or reincorporate.[55] In regulating corporations, the legislature does not have the full range of policymaking choices. It cannot exclude undesirable policies from applying to corporations and shareholders in Hawaii. Thus, the judicial branch should be accorded a greater role in defining state corporation law, including the ability to disregard legislative standards.

One might argue that the "preemption" of Hawaii law by another jurisdiction's law does not justify the courts in usurping the legislature's policymaking functions. After all, federal law "preempts" state law in many areas, but such preemption does not justify depriving state legislatures of their traditional role in choosing the proper policy. The analogy to federal preemption, however, is inappropriate. In corporation law, one state, such as Delaware, has the power to reduce the standards of all states. Indeed, this has been the impact of Delaware law.[56] However, when the "preemp-

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[55] Reincorporation, accomplished by amending the articles and filing in a new state, is often used to obtain the benefits of a less restrictive corporation code. *See* proxy statement of Trans-Texas Airways, Inc., cited in R. HAMILTON, CORPORATIONS 130-31 (1976):

> The Board of Directors is of the opinion that reincorporation in Delaware, which is the domicile of many leading corporations, would achieve the flexibility desired. . . .
>
> . . . .
>
> Under Texas law, an amendment to the articles of incorporation requires the approval of the holders of at least two-thirds of the stock of the corporation. Delaware law provides that amendments to the certificate of incorporation must be approved by the holders of a majority of the corporation's stock entitled to vote thereon. . . . .
>
> Shareholders of a Delaware corporation have no appraisal rights in the event of a sale, lease or exchange of the assets of the corporation or in the event of a merger or consolidation of the corporation in which they receive solely stock of the surviving corporation [subject to several conditions authors note] . . . . Shareholders of Texas corporations have appraisal rights in the event of a sale of assets (other than in the ordinary course of business), merger or consolidation.

Former S.E.C. Chairman William Cary has proposed a Federal Corporate Uniformity Act to eliminate the incentives for incorporating in Delaware, *see* Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101 (1974).

[56] Amendments to the Model Business Corporation Act have undoubtedly been influenced by developments in Delaware as well as other states. Former S.E.C. Chairman, and

tion" is federal, the policies expressed by the federal law reflect a plurality or majority of the states in Congress. No one state dominates federal policy as does Delaware. Moreover, the clear tendency of federal law is to "upgrade" state standards.[57] At least, federal law never prevents the states from adopting more stringent standards.[58] In corporation law, however, the impact of "liberal" states, such as Delaware, is to "downgrade" state law.[59] Additionally, the effect of the "internal affairs rule" has been to make a state's attempt to maintain higher standards meaningless.[60]

III. A Shareholder's Interest as State-Created Property: Exclusive Remedies and Procedural Due Process.

The strongest and most controversial instance where judicial disregard of a statute can be predicated on the court's general responsibility to define state-created property rights is in regard to those statutes which make an appraisal remedy the shareholder's exclusive remedy in a fundamental corporate change.[61] A shareholder's interest in a corporation can

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Professor, William Cary has stated: "Over the years, . . . the Model Act has been watered down to compete with the Delaware statute on its own terms rather than offering alternative approaches." Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 665 (1974). For example, section 5 of the Model Act, allowing greater permissiveness in the indemnification of directors, officers, and agents, was derived from California and Delaware. *See* note 6 *supra*. In 1969, the Model Act adopted the Delaware norm of requiring only a majority vote to approve a merger.

[57] Most federal remedial legislation provide minimum standards. They do not provide, as does Delaware corporation law, a rationale for lowering the standards of protection. Examples of the impact of federal law can be found, *inter alia*, in the areas of environmental protection, employment discrimination, federal securities regulation, OSHA, and in many other areas. *See, e.g.*, District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).

[58] The operation of the internal affairs rule in only one state, which attracts corporations by eliminating shareholder protections, prevents other states from adopting effective, more stringent standards. Most federal remedial legislation provide minimum standards, allowing the states to enact more stringent ones. For example, states may adopt environmental protection laws, safety laws, or consumer protection laws which have higher standards than their federal counterparts.

[59] *See generally* Cary, *supra* note 56.

[60] For an example of an attempt to "out-Delaware" Delaware, *see* Downs, *Michigan to Have a New Corporation Code?*, 18 Wayne L. Rev. 913, 913-14 (1972). For a clear admission of a state's inability to protect shareholders, *see* the Report of the Law Revision Commission of New Jersey in 1968, *cited in*, Cary, *supra* note 56, at 666:

> "It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts . . . . Any attempt to provide such regulations in the public interest through state incorporation acts and similar legislation would only drive corporations out of the state to more hospitable jurisdictions."

[61] Another instance where the courts should intercede to define and protect state-created property rights is where a shareholder's voting right is involved. Where one provision in the

be analogized to the universe of "new property"[62]—benefits and economic interests created by the state.[63] This stems from the fact that a corporation is simply a creature of state law and, thus, a shareholder's interest in a corporation is similarly created by state statute. As such, the procedures by which a corporation terminates a shareholder's interest must be measured against procedures[64] which terminate other state-created property interests.[65] This analysis particularly applies to "exclusivity" provisions that assert a dissenting shareholder's sole remedy in a fundamental corporate change is the appraisal remedy.[66] A legislative attempt to deny a shareholder an equitable action in state court can be attacked along the same lines as a legislative attempt to bar a recipient of state welfare from

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corporation statute gives shareholders the right to cumulate their votes, MBCA, *supra* note 1, at § 33, and another grants the shareholders the power to reduce the board size, MBCA, *supra* note 1, at § 36, or classify the board, MBCA, *supra* note 1, at § 37, the statute should not be read so as to imply that a reduction or classification solely to eliminate a minority shareholder's influence is beyond judicial review. *See* Weinberg v. Dillingham Corp., Civ. No. 61290 (1st Cir. Ct. Hawaii, filed April 25, 1980). The same issue that exists as to exclusivity provisions applies here, namely, is an interest in the corporation taken subject to legislative restrictions? Under the view expressed in this article, the corporation's power to classify or reduce its board does not preclude a court from reviewing the fairness in using that power. The legislature is not the ultimate authority on shareholder's cumulative voting rights. *Cf.* Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977). The shareholder's right to vote his shares is a fundamental right of the shareholder. The legislature cannot, by merely allowing the reduction or classification, establish the extent of a shareholder's interest in the corporation. The court must supervise legislative determinations of a shareholder's interest in order to protect them from transactions that lack "fairness." *See* Tevis v. Beigel, 174 Cal. App. 2d 90, 344 P.2d 360 (1959).

[62] The term "new property" was coined by Professor Reich, in Reich, *The New Property*, 73 YALE L.J. 733 (1964). "New property" includes state-created property interests such as welfare benefits to which a shareholder's interest in a corporation might be analogized.

The author recognizes that the "vested rights" characterization of the shareholder's interest in the corporation has been generally rejected. Perl v. IU Int'l Corp., 61 Hawaii 622, 642 n.14, 607 P.2d 1036, 1047 n.14 (1980). However, the "new property" concept urged by this article is more narrowly restricted to rights created only by state statute, such as welfare benefits. It does not suggest a resurrection of broader, more traditional property concepts to describe the shareholder's interest. *See, e.g.*, Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146, *aff'd*, 33 N.J. 72, 161 A.2d 474 (1960). "The majority, no matter however overwhelming . . ., may not trample upon the property and appraisal rights of the minority shareholders . . ., no matter how few they may be in number." *Id.* at 352-53, 159 A.2d at 157.

[63] *See* note 39 *supra*.

[64] The fourteenth amendment prevents a state from depriving a person of property without due process of law. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); McCoy v. Union Elevated R.R., 247 U.S. 354 (1918); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 241 (1897).

[65] *See* Goldberg v. Kelley, 397 U.S. 254 (1970). *See also* Bell v. Burson, 402 U.S. 535, 542 (1971): "[I]t is fundamental that except in emergency situations due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."

[66] *See* 2 MBCA ANN., *supra* note 27, at § 80(d).

challenging administrative actions in state court. If both interests are property under state law, then both trigger procedural due process rights under the fourteenth amendment.

The classic response to claims for constitutional protection of state-created property is that since the state created the property interest, the recipient takes it subject to the limitations placed by the state.[67] In other words, a shareholder has no constitutional claim against an exclusivity provision because he takes his interest in a corporation subject to such a provision. However, the weakness in this "take it as you find it" argument is similar to the weaknesses in the now defunct rights-privileges distinction in constitutional law.[68]

Furthermore, since only "property" interests deserve constitutional protection, if the state, by statute, deems an interest not to be property, the state may argue that such interests do not trigger constitutional pro-

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[67] *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971) where the Court held that a state did not violate the fourteenth amendment by conditioning welfare benefits on the recipient family's consent to "home visits" by a caseworker. Speaking for the majority, Justice Blackmun wrote: "[T]he visitation in itself is not forced or compelled, and . . . the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317-18. Compare Justice Sutherland's majority opinion in Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926):

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94.

[68] In McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), Justice Holmes argued that government employment was a privilege and, hence, not deserving of constitutional protection. Since such employment was a privilege, the government could attach conditions such as restrictions on political activity. The analysis was expanded to other constitutional rights in subsequent cases, *see* Barsky v. Board of Regents, 347 U.S. 442 (1954). The rights-privileges distinction, which would have excluded state-created property interests from procedural due process protection, has been largely abandoned. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). *See also* Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Comment, *Another Look at Unconstitutonal Conditions*, 117 U. PA. L. REV. 144 (1968). The state cannot now deny a shareholder an action in state court simply on the grounds that an interest in a corporation is merely a privilege, to which the state may attach conditions.

One may encounter the argument that because the termination of a shareholder's interest in a corporation is not "state action," the fourteenth amendment's procedural due process requirements do not apply. But clearly, a corporation's ability to terminate a shareholder's interest by liquidation, merger or sale of substantially all the assets is made possible solely by state statute.

tection.[69] Under this reasoning, an exclusivity section represents the state's determination that a shareholder's interest in a corporation is not property and thus does not require procedural due process protection. An exclusivity section implies that a shareholder's property right is simply a right to an economic return. As such, a shareholder does not have a right to hold up a merger, consolidation or other change of the corporate enterprise.[70]

One might term this as the "Monte Carlo" view of a shareholder's interest in his corporation. A shareholder's interest is like a chip on a roulette table. It is fungible with other investments—mutual funds, savings accounts and pension interests.[71] There are no real rights to control the

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[69] *Cf.* Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961): "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with [procedural] due process of law."

[70] The philosophical basis of limiting a shareholder to his appraisal remedy is based on a view that a shareholder has no real interest in the *form* of his or her investment. In explaining the old view that a shareholder has an interest in the nature of his investment, Professor, later Dean, Manning wrote:

> [O]ne's history is part of his present. Monuments often outlive the philosophies they were built to glorify. The pyramids are one example. The appraisal statutes are another. To the nineteenth century mind contemplating such matters, a corporate merger was a major and significant event. In the first place it involved a species of corporate assasination. A "corporation" died. . . . The shareholders of corporation A somehow became shareholders of corporation B and no longer shareholders of corporation A. The mere statement of such a preposterous proposition did violence to fundamental principles. How *could* a man who owned a horse suddenly find that he owned a cow? Furthermore—or perhaps this is but another statement of the same point—even if this transmutation could somehow be brought off, surely it could not constitutionally be done without the owner's consent.

Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 246 (1962).

Some commentators have attacked the view that a shareholder has an interest in his investment's form.

> One does not invest in a unique corporate entity or even a particular business operation, but rather in a continuous course of business which changes over a long period of time. . . .
>
> It does seem, however, that an unrealistic importance has been attached to the investor's interest in changes in corporate form.

Folk, *supra*, note 26, at 1280-81 (footnote omitted). However, some courts have noted that shareholders may be realistically interested in elements other than an economic return on their investment.

> " 'Money may well satisfy some or most minority shareholders, but others may have differing investment goals, tax problems, a belief in the ability of . . . management to make them rich, or even a sentimental attachment to the stock which leads them to have a different judgment as to the desirability of selling out.' "

Jutkowitz v. Bourns, Cal. Super. Ct. C.A. 000268 (Nov. 19, 1975), *cited in* Singer v. Magnavox, 380 A.2d 969, 977 n.8 (Del. 1977).

[71] For arguments that market price reflects the value of the stock in terms of its rights and limitations, *see* Hyman, *Do Lenient State Incorporation Laws Injure Minority Shareholders*, in THE ATTACK ON CORPORATE AMERICA 166, 170 (M. Johnson ed. 1978).

The shareholder's interest in a "close" corporation is not, however, as fungible as an in-

form and nature of the investment. Thus, if the shareholder's interest is limited solely to an "economic return," then the appraisal remedy does not deprive the shareholder of any value.[72]

The problem with this reasoning is that if the state legislature can unilaterally determine what constitutes "property" under the Constitution, then a danger exists that the state may define "property" so as to avoid constitutional obligations.

For example, while the Supreme Court has stated that a teacher's interest in tenure can be considered "property" for the purposes of proce-

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vestment in a publicly-held corporation. This type of investment is *dependent* upon the identity of the investment relationship. Three elements determine not only the identity of that investment relationship but the value of it as well.

First, shares of the close corporation are held, usually, by a limited number of persons and are not, if at all, widely marketed or publicly traded. Wasserman v. Rosengarden, 84 Ill. App. 3d 713, 406 N.E.2d 131 (1980). *See, e.g.*, F. O'NEAL, CLOSE CORPORATIONS § 1.02 (2d ed. 1971); Covington, *The Tennessee Corporation Act and Close Corporations for Profit*, 43 TENN. L. REV. 183, 187 (1976); Kessler, *The New Jersey Business Corporation Act and the Close Corporation*, 23 RUTGERS L. REV. 632 (1969) [hereinafter cited as Kessler, RUTGERS]; O'Neal & Moeling, *Problems of Minority Shareholders in Michigan Close Corporations*, 14 WAYNE L. REV. 723 (1968). Secondly, few corporations have distinct spheres of management and ownership interests, as management is usually composed of investors. F. O'NEAL, *supra*, at § 5(c); Kessler, RUTGERS, *supra*, at 641-49. *See generally* O'Neal & Moeling, *supra*, at 723. *But see* Benitendi v. Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829 (1945); Jackson v. Hooper, 76 N.J. Eq. 592, 75 A. 568 (1910) (voting agreements which grant a shareholder disproportionate voting power judicially invalidated). *See* note 82 *infra*, for a discussion of sections 34 and 35 of the MBCA which authorize, through the use of shareholder agreements and provisions in the by-laws, direct shareholder management. Kessler, *Hooray(?) for the Model Act—the 1969 Revision and the Close Corporation*, 38 FORDHAM L. REV. 743 (1970) [hereinafter cited as Kessler, FORDHAM]. Finally, shareholders in the close corporation usually exercise some control over the transferability of corporate shares through the use of share-transfer restrictions. *See* note 82 *infra*, for a discussion of section 54(h) of the Model Act which authorizes the use of share-transfer restrictions. L.L. Minor Co. v. Perkins, 246 Ga. 6, 268 S.E.2d 637 (1980). *See generally* Gregory, *Stock Transfer Restrictions in Close Corporations*, 1978 S. ILL. U.L.J. 477; O'Neal & Moeling, *supra*, at 725-31; Oppenheim, *The Close Corporation in California—Necessity of Separate Treatment*, 12 HASTINGS L.J. 227, 234-40 (1961); Painter, *Stock Transfer Restrictions: Continuing Uncertainties and a Legislative Proposal*, 6 VILL. L. REV. 48 (1960). There is a monetary necessity in maintaining the corporate identity by restricting entry into the corporation to those investors who can contribute to the business in a profitable manner. This is often referred to as *delectus personae*, or keeping the corporation closed. J. CRANE & A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIPS § 5(c) (1968) (the phrase literally means "choice of person"); Kessler, FORDHAM, *supra*, at 745 (control over the admission of new participants as a matter of self-survival).

Thus, the "fungibility" of the investment, and ultimately its value, is dependent upon the identity of the corporation and the degree of control which an investor has *vis-à-vis* other investors. Unlike the over-the-counter investment, the nature of the close corporation investment is best described as being a shared, dependent interest. *See generally* Hetherington, *Special Characteristics, Problems and Needs of the Close Corporation*, 1969 U. ILL. L.F. 1, 20-23.

[72] Since "cashing out" the shareholder by means of the appraisal remedy represents a fair valuation of his interest, under this theory the shareholder is entitled to no more.

dural due process, it concedes that the ultimate determination of whether it is property rests with state law.[73] Suppose a state legislature sought to punish a feisty state university by enacting a statute that declares that tenure is not "property."[74] Must the courts accept this characterization and refuse to require procedural due process in the tenure process? Suppose the legislature, to avoid the obligation to compensate, declared that easements in land, water rights, or even land was not "property" for the purposes of procedural or substantive due process.[75] The state should not be able to nullify the Constitution by evasive statutory definitions of property.

First, the sources that define "property" are not simply statutory. The Supreme Court has implied that all sources of state law must be considered: statutes, court decisions, traditions, and practice.[76] Second, since state courts ultimately determine what a statute means, they have an inherent "supervisory" role in determining what constitutes "property" under the Constitution. The definitive interpretation of a statute, such as one that declares tenure not to be "property" or that a shareholder's interest does not extend to the form of the investment, is that meaning given it by the state courts.[77]

Third, statutory definitions run the danger of being self-serving. Legislative decisions, made in the political arena, involve compromises and trade-offs. In such a setting, the legislature might be tempted to define what state property is by the expediency of who deserves constitutional

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[73] Perry v. Sindermann, 408 U.S. 593 (1972).

[74] For example, in *Perry*, the Court held that a non-tenured teacher aware of rules and understandings, officially promulgated and fostered, was entitled to rely on a belief that his interest in his employment was "property" and therefore protected by the procedural due process requirements of the fourteenth amendment. Suppose, however, the state legislature was to declare by statute that despite such rules and understandings, all non-tenured teachers did not have a "property" interest in their employment; would the courts have to accept such a state statutory characterization? The problem is that a state could avoid the application of the fourteenth amendment by declaring by statute that many interests were not property.

[75] *See* Demorest v. City Bank Co., 321 U.S. 36 (1944) (state court reinterpretation of law); Board River Power Co. v. South Carolina, 281 U.S. 537 (1930); Muhlker v. Harlem R.R., 197 U.S. 544 (1905) (new statute challenged as deprivation of due process). A similar question is raised in applying the contracts clause of the Constitution. The term "contract" is not defined in the Constitution. Suppose a state attempts to define by statute a former contractual right as no longer being a "contract" and thus, not protected under the Constitution? *See* Indiana v. Brand, 303 U.S. 95 (1938).

[76] *See* Board of Regents v. Roth, 408 U.S. 564 (1972): Property interests "stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. *See also* Perry v. Sindermann, 408 U.S. 593 (1972) (rights to retention by non-tenured faculty grounded in rules and understandings of university); Goldberg v. Kelley, 397 U.S. 254 (1970) (entitlement to welfare benefits grounded in statute).

[77] The courts have the "last word" in giving a definitive meaning to statutes. Levy, *supra* note 19, at 5.

protection.

On the other hand, under the traditional explanation of judicial behavior, courts must declare what is the true state of affairs.[78] Thus, in determining what constitutes "property" the court would look to the "real world."[79] Since courts must define what is property as opposed to what should be property,[80] there is wisdom in ultimately deferring to the courts' definition. Indeed, the judicial branch's responsibility to preserve the integrity of the Constitution requires scrutinizing the legislative definitions. Without such judicial review, access to constitutional protection can be manipulated by state legislatures.

Thus, it is the state courts which must ultimately judge the fairness of statutory definitions of property, such as those contained in exclusivity provisions.[81] The essence of this question is whether it is objectively accurate to describe a shareholder's interest as simply the right to an economic return.[82] Again, only the courts can properly decide this issue.

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[78] *Id.* at 2.

[79] Some feel that, the same danger of employing self-serving property definitions exists with state courts. They too are often accused of defining state-created property in light of their determinations of what deserves due process protection. *See* Hughes v. Washington, 389 U.S. 290 (1967) (Stewart, J., concurring); Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (state supreme court determination that certain water rights no longer existed held to be a "taking").

Two constraints, however, bind judicial, and not legislative, definitions. First, the courts' normal institutional role is to determine "what is," not "what should be," as the legislatures must do. Therefore, courts do not normally see themselves as acting in a policymaking capacity and are not concerned with, for example, the wisdom of certain choices concurring the state fisc. Secondly, if a state court's intent is to define property to evade the constitution, under the "constitutional evasion" doctrine, the Supreme Court will reexamine, as a federal question, such characterization's legitimacy. *See* Ward v. Love County, 253 U.S. 17, 22 (1923); Terre Haute & Indianapolis R.R. v. Indiana, 194 U.S. 580 (1904).

[80] In other words, the courts may not say that certain interests are "property" simply because it is wise policy to consider them so. Rather, they must justify their holding on the grounds that it is "true" that such interests are property. *See* Levy, *supra* note 19, at 2: "In the traditional view appellate lawmaking is unthinkable: judges are not to 'pronounce a new law, but to maintain and expound the old one.' The judge merely *finds* the preexisting law; he then merely *declares* what he finds."

[81] The Hawaii Supreme Court has already given its insights into this issue in Perl v. IU Int'l Corp., 61 Hawaii 622, 607 P.2d 1036 (1980).

[82] Clearly, in a close corporation, the shareholder's interest is much more than the mere expectation of an economic return. *In re* Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954); Gearing v. Kelley, 11 N.Y.2d 201, 182 N.E.2d 391, 227 N.Y.S.2d 897 (1962). For example, where the statute requires a two-thirds vote to amend the articles, a shareholder who accumulates more than one-third of the stock has acquired the ability to veto certain corporate transactions and participate in the management of the corporation.

It is conceded that at the other end of the spectrum, a shareholder's interests and expectations in a large, publicly held corporation do more closely resemble the right to an economic return. Manning, *supra* note 70. However, this contrast only brings out one more weakness in the Model Act. *See generally* O'Neal, *Close Corporation Legislation: A Survey and an Evaluation*, 1972 DUKE L.J. 867 (1972). The Model Act attempts to bring within its standards both publicly held corporations and closely held corporations. Yet, the nature of a

CONCLUSION

If one agrees with the assertion that corporation codes do not appropri-

shareholder's interest in these two types is clearly different. *See* note 71 *supra*.

Given this inclusive nature, it is important that the judiciary take an interventionist stance and develop appropriate standards for the exercise of corporate power within the context of the close corporation. The differences between the close and public corporation indicate a need to address different interests. For example, the shareholder's investment in a close corporation is a shared one, and derives much of its value to the shareholder from the investor's ability to exercise control over the corporation in a manner different from that exercised within the context of a public corporation. *See generally* Hetherington, *supra* note 71, at 20-25; Andre, *Louisiana Close Corporations: Problems of Control Under the Louisiana Business Corporation Law*, 45 TUL. L. REV. 259, 260-62 (1971).

Because the reality of a shareholder's interest in a closely held corporation is fundamentally different from that of a publicly held corporation, the judicial attitude in each situation should be different.

There are four sections of the Model Act which deserve special attention from the judiciary when applied to the close corporation. For example, sections 35 and 34, in conjunction, permit the incorporators to substitute direct shareholder management for the traditional board of directors through the use of shareholder agreements. Section 34 does not, however, provide any standard by which courts can determine the validity of the agreements. This raises the question of how far the judiciary should go in protecting, if at all, minority interests in the close corporation. *See generally* Hetherington, *supra* note 71, at 20-25.

Section 54(h) poses similar problems. Although the Model Act authorizes the imposition of restrictions upon the sales or transfers of corporate stock, it does not define valid restrictions. The only requirement is that the restriction must not be inconsistent with law. MBCA, *supra* note 1, at § 54(h). The Model Act does not elaborate further, in that section nor in any other section, on the extent or nature of permissible restrictions. By failing to qualify the provision with appropriate language or by example, as other states have done, *e.g.*, N.J. STAT. ANN. § 14A:7-12(3) (West 1969); DEL. CODE ANN. tit. 8, § 202 (1975), the drafters have shifted the burden of developing these proper standards to the state courts.

Generally, the common law standard has been "whether the restraint is sufficiently needed by the particular enterprise to justify overriding the general policy against restraints on alienation." 12 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5461.3 (rev. perm. ed. 1971). Although sufficiently broad to cover every possible situation the common law standard does not illuminate the necessary considerations. When the validity of these restrictions is at issue, the state courts should develop the standard in light of three major considerations: (1) the nature of the close corporation in terms of the principle of *delectus personae;* (2) the position of the minority shareholder and potential overreaching by fellow investors, Elson, *Shareholders' Agreements, A Shield for Minority Shareholders of Close Corporations*, 22 BUS. LAW. 449, 451 (1967); and (3) whether the state has any special interests to protect. Groves v. Prickett, 420 F.2d 1119 (9th Cir. 1970) (restrictions on alienation of shares must not unreasonably deprive a shareholder of substantial rights); Treadway Cos. v. Care Corp., 490 F. Supp. 668 (S.D.N.Y. 1980) (court imposed duty on controlling shareholder to protect minority shareholder's interests); Galler v. Galler, 32 Ill. 2d 16, 203 N.E.2d 577, 585 (1964).

Another section of the Model Act which is open to abuse in the close corporation context is section 78, which gives the board of directors the power to mortgage or pledge all the corporate assets even though the transaction is not in the usual and ordinary course of business. The board of directors is statutorily permitted to exercise this power without shareholder consent; and barring shareholder agreements providing otherwise, *see* note 71 *supra*, standards may be developed which are distinct from those of a public corporation. Fales, *Judicial Attitudes Towards the Rights of Minority Stockholders*, 22 BUS. LAW. 459 (1967);

ately balance shareholder protections and management powers, then the primary blame must rest with the state legislature's inability to meaningfully choose desirable policies. One proposal designed to ameliorate this state impotence is federal chartering of multistate corporations.[83] Such proposals, however, have not received widespread support. In the alternative, this article suggests that state courts assume primary responsibility for ensuring fairness in corporate transactions by applying common law doctrines and standards.

The proposed adoption of the Model Act in Hawaii presents two obstacles to judicial usurpation of the legislative function in corporation law. First, should the common law doctrines not explicitly retained in the Model Act be viewed as surviving its enactment, that is, *expressio unius est exclusio alterius*?[84] For example, since the Model Act does not deal with a majority shareholder's fiduciary duty to minority shareholders, does enactment of the Model Act indicate that the legislature intended to nullify this common law concept? In the cases of all corporation codes, including the Model Act, the answer should be no. The Model Act, unlike, for example, the proposed Federal Securities Codes, does not purport to be a "code" in the sense that it completely replaces the common law. The Model Act was not intended to be so comprehensive. Moreover, its purpose, as the primary purpose of all state corporation codes, is to define the corporation's powers. Its enabling provisions should not be construed as nullifying common law doctrines regarding the fairness of the use of such powers.

The second issue, whether the courts should abide by legislative attempts to explicitly abrogate common law doctrines, is more troublesome. Ordinarily, the courts should abide by the legislature's intent in construing statutes. Thus, if the legislature intends to replace a common law standard with a new statutory one, the courts should usually honor this intent. However, in applying fiduciary standards of reviewing corporate transactions for fairness, courts may ignore such attempts to nullify their equitable powers. First, the states have a residual power to "do equity" when a case is properly presented. Second, since state legislatures cannot meaningfully formulate policies in the corporate area, the ultimate responsibility to ensure fairness falls on state courts. Third, state courts have the final responsibility for defining the nature and extent of state-created property interests, including the shareholder's interest in the

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see also O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873 (1978) [hereinafter cited as O'Neal, BUS. LAW.]; 33 N.Y.U.L. REV. 700 (1958). There may be instances, for example, when close corporations may have need for different standards of conduct as to what constitutes oppressive acts, misapplication or waste of corporate assets. *See* O'Neal, BUS. LAW., *supra*, at 884; Fales, *supra*, at 459; O'Neal & Moeling, *supra* note 71, at 732-33; Hetherington, *supra* note 71, at 1.

[83] *See* R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 15-17 (1976).

[84] *See* 2 J. SUTHERLAND, STATUTORY CONSTRUCTION 123 (4th ed. 1973).

corporation.

The Model Act has two objectives: to define corporate powers and to set forth the conditions or standards under which those powers may be fairly exercised. The first objective should be the only purpose of state corporation codes. The second objective is more ideally left to the state courts. A legislature cannot adequately anticipate all of the possible schemes and combinations that may amount to unfairness. The determination of fairness is better left to the courts, which can decide each case on its own facts. Moreover, if state corporation codes can preclude judicial scrutiny for fairness, a single state could effectively eliminate any concept of fiduciary duties. The only adequate response to such a trend would be an understanding by all state courts that the primary responsibility for enforcing fairness, state statutes notwithstanding, lies with them.

Thus, state legislatures may appropriately claim the right and responsibility of setting forth, by statute, corporate powers. Indeed, since corporations and their concomitant powers exist only by the force of state statute, it is only the legislature which can create corporate powers. But, the formulation of standards by which to judge the proper use of those powers should be left to the state courts. Since the legislature cannot prevent the courts from adopting such an attitude, the courts must simply realize that in this area there are adequate justifications for an interventionist, as opposed to a deferential posture. Indeed, absent a federal act setting fiduciary standards, a recognition of judicial responsibility in supervising corporate transactions is the only means of restoring some balance between shareholder protections and management powers.

OBSERVATIONS ON A NEW HAWAII CORPORATION STATUTE

Larry D. Soderquist*

In determining whether the Hawaii corporation statute[1] should be changed, and if so, how change should be accomplished, three questions should be answered. First, are there problems with the current statute that are great enough to justify the efforts involved in change? Second, if change is to be made, what basic philosophy should be followed, restrictive or enabling? Third, how should change be accomplished: by piecemeal revision, by custom drafting a new statute or by adopting a statute drafted by others?

I. Should the Hawaii Corporation Statute Be Changed?

The first question, whether change is needed, is relatively easy to answer. The current statute is, as one might expect of a statute with century-old origins,[2] a blend of archaic and modern. The archaic should go. For example, the $1,000 paid-in capital requirement of section 416-17 of the Hawaii Revised Statutes, which used to be common in corporation statutes, is now generally viewed as meaningless. It cannot possibly serve in any meaningful way to protect persons dealing with corporations.[3]

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* Professor of Law, University of Notre Dame; Visiting Professor of Law, Vanderbilt University. B.S., 1966, Eastern Michigan University; J.D., 1969, Harvard University.

[1] For present purposes, the following chapters of Hawaii Revised Statutes (1976 & Supp. 1979) are considered to constitute the corporation statute: Chapter 416 (Corporations, Generally), Chapter 417 (Consolidation and Merger of Corporations), and Chapter 418 (Foreign Corporations).

[2] The earliest antecedent to any provision in the corporation statute appears in the Hawaii Civil Code of 1859. *See* Hawaii Rev. Stat. (1976 & Supp. 1979), preface at iv and historical notes throughout.

[3] Not only is $1,000 inconsequential by modern standards, but the idea that paid-in capital protects creditors in any real sense is outdated. It perhaps goes back to the trust-fund doctrine popular in the last century, under which stated capital was viewed as a trust for the payment of corporate debts. *See* Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 191-95, 50 N.W. 1117, 1119-20 (1892). Stated capital, of course, does not represent a fund at all. To determine if cash is or can be made available to pay a particular debt, one must look not at paid-in capital but at the corporation's specific assets and liabilities. *See generally* 40 U. Cin. L. Rev. 823 (1971).

Rather, its likely consequence would be to cause innocent violations by the unsophisticated with possible attendant liability for the incorporators and directors.[4] Likewise, mandatory cumulative voting, as provided for in section 416-74, serves no purpose in most public corporations[5] and is not desired by the shareholders in many nonpublic corporations. The fact that cumulative voting can be mandated by a single shareholder serving a demand forty-eight hours before a meeting seems particularly troublesome.[6] Requiring at least one director to be a Hawaii resident, as provided in section 416-4, seems a throw-back to a more parochial period. It can have no important effect in any case since any corporation can technically comply simply by electing a dummy director.

These and other such problems with the current statute can obviously be lived with. No doubt they seem relatively minor to Hawaii lawyers who know the statute well and have learned to practice under it. This statute cannot, however, be expected to enjoy much favor outside Hawaii. Lawyers for a mainland investor or corporation wishing to establish a business in Hawaii may advise that the business should be incorporated in another state and simply qualify in Hawaii as a foreign corporation. To the extent that this occurs, it means Hawaii will exercise less control over these new corporations than if they were incorporated in Hawaii. Perhaps more importantly, the current statute can affect the way lawyers and their clients view Hawaii as a place to do business. Based on this statute, some lawyers will view Hawaii as uncongenial, and they may convey this impression to their clients.

II. What Basic Philosophy Should Be Followed in Changing the Statute?

There are two basic philosophies that might be followed in a corporation statute: restrictive and enabling.[7] Under the restrictive philosophy, statutory law restricts the corporation and its officers and directors to

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[4] *See* Hawaii Rev. Stat. § 416-17 (1976).

[5] The purpose of cumulative voting is to give a shareholder or group of shareholders holding some significant percentage of a corporation's stock the right to elect at least one director. This makes sense in many nonpublic corporations, and it is often provided for in the corporate charters of nonpublic corporations incorporated under statutes that do not require cumulative voting. In the public corporation, there is usually either no group that holds a significant percentage of the stock or if there is such a group, as a practical matter it has the power to choose at least some of the directors irrespective of cumulative voting. In these corporations, cumulative voting is simply a confusing nuisance.

[6] *See* Hawaii Rev. Stat. § 416-74 (1976). Under this provision, corporate officers and their counsel must sometimes be prepared to handle voting in two ways until shortly before a meeting. Needless confusion and errors leading to invalid elections must occur as a result of this provision.

[7] *See* Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663, 664-68 (1974).

certain forms of conduct in order to achieve certain social or other goals. This might involve something as mundane as requiring that directors act only at meetings attended in person,[8] or it might involve giving shareholders more power in corporate decision making than they traditionally have had.[9] A good example of a restrictive provision in the current statute is the provision, referred to above, requiring at least one director be a resident of Hawaii.[10] Another example is the requirement that a corporation not engage in business until three-fourths of its authorized stock has been subscribed to, of which at least ten percent (totaling at least $1,000) has been paid for.[11]

The enabling philosophy operates on the idea of allowing corporate officers and directors fairly wide latitude in the management of the corporation. This philosophy is evidenced by provisions such as those: (1) allowing a corporation to have as few as one director,[12] (2) allowing written consents in lieu of meetings, (3) allowing telephone board meetings, (4) allowing a corporation's charter to specify purposes simply as "all lawful purposes,"[13] (5) allowing a corporation to choose or reject preemptive rights and cumulative voting, and (6) allowing shareholders basically only the power to elect directors and approve or disapprove certain extraordinary actions.

A check through the current Hawaii statute quickly reveals that it is basically enabling. It contains some of the provisions just mentioned,[14] along with others evidencing the same philosophy.[15] This has been the trend in state corporation statutes for most of this century, led by Delaware and followed by virtually every other state.[16] The enabling philoso-

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[8] This was the standard until several years ago when statutes began allowing directors to act by consent in lieu of meetings, *see, e.g.*, ABA-ALI MODEL BUS. CORP. ACT § 44; DEL. CODE ANN. tit. 8, § 141(f) (1974); HAWAII REV. STAT. § 416-82 (Supp. 1979); N.Y. BUS. CORP. LAW § 708(b) (McKinney Supp. 1979-1980), or by telephone meetings, *see, e.g.*, DEL. CODE ANN. tit. 8, § 141(i) (1974); HAWAII REV. STAT. § 416-83 (Supp. 1979); N.Y. BUS. CORP. LAW § 708(c) (McKinney Supp. 1979-1980).

[9] Traditionally, the shareholders' power has basically been limited to electing directors and voting on extraordinary matters such as charter amendments, mergers, and sales of substantially all the corporation's assets.

[10] HAWAII REV. STAT. § 416-4 (Supp. 1979).

[11] HAWAII REV. STAT. § 416-17 (1976).

[12] Traditionally, corporations were required to have a minimum of three directors.

[13] Under older statutes, corporations typically were required to state their purposes with specificity. Some statutes still require this. *See, e.g.*, N.Y. BUS. CORP. LAW § 402 (McKinney 1963).

[14] *E.g.*, HAWAII REV. STAT. §§ 416-4 (Supp. 1979) (allowing only one director if the corporation has only one shareholder), 416-24 (Supp. 1979) (allowing a corporation to deny or limit preemptive rights), 416-82 (allowing directors' consents in lieu of meetings) and 416-83 (Supp. 1979) (allowing directors' telephone board meetings).

[15] *E.g.*, HAWAII REV. STAT. §§ 416-35 (Supp. 1979) (allowing indemnification of officers, directors, employees, and agents) and 416-79 (Supp. 1979) (allowing directors the power to adopt or amend by-laws).

[16] *See* Cary, *supra* note 7, at 664-66.

phy should also be followed in changing the Hawaii statute. Over the last several years, a number of commentators have advocated the adoption of a more restrictive corporate regulatory philosophy than that which currently prevails.[17] It seems quite clear, however, that corporate regulation permeated with a restrictive philosophy cannot, as a practical matter, be effective at the state level.[18] Since corporations can incorporate in a state with an enabling statute and do business elsewhere by qualifying as a foreign corporation,[19] only federal regulation can be expected to significantly affect corporations that wish to avoid a state statute following a restrictive philosophy.[20]

III. How Should Change in the Statute Be Accomplished?

The current statute can be changed in three ways: (1) piecemeal revision, (2) custom drafting of a new statute, or (3) adopting, in whole or with revisions, a statute drafted by others. Piecemeal revision is the least desirable. The effort and cost involved would be substantial, and the result would be unsatisfactory. Judged by the standard of modern state statutes, the Hawaii statute is very much out-of-step and appears jerry-built because of its many revisions over the decades. It would be difficult to avoid these defects without virtually a complete rewrite.

Custom drafting a new statute is likewise an unsatisfactory alternative. The effort and cost would be greater than a piecemeal revision, although the results would be better. It would be difficult, however, to foresee problems of coverage and interpretation. As these problems surface after adoption, corrective amendments would inevitably follow. This approach would also essentially involve reinventing the wheel. It would be a needless exercise, no matter how satisfactory the final results.

For these reasons alone, a statute drafted by others should be adopted in Hawaii. There is, however, a more important reason. Only a few individual state corporation statutes generate enough litigation to flesh-out many statutory provisions.[21] If lawyers in Hawaii are to have the benefit of decisions interpreting a substantial portion of the Hawaii statute, Hawaii will have to adopt a statute that is interpreted by courts other than its own. The two most obvious choices would be the Delaware statute and

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[17] *See, e.g.*, R. Nader, M. Green & J. Seligman, Taming the Giant Corporation (1976) [hereinafter referred to as Nader, Green & Seligman]; Cary, *supra* note 7; Schwartz, *Symposium, Federal Chartering of Corporations: An Introduction*, 61 Geo. L.J. 71 (1972).

[18] *See, e.g.*, Nader, Green & Seligman, *supra* note 17, at 60-61; Cary, *supra* note 7, at 668; Schwartz, *supra* note 17, at 74-78.

[19] For a basic discussion of the constitutional basis for a corporation's right to do business as a foreign corporation, *see* H. Henn, Law of Corporations 126-27 & 160-63 (2d ed. 1970).

[20] *See* Schwartz, *supra* note 17.

[21] The statutes of Delaware and New York come first to mind, followed perhaps by the California statute.

the Model Business Corporation Act.

The Delaware statute is appealing. It is the product of careful drafting by experts, and it has benefitted from continual refinement. It is well known to corporate lawyers around the country, many of whom feel as comfortable with this statute as with that of their own state.[22] Because of the large number of corporations incorporated in Delaware, the statute is subject to far more litigation than that of any other individual state. Decisions interpreting the statute are generally technically sound since the Delaware judges deciding corporation law cases are sophisticated with respect to corporation law.

On balance, however, the Model Business Corporation Act is even more attractive. The Model Act is the product of the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association.[23] The members of the committee are sophisticated business lawyers who have taken great care in drafting the Model Act and amending it through the years.[24] This care can be expected to continue, so that in the future the committee will, in effect, serve as a highly competent amendment proposing committee for any state that has adopted the Model Act.

The Model Act has served as the basis for the corporation laws of over half the states[25] and has significantly influenced the statutes of several other states.[26] Lawyers seeking guidance in the interpretation of one of the Model Act's provisions can look to the court decisions of states that have adopted the provision. Such decisions can be found in the Model Business Corporation Act Annotated,[27] which not only cites cases but lists relevant secondary materials and provides forms helpful in practice.

Organizationally, the Model Act is more attractive than the Delaware statute. The Delaware draftsmen have sometimes included in one section material that is separated into several sections in the Model Act.[28] As a

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[22] Many corporate lawyers practicing in states other than Delaware will, for example, provide written opinions on Delaware corporation law, though not on the law of any other state.

[23] *See* Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. 1 (1950), for an early discussion of the Model Act and the role of the Committee on Corporate Laws (then called the Committee on Business Corporations).

[24] The Committee on Corporate Laws publishes amendments, in proposed and final form, periodically in *The Business Lawyer*. Recent amendments have appeared in 33 BUS. LAW. 931 (1978) (sending financial statements to shareholders), 34 BUS. LAW. 1595 (1979) (indemnification of corporate personnel), and 34 BUS. LAW. 1867 (1979) (proposed amendments to financial provisions).

[25] *See* 1 MODEL BUS. CORP. ACT ANN. § 1, Comment ¶ 2 (2d ed. 1971, Supp. 1973 & Supp. 1977). The comments following each provision of the Model Act indicate which states have adopted the provision in whole, in part, or with modifications.

[26] *Id.*

[27] This is a research project of the American Bar Foundation and is published for the Foundation by West Publishing Company. In its second edition, it consists of five volumes: three main volumes published in 1971 and two supplements published in 1973 and 1977.

[28] *Compare* DEL. CODE ANN. tit. 8, § 141 (1974 & Supp. 1978) *with* ABA-ALI MODEL BUS.

result, it is sometimes more difficult to find provisions in the Delaware statute than in the Model Act.

Since the Model Act is subject to continual amendment, the question arises as to what version of the Model Act to adopt: the current version or a version that excludes some of the amendments. There should be little question about amendments prior to those announced in the April 1980 issue of *The Business Lawyer*.[29] The prior amendments were mostly refinements that should find general acceptance among the Model Act states and the wider corporate community. Some of the changes announced in April 1980 are, however, quite avant-garde. These amendments all relate to financial matters and make good sense. Among other things, they do away with the concepts of par value, stated capital and treasury stock;[30] concepts unquestionably archaic and confusing. The question for the Hawaii legislature, however, is whether it wants to be in the vanguard for change in this area. It may be that these suggested changes will find general acceptance, but this is far from certain.[31] If Hawaii adopts these provisions while most other states do not, Hawaii will suffer somewhat from being out of step.

Finally, if the Model Act is to be adopted, the legislature must decide whether to adopt it as is, with or without the latest amendments, and whether to (1) add provisions not currently included or (2) rewrite some of the current provisions in an attempt to improve them. So long as the draftsmen are careful not to create conflicts, certain provisions not found in the Model Act could be added without creating problems.[32] The legislature should consider adding a provision recognizing that, when making corporate decisions, the managers of public corporations have an obligation to consider the interests of groups such as customers and persons in the local community.[33] Admittedly this would break new ground, and some, at least, would consider it restrictive. On the other hand, a good argument can be made that it would be enabling since such a provision would free managers from the general rule that corporate decisions are to be made solely in the interest of the shareholders.[34]

CORP. ACT §§ 35-37, 39, 40 & 42-44 (1974).

[29] *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 35 BUS. LAW. 1365 (1980).

[30] *Id. Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867 (1979).

[31] Lawyers and corporations have become used to working with the financial provisions in existence prior to the recent amendments, and relatively few have exerted pressure for change.

[32] A good example would be the provision allowing board meetings by telephone as currently provided in HAWAII REV. STAT. § 416-83 (Supp. 1979).

[33] *See* Soderquist & Vecchio, *Reconciling Shareholders' Rights and Corporate Responsibility: New Guidelines for Management*, 1978 DUKE L.J. 819.

[34] *Id.* at 823-25. There is reason to believe that in their decisionmaking, corporate managers are presently considering the interests of groups other than shareholders. *Id.* at 843; Brenner & Molander, *Is the ethics of business changing?*, 53 HARV. BUS. REV. 57 (1977). The

On the question of rewriting, there are some technical problems in the Model Act that the legislature might be tempted to correct. For example, the section allowing shareholders to act by consent in lieu of meeting[35] is not included along with other provisions relating to actions by shareholders[36] but rather is buried near the end of the statute among miscellaneous provisions. This by itself might cause little problem, but confusion is created by the fact that the like provision on directors' actions[37] is included along with other provisions relating to directors.[38] As a result, one who looks only at the portions of the statute dealing with shareholders and directors can be misled into believing that the statute does not contain a shareholders' consent in lieu of meeting provision.

Though the temptation may be great to clear up this and other like problems, such an effort is likely to snowball. This will create problems. As language is changed, the ability of lawyers and courts to analogize to the statutes and court decisions of other states will diminish. What is more important, the Model Act, like any other complex statute, is a house of cards; one should be hesitant about tinkering with it. Its provisions interrelate in ways that may not be immediately apparent and serious damage can be done by seemingly beneficial changes. In the final judgment, it would be better to live with minor problems than to chance creating major ones.

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main result of the new rule may, therefore, be to allow corporate managers to be honest with themselves and the world about their reasons for corporate decisions. Soderquist & Vecchio, *supra* note 33, at 843-44.

[35] ABA-ALI MODEL BUS. CORP. ACT § 145.

[36] *Id.* §§ 28-34.

[37] *Id.* § 44.

[38] *Id.* §§ 35-43.

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HAWAII BUSINESS CORPORATION ACT*

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Section 1. Short title.

This chapter's short title is the "Hawaii Business Corporation Act." It will be referred to herein as the "HBCA."

Section 2. Definitions.

Present Hawaii law does not contain a set of definitions analogous to the set provided for by this section. In general, the definitions in HBCA § 2 are straightforward and self-explanatory, however, the definition of one term merits discussion. The term, "insolvent," is defined as the inability of a corporation to pay its debts as they become due in the usual course of its business. A determination of a corporation's present or prospective insolvency is important in determining the validity of certain transactions in which corporate assets are distributed to shareholders, such as purchases and redemptions by a corporation of its own shares, payments of dividends, and distributions of corporate assets to shareholders. These types of transactions are discussed below.

Section 3. Purposes.

Both HBCA § 3 and HAWAII REV. STAT. § 416-1 (1976) generally allow profit corporations to organize for any lawful purpose. However, the present statute, unlike the HBCA, explicitly states that professional corporations must organize under special statutory provisions and that corporations required by other statutes to be organized under those statutes may not be organized under HAWAII REV. STAT. ch. 416 (Corporations, generally).

Section 4. General powers.

Both HBCA and HAWAII REV. STAT. § 416-26 (1976 & Supp. 1980) set forth the general powers of a corporation. The two statutes are virtually identical. Basically, both statutes provide that a corporation has the power to have perpetual existence unless limited by its articles of incorporation, to have a corporation seal, to sue and be sued, to acquire, hold, use, and dispose of real and personal property, to make contracts, to lend money, to make donations to charity, to conduct its business, to make or alter its by-laws, to pay pensions and establish pension plans, and to have and exercise all powers necessary or convenient to effect its purposes.

Section 5. Indemnification of officers, directors, employees, and agents.

HBCA § 5 is virtually identical to the current law under HAWAII REV. STAT. § 416-35 (Supp. 1980) regarding the indemnification of corporate agents, i.e., officers, directors, employees, or other agents of the corporation who are sued in their capacities as representatives of the corporation. With regard to third party suits, indemnification is allowed where the corporate agent has acted in good faith and in a manner he reasonably believed to be in or not opposed to the corporation's best interests and with regard to criminal actions, had no reasonable cause to believe his conduct was unlawful.

Section 5 also allows a corporation to indemnify a corporate agent involved in derivative suits where he has acted in good faith and in the best interests of the

corporation; however, indemnification is limited to the expenses incurred by the agent in the defense of the action. It is also provided that indemnification of expenses may not be granted if the agent is adjudged to be liable for misconduct to the corporation unless a court determined that indemnification is warranted.

Mandatory indemnification is required in the event that the agent successfully defends himself in any action. HBCA § 5 also sets forth a method to determine whether the agent should be indemnified when such indemnification is optional. It is provided that this determination be made by a quorum of disinterested directors or if this is not available, by independent legal counsel, the corporation's shareholders, or the court in which such proceeding is or was pending.

Section 5 further provides for the payment by a corporation of its agent's expenses prior to the final disposition of a matter if the agent or someone on his behalf promises to repay the corporation if it is determined that the agent is not entitled to indemnification.

HBCA § 5 states that indemnification is not exclusive of any other rights available pursuant to a by-law, agreement, or otherwise; shall continue although a person has ceased to be a corporate agent; and shall inure to the benefit of his estate.

The HBCA permits a corporation to maintain insurance on behalf of an agent whether or not the corporation would have the power to indemnify him for the liability covered by such insurance.

This section does not apply to a proceeding against a fiduciary of an employee benefit plan in his capacity as such even though he may also be a corporate agent.

Section 6. Right of corporation to acquire and dispose of its own shares.

Both HBCA § 6 and HAWAII REV. STAT. § 416-28 (1976) afford corporations the right to acquire their own shares, provided that the corporation is not insolvent or will not become insolvent as a result of such purchase. The term, "insolvent," is defined in HBCA § 2(i).

The HBCA limits a corporation's purchasing of its own shares to the extent of its unrestricted earned surplus and if its articles of incorporation or an affirmative vote by a majority of shareholders so authorizes, to the extent of its capital surplus available for such purpose. In comparison, HAWAII REV. STAT. § 416-28 allows a corporation to purchase its shares with any surplus, including paid-in surplus and surplus acquired through the reduction of capital stock.

In addition, the HBCA provides that to the extent that earned or capital surplus is used as a measure of a corporation's right to purchase its own shares, such surplus will be restricted by the value of those shares to the extent they are held as treasury shares. Similarly, HAWAII REV. STAT. § 416-28 provides that treasury shares shall not be considered in computing any surplus available for the purchase of a corporation's own shares.

Notwithstanding the provisions limiting a corporation's right to repurchase its shares to amounts available to the corporation in surplus, both statutes provide that stated capital (paid-in capital, if any) may be used for share purchases for specific purposes. The HBCA permits the use of stated capital to retire fractional shares, collect, or compromise indebtedness to the corporation, pay dissenting shareholders, and retire redeemable shares. HAWAII REV. STAT. § 416-28 is similar to the HBCA except it does not permit the use of paid-in (stated) capital to retire fractional shares or redeemable shares unless such shares were purchased by a

corporate officer or employee under an agreement reserving to the corporation an option or obligation to repurchase the shares.

Section 7. Defense of ultra vires.

This section would be new to Hawaii. It provides that an act by a corporation or a conveyance of real property by or to a corporation may not be invalidated because the corporation lacked the capacity or power to act or participate in a particular transaction. Section 7, thus, abolishes the doctrine of inherent incapacity except in two situations. First, lack of capacity may be asserted by a shareholder against a corporation to bar the performance of a wholly or partially executory contract. In such a situation, the HBCA authorizes a court to set aside or enjoin performance under the contract and to award compensation to all parties for damages other than loss of anticipated profits, provided that all parties to the contract are parties to the proceeding and that such ruling is equitable. Second, lack of capacity may be asserted by the corporation or its shareholders in a representative suit against incumbent or former officers or directors.

Section 8. Corporate name.

This section provides general guidelines for the adoption of a corporate name. This section requires that (1) a corporate name reflect the entity's corporate status, (2) it not be misleading as to the entity's corporate purpose, and (3) it not be deceptively similar to a name which has already been reserved or registered unless written authorization to use such name is obtained and an additional word is used to make the name distinguishable or unless there is obtained a judicial decree which establishes that the entity seeking to use a name has the prior right to use the name in this state.

Present Hawaii law, HAWAII REV. STAT. § 416-11 (Supp. 1980) and HAWAII REV. STAT. § 416-12 (1976), is substantially the same as HBCA § 8 except that it does not expressly state that a corporate name must not be misleading as to the entity's corporate purpose and it does not explicitly provide ways in which an entity may obtain the right to use a name that is deceptively similar to a name already registered or reserved.

Section 9. Reserved name.

HBCA § 9 is similar to HAWAII REV. STAT. § 416-13 (Supp. 1980). Both permit the reservation of a corporate name in certain specified situations. The reservation must be made by filing an application with the director of regulatory agencies. Upon approval by the director, the corporate name will be reserved under the HBCA for a period of 120 days as opposed to 60 days under the present law. Both provide that the holder of a reserved name may transfer its right to exclusive use of such name to another person by filing a notice of such transfer with the director.

Section 10. Registered name.

This section provides that a foreign corporation not authorized to transact business in this state may register its corporate name, subject to HBCA § 8, by filing an application with the director of regulatory agencies. The registration will be

effective until the June 30th following the calendar year in which the application is filed. There is no analogous provision under present Hawaii law except insofar as a foreign corporation may reserve a name under HAWAII REV. STAT. § 416-13 (Supp. 1980).

Section 11. Renewal of registered name.

Under this section, a foreign corporation may renew registration of its corporate name by submitting an application with the director of regulatory agencies within three months before the expiration of its existing registration. Current Hawaii law does not contain a similar provision.

Section 12. Registered office and registered agent.

This section requires that a corporation maintain a registered office and designate a registered agent. The agent may be an individual resident of this state, a domestic corporation, or a foreign corporation authorized to transact business in this state. This section further requires that the business office of a corporation's registered agent be the same as the corporation's registered office.

Current Hawaii law only requires that foreign corporations designate registered agents. HAWAII REV. STAT. § 418-3 (1976).

Section 13. Change of registered office or registered agent.

A corporation may change its registered office or agent by filing a statement with the director of regulatory agencies describing the change and affirming that such a change was authorized by its board of directors. Present Hawaii law only requires that a foreign corporation maintain a registered agent and thus, only addresses the question of how such a registered agent may be changed. HAWAII REV. STAT. § 418-3 (1976).

Section 14. Service of process on corporation.

Under the HBCA, the service of any notice or process issued against any corporation may be made upon any corporate director or officer, or if such persons cannot be found within the state, upon the manager, superintendent, or any person in charge of the property, business, or office of the corporation within the jurisdiction. If none of the foregoing persons can be found within the jurisdiction or if a foreign corporation failed to appoint a registered agent, then service may be made upon the corporation by filing the document with the office of the director of regulatory agencies who is required to notify the corporation of the service.

The provisions of this section are virtually identical to the provisions of HAWAII REV. STAT. § 416-131 (1976). Note that HBCA § 14 does not explicitly provide for service upon a corporation's registered agent.

Section 15. Authorized shares.

Section 15 provides that a corporation shall have the power to create and issue the number of shares stated in its articles of incorporation and affords a corporation flexibility in fashioning the characteristics of its shares as does the current law under HAWAII REV. STAT. § 416-58 (1976) and HAWAII REV. STAT. § 416-59 (1976 & Supp. 1980). Under both HBCA § 15 and the present law, a corporation

may divide its shares into one or more classes, any or all of which may consist of shares with or without par value. Such shares shall have the designations, preferences, limitations, and relative rights provided in the corporation's articles. In addition, when so provided in its articles, a corporation may limit or deny voting rights to certain classes of shares and may afford special voting rights to certain classes.

HBCA § 15 further states that a corporation may issue redeemable, preferred, or special classes of shares as provided in its articles. Such shares may be subject to redemption at a fixed price; entitled to cumulative, non-cumulative, or partially cumulative dividends; preferred over any other class in the event of liquidation; and convertible. This section allows the issuance of shares which are convertible into shares of another class, but prohibits the conversion of shares into shares with a higher priority as to dividends or distribution of assets upon liquidation. Present Hawaii law does not contain this prohibition.

This section also prohibits the *conversion* of shares without par value into shares with par value unless the amount of stated capital which represents the shares without par value is at least equal to the aggregate converted par value of the shares or a sufficient amount is transferred from surplus to stated capital to cover any deficiency. HAWAII REV. STAT. § 416-58 prohibits the *issuance* of convertible shares unless the capital represented by the convertible shares plus any additional value required to be paid upon conversion is at least equal to the consideration required for the shares to be issued pursuant to the conversion.

Under present HAWAII REV. STAT. § 416-58, the characteristics of a class of shares may be determined by the articles of incorporation, the vote of shareholders, or if permitted by the articles, the board of directors. Under HBCA § 15, the characteristics of classes of shares are fixed by the articles of incorporation and the board of directors can fix only certain characteristics pursuant to HBCA § 16.

Section 16. Issuance of shares of preferred or special classes in series.

Section 16 allows a corporation to divide and issue any class of special or preferred shares in series if its articles of incorporation so provide. If shares are issued in series, they must be clearly designated as such. The rights and preferences of different series of shares may be fixed by the articles of incorporation.

All shares of a given class must be identical except that there may be variations between different series as to the following: rate of dividend, right of redemption, amount payable upon liquidation, sinking fund provisions, right to and provisions for conversion, and voting rights. Present Hawaii law does not contain the foregoing limitations.

HBCA § 16 further provides that the board of directors may divide special and preferred classes of shares into series and determine the relative rights of each such series to the extent authorized by the articles of incorporation and to the extent that the articles have not established series and determined their relative rights. Under HAWAII REV. STAT. § 416-58 (1976), the board of directors may, if authorized by the articles of incorporation, fix any of the rights of series of stock, not just relative rights, and any such rights may also be fixed by resolution of shareholders.

For the board of directors to establish a series under the HBCA, it must adopt a resolution setting forth the designation of the series and the relative rights and

preferences; such resolution becomes effective upon the filing pursuant to HBCA § 55 of a statement detailing the resolution and circumstances regarding its adoption. HAWAII REV. STAT. § 416-58 contains a similar filing requirement.

Section 17. Subscription for shares.

Section 17 deals with a corporation's rights against and duties to a subscriber for its shares. It specifies that subscriptions for shares of an unorganized corporation be in writing and irrevocable for six months unless provided otherwise in the subscription agreement or unless all the subscribers consent to a revocation. Payments must be made at such time as determined by the board of directors unless the subscription agreement provides otherwise. The board's call for payment on subscription for a particular class or series of shares must be uniform. While present Hawaii statutory law does not deal specifically with these subjects, HAWAII REV. STAT. § 416-92 (1976) does touch upon the subject of calls for amounts unpaid with respect to a corporation's shares.

HBCA § 17 provides that in the event of default on a subscription by a subscriber, the corporation may use any remedy it would have in collecting any other debt owed to the corporation. HAWAII REV. STAT. § 416-92 provides that the liability of a shareholder under a subscription contract shall be a corporate asset and may be enforced by any appropriate proceeding. HBCA § 17 also permits a corporation, through its by-laws, to prescribe any other penalty for failure of subscribers to pay on subscriptions, provided that if such penalty works a forfeiture of amounts paid, the forfeiture may not be declared unless the subscriber fails to make payment for twenty-one days after written demand for payment. This section further provides that in the event of a sale of shares because of a forfeiture, any excess of the proceeds shall be paid to the delinquent subscriber.

HAWAII REV. STAT. § 416-55 (1976) explicitly provides that a sufficient number of a shareholder's shares may be sold at public auction to pay an assessment he fails to pay. Minimum notice is ten days for Hawaii residents and twenty-one days notice by publication for non-residents.

Section 18. Consideration for shares.

Section 18 provides as does HAWAII REV. STAT. § 416-57 (1976) that shares with par value shall be issued for consideration not less than par value. HBCA § 18 further provides that shares without par value shall be issued for the consideration fixed by the board of directors or by the shareholders if such authority is reserved to the shareholders. In comparison, HAWAII REV. STAT. § 416-59(c) (1976) provides that shares of stock without par value may be issued for such consideration as is fixed by the vote of the shareholders, by the board of directors if the board is authorized to do so by the shareholders, or by the articles of incorporation.

HBCA § 18 and HAWAII REV. STAT. § 416-28 (1976), with identical language, provide that treasury shares held by a corporation shall not have any voting or dividend rights, shall not be counted for the purpose of determining any quorum or for any other purpose, and shall not be counted as assets in computing a surplus.

As to the disposition of treasury shares, the HBCA provides that such shares may be disposed of for such consideration as is fixed by the board of directors.

HAWAII REV. STAT. § 416-28 provides for similar disposition subject to any restriction set forth in a corporation's articles of incorporation or by-laws.

Both HBCA § 18 and HAWAII REV. STAT. § 416-56(6) (1976) provide that the amounts transferred from any surplus to capital upon the issuance of shares as a stock dividend shall be deemed consideration.

Under section 18, if shares are issued upon the conversion or exchange of indebtedness or shares, the consideration for the shares will be the amount of the outstanding balance on the debt plus the accrued interest or the stated capital represented by the shares, that part of surplus transferred from stated capital, and any other additional consideration. In comparison, HAWAII REV. STAT. § 416-56(4) (1976) provides that debts cancelled upon issuance of shares may constitute consideration, however, it does not explicitly state whether accrued interest may also be consideration.

Section 19. Payment for shares.

Both HBCA § 19 and present HAWAII REV. STAT. § 416-56 (1976) specify that consideration for shares may be money, tangible or intangible property, and/or labor or services actually performed. HAWAII REV. STAT. § 516-56 also explicitly includes as lawful consideration debts or securities that are cancelled and amounts transferred to capital from any surplus of the corporation upon the issuance of shares as a stock dividend. Similarly, HBCA § 18 recognizes cancellation of corporate debts and transfers from surplus in connection with stock dividends as lawful consideration. HBCA § 19 specifically disallows the use of promissory notes or future services as consideration for shares.

HBCA § 19 changes present Hawaii law by providing that, absent fraud, the judgment of the board of directors regarding the value of consideration exchanged for shares shall be conclusive. Under the current law, the board of directors would be subject to the standard of care set forth in HAWAII REV. STAT. § 416-91.5 (Supp. 1980).

Section 20. Stock rights and options.

The provisions of HBCA § 20 would be new to Hawaii statutory law. It explicitly authorizes a corporation, subject to its articles of incorporation, to create and issue rights or options which entitle the holders to purchase shares from the corporation.

Where the rights and options are sold to the shareholders of the corporation generally, the board of directors shall, subject to the provisions of the corporation's articles, determine the terms governing such transactions. Where the rights or options are issued to directors, officers, or employees of a corporation or of a subsidiary of the corporation and not to the shareholders generally, such issuance must be approved by a majority of shareholders or authorized by and consistent with a plan which has been approved by the shareholders.

Finally, HBCA § 20 provides that the board's decision, absent fraud, regarding the adequacy of the consideration received for such rights and options shall be conclusive, provided that the consideration for shares with par value shall not be less than par value.

Section 21. Determination of amount of stated capital.

HBCA § 21 sets forth a method for determining what constitutes stated capital. With regard to shares with par value, the consideration received to the extent of the shares' par value constitutes stated capital and the excess, if any, constitutes capital surplus. Present Hawaii statutory law contains no analogous provisions.

With regard to shares without par value, section 21 allows the corporation to allocate respective portions of the consideration to stated capital and capital surplus. Certain restrictions, however, are placed on the corporation's power to assign the consideration to capital surplus. First, HBCA § 21 requires that if shares without par value have a preference to assets upon involuntary liquidation, only the excess of the consideration received over such preference may be allocated to capital surplus. Second, the section requires that any allocation to capital surplus be made within sixty days after the issuance of the shares for which the consideration was received. In comparison, HAWAII REV. STAT. § 416-59(d) (1976) provides that the shareholders or the board of directors, if the board is so authorized by the shareholders or the articles of incorporation, may determine that only part of the consideration received for shares without par value be allocated to capital and that the remainder be allocated to surplus. Also, under present law, there is no limitation as to the amount which must be allocated to capital except the $1,000.00 requirement described below.

The total initial stated capital of a corporation under HBCA § 21 cannot be less than $5,000.00. This would be a change from the present law under HAWAII REV. STAT. § 416-59(d) which requires that the total initial capital of a corporation, when the corporation issues shares without par value, be not less than $1,000.00.

Under section 21, if shares have been issued by a corporation in a merger, consolidation, or acquisition of another corporation, any amount which would otherwise constitute capital surplus may be allocated to the issuing corporation's earned surplus account as long as its aggregate earned surplus does not exceed the sum of the earned surpluses of the issuing corporation and of all other corporations which were parties to the merger, consolidation, or acquisition. This is different from but consistent with present Hawaii law under HAWAII REV. STAT. § 417-12 (1976) which although dealing only with mergers and consolidations, states that the earned surplus and paid-in surplus of the constituent corporations to a merger or consolidation, to the extent such surplus is not capitalized, may be entered as earned or paid-in surplus on the books of the surviving or consolidated corporation.

HBCA § 21 provides that stated capital may be increased by transferring amounts from surplus. Similarly, HAWAII REV. STAT. § 416-59(d) provides that capital with respect to shares without par value may be increased by transferring amounts from surplus.

Section 22. Expenses of organization, reorganization, and financing.

This section explicitly permits a corporation to pay organizational and underwriting expenses from proceeds received as consideration for its shares without rendering such shares not fully paid. The last sentence of HAWAII REV. STAT. § 416-57 (1976) is a provision similar to HBCA § 22.

Section 23. Certificates representing shares.

Section 23 deals with stock certificates. Under the HBCA, such certificates must be signed by the president or vice-president and by the secretary or assistant secretary of the corporation and sealed with the corporate seal or a facsimile; however, if the certificate is countersigned by a transfer agent or registrar, facsimiles of the signatures of the foregoing officers may be used. HAWAII REV. STAT. § 416-54 (1976) contains a similar provision regarding signature requirements with respect to stock certificates, but also allows the treasurer or assistant treasurer to sign in place of the secretary or assistant secretary. The current Hawaii statute also provides that when officers sign the certificate, the official seal of the corporation must be applied to such certificate, whereas when a registrar or transfer agent signs the certificate, only facsimiles of the corporate officers' signature and the corporate seal may be used.

Both HBCA § 23 and HAWAII REV. STAT. § 416-54 provide that where a stock certificate is signed by an officer who ceases to be such officer prior to issuance of the certificate, the certificate may still be issued with the same effect as if he were an officer on the date of its issuance.

Section 23 requires that a corporation authorized to issue more than one class of shares must either set forth on its stock certificates a full statement of the designations, preferences, limitations, and relative rights of each class and series of shares or set forth on its stock certificates that such a statement is available from the corporation at no charge to any shareholder. In comparison, HAWAII REV. STAT. § 416-52 (1976) requires only that the stock certificates contain a summary of the preferences, voting powers, restrictions, and qualifications of any preferred stock issued by the corporation or a statement of the places where such information may be obtained.

HBCA § 23 further requires that each stock certificate state that the corporation is organized under the laws of this state; the name of the person the shares were issued to, the number, class, and series (if applicable) of shares; and the par value of the shares represented by the certificate or a statement that the shares are without par value. HAWAII REV. STAT. § 416-52 requires all of the above except it does not require that the certificate state that the corporation was organized under the laws of this state.

HAWAII REV. STAT. § 416-53 (1976) requires that when a corporation is authorized by its by-laws to issue certificates before the shares represented are fully paid for, a certificate issued on this basis state the unpaid balance of the share price. The HBCA does not contain such a provision because under HBCA § 23, no certificate may be issued until the shares represented are fully paid for.

Section 24. Fractional shares.

Section 24 provides a number of ways for dealing with fractional share interests: a corporation may issue fractions of shares, arrange for disposition of fractional interests, pay in cash the fair value of fractions of shares, or issue scrip which may be combined and exchanged for a full share.

Scrip need not entitle the holder to any of a shareholder's substantive rights. Furthermore, the scrip may be issued subject to conditions determined by the board of directors.

Currently, Hawaii has no statute which addresses the subject of fractional share interests, although HAWAII REV. STAT. § 416-65(h) (1976) provides that where a

reduction of capital by retirement of shares on a pro rata basis among shareholders is impossible without the retirement of fractional shares, the shares to be retired may be chosen by lot in a manner approved by the board of directors or the shareholders in order to eliminate the retirement of fractional shares.

Section 25. Liability of subscribers and shareholders.

Section 25 deals with the liability of subscribers and shareholders. Under this section, a subscriber or shareholder has no obligation to the corporation or its creditors other than to pay the full consideration for shares. Similarly, HAWAII REV. STAT. § 416-92 (1976) provides that the liability of a holder or subscriber of shares shall be the unpaid portion of the consideration, but not less than the unpaid portion of the capital attributable to the shares.

HBCA § 25 and HAWAII REV. STAT. § 416-92 provide that that a transferee or assignee who takes shares in good faith without knowledge that there is any unpaid amount outstanding with respect to the shares will not be liable to the corporation or its creditors for such unpaid amount. The current statute also protects any shareholder who derives his title from a transferee or assignee as described in the foregoing sentence, provided that such a shareholder is not a party to any fraud connected with the issuance of the applicable shares. Conversely, under HAWAII REV. STAT. § 416-92, every transferee of partly paid shares who acquires them under a certificate showing the fact of such part payment and every transferee of shares, other than a transferee covered by the preceding sentence, who acquired them with actual knowledge of such part payment shall be liable to the corporation for calls made or for the installments becoming due until he transfers the shares to one becoming liable. Under the present statute, a transferor making a registered transfer in good faith to a transferee who becomes liable for the unpaid consideration or capital is not liable for that portion of the subscription price or attributable capital uncalled at the time of the stock transfer registration unless otherwise provided in the stock certificate or unless a subscription contract was executed with respect to the shares. Moreover, HAWAII REV. STAT. § 416-92 provides that after a transfer has been registered, there shall be no lien on the shares for calls already made or installments of the price due at the time of transfer and registration except as reserved in the certificate. Except as stated in the first sentence of this paragraph, none of the provisions described in this paragraph are contained in the HBCA.

HBCA § 25 provides that an executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not be personally liable to the corporation for amounts unpaid on the corporation's shares held by him as such, but the estate in his possession shall be liable. HAWAII REV. STAT. § 416-92 contains a substantially identical provision regarding shares held by fiduciaries except that it requires that the fiduciary must be holding the shares in good faith.

HBCA § 25 also provides that no pledgee or other person holding shares as collateral shall be personally liable as a shareholder. HAWAII REV. STAT. § 416-92 contains an almost identical provision except that it provides that the person pledging such shares shall be liable as a shareholder.

Section 26. Shareholders' preemptive rights.

HBCA § 26 deals with shareholders' preemptive rights, *i.e.*, the rights of existing shareholders to subscribe to or purchase newly issued shares in proportion to their present interests in the corporation. This section, like HAWAII REV. STAT. § 416-24 (1976), allows a corporation to restrict preemptive rights which may exist by virtue of its articles of incorporation. However, in contrast to the present statute, HBCA § 26 does not explicitly allow a corporation to restrict preemptive rights which may exist by virtue of common law. The elimination, through adoption of the HBCA, of the explicit corporate power to limit common law preemptive rights may be interpreted to mean that common law preemptive rights, if any, may not be restricted.

Section 27. By-laws.

HBCA § 27 addresses the questions of (1) who has the power to adopt, amend, and/or repeal corporate by-laws, and (2) what the contents of the by-laws should be. This section delegates the authority to adopt, amend, and repeal by-laws to the board of directors, subject to the right of the shareholders to retain such authority by so providing in the articles of incorporation. This provision is substantially identical to HAWAII REV. STAT. § 416-79 (Supp. 1980) except that HBCA § 27 eliminates the incorporators' power to adopt the initial by-laws of the corporation.

Regarding the contents of the by-laws, section 27 and HAWAII REV. STAT. § 416-79 provide that any provision for the regulation and management of the corporation which is not inconsistent with law or the articles may be included. Unlike current HAWAII REV. STAT. § 416-80 (1976), the HBCA does not set forth specific matters which may be contained in the by-laws. However, reference is made in various sections of the HBCA to certain provisions which may be included in the by-laws.

Section 28. Meetings of shareholders.

HBCA § 28 deals with requirements regarding shareholder meetings. This section and HAWAII REV. STAT. § 416-72 (Supp. 1980) provide that the by-laws may specify the place of shareholder meetings and if no place is so specified, then such meetings shall be held at the corporate office. Regarding the date of the annual meeting, the HBCA allows the corporate by-laws to fix the time at which it will be held. HAWAII REV. STAT. § 416-72 provides that the annual meeting shall be held on the first Monday of April unless otherwise stated in the articles of incorporation or by-laws.

HAWAII REV. STAT. § 416-72 explicitly provides that the shareholders may dispense with the annual meeting by unanimous written consent. HBCA § 28 provides that if an annual meeting is not held within any period of thirteen months, the court of the first judicial circuit, upon the application of any shareholder, may summarily order that a meeting be held. This provision differs from the present law under HAWAII REV. STAT. § 416-73 (1976) which provides that whenever an annual meeting is not held or directors are not elected at an annual meeting, any shareholder may make a written demand upon a corporate officer for the holding of a special shareholders' meeting to elect directors, and if a meeting is not held within fifteen days, the shareholders who made the demand may call the meeting.

HBCA § 28 also involves the determination of who is authorized to call special shareholder meetings. This section provides that the board of directors, shareholders holding not less than one-tenth of all shares entitled to vote at a meeting, or such other persons so authorized by the articles of incorporation or by-laws shall have the power to call special meetings. Further, this section contains no explicit limitation regarding the purpose for which a special shareholder meeting may be held. Present Hawaii statutory law contains no provision dealing with the requirements regarding special shareholder meetings except as described in the preceding paragraph.

Section 29. Notice of shareholders meetings.

HBCA § 29 sets forth express requirements of notice to shareholders of both annual and special shareholder meetings. Present Hawaii statutory law does not explicitly set forth such requirements except insofar as HAWAII REV. STAT. § 416-73 (1976) deals with notice of special shareholder meetings called by the shareholders to elect directors.

Section 30. Closing of transfer books and fixing record date.

HBCA § 30 permits a corporation to choose between closing its stock transfer books or fixing a record date in order to determine who its shareholders are for any proper purpose, *e.g.*, voting at meetings, payment of dividends. The period during which the books may be closed or a record date may be set in advance of the event necessitating a determination of shareholders is a maximum of fifty days and in the case of determining the shareholders for the purposes of a shareholders' meeting, a minimum of ten days.

If the board of directors does not elect to close its stock transfer books or fix a record date with respect to a shareholders' meeting, the date on which notice is mailed will constitute the record date and with respect to the payment of a dividend, the date on which the dividend was declared will constitute the record date.

Under HAWAII REV. STAT. § 416-80 (1976), the record dates or the dates for closing the stock transfer books in order to ascertain voting rights may be determined by the corporate by-laws. Otherwise, present statutory law does not address the subject.

Section 31. Voting record.

HBCA § 31 requires that a corporation maintain a list of its shareholders entitled to vote and that such a list be available at shareholders' meetings. HAWAII REV. STAT. § 416-51 (1976) requires that the corporation maintain a record of all of its shareholders and their respective interests as such in the corporation and that the record be available at all reasonable times for inspection by shareholders.

While failure to comply with HBCA § 31 will not affect the validity of any action taken at a shareholders' meeting, the section imposes personal liability on the person in charge of the stock transfer books of the corporation for any damage to a shareholder as a result of failure to comply with said section. Present Hawaii statutory law does not set forth with such specificity the liability for failing to properly maintain and handle records of shareholders.

Section 32. Quorum of shareholders.

HBCA § 32 deals with the quorum required to be present in order to take valid shareholder action at a duly held shareholders' meeting. Existing Hawaii statutory law does not contain a provision addressing this subject.

According to HBCA § 32, a quorum is a majority of shares entitled to vote at a shareholders' meeting unless the articles of incorporation provide otherwise. However, the articles may not set quorum at less than one-third of the shares entitled to vote at a shareholders' meeting.

This section also states that once a quorum is established, a majority vote of the shares represented at a shareholders' meeting will constitute shareholder action unless a greater vote or voting by classes is required by statute, the articles, or the by-laws.

Section 33. Voting of shares.

HBCA § 33 provides a detailed explanation of what types of shares may be afforded voting rights and the methods by which such votes may be effected. Reference is made in this section to a number of subjects not covered by present Hawaii statutory law, as is more particularly set forth in the remaining portion of this paragraph. First, HBCA § 33 sets forth the basic rule that each outstanding share is entitled to one vote unless otherwise provided by the articles of incorporation. Second, this section prohibits the voting of treasury shares and shares held by a subsidiary of the corporation whose shares are so held; also, these shares are not counted in determining the presence or absence of a quorum. Third, HBCA § 33 provides that a shareholder whose shares have been pledged may vote the shares until the shares are transferred to the name of the pledgee; thereafter, the pledgee has the power to vote the shares. Fourth, this section prohibits the voting of redeemable shares after notice of redemption has been mailed to holders and a sum sufficient to redeem those shares has been deposited with a bank or trust company with the irrevocable instruction to pay the redemption price to the holders upon surrender of the certificates.

Like HAWAII REV. STAT. § 416-71 (1976), this section allows a shareholder to vote either in person or by proxy and provides that a proxy shall not be valid after eleven months from its execution unless otherwise provided in the proxy instrument. Unlike the present law, HBCA § 33 explicitly provides that a proxy holder shall vote as directed by the shareholder if the shareholder so directs.

Present Hawaii law regarding cumulative voting, HAWAII REV. STAT. § 416-74 (1976), has been incorporated into HBCA § 33. This provision states that cumulative voting for the election of directors is mandatory if a shareholder so requests at least forty-eight hours prior to the shareholders' meeting at which such election is to occur.

HBCA § 33 also defines the voting rights of fiduciaries and agents of the record shareholder. Like HAWAII REV. STAT. § 416-76 (1976), the right to vote is extended to personal representatives and trustees. HBCA § 33 treats shares held in trust differently from present HAWAII REV. STAT. § 416-76, however, in that title to the shares must stand in the name of the trustee as a prerequisite to voting by the trustee. HBCA § 33 also recognizes the voting rights of a receiver.

Section 34. Voting trusts and agreements among shareholders.

HBCA § 34 authorizes voting trusts and voting agreements and sets forth the procedural requirements regarding their creation. Like the current law under HAWAII REV. STAT. § 416-75 (1976), this section limits the effectiveness of voting trusts to a period of ten years. The procedural requirements regarding recordation specified in this section are similar to those set forth in the present statutory law. HBCA § 34 eliminates the express statutory provisions contained in HAWAII REV. STAT. § 416-75(a) (1976) which provide that: (1) The trust agreement may specify the method of a trustee's appointment or election and may designate his successors; (2) a voting trustee may vote in person or by proxy unless provided otherwise; and (3) a voting trustee's action which is in violation of the voting trust agreement will not invalidate any shareholder action, the sole remedy for such violation being against the defaulting trustee. HBCA §§ 34 and 52 add to the present law by expressly affording to certain shareholders and holders of voting trust certificates the right to inspect voting trust agreements and records listing holders of voting trust certificates.

With regard to voting agreements, HBCA § 34 provides that such agreements are enforceable according to their terms. This is a change from present Hawaii law under HAWAII REV. STAT. § 416-75(b) (1976) pursuant to which voting agreements are treated similarly to voting trusts. In fact, HBCA § 34 explicitly states that voting agreements shall not be subject to the provision regarding voting trusts.

Section 35. Board of Directors.

HBCA § 35 discusses the functions, qualifications, and duties of the board of directors and corporate directors individually. As in HAWAII REV. STAT. § 416-91.5 (Supp. 1980), this section provides that the board will have the sole authority to exercise corporate powers unless otherwise provided by statute or the articles of incorporation. Other provisions of the current statute, including the authority of the board to fix the compensation of its members, the obligation of good faith on the part of directors, and the permissibility of reliance by directors on various kinds of information prepared by certain officers, employees, experts, or committees of the board, would be unchanged. In conformity with HAWAII REV. STAT. § 416-4 (Supp. 1980), HBCA § 35 requires at least one member of the board to be a Hawaii resident and moreover, a board without such a resident director cannot act except to fill such a vacancy.

A few provisions of HBCA § 35 would be new to Hawaii statutory law. This section explicitly states that directors need not be shareholders of the corporaton unless otherwise required by the articles of incorporation or by-laws. In addition, a director is presumed to have assented to an action taken in a meeting of the board at which he was present unless his dissent is entered within the minutes of the meeting or unless he files a written dissent with the secretary and has not voted in favor of the action.

Section 36. Number and election of directors.

In conformity with the present law under HAWAII REV. STAT. § 416-4 (Supp. 1980), HBCA § 36 requires a corporation to have one or more directors if there is one shareholder, two or more directors if there are two shareholders, and three or

more directors if there are three or more shareholders.

HBCA § 36 incorporates HAWAII REV. STAT. § 416-11(5) (Supp. 1980) pursuant to which the initial number of directors is to be fixed by the articles of incorporation and the names and addresses of the initial directors are to be stated in the articles. Unlike the present law, section 36 explicitly provides that directors may be increased or decreased by amendment to the articles of incorporaton or the by-laws, but that a decrease may not shorten the term of any incumbent director.

The HBCA provides that directors are to be elected at the shareholders' annual meeting to hold office until the next annual meeting and until their successors are elected and qualified. Section 36 sets forth an exception to this rule when there is a classification of directors in relation to their terms of office; accordingly, a director is to hold office for the term for which he is elected and until his successor is elected and qualified.

Section 37. Classification of directors.

HBCA § 37 permits the classification of directors by the use of a staggered board. Under this section, classification is not allowed unless the board of directors is composed of at least nine members. The present law under HAWAII REV. STAT. § 416-80 (1976) merely provides that the by-laws of a corporation may include provisions for the classification of directors without any specific reference to any particular kind of classification or minimum requirements.

Under the HBCA, directors may be divided into two or three classes with each class as nearly equivalent in number as possible. The term of office of the first class of directors is to expire at the first annual shareholders' meeting following their election, the term of the second class at the second annual meeting, and the term of the third class, if any, at the third annual meeting. At each annual meeting after the first meeting, the shareholders will elect the number of directors as there are directors with terms expiring.

Section 38. Vacancies.

HBCA § 38 sets forth a procedure for the filling of vacancies on the board of directors. Under the existing law, HAWAII REV. STAT. § 416-74 (1976), vacancies are to be filled as provided in a corporation's articles of incorporation or by-laws.

According to HBCA § 38, the directors may fill a vacancy by an affirmative vote of a majority of the directors, even though such directors may constitute less than a quorum of the board. A director elected in this manner is to serve for the unexpired term of his predecessor or if the vacancy was created by an increase in the number of directors, until the next election of directors by the shareholders.

Section 39. Removal of directors.

HBCA § 39 provides a rule for the removal of directors. According to the present law under HAWAII REV. STAT. § 416-80 (1976), a corporation may set forth the procedures for the removal of directors in its by-laws; but, there is no other present statutory law covering the subject. Under HBCA § 39, a director or the whole board may be removed with or without cause by a majority vote of the shareholders at a meeting called expressly for the removal of directors.

For corporations with cumulative voting, however, if the removal of less than the entire board is involved, a director may not be removed if the votes in opposi-

tion to his removal are sufficient to elect him at an election of the whole board.

Section 40. Quorum of directors.

HBCA § 40 establishes a quorum requirement for valid meetings of the board of directors and for the taking of action by the board. This subject is not dealt with under present Hawaii statutory law. Under HBCA § 40, unless a greater number is required by a corporation's articles of incorporation or by-laws, a majority of directors constitutes a quorum. Section 40 also provides that once a quorum is established, the act of a majority of the directors present at the meeting will comprise the act of the board of directors unless the articles or by-laws require the act of a greater number.

Section 41. Director conflicts of interest.

HBCA § 41 introduces a provision to deal with the problem of corporate transactions involving an "interested" director. This section provides that a transaction between a corporation and a financially interested director, between a corporation and an entity sharing common directors, or between a corporation and an entity in which a director has a material financial interest is not void or voidable solely because of such relationship or interest, because such a director is present at the board or committee meeting which authorizes such transaction, or because his vote is counted for such purpose if one of three conditions is satisfied. The three conditions are: (1) If the director's conflict of interest is disclosed to the board or committee whose approval of the transaction is sufficient without counting the vote of the interested director(s), (2) if the relationship is disclosed to the shareholders entitled to vote and they approve the transaction, or (3) if the contract or transaction is just and reasonable to the corporation. In addition, the HBCA allows interested directors to be counted in determining the presence of a quroum at a board or committee meeting that approves or ratifies the transaction. There is no analogous provision under present Hawaii statutory law.

Section 42. Executive and other committees.

Whereas, under HAWAII REV. STAT. § 416-80 (1976), the by-laws of a corporation may provide for the appointment of an executive committee and other committees of the board of directors, the HBCA recognizes that to the extent provided in the articles or by-laws, the directors, by resolution of a majority of the board, may designate an executive committee or other committees. Unlike the present law, HBCA § 42 imposes limitations upon the authority of such committees; it explains that these committees are not to have the authority to (1) declare dividends or distributions, (2) approve or recommend to shareholders actions or propositions requiring shareholder approval, (3) designate candidates for director or fill vacancies on the board or any board committee, (4) amend by-laws, (5) approve a plan of merger, (6) reduce earned or capital surplus, (7) authorize a reacquisition of shares except pursuant to a formula specified by the board, or (8) approve the issuance or sale of shares or specify the terms of a series, provided that the board, having acted regarding general authorization for the issuance or sale of shares, may authorize a committee to set the terms of a contract for the sale of shares and to fix the terms upon which such shares may be issued or sold pursuant to a method enumerated by the directors.

The HBCA also provides that the designation of a committee, the delegation of authority, or action by such a committee will not constitute fulfillment by a director who is not a member of the committee of his responsibility to act in good faith, in the best interests of the corporation, and with such care as would be used by a reasonable person in a like position under the circumstances at hand.

Section 43. Place and notice of directors' meetings; committee meetings.

HBCA § 43 deals with the time, place, and notice of directors' and committee meetings. There is no current Hawaii statute which addresses this subject. Under section 43, the board of directors may hold their meetings anywhere within or without the state. Unless required by the by-laws, regular meetings of the board or any committee may be held without notice; notice of special meetings as prescribed by the by-laws, however, is required. Attendance will constitute a waiver of notice unless such attendance is for the specific purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully convened.

Section 43 authorizes meetings by means of a conference telephone or like communications equipment except as otherwise restricted by the articles or by-laws. Such meetings are authorized under the present provision in HAWAII REV. STAT. § 416-83 (Supp. 1980).

Section 44. Action by directors without a meeting.

HBCA § 44 is identical to HAWAII REV. STAT. § 416-82 (Supp. 1980). It permits action by the directors without a meeting through unanimous written consent. Such consent is required to be filed with the minutes of directors' meetings and will be as effective as a unanimous vote.

Section 45. Dividends.

HBCA § 45 sets forth requirements for the declaration and payment of dividends which differ in certain respects from the present law under HAWAII REV. STAT. § 416-91 (Supp. 1980). HBCA § 45 provides as a general limitation that dividends may not be paid when the corporation is insolvent or would be rendered insolvent by such payments. In contrast, the current statute prohibits the payment of dividends when a capital deficit would be created.

As to the sources for cash or property dividends, HBCA § 45, like the present law, allows dividends to be paid out of the earned surplus of a corporation. Unlike HAWAII REV. STAT. § 416-91, however, the HBCA restricts the payment of dividends to payments out of the "unreserved and unrestricted" earned surplus. In addition, the HBCA permits the payment of dividends from depletion reserves. Section 45 also specifically prohibits the use of unrealized appreciation or profits as sources of cash and property dividends.

The HBCA provides that either treasury shares or unissued shares may be used for share dividends. Section 45 requires that dividends in unissued shares be paid out of a corporation's "unreserved and unrestricted" surplus. Similarly, the present law provides that the source of share dividends consist of the earned surplus, paid-in or contributed surplus, or other surplus of the corporation. This section specifically distinguishes share split-ups from share dividends; it is noted that a

split-up of issued shares into a greater number of shares without an increase in stated capital will not be construed as a stock dividend.

Unlike the present statute, section 45 does not impose liability on directors or managers who have authorized illegal distributions; this is covered in section 48 of the HBCA. In addition, the exemptions afforded certain distributions relating to corporations under Title VIII of the National Housing Act is not recognized in the HBCA.

Section 46. Distributions from capital surplus.

HBCA § 46 authorizes distributions of cash or property to shareholders out of the capital surplus of a corporation. According to this section, such distributions may be made if (1) the corporation is not insolvent and will not be rendered insolvent by a distribution, (2) the distribution is permitted by the articles or by a vote of the shareholders, (3) all cumulative dividends have been paid, (4) the distribution will not diminish net assets below the amount needed to pay the liquidating value of the preferred shares, and (5) the distribution is explained to the shareholders as being from capital surplus.

HBCA § 46 also provides that cumulative preferential dividends may be paid out of capital surplus if, at such time, the corporation has no earned surplus, is not insolvent, would not be rendered insolvent by such payment, and such distribution is identified as payment of cumulative dividends from capital surplus.

Present Hawaii law does not contain a provision analogous to HBCA § 46. However, the current statutes do provide for distribution of assets in limited circumstances, *i.e.*, upon reduction of authorized stock under HAWAII REV. STAT. § 416-65(g) (1976), upon dissolution under HAWAII REV. STAT. §§ 416-121 to -122 (1976), or upon the expiration of a corporation's charter or pursuant to a plan of complete liquidation if all the assets are distributed within the year following the adoption of such a plan under HAWAII REV. STAT. § 416-91 (Supp. 1980).

Section 47. Loans to employees, officers, and directors.

HBCA § 47 is consistent with HAWAII REV. STAT. § 416-26(7) (1976) which permits a corporation to lend money to or otherwise assist its employees, officers, and directors.

Section 48. Liabilities of directors in certain cases.

HBCA § 48 provides that unless he has complied with the standard for performance of the duties of a director, a director so voting or assenting is jointly and severally liable to the corporation and to its creditors for (1) payment of dividends or distributions of assets in violation of statute or contrary to restrictions in the articles of incorporaton, (2) the purchase of the corporation's shares for consideration in excess of the maximum limits as provided by statute, or (3) the distribution of assets without discharging or making adequate provision for the discharge of corporate debts and obligations. This varies from the present law which appears to impose strict liability upon directors to the corporation and its creditors for the payment of dividends or distributions in violation of the statutory requirements under HAWAII REV. STAT. § 416-91 (Supp. 1980). In addition, the present law under HAWAII REV. STAT. § 416-17 (Supp. 1980) provides that directors are liable to the corporation, its shareholders, and creditors for injury caused

by the commencement of business without the minimum initial capital of $1,000.00.

Another change in Hawaii law would be the possibility under the HBCA that a director against whom liability is asserted under section 48 could seek contribution from shareholders who received dividends or assets with knowledge of the illegality of the payments and from other directors who voted for or assented to the action upon which the claim is asserted.

The HBCA retains a provision identical to the last paragraph of HAWAII REV. STAT. § 416-91 whereby certain distributions by corporations organized under Title VIII of the National Housing Act would not be prohibited by anything in the HBCA.

Section 49. Provisions relating to actions by shareholders.

HBCA § 49 sets forth the guidelines for shareholder derivative suits. It is identical to Rule 23.1 of the Hawaii Rules of Civil Procedure except that section 49 does not address derivative actions by members of unincorporated associations.

Under this section, a shareholder may bring a derivative action where (1) he was an owner of shares at the time of the transaction of which he complains or his share devolved on him by operation of law and (2) he has made unsuccessful attempts to obtain the action from the directors or shareholders or there was reason for not making the effort.

Where it is found that the plaintiff does not fairly represent the interests of other similarly situtated shareholders, the derivative action may not be maintained. In addition, the HBCA includes the necessity of court approval and shareholder notification of a settlement or compromise agreement.

Section 50. Officers.

The provisions of HBCA § 50 are virtually identical to current Hawaii law governing the requirements for corporate officers as set forth in HAWAII REV. STAT. § 416-18 (Supp. 1980). The required officers are: a president, one or more vice-presidents as may be prescribed in the by-laws, a secretary, and a treasurer. In addition, the election and appointment of other officers, assistant officers, and agents are permitted. It is permissible for two or more offices to be held by the same individual provided that the corporation has at least two persons as officers.

Section 50 also provides a broad definition of the authority afforded corporate officers. It states that officers and agents are to possess the authority and perform such duties in the management of the corporation as provided in the by-laws or board resolution.

Section 51. Removal of officers.

HBCA § 51 provides that the board of directors may remove a corporate officer or agent if in the board's judgment, the best interests of the corporation will be served. This section makes it clear, however, that exercise of this removal power shall not prejudice any rights of a removed officer or agent under an employment contract. It is also expressly provided that the election or appointment of such an individual does not in itself create such contract rights. Current Hawaii statutory law does not have a provision dealing with the removal of officers.

Section 52. Books and records.

HBCA § 52 recognizes the right of shareholders and directors to inspect the books and records of the corporation. This section requires corporations to keep complete books and records of account, in addition to minutes of directors' and shareholders' meetings and shareholder lists, all of which are subject to inspection as described below. Hawaii's present law as represented by HAWAII REV. STAT. § 416-51 (1976) and HAWAII REV. STAT. § 416-34 (1976) contains similar requirements; however, the right of inspection is limited to inspection of shareholder lists.

The procedural requirements set forth in section 52 differ significantly from the existing law. The right of inspection under the HBCA may be asserted by a shareholder or holder of voting trust certificates who satisfies the specified time or percentage of holding requirements. In addition, such an individual must demonstrate a proper purpose for inspection in his written demand. Moreover, courts are given the authority to compel production regardless of whether or not the shareholder satisfies the time or percentage of holding requirements. The statute would expand the present law by extending an absolute right of inspection to directors. In contrast, the current provision as embodied in HAWAII REV. STAT. § 416-51 explicitly affords only the right to inspect the stock ledgers to shareholders of the corporation.

Another important difference between the HBCA and the current law is that the HBCA imposes personal liability on officers for wrongful refusal to permit inspection. In addition, this section provides that inspection may be refused to a shareholder who has, within the past two years, made improper use of corporate records.

Section 53. Incorporators.

Like HAWAII REV. STAT. § 416-11 (Supp. 1980), this HBCA provision states that one or more persons may act as an incorporator. Section 53 differs from present Hawaii law in that it clearly provides that a corporation may act as an incorporator.

Section 54. Articles of incorporation.

HBCA § 54 provides a detailed outline of the contents of the articles of incorporation and would replace the corresponding provisions of HAWAII REV. STAT. § 416-11 (Supp. 1980). Section 54 is substantially identical to HAWAII REV. STAT. § 416-11 except as follows: (1) HBCA § 54 requires that the initial registered agent of the corporation be set forth in the articles of incorporation; and (2) the HBCA eliminates the requirement of HAWAII REV. STAT. § 416-11 that the following information be set forth in the articles of incorporation: (a) the names and addresses of the initial officers of the corporation; (b) the names of the initial subscribers for shares of each class; (c) the number of shares subscribed for; (d) the subscription price or prices of shares of each class subscribed for by each intitial subscriber; and (e) if consideration is not cash, a description of the consideration and the amount of capital and paid-in surplus, if any, paid in by each subscriber, separately stating the amount paid in cash and in property.

Section 55. Procedure for filing documents; effective date.

In comparison to the scattered provisions of present Hawaii law and specifically HAWAII REV. STAT. § 416-14 (1976), the HBCA provides a clear outline of filing procedures for all documents required to be filed with the director of regulatory agencies under the HBCA. Section 55 would explicitly designate the payment of filing fees pursuant to HBCA § 128 as a condition precedent to the filing of any document.

This section would not change the duties of the director in examining documents; as under the current law, he need only ascertain whether they contain the information required to be set forth.

HBCA § 55 explicitly provides that the document will be effective upon its filing or on such later date set forth in the document, but not later than thirty days after filing.

Further, it also provides that anyone who knowingly makes a false statement in any document filed with the director is guilty of a violation. This is a change from the present law under HAWAII REV. STAT. § 416-94 (1976) pursuant to which a person who makes a false statement in any affidavit, return, statement, or certificate of stock with regard to a corporation shall be fined not more than $5,000.00.

Section 56. Effect of issuance of articles of incorporation.

According to this section, filing of the articles of incorporation by the director of regulatory agencies would be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with. The HBCA section would not change the point in time as provided in HAWAII REV. STAT. § 416-16 (Supp. 1980) when corporate existence would begin, *i.e.*, upon filing of the articles by the director.

Section 57. Organization meeting of directors.

This HBCA provision requires that the board of directors meet after the filing of the articles of incorporation in order to adopt by-laws, elect officers, and transact such other business as may come before the meeting. There is currently no Hawaii provision dealing with this subject. Notice to each director is required unless waived pursuant to HBCA § 144.

Section 58. Right to amend articles of incorporation.

This section provides that a corporation has very broad powers to amend its articles of incorporation. First, the new section generally permits any amendment which may have lawfully been contained in the original articles. Second, it sets forth, without any limitation, a detailed list of permissible types of amendments, some of which have previously been held invalid in other jurisdictions. The list includes such possibilities as changes in corporate name or purposes, increases or decreases in the number of shares or their par values, various reclassifications of shares, and alteration of rights of shares and shareholders. This section would clarify any ambiguities which may exist under HAWAII REV. STAT. § 416-23 (Supp. 1980) and HAWAII REV. STAT. § 416-24 (1976) as to what amendments are permissible. As under HAWAII REV. STAT. § 416-24 (1976) provisions regarding preemptive rights could be amended.

HBCA § 58 would change HAWAII REV. STAT. § 416-65 (1976 & Supp. 1980) which provides that a reduction of capital necessitates compliance with the provisions, including in some cases, publication before the reduction is effective.

Section 59. Procedure to amend articles of incorporation.

According to this section, an amendment of the articles of incorporation shall be initiated by the board of directors. The corresponding provision under the present law, HAWAII REV. STAT. § 416-23 (Supp. 1980), does not contain this requirement. Voting on an amendment would take place at either an annual or special meeting of the shareholders or by unanimous written consent of the shareholders in lieu of a meeting pursuant to HBCA § 145. Under the current statute, voting on such amendments must be conducted at a meeting called and held for such purpose.

The new section would be identical to the present law in requiring at least a two-thirds majority for the adoption of an amendment. However, where a class of shares is entitled to vote on an amendment as a class, the vote of a majority of the shares of that class as well as of the total shares entitled to vote is required. This is a significant change from HAWAII REV. STAT. § 416-23 whereby it is provided that when a class of stock is entitled to vote as a class on an amendment, then a two-thirds vote of that class is required to pass an amendment. Section 59 would not change the provision under the current Hawaii statute that a corporation may provide for a larger percentage vote in its articles. HBCA § 143.

HBCA § 59 specifies that a resolution of the board of directors would suffice to amend the articles if shares have not yet been issued. Current Hawaii law does not contain a similar provision.

Another addition to the present law is represented by the requirement under section 59 of written notice to shareholders setting forth the proposed amendments or summaries in accordance with the notice provisions in HBCA § 29.

Section 60. Class voting on amendments.

HBCA § 60 explicitly sets forth the situations in which class voting on proposed amendments to the articles would be necessary. According to the present law, HAWAII REV. STAT. § 416-23 (Supp. 1980), the holders of a class of shares have the right to vote as a class on a proposed amendment if it would adversely affect the rights of that class. In contrast, HBCA § 60 specifies that a class is entitled to vote on an amendment which would materially affect it in any of the ways specified, whether that effect would be adverse or advantageous.

Section 61. Articles of amendment.

HBCA § 61 would eliminate the current requirement under HAWAII REV. STAT. § 416-23 (Supp. 1980) of a verified certificate stating that an amendment was legally adopted. HBCA § 61 sets forth the necessary contents of the articles of amendment which would be filed pursuant to HBCA § 55. The articles of amendment should specify the name of the corporation, the date of the amendment's adoption, the number of shares outstanding, a designation of classes entitled to vote on the amendment, and a documentation of particulars regarding the number and classes of outstanding shares and a record of how they voted. Also required to be contained in the articles of amendment are statements regarding the

effectuation of an exchange, reclassification, cancellation of issued shares, or a change in the amount of stated capital, where an amendment provides for such corporate action.

Section 62. Effect of certificate of amendment.

This section is reserved.

Section 63. Effect of articles of amendment.

This section would clarify any ambiguities which may exist under HAWAII REV. STAT. § 416-23 (Supp. 1980) regarding the effect an amendment to the articles may have on any causes of action or suits against the corporation since said present Hawaii statute is silent on this point. Under HBCA § 63, no amendment or change of corporate name shall affect any existing cause of action or pending suit in favor of or against a corporation or the existing rights of persons other than shareholders.

Section 64. Restated articles of incorporation.

Similarly to HAWAII REV. STAT. § 416-23 (Supp. 1980), HBCA § 64 requires a formal resolution of a corporation's board in order for its restated articles of incorporation to be filed with the director of regulatory agencies. Whereas current Hawaii law requires verification of the restated articles by two officers of a corporation, HBCA § 64 would require only a simple statement that the restated articles correctly set forth the articles as amended and that they supersede the previous articles and prior amendments.

Section 65. Amendment of articles of incorporation in reorganization proceedings.

The provisions of HBCA § 65 would be new to Hawaii. This section permits the articles of incorporation to be amended to conform to a reorganizational plan which has been confirmed by a court in reorganization proceedings under the relevant federal statutes. Amendments permissible under this section specifically include, without any limitation, the issuance of bonds, debentures, or other obligations of the corporation and reorganizations of the board of directors. Under this section, the articles of amendment are filed under HBCA § 55 pursuant to a court order and are effective upon filing without any action by the directors or shareholders and with the same effect as if the amendments had been adopted by unanimous action of the corporation's directors and shareholders.

Section 66. Restriction on redemption or purchase of redeemable shares.

This section provides that no redemption or purchase of redeemable shares shall be made when a corporation is insolvent, when insolvency would result, or when net assets would be reduced below the aggregate amount payable with respect to shares having rights to corporate assets upon involuntary dissolution.

This would change the present law as set forth in HAWAII REV. STAT. § 416-28 (1976). Under the current statute, a corporation, under certain specified circumstances, may purchase its own shares if the amount of the corporation's assets is

not reduced below the amount of its debts; otherwise, a corporation may purchase its own shares only out of surplus.

Present Hawaii law does not contain a statute which deals primarily and specifically with redeemable shares. HAWAII REV. STAT. § 416-28 deals with the purchase by a corporation of its own shares generally.

Section 67. Cancellation of redeemable shares by redemption or purchase.

HBCA § 67 changes present Hawaii law by providing that upon a corporation's purchase or redemption of its redeemable shares, the shares shall be deemed cancelled and shall be restored to the status of authorized but unissued shares unless the articles of incorporation provide that the shares shall not be reissued. HAWAII REV. STAT. § 416-28 (1976) provides that upon the purchase by a corporaton of its own shares, the shares will become treasury shares (issued but owned by the corporation) unless or until the shares are retired pursuant to a reduction of capital stock under HAWAII REV. STAT. § 416-65 (1976 & Supp. 1980).

HBCA § 67 also provides that upon a corporation's purchase or redemption of its redeemable shares, it shall file a statement of cancellation setting forth information regarding the capital of the corporaton; upon such filing, the corporation's stated capital shall be deemed reduced by the amount represented by the shares cancelled.

Section 68. Cancellation of other reacquired shares.

HBCA § 68 is a change from present Hawaii law under HAWAII REV. STAT. § 416-65 (1976 & Supp. 1980). Under section 68, issued but not outstanding shares (treasury shares) may be cancelled by a majority vote of the board of directors.

Under HAWAII REV. STAT. § 416-65, no board of director action is required to retire treasury shares, but a two-thirds vote of the shareholders is required to authorize such corporate action unless otherwise provided in the articles of incorporation or a resolution filed with the director of regulatory agencies pursuant to HAWAII REV. STAT. § 416-58 (1976).

Under both HBCA § 68 and HAWAII REV. STAT. § 416-65(a), the filing of a document with the director of regulatory agencies is required to effectuate the cancellation of shares (reduction of capital stock).

HBCA § 68 does not include provisions of HAWAII REV. STAT. § 416-65 whereby after a reduction of capital stock, no distribution of assets representing the surplus created by the reduction may be made by the corporation to its shareholders unless the corporation's then remaining assets equal the aggregate par value of the remaining corporate stock and twice the amount of the corporation's indebtedness.

Section 69. Reduction of stated capital in certain cases.

HBCA § 69 represents a change from present Hawaii law. It provides that a reduction of capital stock not accompanied by any action requiring an amendment of the articles of incorporation and not accompanied by a cancellation of shares may be effectuated by a majority vote of the board of directors, a majority vote of the shareholders entitled to vote, and a filing with the director of regulatory agencies.

Under HAWAII REV. STAT. § 416-65 (1976 & Supp. 1980), such a reduction of capital stock need not be approved by the board of directors, but must be approved by a two-thirds vote of the shareholders entitled to vote. There must be a filing with said director.

Further, the HBCA eliminates the requirements under HAWAII REV. STAT. § 416-65(e) (1976) which provides that when a reduction of capital stock involves the retirement or reduction in par value of issued and outstanding shares or the release or cancellation of any stock subscription, the director of regulatory agencies, upon receipt of the document filed by the corporation to effectuate the reduction, shall publish a notice of the reduction and shall receive any objections to the reduction. If there are no objections or said director is satisfied that the required vote or other determination has been made, then he shall record the reduction upon payment of the proper fee.

Section 69 adds to present Hawaii law by prohibiting any reduction of stated capital under HBCA § 68 which would diminish aggregate stated capital to an amount equal to or less than the sum of the aggregate preferential amounts payable on all issued shares having preferential rights to the corporate assets on involuntary liquidation plus the aggregate par value of all issued shares without such preferential rights.

HBCA § 69 does not include the prohibition under HAWAII REV. STAT. § 416-65(g) (1976) against the distribution of surplus created by a reduction of capital unless the remaining assets at least equal the aggregate par value of the remaining corporate stock and twice the indebtedness of the corporation.

Section 70. Special provisions relating to surplus and reserves.

HBCA § 70 contains general provisions regarding the use of surplus and reserves of a corporation. Present Hawaii statutory law does not include such general provisions. Under section 70, a corporation, by resolution of the board of directors, may: (1) Increase capital surplus by transferring all or a portion of its earned surplus to capital surplus; (2) reduce or eliminate a deficit in earned surplus through an application of capital surplus; (3) create a reserve out of its earned surplus for any proper purpose; and (4) abolish any such reserve in the same manner. If a reserve is created, it shall not be available for dividends or distributions by the corporation except as expressly permitted by the HBCA. HBCA § 70 also states that any surplus created by a reduction of capital shall be capital surplus.

Section 71. Procedure for merger.

This section empowers any two or more domestic corportions to merge and delineates the board of directors' role in the merger process. The corresponding present law is contained in HAWAII REV. STAT. § 417-2 (1976) and HAWAII REV. STAT. § 417-3 (Supp. 1980). The shareholders' role is described in HBCA §§ 73 and 73A and the role of the director of regulatory agencies is described in HBCA § 74. The HBCA does not change the general power of a corporation to merge.

Under the HBCA, the board of directors must approve the plan of merger before it is presented to the shareholders for their approval. Under HAWAII REV. STAT. § 417-3, the board can approve the plan either before or after the shareholders give their approval or authorization.

The HBCA eliminates the present limitation under HAWAII REV. STAT. § 417-3 that prohibits a distribution of assets to shareholders (except for payments to dissenting shareholders) pursuant to or as part of a merger if the surviving corporation's liabilities and capital stock after the distribution exceeds the value of its remining assets or if after the distribution, its liabilities are equal to or more than one-half the value of its assets.

Also, HBCA § 71 eliminates the requirement under HAWAII REV. STAT. § 417-3 that the preferences, voting powers, restrictions, and qualifications of all classes of stock of the surviving corporation, if there is more than one class of stock, be contained in the plan or agreement prepared or adopted by the board of directors.

Section 72. Procedure for consolidation.

This section empowers any two or more domestic corporations to consolidate and delineates the board of directors' role in the consolidation process. The equivalent present law is contained in HAWAII REV. STAT. § 417-2 (1976) and HAWAII REV. STAT. § 417-3 (Supp. 1980). The shareholders' role is described in HBCA §§ 73 and 73A, and the director's role is described in HBCA § 74. The HBCA does not change the power of corporations to consolidate.

The explanation of HBCA § 71 above is made applicable to this section by substituting the term "consolidation" for "merger" and the term "consolidated corporation" for "surviving corporation."

Section 72A. Procedure for share exchange.

A share exchange is a method of combining business entities not explicitly addressed under present Hawaii statutory law. In a share exchange pursuant to HBCA § 72A, all of the shares of one or more classes of a corporation are exchanged for shares of another corporation. The process of initiating, approving, and implementing the share exchange is similar to that used in a merger.

Note that only shareholders of the acquired corporation (three-fourths of the shares authorized to vote) need to approve the transaction. HBCA § 73. Shareholders in the acquired corporation who properly dissent to the share exchange are entitled to the appraisal remedy. HBCA § 80(c).

HBCA § 72A expressly states that the procedure set forth shall not limit the power of a corporation to acquire any shares in any other corporation through a voluntary exchange or agreement with the shareholders of the other corporation.

Section 73. Approval by shareholders.

The procedure for approval of a merger, consolidation, or share exchange under the HBCA differs from present Hawaii law in several ways. First, under the HBCA, the board of directors must first approve of such corporate action before it is considered by the shareholders, while HAWAII REV. STAT. § 417-4 (Supp. 1980) allows consideration of a merger or consolidation by the shareholders prior to the board's approval.

Second, the HBCA appears to limit the shareholders to either rejecting or accepting the plan approved and proposed by the board of directors. In contrast, HAWAII REV. STAT. § 417-4 allows the shareholders to (1) approve or reject the plan, (2) approve it subject to certain modifictions, or (3) authorize the board to make further modifications without having to consult the shareholders again.

HBCA § 73 allows the board of directors to abandon the proposed corporate action after approval by the shareholders only if the plan so provides.

Third, section 73 sets forth two rules concerning class voting with regard to a merger, consolidation, or share exchange. A class of shares shall have the right to vote as a class (1) if it is entitled to vote thereon as a class or (2) if the subject plan contains any provisions which, if contained in a proposed amendment to the articles of incorporation, would entitle the class to so vote and in a share exchange, if the class is included in the exchange.

HBCA § 73 changes present Hawaii law in another respect. While section 73 requires shareholder approval of a merger, consolidation, or share exchange by holders of three-fourths of all shares entitled to vote, HAWAII REV. STAT. § 417-4 provides that a merger or consolidation shall be approved by holders of three-fourths of all issued and outstanding shares having voting power regardless that their right to vote is otherwise restricted or denied by the constituent corporation's charter, articles, by-laws, or resolution.

Section 73A. Approval of shareholders not required.

Under the HBCA, unless required by a corporation's articles of incorporation, shareholder approval to a merger or exchange is not required if three conditions are met. First, the subject plan must not amend the articles of incorporation of the surviving or issuing corporation. Second, each share in the surviving or issuing corporation outstanding immediately before the merger must be an identical, outstanding, or treasury share of such surviving or issuing corporation after the merger. Third, either (1) the plan will not require any issuance of common shares of the surviving corporation, securities, or obligations convertible into such common shares or (2) if there will be such issuance, then the common shares issued and/or to be issued upon conversion cannot exceed twenty percent of the corporation's common shares outstanding immediately preceding the transaction's effective date. The filing requirements under this section are also set forth. This section is derived from DEL. CORP. ANN. tit. 8, § 251(f) (Supp. 1980).

This section represents a change from present Hawaii law which contains no analogous provision.

Section 74. Articles of merger, consolidation, or exchange.

This section sets forth the required contents of the articles of merger, consolidation, or exchange which must be delivered to the director of regulatory agencies upon the requisite corporate approval. The director is to issue a certificate of merger, consolidation, or exchange upon return of the duplicate articles of merger, consolidation, or exchange, as the case may be. Such articles are equivalent to the certificate of approval required to be filed under the present law, HAWAII REV. STAT. § 417-6 (1976).

The HBCA requires that the articles set forth: The plan of merger, consolidation, or exchange; the outstanding shares of each class or classes of shares entitled to vote on the particular corporate action; the votes cast for and against such plan; and as to the acquiring corporation in an exchange, a statement that the exchange had been duly approved. This is similar to the required contents of the certificate of approval under the present statute. However, unlike HAWAII REV. STAT. § 417-6, the HBCA does not require that the time and place of the share-

holders' and directors' meetings and the facts indicating compliance with the notice requirements be set forth. Also, the HBCA eliminates the present requirement under the current statute that the filed document state, if applicable, all conditions precedent to the filing or execution of the merger or consolidation agreement have occurred.

Section 75. Merger of subsidiary corporation.

This section is similar to HAWAII REV. STAT. § 417-42 (1976). The merger of a subsidiary into a corporation owning at least ninety percent of the outstanding shares in each class of the subsidiary's stock need only be approved by the board of directors of the parent corporation under both the HBCA and the present statutory law.

However, while HAWAII REV. STAT. § 417-42 requires a plan of merger only if the parent does not own all of the subsidiary's shares, HBCA § 75 requires such a plan in all mergers pursuant to this provision. Under section 75, the parent's board of directors must approve a plan and mail a copy of the plan to each of the subsidiary's shareholders. The articles of merger must also set forth the plan, the number of shares owned by the parent, and the date of the above-described mailing. The articles are submitted to the director thirty days after the mailing or upon waiver by the shareholders and at this time, the director shall issue a certificate of merger.

Section 76. Effect of merger, consolidation, or exchange.

This section sets forth the legal consequences of a merger, consolidation, or exchange. These are similar to those specified under present Hawaii law in HAWAII REV. STAT. §§ 417-8 and -13 (1976). In addition to these provisions of the current law, HBCA § 76 provides for the automatic amendment of the surviving corporation's articles of incorporation pursuant to the plan of merger and with regard to consolidation, the proposed articles of incorporation for the consolidated corporation shall be deemed the original articles of such corporation.

Note also that the HBCA does not contain any provision which is equivalent to HAWAII REV. STAT. § 417-12 (1976) which provides that uncapitalized paid-in or earned surplus of the constituent corporations may be capitalized by the surviving corporation or entered as paid-in or earned surplus, as the case may be.

Section 77. Merger, consolidation, or exchange of shares between domestic and foreign corporations.

This section which sets out the conditions upon which a domestic corporation may engage in a merger, consolidation, or exchange with a foreign corporation differs from present Hawaii law as embodied in HAWAII REV. STAT. § 417-16 (Supp. 1980) and HAWAII REV. STAT. § 417-17 (1976) in several aspects. First, the HBCA requires only holders of three-fourths of the corporation's shares entitled to vote to approve the transaction. HAWAII REV. STAT. § 417-16 requires holders of three-fourths of all issued and outstanding shares to so approve. Second, only the HBCA makes provisions for class voting with regard to such mergers, consolidations, or exchanges.

Third, the HBCA does not require as does HAWAII REV. STAT. § 417-17 that the foreign surviving corporation designate a person residing in the state who may be

served with legal notice and process. It does, however, provide that the foreign surviving corporation execute an agreement that it may be so served.

Fourth, under the HBCA, only the director of regulatory agencies is designated as an agent to receive process for the surviving foreign corporation, not the deputy director as under HAWAII REV. STAT. § 417-17.

Finally, the HBCA does not include special rules pertaining to fiduciary companies, public utility companies, or companies subject to the bank examiner as does HAWAII REV. STAT. § 417-17.

Section 78. Sale of assets in regular course of business and mortgage or pledge of assets.

The HBCA differentiates between a sale, lease, exchange, or other disposition of all or substantially all the property and assets of a corporation in the usual and regular course of business and one not in the usual and regular course of business. Under HBCA § 78, a corporation need not obtain its shareholders' approval if it sells, leases, or otherwise disposes of all of its assets in the regular course of business; if such disposition is not in the ordinary course of business, then HBCA § 79 governs. HAWAII REV. STAT. § 416-33 (1976), however, does not differentiate a disposition in the regular course of business from one not in the regular course of business. The disposition of all or substantially all of a corporation's assets in either situation must be authorized and approved by both its directors and shareholders.

HBCA § 78, like the current Hawaii statute, allows a corporation to mortgage or pledge all of its assets without shareholder approval.

Section 78 differs from HAWAII REV. STAT. § 416-33 in that it does not allow a corporation to transfer all or substantially all of its assets without special director or shareholder approval if the transfer is made to satisfy or partially satisfy debt or liability.

Section 79. Sale of assets other than in regular course of business.

HBCA § 79 delineates the procedure by which a corporaton may sell, lease, exchange, or otherwise dispose of more than one-half of its property and assets, or assets or property from which it derived one-half of the aggregate revenue or earnings in three of its five most recent fiscal years if not in the ordinary and usual course of business. The board of directors must initiate the process by passing a resolution submitting the proposed action for shareholder approval. Twenty days prior notice must be given to all record shareholders pursuant to HBCA § 80A. Three-fourths of the shareholders of all classes entitled to vote and three-fourths of the shareholders of each class entitled to vote as a class must approve the proposed transaction. After such authorization, the board may abandon the transaction at any time without shareholder approval.

The HBCA represents a change from present Hawaii law in the following respects: the present law does not prescribe a minimum period of notice to shareholders; the present law allows that either director or shareholder approval may take place first; the present law provides that no action may be brought to set aside a transfer because the requirements of HAWAII REV. STAT. § 416-33 (1976) were not complied with after ninety days from recordation of the instrument of transfer in the Bureau of Conveyances; and the present law specifically states that

HAWAII REV. STAT. § 416-33 does not modify the bulk transfer provisons of the UCC.

The HBCA allows a corporation to revoke its voluntary dissolution proceedings at any time prior to the filing of the articles of dissolution. HBCA §§ 88-91.

Section 80. Right of shareholders to dissent.

This section expands the present law as set forth in HAWAII REV. STAT. § 417-19 (1976) to allow shareholders to dissent not only to a merger, HBCA §§ 71, 75, 77, or consolidation, HBCA §§ 72, 77, but also to a share exchange, HBCA §§ 72A, 77, and a sale or exchange of all or substantially all of the corporation's assets not made in the regular course of business, HBCA § 79, including a sale in dissolution, HBCA § 87, but not including sales pursuant to court order and sales for cash upon terms pursuant to which proceeds are to be distributed to the shareholders within one year.

Under the HBCA, a shareholder may not dissent as to less than all of the shares registered in his name. This limitation does not exist under present Hawaii law. Although brokers, trustees, and agents are excluded from this limitation, they may not dissent to less than all of one beneficial owner's shares.

The right to dissent under section 80 is not available to shareholders of the surviving corporation in a merger if a vote of shareholders is not necessary to authorize the merger. This provision is consistent with HAWAII REV. STAT. § 417-43 (1976) presently in force.

Section 80A. Requirements of notice to shareholders who have the right to dissent.

This section sets out the notice requirements when a corporation's act gives rise to dissenters' rights under HBCA § 80. Such notice must be mailed to each and every shareholder and must contain written notice of the meeting in which the action will be considered, a copy or summary of the plan to be voted on, a statement informing shareholders of their rights under HBCA § 80, and a copy of HBCA § 80.

The plan or summary, in addition to the requirements set forth in the HBCA provisions governing the particular corporate action being proposed, must minimally describe the proposed transaction, designate each party's role, set out the manner of converting the shares of each party, and contain a statement of any new articles of incorporation and/or any articles of incorporation which would be affected by the transaction.

Except for mergers or consolidations pursuant to HAWAII REV. STAT. § 417-2 (1976), present Hawaii law does not prescribe notice requirements as stringent as those contained in HBCA § 80A.

Section 81. Rights of dissenting shareholders.

This section sets forth the procedure by which a shareholder can exercise his right to dissent to a proposed corporate action, demand fair value for his shares, and force a suit to determine fair value.

The first paragraph requires that all shareholders desiring to dissent file a written objection to the proposed transaction prior to or at the meeting at which the proposed corporate action is submitted to a vote. If the proposed transaction is

duly approved and the shareholder did not vote in the proposal's favor, the shareholder must make a written demand on the corporation for the *fair value* of his shares, determined as of the day prior to the vote. In contrast, HAWAII REV. STAT. § 417-19 (1976) provides that a dissenting shareholder may demand the *fair market value* of his shares as of the date of the vote. Also, the HBCA differs procedurally from HAWAII REV. STAT. §§ 416-19 and -20 (1976) under which only one demand for payment is necessary to initiate the process of effectuating dissenters' rights. The HBCA modifies HAWAII REV. STAT. § 417-19 by specifically excluding from fair value any depreciation or appreciation resulting from anticipation of the corporate action. The written demand must be made within ten days of the vote, but if a corporaton is to be merged without a shareholders' vote, HBCA § 73A, the written demand must be made within fifteen days after the plan has been mailed, HBCA § 80. Present Hawaii law gives dissenting stockholders thirty days to make their demand. Failure to make such demand binds the shareholder to the corporate action and making such a demand deprives the shareholder of all his other rights as a shareholder. This section as does HAWAII REV. STAT. § 417-29 (1976) makes the shareholder's right to demand fair value an exclusive remedy.

The second paragraph, like HAWAII REV. STAT. § 417-21 (1976), allows a shareholder to withdraw his demand for fair value only with the corporation's consent. Under the HBCA, the shareholder's right to be paid fair value ceases if his demand is withdrawn upon such consent, if the proposed corporate action is abandoned *cf.* HAWAII REV. STAT. § 417-20 (1976), if the shareholders revoke their approval of the proposed action, if no timely demand for fair value is made, if a court denies the shareholder such relief, or in the case of a merger, if the surviving corporation owns all of the outstanding shares of the merged corporation upon the filing of the articles of merger, HBCA § 74. In such event, the dissenter's status as a shareholder is restored without prejudice.

The third paragraph requires the corporation or the surviving or new corporation in the case of a merger or consolidation to make a written offer to the dissenting shareholder for his shares at a price which it deems to represent the fair value of the shares. This represents a change from HAWAII REV. STAT. § 417-22 (1976) which requires the constituent corporation of which the dissenter owns shares, which may not be the new or surviving corporation, to fulfill obligations to dissenters. Under the HBCA, the offer must be made within ten days after the effectuation of the disputed corporate action and must be accompanied by the balance sheet and profit and loss statement of the corporation in which the dissenting shareholder holds shares. The financial statement requirements are additions to the requirements of HAWAII REV. STAT. § 417-22.

Under the fourth paragraph, if the corporation and a dissenting shareholder agree on fair value within thirty days after the subject corporate action takes effect, the corporation has ninety days within which to pay the agreed value to the shareholder surrendering his certificates. HAWAII REV. STAT. § 417-22 does not contain such time limitations.

The fifth paragraph sets forth the procedure for a judicial determination of fair value. Under the HBCA, if the corporation and shareholder fail to agree on a fair value within thirty days after the subject corporate action takes effect, the shareholder has another thirty days to make a written demand on the corporation for the fair value of his shares. The corporation must, within thirty days after receipt of such written demand given within sixty days after the date on which such corporate action was effected, file a petition for a judicial determination of fair value.

If the corporation fails to so file, any dissenting shareholder may do so in the corporation's name. This section changes HAWAII REV. STAT. § 417-23 (1976) which places the burden of bringing a judicial action to determine fair market value on the shareholder.

The joinder and intervention provisions in HAWAII REV. STAT. § 417-24 (1976) are eliminated under the HBCA which makes all dissenting shareholders parties to a single action. All shareholders who are parties to the suit are entitled to payment of the judgment upon surrendering their certificates.

Under both the HBCA and HAWAII REV. STAT. § 417-25 (1976), the court has the option of appointing appraisers. However, under the HBCA, the court may appoint any number of appraisers and is also free to set the scope of their power and authority.

The sixth paragraph gives the court the power to set an appropriate interest rate on the amount owed, such rate to be calculated from the date of the vote on the disputed action. This differs significantly from the fixed rate of four percent calculated from the date of filing prescribed by HAWAII REV. STAT. § 417-25.

The seventh paragraph sets out the rules for apportioning the costs and expenses of the suit. In most instances, the corporation must pay for all costs and expenses. However, if the court determines that the shareholders acted arbitrarily, vexatiously, or in bad faith in rejecting the corporation's original offer, the court may apportion the costs and expenses in its discretion. Expenses include the appraiser's fees, but exclude fees and expenses expended by any party for counsel and experts unless the judgment materially exceeds the original offer by the corporation or no offer was made. In such event, the court may award to any shareholder reasonable compensation for the experts retained by him. HAWAII REV. STAT. § 417-25 presently gives the court complete discretion in apportioning costs.

Under the eighth paragraph, the shareholder has twenty days after making demand for payment to submit his certificates to the corporation for notation that demand has been made. If he fails to do so, the corporation may, subject to judicial review, deny him the right to dissent. The shares represented by a certificate on which notation has been made may be transferred if the new certificate issued bears a similar notation and the original shareholder's name. The transferee's rights are limited to those possessed by the original owner after making his demand for payment. The provisions of this paragraph are similar to provisions contained in HAWAII REV. STAT. § 417-21.

The ninth paragraph provides that subject to any plan of merger or consolidation, the shares acquired by the corporation under this section become treasury shares and shall be treated accordingly.

Sections 82 through 105. Voluntary dissolution under HBCA.

The procedure for voluntarily dissolving a corporation and distributing its assets under the HBCA is different from the procedure under present Hawaii law. Under HAWAII REV. STAT. ch. 416, part VI, the director of regulatory agencies issues a decree of dissolution after a vote of shareholders and the filing of a certificate of dissolution. The corporation ceases to exist upon the issuance of the decree of dissolution. HAWAII REV. STAT. § 416-121 (1976). Thereafter, the state appoints a trustee, HAWAII REV. STAT. § 416-123 (1976), who is vested with title to the corporate property and charged with distributing the corporation's assets pur-

suant to HAWAII REV. STAT. § 416-125 (1976). Upon submission of a final itemized account, the trustee's powers terminate.

In contrast, under the HBCA, the corporation remains in existence until all the assets are distributed. When a corporation agrees to dissolve, HBCA §§ 82 to 84, it files a statement of intent to dissolve, HBCA § 85. The corporate assets are subsequently distributed by the corporation pursuant to HBCA § 87. Unlike present Hawaii law, there is no trustee in dissolution. When the corporation's assets have been appropriately distributed, the corporation prepares the articles of dissolution, HBCA § 92, and the corporation ceases to exist upon the filing of the articles, HBCA § 93.

Section 82. Voluntary dissolution by incorporators.

Voluntary dissolution by incorporators, nonexistent under present Hawaii law, is available only to corporations which have not commenced business or issued shares. Under this section, a majority of the incorporators may elect to dissolve the corporation. In addition to the non-commencement of business and nonissuance of shares, the HBCA also requires that no debts remain unpaid and that amounts paid for subscriptions to shares be returned to subscribers prior to dissolution. If the above conditions are met, the incorporators need only file articles of dissolution with the director of regulatory agencies in order to dissolve the corporation.

Procedurally, this section is analogous to HAWAII REV. STAT. §§ 416-121 and -123 (1976). Under present Hawaii law, however, the stockholders and not the incorporators must vote to dissolve and there is no requirement that no shares have been issued.

Section 83. Voluntary dissolution by consent of shareholders.

Voluntary dissolution by consent of the shareholders requires the unanimous written consent of all of the shareholders.

This procedure is provided for by present Hawaii law under HAWAII REV. STAT. § 416-78 (Supp. 1980) and HAWAII REV. STAT. § 416-121 (1976).

Section 84. Voluntary dissolution by act of corporation.

Under HBCA § 84, the board of directors initiates the process of voluntary dissolution by adopting a resolution and a proposal to be presented to the shareholders. Upon approval by the holders of three-fourths of the outstanding voting shares, a statement of intent to dissolve is filed with the director of regulatory agencies. HBCA § 84(d) lists the requirements of the statement of intent. Under present Hawaii law, only the approval of holders of three-fourths of the corporation's outstanding stock having voting power is required to authorize voluntary dissolution. HAWAII REV. STAT. § 416-121 (1976).

Section 85. Filing of statement of intent to dissolve.

This section directs a corporation to file its statement of intent to dissolve with the director of regulatory agencies when dissolution has been authorized under HBCA §§ 83 and 84. The requirements of the statement of intent to dissolve are set out in HBCA §§ 83 and 84. The statement of intent to dissolve serves the

same purpose as the certificate of dissolution required to be filed under HAWAII REV. STAT. § 416-121 (1976).

Section 86. Effect of statement of intent to dissolve.

HBCA § 86 requires the corporation to cease carrying on all business not related to its winding up upon the filing of its statement of intent to dissolve. Its corporate existence does continue, however, until the issuance of the certificate of dissolution pursuant to HBCA § 93 or until the entry of an appropriate court decree. Under present Hawaii law, corporate existence ceases upon filing of the certificate of dissolution which is analogous to the statement of intent unless a later date is requested by the corporation; thereafter, title to corporate property is vested in the trustee for the creditors and stockholders of the corporation. HAWAII REV. STAT. § 416-121 (1976).

Section 87. Procedure after filing statement of intent to dissolve.

Section 87, like HAWAII REV. STAT. §§ 416-121 to -122 (1976), delineates the steps necessary in winding up a corporation. Note that the corporation, not the trustee as under present Hawaii law, is responsible for the winding up. The HBCA contains three changes from present Hawaii law. First, the corporation, in notifying creditors of the dissolution, must set forth all corporate and trade names used by the corporation or its predecessors during the preceding six years.

Second, tort claims are not barred by a claimant's failure to present his claim. Tort claims are treated separately in HBCA § 105.

Finally, the HBCA allows a corporation to petition the court to take over the liquidation of its business and affairs. Court supervised liquidations are discussed in HBCA §§ 98 to 104.

Section 88. Revocation of voluntary dissolution proceedings by consent of shareholders.

This section allows a corporation to revoke its decision to voluntarily dissolve upon the signed, written consent of all of its shareholders prior to the issuance of a certificate of dissolution by the director of regulatory agencies and enumerates the filing requirements for the statement of revocation of voluntary dissolution proceedings. Present Hawaii statutory law does not afford a similar power to a corporation. The effect of such revocation is set forth in HBCA § 91.

Section 89. Revocation of voluntary dissolution proceedings by act of corporation.

HBCA § 89 allows a corporation to revoke its decision to voluntarily dissolve through the adoption by the board of directors and approval by the shareholders of a resolution recommending revocation prior to the issuance of a certificate of dissolution by the director. The filing requirements for a statement of revocation of voluntary dissolution proceedings are set forth therein. There is no similar power afforded to a corporation under present Hawaii statutory law. The effect of such revocation is set forth in HBCA § 91.

Section 90. Filing of statement of revocation of voluntary dissolution proceedings.

Section 90 directs the corporation to file its statement of revocation of voluntary dissolution with the director of regulatory agencies. The required contents of the statement are set forth in HBCA §§ 88 and 89(d). There is no analogous provision under present Hawaii law.

Section 91. Effect of statement of revocation of voluntary dissolution proceedings.

This section provides that upon the filing of the statement of revocation pursuant to HBCA § 90, the revocation becomes effective, the voluntary dissolution process ceases, and the corporation may again carry on its business. Under present Hawaii law, there is no provision for discontinuance of dissolution proceedings once the certificate of dissolution has been filed by the corporation.

Section 92. Articles of dissolution.

HBCA § 92 sets out the required contents of the articles of dissolution which is filed with the director of regulatory agencies upon completion of the winding up of a corporation. Such articles must be filed no more than five years after the filing of the statement of intent to dissolve. Thus, the HBCA extends the period of winding up from one year as provided under present Hawaii law, HAWAII REV. STAT. § 416-125 (1976), to five years. (Note, however, that under present Hawaii law, the director may for good cause extend this period.) The ramifications of failure to meet this deadline are contained in HBCA § 94(g).

Section 93. Filing of articles of dissolution.

Section 93 provides that the effect of the certificate of dissolution is to end the corporation's existence except as otherwise provided in HBCA. *See, e.g.*, HBCA § 105.

Section 94. Involuntary dissolution.

This section, like HAWAII REV. STAT. § 416-122 (1976), sets forth the grounds upon which a corporation may be involuntarily dissolved by the director of regulatory agencies. The HBCA eliminates one cause for involuntary dissolution available under present Hawaii law—when the corporation ceases to have any assets and fails to function as shown by the certificate of any of its directors or officers. It retains three of the present grounds for involuntary dissolution: adjudication of bankruptcy, failure to file an annual exhibit, and expiration of the articles of incorporation. The HBCA adds five new grounds for involuntary dissolution: when the corporation has continued to exceed the authority conferred upon it by law, HBCA § 94(c); when the articles of incorporation have been procured through fraud, HBCA § 94(b); when the corporation has failed to maintain a registered agent in the state for thirty days, HBCA § 94(d); when there is a failure to notify the director of a change in a corporation's registered office or agent, HBCA § 94(e); and when there is a failure to complete voluntary dissolution proceedings within five years, HBCA § 94(f).

Section 95. Involuntary dissolution; ordered by director and certificates, notices, etc.

HBCA § 95 sets forth the procedure by which a corporation may be involuntarily dissolved by the director of regulatory agencies. It is identical to the procedure set forth in HAWAII REV. STAT. § 416-122 (1976).

Section 96. Equal division of directors; appointment of provisional director; rights and powers; compensation.

This section which allows the first circuit court to appoint a provisional director in the event of a directors' deadlock is identical to HAWAII REV. STAT. § 416-84 (Supp. 1980). It is not part of the MBCA. *See also* HBCA § 97 which allows the first circuit court to dissolve a corporation with a deadlocked board of directors.

Section 97. Jurisdiction of court to liquidate assets and business of corporation.

Section 97 is analogous to HAWAII REV. STAT. § 416-123(a) (1976). The HBCA grants to the first circuit court jurisdiction to dissolve and liquidate the assets and business of the corporation. This differs from HAWAII REV. STAT. § 416-123(a) which empowers all circuit courts to so act and pursuant to which proper jurisdiction lies with the circuit in which the corporation's principal office is located.

Under the HBCA, in an action by a shareholder, judicial dissolution and liquidation is proper if: (1) the directors are deadlocked, the shareholders are unable to break the deadlock, and irreparable injury is being suffered or threatened to the corporation; (2) the directors or those in control of the corporation are acting illegally or fraudulently where the corporation has twenty-five or fewer shareholders; or (3) the shareholders are deadlocked and have failed for two consecutive annual meetings to elect successors to replace directors whose terms have expired. Only the second ground is unavailable under present Hawaii law.

Unlike present Hawaii law, the HBCA also allows a corporation to petition for liquidation under court supervision after filing its statement of intent to dissolve pursuant to HBCA § 85.

Section 98. Procedure in liquidation of corporation by court.

This section which sets out the procedures to be taken by the court in liquidating a corporation is identical to HAWAII REV. STAT. § 416-128(b) (1976).

Section 99. Qualifications of receivers.

HBCA § 99 is analogous to HAWAII REV. STAT. § 416-128(c) (1976). Under the HBCA, the receiver must be a resident of the state if he is an individual. The requirement of United States citizenship mandated by HAWAII REV. STAT. § 416-128(c) has been eliminated. As to corporate receivers, only domestic corporations would be eligible. The bonding requirements are unchanged.

Section 100. Filing claims in liquidation proceedings.

This section which sets out the procedure for filing claims by creditors against a corporation in liquidation is identical to HAWAII REV. STAT. § 416-128(d) (1976).

Section 101. Discontinuance of liquidation proceedings.

Section 101 which empowers the court to discontinue liquidation proceedings when it is established that cause for liquidation no longer exists is identical to HAWAII REV. STAT. § 416-128(e) (1976).

Section 102. Decree of involuntary dissolution.

HBCA § 102 which directs the court to enter a decree of involuntary dissolution upon the completion of liquidation is substantially identical to HAWAII REV. STAT. § 416-128(f) (1976).

Section 103. Filing of decree of dissolution.

This section directs the court pursuant to entering a decree dissolving the corporation to file a certified copy of such decree with the director of regulatory agencies. It is analogous to the last sentence of HAWAII REV. STAT. § 416-128(f) (1976).

Section 104. Deposit with director of finance of amount due certain shareholders.

HBCA § 104 requires that upon the dissolution of a corporation, assets which are distributable to shareholders or creditors who cannot be found, who are unable to receive such assets, or who are unknown are to be reduced to cash and deposited with the director of finance. Such creditors or shareholders can receive the amount upon satisfactory proof of entitlement to the director of finance. A similar provision does not exist under present Hawaii law.

Section 105. Survival of tort claims after dissolution.

The provision in this section, not present under current Hawaii law, preserves all tort remedies for claims available to or against the dissolved corporation for two years after the date of dissolution or the date of the incident giving rise to the claim, whichever is earlier.

This section also allows a corporation dissolved by expiration of its duration as set forth in the articles of incorporation to amend its articles during the two-year period so as to extend its period of duration.

Section 106. Admission of foreign corporation.

The HBCA requires that a foreign corporation, in order to transact business in this state, must first obtain a certificate of authority from the director of regulatory agencies. Under present Hawaii law, there is no provision for a certificate of authority although foreign corporations must still file a declaration, HAWAII REV. STAT. § 418-1 (1976 & Supp. 1980), analogous to the application required by HBCA § 110. The procedure for obtaining such a certificate is set out in HBCA §§ 110 and 111.

The second paragraph of this section lists ten situations specifically considered not to be "transacting business" for qualification purposes and therefore, obviating the need for a certificate of authority. The list is virtually identical to that in HAWAII REV. STAT. § 418-6 (1976).

Section 107. Powers of foreign corporation.

This section, like HAWAII REV. STAT. § 418-7 (1976), delineates the powers of a registered foreign corporation in the state. This provision grants a qualified foreign corporation the same rights and privileges and subjects it to the same duties, restrictions, penalties, and liabilities as are enjoyed by and imposed upon a like domestic corporation. The only change from HAWAII REV. STAT. § 418-7 is that the HBCA does not explicitly deny a foreign corporation the special powers conferred by law upon railroad or banking corporations organized under the laws of the state.

Section 108. Corporate name of foreign corporation.

Section 108 forbids a new foreign corporation from using a name the same as or similar to that of a corporation already doing business in the state. This is the same rule found in HAWAII REV. STAT. § 418-4 (1976). The HBCA also adds two exceptions to this rule. The foreign corporation may use the name if it has the written consent of the other corporation involved and adds thereto a distinguishing word or words. The foreign corporation may also use the name if it has a court decree establishing its prior right to the name.

The HBCA also has two additional requirements to registering a corporate name. First, the name must contain the word (or its abbreviation) "corporation," "incorporated," or "limited." Second, the name must not suggest that the corporation is organized for any purpose other than one contained in the articles of incorporation of a general corporation.

Section 109. Change of name by foreign corporation.

Section 109 requires the director of regulatory agencies to suspend the certificate of a foreign corporation when it changes its name to one not allowed under HBCA § 108, preventing it from transacting business in the state until it has complied with applicable Hawaii law regarding the same. HAWAII REV. STAT. § 418-5 (Supp. 1980) requires a foreign corporation to inform the director of a name change, but provides no sanction for changing its name to an illegal one.

Section 110. Application for certificate of authority.

This section sets forth the contents of the application for the certificate of authority for a foreign corporation to transact business in this state as required under HBCA § 106. The section is analogous to HAWAII REV. STAT. § 418-1(1) (1976). A foreign corporation is required to make an application to the director of regulatory agencies setting forth the corporate name, the state or country of its incorporation, the date of incorporation, the duration of the corporation, the address of its principal office in the domiciliary state, the resident registered agent and registered office in Hawaii, the purpose for which the corporation is organized, and the names and addresses of its corporate directors and officers. Unlike HAWAII REV. STAT. § 418-1 (1976 & Supp. 1980), however, the HBCA provides that a corporation must give an estimate, with respect to the coming year, of all corporate property to be located in the state, of its gross business, and of its gross business to be transacted within the state. The present law requires a report of property presently owned and income of the previous year. Also, the HBCA does

away with both the requirement in HAWAII REV. STAT. § 416-4 (Supp. 1980) that a corporation's capital be at least $1,000.00 and the $50.00 filing fee provided for by HAWAII REV. STAT. § 418-7 (1976).

Section 111. Filing of application for certificate of authority.

The HBCA requires that an application for a certificate of authority be delivered to the director of regulatory agencies accompanied by a copy of the applicant's articles of incorporation and a certificate of good standing authenticated by the proper official of the applicant's state of incorporation. This differs in one respect from HAWAII REV. STAT. § 418-1(2) (Supp. 1980) which requires a copy of a corporation's articles to be filed only at the director's request.

Section 112. Effect of certificate of authority.

This section provides that upon issuance of the certificate of authority, the foreign corporation is entitled to transact business in the state as set out in the purposes clause of its application. By comparison, under HAWAII REV. STAT. § 418-7 (1976), the foreign corporation is entitled to transact business upon meeting the filing requirements of the director and is entitled to transact business for any legal purpose except that it shall not have the special powers conferred by law upon railroad and banking corporations. Under the HBCA, the director has the power to suspend, revoke, or modify the certificate. This differs from HAWAII REV. STAT. § 418-15 (1976) whereby the director has only the power to cancel registration for failure to conform to HAWAII REV. STAT. ch. 418.

Section 113. Registered office and registered agent of foreign corporation.

Section 113 requires a foreign corporation to maintain a registered agent and office in this state. The present law, HAWAII REV. STAT. § 418-3 (1976), appears to require that the agent be an individual, but the HBCA also allows the agent to be another corporation properly doing business in the state. Under the HBCA, the registered agent must have a business office identical with the foreign corporation's registered office. There is no requirement for a foreign corporation to maintain a registered office under present Hawaii law.

Section 114. Change of registered office or registered agent of foreign corporation.

This section, like HAWAII REV. STAT. § 418-3 (1976), allows a foreign corporation to change its registered agent upon notice to the director of regulatory agencies. The HBCA additionally requires that the notice of change reflect that the change was authorized by the corporation's board of directors.

This section also contains provisions for the resignation of a registered agent substantially identical to provisions contained in HAWAII REV. STAT. § 418-3 (1976).

Section 115. Service of process on foreign corporation.

Under HBCA § 115, service of process upon a foreign corporation is made in the same manner as upon a domestic corporation. HBCA § 14. This is the same

procedure set forth in HAWAII REV. STAT. § 416-131 (1976).

Section 116. Amendment to articles of incorporation of foreign corporation.

The HBCA requires the corporation to file any amendments to its articles of incorporation with the director of regulatory agencies. This represents a change from HAWAII REV. STAT. § 418-5 (Supp. 1980) which requires only the filing of a certificate of an amendment of articles involving a change of corporate name, merger, or consolidation. The actual amendment or other corporate document need be filed only upon request of the director. If the amendment changes the corporation's name or purpose, the corporation must obtain an amended certificate under HBCA § 118 in order to transact business under its changed name or for the new purpose in this state.

Section 117. Merger of foreign corporation authorized to transact business in this State.

This section addressing notice requirements in the event of a merger of a foreign corporation authorized to transact business in this state changes present Hawaii law as contained in HAWAII REV. STAT. § 418-5 (Supp. 1980) in four ways. First, the corporation must file a certified copy of the articles of merger, not merely notice. Second, while present Hawaii law allows an official of either the foreign corporation's state of incorporation or the state where the merger took place to certify the articles, the HBCA allows for only the latter to do so. Third, the corporation has sixty as opposed to thirty days to so file. Finally, the HBCA directs the surviving foreign corporation to comply with the requirements of HBCA § 118 relating to amended certificates of authority. Note that the HBCA does not require such steps in the event of a consolidation or share exchange. An amended certificate of authority is required, however, if the corporate name is changed or a new purpose is added.

Section 118. Amended certificate of authority.

HBCA § 118 requires a foreign corporation to procure an amended certificate of authority in the event it changes its corporate name or desires to pursue purposes other than those listed in its prior certificate. HAWAII REV. STAT. § 418-5 (Supp. 1980) requires public recordation of a change in a foreign corporation's name, but there is no current Hawaii provision which requires public recordation of a change in a foreign corporation's purpose.

Section 119. Withdrawal of foreign corporation.

As in HAWAII REV. STAT. § 418-14 (1976), the HBCA provides that a foreign corporation may relinquish its authority to conduct business in the state by applying for a certificate of withdrawal from the director of regulatory agencies. Like present Hawaii law, the application must state that the corporation surrenders its authority to do business in this state, that it revokes the authority of its registered agent to receive process and consents to process being served upon the director for any cause of action arising from its transactions within the state, and a post office address to which the director may mail a copy of any process upon

which he has been served. The HBCA, unlike the current statute, requires that the application set forth a statement of the amount of the corporation's stated capital as of the date of application.

The corporation must also submit sufficient proof that it has published, at least once a week for four successive weeks within the last sixty days in a newspaper of general circulation, a notice to its creditors of its intention to apply for a certificate of withdrawal and to forfeit its right to conduct business in the state, thereby notifying all creditors to present their claims. In addition, the corporation must present sufficient proof that not less than fifteen days have passed since the last notice was published and that all creditors within the state have received payment. Finally, a corporation must obtain a certificate showing that it has paid all taxes and license fees and must provide whatever additional information is necessary for the director to ascertain any unpaid fees.

This section is substantially identical to HAWAII REV. STAT. § 418-14 (1976).

Section 120. Certificate of withdrawal.

HBCA § 120 authorizes the director to issue a certificate of withdrawal upon the filing of such an application. While this section does not change the effect of HAWAII REV. STAT. § 418-14 (1976), it explicitly states that the authority of a foreign corporation to do business in the state will terminate upon the issuance of the certificate of withdrawal.

Section 121. Revocation of certificate of authority.

Under the HBCA, a foreign corporation's certificate of authority may be revoked when it has (1) failed to file its annual exhibit with the director of regulatory agencies, (2) failed to pay fees, penalties, or taxes, (3) neglected to appoint and maintain a registered agent, (4) failed to notify the director of a change in its registered office or registered agent, (5) neglected to file any amendment to its articles of incorporation or any articles of merger within the prescribed period, or (6) misrepresented any fact in a document submitted pursuant to the HBCA.

The HBCA differs from the current law under HAWAII REV. STAT. § 418-15 (1976) in that the latter authorizes cancellation of a foreign corporation's registration only upon its failure to file a corporate exhibit for a period of two years. Moreover, although both statutes require at least sixty days notice to the corporation, HBCA § 121 abolishes the existing requirement of publication of notice to the foreign corporation's creditors prior to cancellation. This section also explicitly provides that if a foreign corporation, prior to revocation, removes the cause of such revocation, its certificate will not be revoked.

Section 122. Issuance of certificate of revocation.

HBCA § 122 introduces a provision, nonexistent under the current law, whereby the director of regulatory agencies, upon revocation of a certificate of authority, is required to issue a certificate of revocation in duplicate. One copy is to be filed with his office and the other is to be mailed to the foreign corporation at its registered office. The foreign corporation's authority to transact business in this state terminates upon the issuance of this certificate.

Section 123. Application to corporations heretofore authorized to transact business in this State.

Section 123 provides that upon enactment of the HBCA, foreign corporations already authorized to conduct business will be subject to the rights and limitations imposed by the HBCA. These corporations are given two years to comply with the other provisions of the HBCA.

Section 124. Transacting business without certificate of authority.

HBCA § 124 sets forth a comprehensive explanation of the consequences to a foreign corporation for conducting business within the state without a certificate of authority. Currently, HAWAII REV. STAT. § 418-10 (1976) provides that any foreign corporation which fails to comply with any provisions of HAWAII REV. STAT. ch. 418, including the requirement of filing its declaration under HAWAII REV. STAT. § 418-1(1) (1976), will be subject to a penalty of up to $100.00 for each violation.

Section 124 states that neither the noncomplying corporation nor its successor or assignee has the right to maintain an action or proceeding in a state court until the certificate is obtained. Nevertheless, the corporation's failure to obtain the certificate will not affect the validity of its acts or any contract it has entered into and the corporation may be made to defend an action or proceeding in a state court. Moreover, it will be liable to the state for the fees and taxes which would have been imposed had it obtained a certificate of authority to transact business in this state as required by the HBCA.

The corporation will be fined not more than $5,000.00 and $50.00 per day for each day after expiration of the ninety day period during which the certificate should have been applied for. It may be ordered to cease and desist from doing business in this state. The attorney general will bring proceedings to recover amounts due to the state.

For the purpose of service of process, the director of regulatory agencies will be deemed the delinquent corporation's agent.

Section 125. Annual report of domestic and foreign corporations.

In comparison to HAWAII REV. STAT. §§ 416-95 and 418-11 (Supp. 1980) which require a corporation's annual report to include such information as the director shall prescribe, HBCA § 125 specifically requires an annual report to contain the following: the name of the corporation, the address of its registered office, the name of its registered agent, a statement of the character of its business, a list of its directors, and statements regarding shares and stated capital.

Section 126. Filing of annual report of domestic and foreign corporations.

HBCA § 126 requires a corporation authorized to do business within the state to file its annual report with the director between January 1st and March 1st. The filing period currently in effect under HAWAII REV. STAT. § 416-95 (Supp. 1980) expires on March 31st.

Section 126 states that a March 1st postmark will be deemed to have met the filing deadline. If an annual report submitted by the deadline is returned to the

corporation for corrections, the corporation is given thirty days to make the necessary corrections and to return the report to the director without incurring any penalty fees. There is no explicit provision for such correction under present Hawaii law.

Section 127. Fees and charges to be collected by director.

This section generally provides that the director shall charge and collect in accordance with the HBCA filing fees, miscellaneous charges, and license fees.

Section 128. Fees for filing documents and issuing certificates.

HBCA § 128 prescribes fees to be paid to the director of regulatory agencies upon the filing of corporate documents. It is basically identical to HAWAII REV. STAT. § 416-97 (Supp. 1980). Only HBCA § 128(p) which deals with fees for the issuance of a certificate of good standing and HBCA § 128(q) regarding fees for the filing of any statement of report of a corporation other than an annual report would be new to Hawaii law.

Section 129. Miscellaneous charges.

This section prescribes miscellaneous fees to be charged by the director of regulatory agencies. Copy charges for a certified copy of a document are to be $.75 per page, in contrast to the $.50 currently charged under HAWAII REV. STAT. § 92-24 (1976), and $25.00 for a certificate with the state seal. Twenty-five dollars is to be paid to the director if he is served with process as a corporation's agent. There is presently no charge under HAWAII REV. STAT. § 416-131 (1976) for this service.

Section 130. License fees payable by domestic corporations.

Section 130 has been reserved because Hawaii does not charge a license fee for domestic corporations.

Section 131. License fees payable by foreign corporations.

HBCA § 131 prescribes the annual fees to be paid by foreign corporations. It is identical to HAWAII REV. STAT. § 418-9 (Supp. 1980). Payment of the fee is a condition precedent to the conducting of business within the state. This section also permits the director of regulatory agencies to settle and collect the amount of the license fee from a corporation in violation of this section, along with a penalty of up to fifty percent. The director is allowed to waive or reduce the penalty on a showing of good cause.

Sections 132 through 134. Franchise taxes.

These Model Act sections deal with franchise taxes and have been reserved under the HBCA because in Hawaii such taxes pertain solely to banks, building and loan associations, industrial loan companies, financial corporations, and small business investment companies.

Section 135. Penalties imposed upon corporations.

HBCA § 135 prescribes a uniform penalty to be imposed upon corporations, whether domestic or foreign, which fail or refuse to file annual reports. The penalties under this section are the same as those prescribed under HAWAII REV. STAT. § 416-95 (Supp. 1980) and HAWAII REV. STAT. § 418-10 (1976). The penalties currently applicable solely to foreign corporations, such as denying them the benefits of the laws of the state and prohibiting them from maintaining legal actions in state courts, are eliminated.

Section 136. Penalties imposed upon officers and directors.

According to this section, an officer or director of a corporation who fails to answer an interrogatory or knowingly signs a false statement is guilty of a violation. No specific penalties are prescribed. Under the current law, an agent of a foreign corporation who violates any statutory requirement is subject to a $100.00 fine pursuant to HAWAII REV. STAT. § 418-10 (1976), and under HAWAII REV. STAT. § 416-94 (Supp. 1980) and HAWAII REV. STAT. § 418-13.5 (1976), any person who makes a false statement in certain documents is liable for a penalty of up to $5,000.00. Also, under HAWAII REV. STAT. § 418-13 (1976), if any officer of a foreign corporation refuses to be examined under oath regarding the affairs of the corporation, the corporation shall be denied the benefit of the laws of this state, particularly statutes of limitation of actions and the right to sue in any state court, so long as the refusal continues.

Section 137. Interrogatories by director.

The provisions of HBCA § 137 which permit the director to submit interrogatories to a corporation or its officers in order to ascertain whether the corporation has complied with the provisions of this act would be new to Hawaii. The interrogatories are to be answered under oath within thirty days of mailing. If an interrogatory is directed to an individual, it is to be answered by him and if directed to the corporation, it is to be answered by an officer. The director of regulatory agencies is to certify to the attorney general, for appropriate action, all interrogatories and answers which disclose violations of HBCA provisions. This section would retain the powers of the director under HAWAII REV. STAT. § 416-95 (Supp. 1980) and HAWAII REV. STAT. § 418-13 (1976) to depose officers of a corporation or induce productions of its documents.

Section 138. Information disclosed by interrogatories.

HBCA § 138 states that interrogatories and answers will not be open for public inspection and that the director of regulatory agencies will reveal any information contained within only if the information is required as evidence in any criminal or other proceeding by the state. A provision addressing this point does not exist under the present law.

Section 139. Powers of director.

This section gives the director of regulatory agencies the power and authority necessary for efficient administration of HBCA provisions and enables him to establish rules and regulations necessary to promulgate the HBCA. There is no cor-

responding provision under current Hawaii law.

Section 140. Appeal from director.

HBCA § 140, nonexistent under the present law, requires that if the director of regulatory agencies fails to approve any documents required to be approved under the HBCA, he shall give notice of his disapproval and the reasons within thirty days after disapproval. Under this section, a corporation is entitled to appeal to the first circuit court if the director should disapprove a submitted document or revoke a foreign corporation's certificate of authority. In situations in which the director submits interrogatories pursuant to HBCA § 137, this right would not accrue until after the corporation has answered.

Section 141. Certificates and certified copies to be received in evidence.

This section is analogous to HAWAII REV. STAT. § 416-5 (1976). It states that all certificates and documents certified by the director shall be taken in all courts, public offices, and official bodies as prima facie evidence of the facts stated. Under HAWAII REV. STAT. § 416-5, copies of documents filed with the director and certified by him are admissible as evidence. Certifications by him regarding the existence or nonexistence of records are prima facie evidence of such existence or nonexistence, but the certificates are not prima facie evidence of the facts stated.

Section 142. Forms to be furnished by the director.

HBCA § 142 is an addition to the present law. This section provides that if the director prescribes and furnishes forms for documents required to be filed by the HBCA, it is mandatory that they be used. Other forms may be furnished by the director on request, but their use is not mandatory unless prescribed by the HBCA.

Section 143. Greater voting requirements.

Hawaii law currently permits a corporation's articles of incorporation to provide for higher voting percentage requirements than the statutory minimum in specified instances of shareholder action: the adoption of amendments to the articles, HAWAII REV. STAT. § 416-23 (Supp. 1980); voluntary transfers of corporate assets, HAWAII REV. STAT. § 416-33 (1976); and voluntary dissolutions, HAWAII REV. STAT. § 416-121 (1976). Under HBCA § 143, it is possible for the articles to require the vote or concurrence of a greater proportion of shares than is otherwise prescribed in the HBCA for *any* shareholder action. In cases of conflict in voting percentage requirements between the HBCA and a corporation's articles, the latter is to control provided the statutory minimum is fulfilled.

Section 144. Waiver of notice.

Pursuant to this section, notice can be waived for both shareholders' and directors' meetings. Under HAWAII REV. STAT. § 416-77 (1976), however, such waiver of notice is explicitly permissible only for shareholders' meetings. Moreover, the only form of waiver explicitly permissible, under the present law is a written one signed by three-fourths of those persons entitled to notice. Under HBCA § 144,

written waiver by a person entitled to notice is the equivalent of notice and attendance at a meeting without protest is a valid waiver of notice of the meeting.

Section 145. Action by shareholders without a meeting.

This section authorizes shareholder action without a meeting by means of unanimous written consent. HAWAII REV. STAT. § 416-7 (1976) similarly excuses the requirement of a shareholders' meeting where all of the shareholders entitled to vote consent in writing to the action. Under HBCA § 144, such unanimous consent is to have the same effect as a unanimous vote of shareholders and may be so stated in any document filed with the director.

Section 146. Unauthorized assumption of corporate powers.

HBCA § 146, nonexistent under the present law, states that all persons who assume to act as a corporation without authority will be jointly and severally liable for all debts and liabilities incurred as a result. Its purpose is to eliminate any application of the de facto incorporation theory in Hawaii. Only de jure corporations would be recognized; these being formed, as noted in HBCA § 56, through compliance with the provisions of HBCA §§ 53 to 55.

Section 147. Application to existing corporations.

This section makes it clear that the HBCA would apply to all corporations which existed prior to passage of the HBCA and to all corporations which are subsequently formed.

Section 148. Application to foreign and interstate commerce.

This section states that the HBCA is to apply to foreign and interstate commerce insofar as may be permitted by the Constitution, laws, and treaties of the United States. It is intended to make clear that the HBCA is to apply to interstate commerce as long as it is not preempted by federal law. Hawaii's present law does not contain an analogous provision.

Section 149. Reservation of power.

HBCA § 149 is a reserved power provision whereby the legislature is given the power to enact statutory amendments and to prescribe provisions which will be binding on all corporations.

INDEX

1979 HAWAII SUPREME COURT CASES

This alphabetical index provides a summary of each Hawaii Supreme Court case decided in 1979. The phrase "the court" refers to the Hawaii Supreme Court; lesser courts will be specifically indicated. The explicit or implicit date of a statute construed in a supreme court opinion is included in the citation along with any amendments acknowledged by the court. However, in certain cases, the date cannot be discerned from the opinion. Where the court did not provide the date of the statute, but the law has not been amended since 1955, the reader is referred to the most recent compilation of Hawaii Revised Statutes (1976). Parenthetical material is intended to update the reader by noting all Hawaii Supreme Court cases that cited the 1979 case and subsequent amendments to relevant statutory or constitutional material relied upon in the 1979 case.

Anders v. State, 60 Hawaii 381, 590 P.2d 564 (1979).

Appellee suffered severe bodily injuries after her automobile fell into a rut in the shoulder of the road, crossed the median strip, and collided with an oncoming car. She filed an action pursuant to the State Tort Liability Act, HAWAII REV. STAT. ch. 662 (1976), and judgment was rendered in her favor. On appeal, the court affirmed the trial court's conclusion that the State had breached its duty under HAWAII REV. STAT. § 264-43 (1976) to exercise ordinary care in maintaining the highway, including the shoulder, in a reasonably safe condition for people who exercise ordinary care in driving on the highway. The trial court's finding that the State had notice of the defect in the shoulder of the highway, but did not exercise ordinary care in repairing and maintaining the shoulder, was supported by substantial evidence in the record. Further, the trial court's conclusion that the sole proximate cause of the collision was the State's failure to maintain the highway, including the shoulder, in a reasonably safe manner for the use of the public in general, and appellee in particular, was not clearly erroneous and was also supported by substantial evidence. (C.L.)

Arnold v. Higa, 61 Hawaii 203, 600 P.2d 1383 (1979).

Defendant, indicted for murder, was initially represented by court-appointed counsel, and thereafter by private counsel retained by his parents. He then moved for the appointment of a court-paid investigator, relying upon HAWAII REV. STAT. § 802-7 (1976). Because defendant was represented by private counsel, the trial court concluded that defendant was no longer indigent and denied his request. On petition for a writ of prohibition, the court reversed the trial court's denial of defendant's motion and remanded the case for an *ex parte* hearing to determine defendant's indigency and his need for the requested investigatory services. A criminal defendant is not disqualified from receiving necessary court-paid defense services under HAWAII REV. STAT. § 802-7 merely because he is represented by private counsel. A writ of prohibition, normally an extraordinary remedy, was appropriate here because of the prejudicial effects of delay that would arise if defendant were to go through the appeal process. Kobayashi, J., concurred, with the exceptions that defendant's hearing should not be held without the State's participation and that the court's instruction to the trial court regarding the *ex parte* hearing was improperly restrictive contra to Hawaii R. Penal P. 16(c)(3). (HAWAII REV. STAT. § 802-7 (1976) (amended 1979).) (K.M.K.)

Au-Hoy v. Au-Hoy, 60 Hawaii 354, 590 P.2d 80 (1979).

In granting a decree of absolute divorce, the trial court awarded the residential property to the parties to be held as tenants in common. The former husband appealed, claiming an abuse of discretion in the trial court's failure to award him an interest in other real properties in which the former wife had some interest. HAWAII REV. STAT. § 580-47 (1976), as interpreted by the court in *Carson v. Carson,* 50 Hawaii 152, 436 P.2d 7 (1967), requires that the trial court consider several factors, including the merits and abilities of the parties, when dividing marital property. Absent a showing of abuse of discretion, the decision of a trial court will not be disturbed. The division and distribution of property pursuant to a divorce need not be equal, but should be just and equitable. The former husband did not sustain his burden of showing that the trial court had failed to consider the statutory factors, and the record indicated that all relevant factors had been considered. Kidwell, J., dissented on the grounds that the trial court had placed too much emphasis on the fact that the parties had kept separate accounts and estates while married and that the statutory criteria had not been properly applied. (*Cited in* Griffith v. Griffith, 60 Hawaii 567, 592 P.2d 826 (1979) (this index). HAWAII REV. STAT. § 580-47 (1976) (amended 1977, 1978).) (A.N.)

City & County of Honolulu v. Toyama, 61 Hawaii 156, 598 P.2d 168 (1979) (per curiam).

The court reversed the trial court's grant of a summary judgment for summary possession of property in favor of the city. The case involved three buildings owned by the municipality and managed through the City Department of Housing and Community Development (DHCD). DHCD decided to demolish all three buildings upon notification from the City Building Department (CBD) that the buildings were in a substandard condition that required one to be repaired and the other two demolished. The appellant tenants claimed that because a voluntary demolition was involved, they were entitled to a 90-day notice of termination

of their rental agreement under HAWAII REV. STAT. § 521-71(a) (1976). CBD and DHCD are subordinate departments supervised by the same director; thus the decision to demolish was voluntary within the meaning of the statute. Even if there had been proper notice, summary judgment was improper for the trial court should have resolved other issues. Appellants, as displaced persons, were entitled to adequate relocation assistance prior to eviction under HAWAII REV. STAT. § 111-2 (1976), as construed in *Lau v. Bautista*, 61 Hawaii 144, 598 P.2d 161 (1979) (this index). There had also been a lack of notice and no preliminary investigatory hearing regarding demolition of the buildings; a violation of the state and federal constitution procedural due process guarantees. (*Cited in* Iuli v. Fasi, 62 Hawaii 180, 613 P.2d 653 (1980); Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980); Ai v. Frank Huff Agency, Ltd., 61 Hawaii 607, 607 P.2d 1304 (1980); Miller v. First Hawaiian, 61 Hawaii 346, 604 P.2d 39 (1979) (this index); Gealon v. Keala, 60 Hawaii 513, 591 P.2d 621 (1979) (this index). HAWAII REV. STAT. § 111-2 (1976) (amended 1979); HAWAII REV. STAT. § 521-71 (1976) (amended 1978, 1979, 1980.) (L.C.F.)

Collins v. Greenstein, 61 Hawaii 26, 595 P.2d 275 (1979).

Appellant brought a malpractice action against appellee attorney, alleging professional negligence for failure to institute a suit on her behalf, to set forth affirmative defenses, and to answer a request for admissions. The court reversed the trial court's grant of appellee's motion for a directed verdict on the issue of proximate cause and denial of appellant's motions for relief from judgment and for a new trial. In this case, expert testimony of other attorneys was unnecessary to establish the reasonable standard of care that was required of appellee. In an action for negligence, the complainant must show that defendant's action was the sole proximate cause of injury not aggravated by some additional intervening cause or agency. Whether the actions of a subsequent attorney mitigated or contributed to the negligence of the original attorney was a question for the jury. Although the court found that proof of mishandled litigation had been sufficiently presented, the judgment was nevertheless reversed and remanded for a jury determination of proximate cause. (*Cited in* Brown v. Clark Equipment Co., 62 Hawaii 530, 618 P.2d 267 (1980); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980).) (T.W.)

Disciplinary Board v. Bergan, 60 Hawaii 546, 592 P.2d 814 (1979).

Respondent attorney was arrested by Federal Drug Enforcement Administration agents and convicted for the knowing and intentional possession and distribution of cocaine. He served one year of a three-year term in a federal prison, was paroled, and returned to Hawaii to work. Thereafter, the Office of Disciplinary Counsel initiated formal disciplinary proceedings against respondent. A hearing committee of the Disciplinary Board of the Hawaii Supreme Court recommended suspension of respondent's license to practice law in the state for three years, but the board summarily recommended the disbarment of respondent. The court held that it is not bound by the findings or recommendations of either the hearing committee or the board, but could independently consider all the testimony and evidence on the record in exercising its exclusive power to suspend or revoke an attorney's license. Thereupon, the court ruled that respondent's license to prac-

tice law in the state should be suspended for five years, the maximum term of suspension. While the court recognized that the violation of a felony under state law may be a sufficient ground for disbarment, it found the following mitigating factors in favor of respondent to offset the severity of disbarment: (1) Respondent served a term in a penal institution and was still subject to the restrictions of his parole terms, (2) he subsequently earned the respect of his business associates and demonstrated a commitment to self-rehabilitation, (3) he displayed a willingness to accept punishment for his misconduct, and (4) he voluntarily underwent psychiatric treatment which resulted in a favorable prognosis. (T.W.)

Fasi v. Hawaii Public Employment Relations Board, 60 Hawaii 436, 591 P.2d 113 (1979).

Following a dispute over the promotion of a public employee, the mayor of the City and County of Honolulu sought a declaratory ruling from the Hawaii Public Employment Relations Board (HPERB) on whether a provision in a collective bargaining agreement with the United Public Workers (UPW) making seniority a primary factor in promotions conformed with HAWAII REV. STAT. § 89-9(d) (1976). HPERB ruled that the provision was consistent with the statute. The circuit court reversed on the ground that HPERB had no jurisdiction because the matter was pending arbitration. On appeal, the court reversed the circuit court on the question of jurisdiction, remanding the case for consideration on the merits. On the threshold question of HPERB's standing to appeal the circuit court's judgment, the court held that an agency whose decision is subsequently rendered ineffective by a court is an "aggrieved party" within the meaning of HAWAII REV. STAT. § 91-15 (1976). Moreover, under section 91-8, a declaratory ruling by an agency can be an appealable order. HPERB had the power to determine whether a violation of a collective bargaining agreement by an employer was prohibited, which necessarily included the power both to construe an agreement and to determine what was a prohibited practice. The circuit court erred in ousting HPERB of its jurisdiction over the petition for a declaratory order. (HAWAII REV. STAT. § 89-9 (1976) (amended 1980); HAWAII REV. STAT. § 91-15 (1976) (amended 1979).) (L.C.F.)

Figueroa v. State, 61 Hawaii 369, 604 P.2d 1198 (1979), *rehearing denied,* 61 Hawaii 661 (1980).

Appellee, a juvenile committed to the state-operated Hawaii Youth Correctional Facility (HYCF), suffered permanent brain damage after a suicide attempt while in an isolation cell. The trial court found, *inter alia,* that the State was negligent in placing appellee in isolation. The court vacated the judgment and remanded for retrial the following two issues relevant to appellant's negligence: (1) Whether it was reasonably foreseeable to the HYCF staff that appellee would attempt suicide; and (2) assuming that it was foreseeable, whether the HYCF staff exercised reasonable care in its supervision of appellee to prevent him from harming himself while in isolation. The reasonableness of care in supervision must be determined in part by the nature of the institution and by appellant's prior knowledge of the juvenile's suicidal inclination. The State also appealed the judgment granting monetary damages for the violation of the juvenile's constitutional rights of due process and freedom from cruel and unusual punishment. The court

vacated the award on the grounds that the self-executing clause of the HAWAII CONST. art. XIV, § 15 does not constitute waiver of sovereign immunity for money damages, and the State Tort Liability Act, HAWAII REV. STAT. ch. 662 (1976), does not permit such recovery. (K.M.K.)

Fujikane v. Fujikane, 61 Hawaii 352, 604 P.2d 43 (1979) (per curiam).

The trial court denied appellant's motion for a change of custody of two minor children from his former wife to him. It found that appellee's occasional lack of cooperation regarding visitation was an insufficient reason to grant a change of custody. The court affirmed on appeal; a trial court possesses wide discretion in making custody decisions. Under HAWAII REV. STAT. § 571-46 (1976), each parent has an equal right to custody in both an original award and a subsequent motion for a change of custody but the critical factor is the best interests of the child. In this case, a written decision stating the reasons for denial of the motion had been issued, and the court could find no abuse of discretion. A child custody investigation, report, and hearing had revealed that a change of custody would not have been in the best interests of the children, who were happy, well-cared-for, and well-adjusted to their environment with their mother. (HAWAII REV. STAT. § 571-46 (1976) (amended 1980).) (A.N.)

Gealon v. Keala, 60 Hawaii 513, 591 P.2d 621 (1979).

Appellant police officer received notice of dismissal on June 8. According to the collective bargaining agreement between his union and his employer, he had twenty days to file a grievance. On June 23, he was told that he had twenty working days; on June 30, he was informed that he had twenty consecutive days. Appellant filed his grievance on July 1, and subsequent appeals to the Chief of Police and the Director of Civil Service were denied on the grounds that they were untimely. The court affirmed the trial court's grant of appellees' motion for summary judgment. The filing of the complaint in circuit court was timely under Hawaii R. Civ. P. 72(b) and HAWAII REV. STAT. § 91-14(a) (1976) as appellant had, upon receiving the final decision of the Director of Civil Service, proceeded to exhaust the administrative remedies available under the bargaining agreement. Appellant's filing of his administrative grievance, however, was untimely, for the court construed "twenty days" to mean twenty calendar days from the date of notice. A provision in the agreement permitting an extension of time for filing a grievance upon reasonable explanation for delay was inapplicable. Although appellant was first erroneously informed that he had twenty working days to file and appeal, it did not constitute a reasonable explanation for delay, for the provision of a collective bargaining agreement is binding on all parties to the agreement regardless of an individual union member's personal knowledge or ratification of the agreement. Nor were appellees' administrative rulings "clearly erroneous" or "arbitrary and capricious" so as to warrant reversal or modification under HAWAII REV. STAT. § 91-14(g) (1976). (*Cited in* Miller v. First Hawaiian Bank, 61 Hawaii 346, 604 P.2d 39 (1979) (this index); Iuli v. Fasi, 62 Hawaii 180, 613 P.2d 653 (1980); Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980). HAWAII REV. STAT. § 91-14 (1976) (amended 1980).) (L.C.F.)

Griffith v. Griffith, 60 Hawaii 567, 592 P.2d 826 (1979).

A father brought an action to enforce custody rights under a California court order regarding a child removed to this state from California by appellee mother. The court affirmed the family court's modification of the foreign decree in favor of appellee. HAWAII REV. STAT. § 583-3(a)(1)(A) (1976) provides that in order for this state to have jurisdiction to make a child custody determination, Hawaii must have been the child's "home state" at the time of the commencement of the proceedings. "Home state" is defined in section 583-2(5) as the state in which the child lived with a parent or guardian for at least six months immediately preceding the custody action. The court found that the child had resided in Hawaii for six months and five days, his interim return to California being only a temporary absence. Thus, Hawaii was the child's home state, vesting the family court with jurisdiction over the child custody proceedings. Under HAWAII REV. STAT. § 583-14(a) (1976), it must also be shown that the foreign court that rendered the decree does not presently have jurisdiction under the prerequisites of chapter 583, or has declined to assume jurisdiction to modify the decree. Applying the tests of HAWAII REV. STAT. §§ 583-3(a)(1)(A) and -3(a)(1)(B), or the § 583-3(a)(2) test of significant connection and substantial evidence, the court determined that California did not have jurisdiction. Finally, the family court's finding that its assumption of jurisdiction was in the best interests of the child was found not to be an abuse of discretion. (D.L.)

Harada v. Ellis, 60 Hawaii 467, 591 P.2d 1060 (1979), *rehearing denied,* 60 Hawaii 677 (1979).

Payment to mortgagees of the judgment and attorneys' fees due them was delayed for two years after the auction sale of foreclosed real property because of numerous cross-appeals. In a multiparty consolidation of several appeals, the court affirmed the trial court's refusal to award interest on mortgagees' attorneys' fees for the two-year period, holding that interest awarded pursuant to HAWAII REV. STAT. § 478-2 (1976) is predicated on in personam liability. The only in personam liability for interest incurred by mortgagors under the original judgment was on the principal amount due under the defaulted mortgage. Relying on *Kamaole Resort Twenty-One v. Ficke Hawaiian Investments, Inc.,* 60 Hawaii 413, 591 P.2d 104 (1979) (this index), the court held that interest did not accrue on funds held by a party under order of the court, and therefore, denied mortgagees' request for additional interest. The court also affirmed the denial of mortgagors' demand that the mortgagees execute and deliver a release of mortgage upon satisfaction of judgment. Although mortgagors were entitled to the benefit of HAWAII REV. STAT. § 636-3 (1976) which provides that an execution and delivery shall be made when judgment sums are paid, there was no determination of the payment date. The trial court's refusal to order such execution and delivery had not prejudiced the ability of mortgagors to later obtain the same. The trial court's award of attorneys' fees to the commissioners' attorneys for a period subsequent to the sale of the property and order for mortgagors' successor in interest to pay mortgagees for his failure to appear at a deposition were not abuses of discretion. HAWAII REV. STAT. § 449-16.5 (1976), which provides for payment of interest to a purchaser of real property from funds held in escrow, did not apply to this transaction for it was unclear whether the trial court had determined the existence of an escrow relationship. The commissioners, parties to the sale, could not have

been escrow depositories. (HAWAII REV. STAT. § 478-2 (1976) (amended 1979).) (C.Y.)

Hawaii State Teachers Association v. Hawaii Public Employment Relations Board, 60 Hawaii 361, 590 P.2d 993 (1979), *rehearing denied,* 60 Hawaii 677 (1979).

The Hawaii State Teachers Association (HSTA) carried out an illegal strike for seventeen days. The strike settlement agreement proscribed discriminating against any participant or nonparticipant in the strike. Teachers taking part in the entire strike were denied seniority credit for the month under a Board of Education (BOE) departmental policy, which required that employees be on paid status for more than one-half of the total number of working days in a month to qualify for credit. Hawaii Public Employment Relations Board (HPERB) made a specific finding that the BOE had not committed any prohibited practice within the meaning of HAWAII REV. STAT. ch. 89 (1976); the circuit court sustained, and the court affirmed. HAWAII REV. STAT. §§ 89-13(a)(1) and -13(a)(3) (1976) prohibit certain public employer practices only with respect to lawful employee activity or discrimination affecting employees' exercise of protected rights. The HSTA strike was unlawful and therefore not a protected activity. The strike settlement agreement did not condone the strike as condonation requires clear and convincing evidence that the employer has completely forgiven the employee. It must appear as if no misconduct had occurred. Also, application of the seniority credit formula was not prohibited by the strike settlement agreement. Settlement agreements are construed in accordance with contract law, and therefore, interpretation of their terms derives from the parties' intent. Intent was a question of fact for resolution by HPERB, which found that the nondiscrimination clause did not cover the withholding or granting of service credit. Application of the formula was neither discriminatory nor retaliatory as applied to the striking teachers. Kidwell, J., dissented, calling for reversal on the ground that treatment of striking teachers as inferior in seniority status to that of nonstriking teachers was discriminatory and thus violative of the strike settlement agreement. (*Cited in* McNamee v. Bishop Trust Co., 62 Hawaii 397, 616 P.2d 205 (1980).) (L.C.F.)

Haworth v. State, 60 Hawaii 557, 592 P.2d 820 (1979), *rehearing denied,* 61 Hawaii 661 (1980).

Appellant sought damages for injuries sustained while performing a work assignment as a prisoner of the State. The trial court declared judgment for the State on the ground that appellant, by disobeying the supervisor's safety instructions and placing himself in a situation he knew or should have known to be dangerous, assumed the risk of his injuries. The court vacated judgment on the following grounds: (1) The doctrine of assumption of risk relieves an employer of liability only when the employment relationship was entered into voluntarily by the employee and not where the relationship was involuntary; and (2) although the State cannot disregard the possibility that the prisoner may negligently misinterpret or disregard the supervisor's instructions, the State has a duty to exercise only reasonable care in supervising and instructing its prisoners. Because the trial court made no finding of whether the State had fulfilled its duty in issuing oral instructions and warnings before the commencement of work and in supervising

work performance, the case was remanded for determination of those issues. (K.M.K.)

Hunt v. Chang, 60 Hawaii 608, 594 P.2d 118 (1979).

Appellants, mother and son, brought an action for alienation of affections of their husband-father against his live-in girlfriend. The court affirmed the trial court's order granting appellee's motion for summary judgment of the wife's claim and the dismissal of the son's claim. It adopted the test in *Long v. Fischer,* 210 Kan. 21, 499 P.2d 1063 (1972), which set forth the elements of a spousal action for alienation of affections: (1) Defendant must have exercised improper, wilful, and malicious influence on plaintiff's spouse in derogation of plaintiff's marital rights; (2) plaintiff's spouse must not have voluntarily accepted defendant's advances at the outset of the affair; (3) plaintiff's spouse must not have actively contributed to the procuration by intentionally seeking the companionship and affection of defendant; (4) plaintiff must prove that he or she was not at fault in causing the other spouse's affections to stray; and (5) the wilful and malicious influence of defendant on plaintiff's spouse must be proven as the procuring cause of the loss of the love and affection that plaintiff's spouse formerly held for plaintiff. Based on the undisputed facts of the case, the court found that appellant wife could not satisfy the second, third, and fifth elements of the *Long* test. Further, the court held that it joined the majority of jurisdictions in denying a child a cause of action for alienation of affections. In so holding, the court cited the policy rationales of *Nash v. Baker,* 522 P.2d 1335 (Okl. 1974), and *Nelson v. Richwagen,* 326 Mass. 485, 95 N.E.2d 545 (1950): (1) The possibility of a multiplicity of suits, (2) the possibility of extortionary litigation, (3) the inability to define the point at which the child's right would cease, and (4) the difficulty in determining damages. (*Cited in* Iuli v. Fasi, 62 Hawaii 180, 613 P.2d 653 (1980); Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980); Ai v. Frank Huff Agency, Ltd., 61 Hawaii 607, 607 P.2d 1304 (1980); City & County of Honolulu v. Toyama, 61 Hawaii 156, 598 P.2d 168 (1979) (this index).) (K.M.K.)

Ili v. Kuwahara, 60 Hawaii 675 (1979) (mem.).

The trial court entered a judgment for plaintiffs, finding that the deed was void and of no force and effect to pass title to defendants. On appeal, the court affirmed. Civ. No. 3295 (3rd Cir. Ct. Hawaii June 17, 1976). (F.H.)

In re Ainoa, 60 Hawaii 487, 591 P.2d 607 (1979).

A native Hawaiian lessee of Hawaiian home lands on Molokai appealed from a Tax Appeal Court judgment dismissing his appeal of the Board of Review's decision affirming the assessment by the State Tax Department. The court affirmed. Lessee argued that his tax liability was limited to the assessed value of his leasehold interest, which he valued at zero, and not the assessed value of the fee interest as held by the State. He based his argument on Hawaiian Homes Commission Act § 207(a), adopted as law of the State in Hawaii Constitution, art. XI, which authorizes the Department of Hawaiian Home Lands to lease tracts to native Hawaiians. The court declined to accept lessee's construction of the act, holding: (1) In the context of the act, the word "tract" refers to real acreage and not the leasehold interest of a lessee of Hawaiian home lands; (2) when the act was passed

in 1960, Hawaii had no statute taxing any leasehold interest except for leasehold interests acquired before May 2, 1917, and it would therefore be meaningless to require a Hawaiian home lands lessee to pay a tax based on his leasehold interest; and (3) to accept lessee's construction would render section 208-6 of the same act, requiring a lessee to pay all taxes assessed on the land, mere surplusage. The court also found that lessee, in failing to present any evidence of the fee simple value of the land in accordance with HAWAII REV. STAT. § 232-3(1) (1976), had not sustained his contention that the Board of Review's determination of the assessed value of the land was arbitrary and irrational. (N.H.)

In re Doe, 61 Hawaii 48, 594 P.2d 1084 (1979).

Appellant, a minor, was alleged to have committed attempted rape, sodomy, and murder. The family court waived its jurisdiction over appellant pursuant to HAWAII REV. STAT. § 571-22(a) (1976), and the court affirmed. The court rejected appellant's contention that HAWAII REV. STAT. § 571-41 (1976) requires proof of the commission of the offenses alleged by a preponderance of evidence before jurisdiction may be waived. HAWAII REV. STAT. ch. 571 (1976) does not explicitly provide for any standard of proof in waiver proceedings as such proceedings do not determine a minor's guilt. Because for purposes of waiver, the charges against a minor are presumed to be true, diagnostic team members were entitled to assume that appellant had committed the alleged offenses. The court also rejected appellant's contention that the waiver order was defective because the family court had inadequately set out reasons for the decision to waive jurisdiction. Under *State v. Stanley,* 60 Hawaii 527, 592 P.2d 422 (1979) (this index), a statement supporting a family court waiver decision must demonstrate that the statutory requirements of full investigation and consideration of the evidence have been met, that the decision is supported by substantial evidence, and that the reasons are specific enough to permit meaningful review. In this case, the transcript of the hearing on the motion for reconsideration was a part of the record and revealed the sufficiency of the family court's reasons. Finally, appellant's refusal to respond to interviews with the court-appointed psychologist and psychiatrist in the exercise of the privilege against self-incrimination was not held against him. There was substantial evidence in the record supporting the finding that rehabilitation should extend beyond appellant's minority *despite* the psychiatrist's inability to predict a specific form of rehabilitation because of appellant's lack of cooperation. No undue burden was placed upon appellant to affirmatively prove that he did not require judicial restraint beyond his minority. (*Cited in In re* Doe, 62 Hawaii 70, 610 P.2d 509 (1980); *In re* Doe, 61 Hawaii 561, 606 P.2d 1326 (1980); *In re* Doe, 61 Hawaii 364, 604 P.2d 276 (1979) (this index); *In re* Doe, 61 Hawaii 167, 598 P.2d 176 (1979) (this index). HAWAII REV. STAT. § 571-22 (1976) (amended 1980); HAWAII REV. STAT. § 571-41 (1976) (amended 1980).) (G.G.)

In re Doe, 61 Hawaii 167, 598 P.2d 176 (1979) (per curiam).

Appellant was alleged to have committed murder and attempted rape when he was sixteen years old. The family court waived its jurisdiction over appellant pursuant to HAWAII REV. STAT. § 571-22(a) (1976). The court vacated the order and remanded the case. The family court had failed to include in its order or in the

record a sufficient statement of the reasons for the waiver; the order consisted of only conclusory statements and a mere recital of the statutory requirements. A waiver determination is a critical stage for a juvenile defendant for it subjects him to a formal trial and the consequences thereof as an adult. Further, a family court's discretion to waive jurisdiction must be exercised within the bounds of due process which requires a hearing, assistance of counsel, and a statement of reasons supporting the waiver. The court distinguished two earlier cases, *State v. Stanley*, 60 Hawaii 527, 592 P.2d 422 (1979) (this index), and *In re Doe*, 61 Hawaii 48, 594 P.2d 1084 (1979) (this index), which antedated the approval of the Hawaii Family Court Rules by the Hawaii Supreme Court on February 15, 1977. Rule 129 now mandates that the family court make and enter specific findings supporting its decision to transfer a juvenile to criminal court. Oral statements of reasons that were acceptable in *Stanley* and *Doe* are no longer satisfactory. (*Cited in In re* Doe, 62 Hawaii 70, 610 P.2d 509 (1980); *In re* Doe, 61 Hawaii 561, 606 P.2d 1326 (1980); In re Doe, 61 Hawaii 364, 604 P.2d 276 (1979) (this index). HAWAII REV. STAT. § 571-22 (1976) (amended 1980).) (G.G.)

In re Doe, 61 Hawaii 364, 604 P.2d 276 (1979) (per curiam).

Appellant, a minor, was alleged to have committed robbery and theft. The family court waived its jurisdiction over appellant pursuant to HAWAII REV. STAT. § 571-22(a) (1976). The court reversed, holding that the family court had erred in deciding that appellant was unsuited for rehabilitation under the family court and that he would pose a danger to the community. The evidence revealed that waiver had not been advised by experts who testified that appellant would be rehabilitated by being placed on probation rather than being committed to a juvenile facility where he could learn negative behavior. Although the family court is not required to follow recommendations by experts and may exercise discretion in assessing all the evidence, no substantial evidence supported the findings and decision in this case. Age and the character of the alleged offense may be considered, but the family court's undue emphasis on these two factors was inconsistent with appellant's exemplary background and lack of prior violations and with the underlying philosophy of the family court statutes to provide juveniles with individualized attention and treatment. (*Cited in In re* Doe, 61 Hawaii 561, 606 P.2d 1328 (1980). HAWAII REV. STAT. § 571-22 (1976) (amended 1980).) (G.M.)

In re Doe, 61 Hawaii 659 (1979) (mem.).

A family court waived jurisdiction over appellant. The court affirmed on appeal, rejecting appellant's arguments that the family court was predisposed to rule against appellant. The contentions relating to burden of proof and use of hearsay evidence were rejected based on *In re Doe*, 61 Hawaii 48, 594 P.2d 1084 (1979) (this index); *State v. Stanley*, 60 Hawaii 527, 592 P.2d 422 (1979) (this index); and *In re Dinson*, 58 Hawaii 522, 574 P.2d 119 (1978). No. 70-109040-A (Fam. Ct. 1st Cir. Hawaii June 30, 1976). (F.H.)

In re Estate of Lorenzo, 61 Hawaii 236, 602 P.2d 521 (1979).

Appellant appealed from a jury verdict that denied her a dower interest in her deceased husband's estate pursuant to HAWAII REV. STAT. § 533-9 (1968) because she had wilfully and utterly deserted her husband. In reversing the judgment and

remanding the case for a new trial, the court made the following conclusions: (1) The trial court did not err in granting appellant a jury trial even though the probate court already had made a decision pursuant to HAWAII REV. STAT. § 531-1 (1968). The Hawaii Constitution art. 1, § 13 preserves the right of trial by jury in suits at common law based on a dower interest; (2) the trial court did not err in presiding over both the original probate trial and the jury trial, for the jury trial was in essence a trial *de novo* and not an appeal; hence, HAWAII REV. STAT. § 601-7(a) (1976) did not operate to disqualify the judge; and (3) the trial court erred in denying certain of appellant's jury instructions and in granting certain of appellee's instructions. The court found that prejudicial error resulted, for, *inter alia*, the jury instructions wrongly required appellant to make a showing of the facts and circumstances justifying her departure by a preponderance of the evidence rather than placing the burden of proving "utter and wilful desertion" on appellee. (HAWAII REV. STAT. § 531-1 (1968) (repealed and superseded 1976).) (L.Z.)

In re Estate of Spencer, 60 Hawaii 497, 591 P.2d 611 (1979), *rehearing denied*, 60 Hawaii 677 (1979).

Contestants appealed from a ruling that the deceased testator's will was not revoked by the subsequent marriage of the testator to appellee, the sole beneficiary. The court reversed, holding that the testator's will was revoked for failure to comply with HAWAII REV. STAT. § 536-11 (Supp. 1975). The court found that the statute explicitly provided in clear and unambiguous terms that "[if,] after the making of a will, the testator . . . marries . . . such marriage shall operate as a revocation of the will," unless "provision is made in the will for such contingency." As there was no such provision in the will, the testator's will was automatically revoked by his subsequent marriage. The court further ruled that because the will was unambiguous, extrinsic evidence to show the testator's intent to marry the beneficiary at the time of the making of the will was inadmissible and immaterial. (*Cited in In re* Hawaiian Telephone Co., 61 Hawaii 572, 608 P.2d 383 (1980); State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980); Chun v. Employees' Retirement System, 61 Hawaii 596, 607 P.2d 415 (1980). HAWAII REV. STAT. § 536-11 (Supp. 1975) (repealed and superseded 1976).) (L.Z.)

In re Hawaii Electric Light Co., 60 Hawaii 625, 594 P.2d 612 (1979).

An appeal brought by the state Public Utilities Division (Division) and Lima Kokua, a community interest group, contested the state Public Utilities Commission (PUC) decision allowing a utility company a rate increase and a rate schedule revision. The court affirmed the rate increase but remanded the declining block rate structure. It found that the 8.95% rate approved previously in 1974 was a fair rate of return, which is the percentage of earnings on the rate base allowed a utility after deducting operating expenses, taxes, and other costs. The debt, preferred stock, and common equity components of a utility company's capital structure should be weighed to determine the rate of investment return. The PUC must consider the interests of the utility company's investors as well as the interest of the consumers. A technique recognized in *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923) indicated that a 8.95% rate of return was within the range of normal investment returns for similarly situated utilities. As for the reasonableness of the declining block structure

formula of incremental rate changes, the PUC's order failed to state sufficiently, as required by HAWAII REV. STAT. § 91-12 (1976), the supporting facts justifying the rate revision. The record failed to justify the rate differences for high, medium, and low level energy users. Although the challenging party usually bears the burden of showing the unreasonableness of approved rates, impecunious associations without the resources to counter every calculation, such as Lima Kokua, are only required to show an absence of substantial supporting evidence. A rate schedule that promoted higher consumption of energy was inconsistent with state and national policies encouraging conservation of energy, and discriminated unreasonably between groups of users. The PUC was obliged to consider public policy objectives such as the impact of new rates on the poor and the small consumer, and also the overall utilization of energy resources in determining rate revisions. Other jurisdictions have already recognized the impropriety of the declining block structure. While some discrimination between groups of customers is inevitable, the law forbids discrimination without a rational basis. (HAWAII REV. STAT. § 91-12 (1976) (amended 1980).) (D.T.)

In re West, 61 Hawaii 112, 595 P.2d 1080 (1979) (per curiam).

Applicant, a district family judge who had never been formally licensed to practice law in Hawaii, sought to be admitted to the Hawaii bar effective September 14, 1940, *nunc pro tunc,* without being required to take the regular written examination. Alternatively, applicant orally moved the court to declare that he had been licensed to practice law in this state since his appointment as district family court judge. The sole purpose of the application was to ensure applicant's eligibility for reappointment as a district family judge under the judicial selection procedures mandated by article VI, section 3 of the Hawaii Constitution as amended in 1978, which required a state license to practice law five years prior to nomination. In this original proceeding, the court denied the application on the following grounds: (1) Applicant could not rely on a former provision of R. Hawaii Sup. Ct. 15(f) (1942) which waived the requirement of a written examination for applicants joining military service prior to the occurrence of the first bar examination; (2) even if applicant were entitled to be presently admitted to the bar on the former provision of rule 15(f), it would be improper for the court to grant admission, *nunc pro tunc,* effective more than thirty years ago, when applicant failed to cite precedent for such admission; and (3) appointment of applicant as a district family court judge did not qualify as being "licensed to practice law by the supreme court." (D.Y.)

Kahalekai v. Doi, 60 Hawaii 324, 590 P.2d 543 (1979).

In an original action, plaintiffs challenged the validity of the ballot and informational publications used in connection with the 1978 state constitutional amendment election on the following grounds: (1) The ballot form was defective as inherently biased in favor of the propositions' ratification; (2) several propositions contained amendments relating to more than one subject matter; and (3) the electorate had been supplied with inadequate and misleading information concerning the proposed amendments. First, the court held that it had jurisdiction over the subject matter under HAWAII REV. STAT. § 602-5(7) (1976). The court then rejected plaintiffs' first two arguments, ruling that election results will not be

invalidated where the ballot allows the voter to make a knowing and deliberate choice, and is not misleading. The ballot clearly informed voters of voting procedures and was otherwise not facially misleading, and in the absence of a constitutional proscription, there is no limit on the number of subjects that may be included in a proposed amendment or proposition. The court ultimately struck seven amendments as not properly ratified on plaintiffs' final ground that the constitutional convention's informational publications, one of which purported to contain a full text of all of the proposed amendments, failed to identify the amendments in substance and effect. An additional proposition which did not appear in full text was sustained as to the purely stylistic and technical changes it proposed for the entire constitution, while unspecified changes authorized under the same proposal were held not to have been ratified if they altered the sense, meaning, or effect of any constitutional provision. Kidwell, J., concurred and dissented in part, and would have held that ratification occurred for only those amendments that had appeared in full text in the convention's newspaper supplement. (*Cited in* Thirty Voters v. Doi, 61 Hawaii 179, 599 P.2d 286 (1979) (this index). HAWAII REV. STAT. § 602-5(7) (1976) (amended 1979).) (S.M.)

Kailua Community Council v. City & County of Honolulu, 60 Hawaii 428, 591 P.2d 602 (1979).

The chief planning officer of the city (CPO) issued a document outlining procedures to be followed when processing an application to amend the city's general plan or detailed land use map. The procedures were not mandatory or adopted as agency rules within the meaning of the Hawaii Administrative Procedure Act (HAPA), HAWAII REV. STAT. ch. 91 (1976). The city council approved an application to rezone land for development and enacted two ordinances amending the detailed land use map. The Kailua Community Council (KCC), opposing the development, filed suit for nullification of the ordinances on the ground that the document issued by the CPO was not adopted as agency rules as required by HAWAII REV. STAT. §§ 91-3, -4, and -5, and thus the ordinances enacted in reliance thereon were void. The court reversed the trial court's decision that the ordinances were void, holding that the actions of the CPO and the department of general planning in this case were not subject to the provisions of the HAPA. When his actions are determinative of public or private rights as an agent of the executive branch, a CPO may be required to conform to the provisions of the HAPA. However, when acting as an initial factfinder for the city council, a CPO performs a legislative and advisory function, making recommendations which the city council may ultimately consider in making its decision to deny or to grant a land use reclassification, and the provisions of the HAPA do not apply. To hold otherwise would extend the provisions of the HAPA to city council actions, which were exempted by HAWAII REV. STAT. § 91-1(1). Moreover, the enactment of the two ordinances was in accordance with other procedural requirements prescribed by the Revised Honolulu Charter. (HAWAII REV. STAT. §§ 91-3, -5 (1976) (amended 1979); HAWAII REV. STAT. § 91-4 (1976) (amended 1980).) (D.T.)

Kamaole Resort Twenty-One v. Ficke Hawaiian Investments, Inc., 60 Hawaii 413, 591 P.2d 104 (1979).

Appellant corporation defaulted on two mortgages and the trial court entered a

decree of foreclosure and order and sale. Approximately one year later, the trial court entered a supplemental decree of foreclosure specifying the exact amount of indebtedness owing among the parties. Vacating in part and affirming in part, the court first found that there was no default under the first mortgage until the date when the principal became due and was not paid. The court vacated the award of interest prior to that date, but held that interest at the contract rate of 15% subsequent to that date until the date of the first decree of foreclosure was proper. The court found that the first judgment was not a money judgment to which the provisions of HAWAII REV. STAT. § 478-2 (1976), limiting interest to 6% per annum, were applicable, and held that the contracted default rate of interest at 15% continued until entry of the supplemental decree. Regarding the second mortgage, the court affirmed the trial court's award of interest and found that an increased interest rate after maturity following default can be provided for by contract, even if maturity resulted from the exercise of an option to accelerate upon nonpayment of interest. A mortgage agreement may secure an antecedent debt on the basis of HAWAII REV. STAT. § 506-1(b) (1976), as interpreted by the court in *Akamine & Sons v. American Security Bank*, 50 Hawaii 304, 440 P.2d 262 (1968). The *Akamine* test was satisfied in this case, for the parties had expressly agreed in an instrument subsequent to the mortgage to secure indebtedness other than those specifically referred to therein, such as appellant's indebtedness as assignee under a prior agreement of sale. (*Cited in* Harada v. Ellis, 60 Hawaii 467, 591 P.2d 1060 (1979) (this index). HAWAII REV. STAT. § 478-2 (1976) (amended 1979).) (N.H.)

Kekua v. Kaiser Foundation Hospital, 61 Hawaii 208, 601 P.2d 364 (1979).

Appellees brought a tort action for the death of their son against a hospital and its physician who had advised against hospitalization of the son. The trial court found that appellants were negligent and did not meet the standards of reasonable medical care in the community. On appeal, appellants contended that they were denied their right to a fair and impartial trial because of the trial court's erroneous evidentiary rulings. The court upheld the judgment on the following grounds: (1) Although appellants have a right to use depositions containing prior inconsistent statements for the purpose of impeaching the testimony of appellees' witnesses, appellants failed to offer the depositions into evidence, using them only to refresh the recollection of witnesses; (2) although the testimony of one of appellants' witnesses regarding the out-of-court statements made by appellees was admissible as an exception to the hearsay rule, it was harmless error to deny the testimony because, *inter alia*, essentially the same evidence was established by the testimony of another witness; and (3) because appellants had made no attempt to clarify ambiguous terms used on cross-examination, the trial court did not commit error in curtailing appellants' cross-examination of appellees' medical expert witness. (*Cited in* State v. Sugimoto, 62 Hawaii 259, 614 P.2d 386 (1980); State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980).) (K.M.K.)

Lau v. Bautista, 61 Hawaii 144, 598 P.2d 161 (1979) (per curiam).

Landlord appellees brought an action for summary judgment against tenant appellants. The court reversed the trial court's grant of appellees' motion for summary judgment and remanded the case with respect to three out of the four issues

appealed. Regarding the first issue of adequate advance notice of termination, the court found that some of appellants had properly received the 28-day advance notice of eviction in compliance with HAWAII REV. STAT. § 521-71(a) (1976), but that other appellants had not. As to the second issue of using a breach of an implied warranty of habitability as an affirmative defense in a summary possession action, the trial court erred in failing to determine whether appellees' neglect led to the substandard living conditions which resulted in the eviction. Appellants also qualified for state relocation assistance under HAWAII REV. STAT. ch. 111 (1976), and the trial court had failed to resolve the adequacy of relocation assistance. Finally, the trial court erred in granting summary judgment without the joinder of the City and County of Honolulu as an indispensable party to the proceedings, for the city's interests, as a practical matter, could be effected by the adequacy of relocation interest. (*Cited in* Iuli v. Fasi, 62 Hawaii 180, 613 P.2d 653 (1980); Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980); Ai v. Frank Huff Agency, Ltd., 61 Hawaii 607, 607 P.2d 1304 (1980); Miller v. First Hawaiian Bank, 61 Hawaii 346, 604 P.2d 39 (1979) (this index); City & County of Honolulu v. Toyama, 61 Hawaii 156, 598 P.2d 168 (1979) (this index). HAWAII REV. STAT. § 521-71 (1976) (amended 1978, 1979, 1980).) (R.M.)

Life of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979), *rehearing denied,* 60 Hawaii 677 (1979).

The court denied appellant Life of the Land's petition for a temporary injunction pending appeal of a summary judgment rendered in the city's favor. Appellant had not shown a threat of irreparable injury and a substantial likelihood of prevailing on the merits that is needed to obtain an injunction. Although the merits were not yet fully heard, the court found that the doctrine of equitable estoppel prevented the city from enforcing a new height limitation based on the enactment of the Thomas Square Historical Cultural and Scenic District Ordinance (HCS Ordinance) after appellee developers had been granted an exemption from a building permit moratorium. Appellees had spent substantial sums of money in good faith reliance upon the assurances of city officials that if certain conditions were met, the developers would be issued a building permit. The HCS Ordinance, which was passed after the moratorium exemption but prior to the issuance of the building permit, could not operate to deprive appellees of the expectation interest in the development that they had so acquired; thus the city was estopped from attempting to alter the development by enforcing the new height limitation. Kidwell, J., dissented, stating that appellant had satisfied the requirements of standing: (1) They would be likely to prevail on the merits; and (2) appellant would suffer irreparable harm without an injunction, and the public interest supported the injunction. The HCS Ordinance should be applied to the project in controversy because the developers had only ambiguous, rather than unqualified, assurances that the permit would issue, and thus the developers did not qualify for an equitable estoppel. Ogata, J., dissented, stating that he would not issue the temporary injunction unless the developers refused to furnish a bond to ensure that the premises will be restored should the court ultimately hold that the project is illegal. (*Cited in* Life of the Land, Inc. v. City Council, 61 Hawaii 390, 606 P.2d 866 (1980).) (F.H.)

Life of the Land, Inc. v. Land Use Commission, 61 Hawaii 3, 594 P.2d 1079 (1979).

A nonprofit environmental corporation and its representative appealed from the trial court's order granting motions to dismiss appeals from Land Use Commission decisions for lack of standing and for failure to file timely appeals. The court reversed and remanded on appeal. HAWAII REV. STAT. § 91-14(a) (Supp. 1975) requires that to have standing, one must be an aggrieved person who has participated in the contest of a case. In recent cases, the court has found that those individuals and groups who show aesthetic and environmental injury, as distinct from injury to conventional property rights, have standing to sue. Appellant established that it was a party specially, personally, and adversely affected by the agency's action because three of its members lived within one and one-half to two miles from the reclassified lands, and three members used the area for recreational and occupational purposes. Appellant also sufficiently participated in a contested case by attending public hearings and by submitting written commentaries at public meetings for docketing and review. Given the agency's restrictions on access to the judicial portion of its hearing, appellant's participation in the legislative portion alone was sufficient. On the issue of timeliness, the court held that the requirements of HAWAII REV. STAT. § 91-14(b) (Supp. 1975) were satisfied, for the appeals had been filed within thirty days after service of the agency decisions on appellant. (*Cited in* Jordan v. Hamada, 62 Hawaii 444, 616 P.2d 1368 (1980). HAWAII REV. STAT. § 91-14 (Supp. 1975) (amended 1979, 1980).) (F.H.)

Lumsden v. Lumsden, 61 Hawaii 338, 603 P.2d 564 (1979) (per curiam).

A 1972 divorce decree ordered that appellant, the former husband, pay alimony to appellee, the former wife, until further order of the trial court. In 1975, appellant filed an order seeking relief from the alimony requirement on the ground that appellee had failed to obtain gainful employment after obtaining her master's degree. Appellee in turn filed an order to show cause to increase the amount of alimony because of price increases and inflation, substantial increases in the income of appellant, and the pursuit of a doctoral degree by appellee. The trial court amended the divorce decree, providing an increase and continuation of rehabilitative alimony payable by appellant. The court reversed in part and remanded for further proceedings. The amount of alimony is to be determined upon a realistic appraisal of the situation of the parties at the time of the divorce. Appellee's pursuit of a doctorate degree was never contemplated during marriage or at the time of divorce. Although HAWAII REV. STAT. § 580-47 (1976) provides that an award of alimony may be amended upon a showing of a material change in the physical or financial circumstances of either party, the increase of rehabilitative alimony was an abuse of discretion on the part of the trial court, for that court had found that the obtaining of a master's degree constituted substantial rehabilitation. The court remanded the case to determine whether appellee was able and capable of substantially rehabilitating herself financially after obtaining her master's degree to the extent that the alimony was no longer necessary. (HAWAII REV. STAT. § 580-47 (1976) (amended 1978, 1979).) (A.N.)

Maeda v. Amemiya, 60 Hawaii 662, 594 P.2d 136 (1979) (per curiam).

In an action for declaratory judgment, appellants sought to declare HAWAII REV.

STAT. § 188-45 (1976) unconstitutional as violative of the equal protection clauses of the federal and state constitutions. The trial court dismissed the complaint. The court upheld the statute, reversing the trial court's statutory construction, but affirming its ultimate decision. Contrary to the trial court's construction, the statute creates the following two classes of persons permitted to catch *nehu*, a baitfish: (1) Properly licensed commercial tuna fishermen, who may catch *nehu* with a net of unlimited size; and (2) all other commercial and recreational fishermen, who may catch *nehu* for home consumption or bait purposes with a net no longer than fifty feet. The court made the following conclusions in upholding the statute: (1) Under equal protection analysis, the right to work, involving economic interests, invokes the application of the rational basis standard, not the strict scrutiny standard; and (2) the statutory classification is rationally related to the legitimate state interests of conservation of *nehu*, allocation of a limited resource, and enforcement of its wildlife regulations. In differentiating between tuna and other fishermen, the State had recognized that the limited supply of *nehu* is the primary bottleneck to expansion of the *aku* industry, which provides the State's only significant fish product for export. (*Cited in* State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980).) (D.K.)

Miller v. First Hawaiian Bank, 61 Hawaii 346, 604 P.2d 39 (1979), *rehearing denied,* 61 Hawaii 661 (1980).

A beneficiary complained that appellee trustee had breached its fiduciary duty by not notifying him prior to consenting to a sale of leasehold interest and had therefore been negligent in performing its duties. The court affirmed the trial court's order granting summary judgment for appellee. The trustee's duty to inform a beneficiary of facts that the beneficiary needs to know in dealing with a third person arises only when such facts affect the beneficiary's interest in the trust property. Because the beneficiary's interest was in the fee, and not the leasehold interest of the property, no duty to inform had arisen. A trustee is held to the standard of ordinary care and diligence under the plenary powers of a trust agreement over trust property, and the court will not interfere in a trustee's exercise of its discretionary power except to prevent an abuse. The court found no abuse by the trustee, noting that the seller of the leasehold interest remained fully liable to trustee under the terms and conditions of the lease even after appellees consented to the sale. (*Cited in* Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980); City & County of Honolulu v. Midkiff, 62 Hawaii 411, 616 P.2d 213 (1980).) (L.H.)

Molokoa Village Development Co. v. Kauai Electric Co., 60 Hawaii 582, 593 P.2d 375 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Appellee development company sought reimbursement from appellant electric company for the costs of installing an underground electrical system in reliance on oral agreements reached between the parties. The trial court found for appellee, but the court reversed and remanded for a redetermination of the proper amount to be reimbursed. As a defense, appellant argued that its internal rule 13, governing the allocation of underground installation costs between the electric company and its customers, prevented the honoring of other arrangements for reimbursement. The court held that although the general rule is that a public

utility cannot depart from the strictures of its own rules, there was a question as to whether appellee's situation fell under rule 13. Appellant failed to sustain its burden of proving that rule 13 barred reimbursement for the cost difference between an underground and overhead system. It was appropriate to hold the company strictly to its burden of proof. While a party dealing with a public utility should know that the utility is limited by its own tariff rates and schedules, a utility should not make fraudulent representations to a customer concerning rates. Appellee relied on the doctrine of promissory estoppel to argue that the conversations with appellant entitled it to reimbursement. Although the trial court had not analyzed the doctrine in its component elements, its findings of fact and conclusions of law were nevertheless sufficient to sustain appellee's argument. The trial court had erred, however, in computing the amount of reimbursement by including costs not covered by the oral agreements, thus requiring reconsideration of the overhead and profit items as part of the award. (*Cited in* State v. Moore, 62 Hawaii 301, 614 P.2d 931 (1980); McNamee v. Bishop Trust Co., 62 Hawaii 397, 616 P.2d 205 (1980).) (D.T.)

Oahu Plumbing & Sheet Metal, Ltd. v. Kona Construction, Inc., 60 Hawaii 372, 590 P.2d 570 (1979).

Appellee sued for unpaid sums representing the cost of labor and materials that it had provided appellant company. Appellant's non-attorney vice president Walters first appeared to enter a general denial and again to set aside the default judgment entered against the corporation. Walters indicated that the corporation would not seek legal representation by a licensed attorney. The trial court denied the motion to set aside the default, ruling that a corporation cannot be represented by non-attorney officers. Although HAWAII REV. STAT. § 416-26 (1976) allows a corporation to sue and be sued in any state court, a corporation can only do so through the agency of other persons and appear in a court only through a licensed attorney. The exception in HAWAII REV. STAT. § 633-28(b) (1976) permitting a corporation to be represented by a non-attorney in small claims court does not apply to any other setting. HAWAII REV. STAT. § 605-2 (1976) allows *pro se* appearances in state courts only by natural persons and individuals. Policy considerations against *pro se* representation of corporations by non-attorney officers include the prevention of the unauthorized practice of law, the assurance that proceedings will be conducted with professional skill and knowledge of the law, and the preservation of accountability of licensed attorneys to the ethical standards of the court. Corporations are distinguishable from natural persons; *pro se* representation to natural persons does not deny corporations of due process or equal protection of the law. (HAWAII REV. STAT. § 416-26 (1976) (amended 1977).) (D.T.)

Office of Disciplinary Counsel v. DeMello, 61 Hawaii 223, 601 P.2d 1087 (1979) (per curiam).

The court ordered respondent's immediate disbarment as recommended by the Disciplinary Board. The court found that respondent had committed the following violations: (1) Conversion of mutual fund proceeds belonging to a client to respondent's own use and benefit without the knowledge or consent of the client, and failure to deliver the proceeds to the client upon request, in violation of Dis-

ciplinary Rule 9-102(B)(4); and (2) failure to prepare and file income tax returns entrusted to him in violation of Disciplinary Rules 6-101(A)(3) and 7-101(A)(2). The records showed that respondent had failed to appear at hearings after being duly notified of the disciplinary proceedings and had failed to file any formal response at any stage of the proceedings. According to R. Hawaii Sup. Ct. 16.7(b), the charges in a disciplinary petition shall be deemed admitted unless timely answered or answered after obtaining permission to file a delayed answer because of mistake, inadvertence, surprise, or excusable neglect. Respondent had merely written a short, informal letter indicating that he did not intend to practice law again and that he had moved to California. The court further ordered that respondent not be eligible for reinstatement as an attorney unless he reimbursed attorneys appointed to inventory his files. (*Cited in* Office of Disciplinary Counsel v. Smith, 62 Hawaii 467, 617 P.2d 80 (1980); Office of Disciplinary Counsel v. Johnson, 62 Hawaii 95, 611 P.2d 993 (1980); Office of Disciplinary Counsel v. Klein, 61 Hawaii 334, 603 P.2d 562 (1979) (this index).) (T.W.)

Office of Disciplinary Counsel v. Klein, 61 Hawaii 334, 603 P.2d 562 (1979) (per curiam).

The Disciplinary Board recommended that respondent be disbarred but the court entered an order suspending respondent from the practice of law for the maximum period of five years. Respondent had failed to file a formal answer to the original petition for discipline, thereby admitting the charges in the petition pursuant to R. Hawaii Sup. Ct. 16.7(b) and *Office of Disciplinary Counsel v. DeMello,* 61 Hawaii 223, 601 P.2d 1087 (1979) (this index). The court found that respondent had committed the following violations in the first bankruptcy case: (1) Assistance in the disbursement of bankruptcy funds sequestered for the benefit of creditors with knowledge that it was in violation of the rules and orders of the bankruptcy court; (2) deceitful procurement of an interim bankruptcy court order by failing to disclose that respondent had already disbursed funds to the client and then deviating from such order; and (3) disbursement to himself of approximately $22,000 as attorney's fees without the bankruptcy court's approval, all of which collectively violated Disciplinary Rules 1-102(A)(4), 7-106(A), and 1-102(A)(5). In a second bankruptcy case, disbursement of some $10,000 of a bankrupt's estate to the bankrupt, to himself for attorney fees, and to mainland counsel, without the approval or knowledge of the bankruptcy court, was in violation of Disciplinary Rule 1-102(A)(5). (*Cited in* Office of Disciplinary Counsel v. Smith, 62 Hawaii 467, 617 P.2d 80 (1980); Office of Disciplinary Counsel v. Johnson, 62 Hawaii 95, 611 P.2d 993 (1980).) (T.W.)

Okuna v. Nakahuna, 60 Hawaii 650, 594 P.2d 128 (1979).

Appellant brought an action pursuant to HAWAII REV. STAT. ch. 669 (1976) seeking to quiet title to a parcel of land that he and his predecessors allegedly had acquired by adverse possession. The trial court concluded that appellant had failed to prove the requisite element of hostile possession by clear and positive proof because appellant had never paid taxes on the property or possessed any documents on title or conveyances. The court affirmed on appeal. Although the trial court had erred in ruling that payment of taxes and color of title were required to establish hostility, a trial court judgment based on a misstatement of

the applicable law will be sustained where the findings, as applied to the proper law, support the trial court's conclusion. Appellant failed to establish the fundamental element of possesson under a claim of right since, in addition to the nonpayment of taxes and lack of color of title, seasonal visits to the site for fruitpicking cannot be considered possession, and appellant failed to list the property in his deceased father's estate before the statutory period arguably could have run. (R.M.)

Pacific Professionals, Inc. v. White, 60 Hawaii 675 (1979) (mem.).

Defendant appealed from a judgment granting plaintiff recovery on an assigned claim for the unpaid portion of dental fees. On appeal, the court affirmed. The evidence did not establish an antitrust violation, and the trial court's finding of insufficient evidence to conclude that an accord and satisfaction had been executed was not clearly erroneous. Civ. No. 3240 (Dist. Ct. 3rd Cir. May 13, 1976). (F.H.)

Quality Furniture, Inc. v. Hay, 61 Hawaii 89, 595 P.2d 1066 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Appellant, a furniture store chain, brought a negligence action against its insurance agents for failure to procure fire insurance for one of its storage warehouses that was destroyed by fire. The trial court concluded that appellees were not negligent, and the court affirmed on appeal. The court recognized that an insurance agent owes a duty to the insured to exercise reasonable care, skill, and diligence in carrying out the agent's duties of procuring insurance, that negligence can result from a failure to act, and that the extent of responsibility that an insurance agent owes a client depends upon the facts of each case. The court based its affirmance of the trial court's decision upon the following facts: (1) Appellees had been plaintiff's insurance agents for only a few months before the subject warehouse was leased, and they could not extend insurance to the new premises without the permission of appellant's vice president; (2) appellant failed to submit monthly valuation reports that were required by the existing policy and which would have informed appellees of the new warehouse location; and (3) appellant's bookkeeper knew that the warehouse was not insured, yet failed to notify his superiors of that fact. (*Cited in* Chung v. Kaonohi Center Co., 62 Hawaii 594, 618 P.2d 283 (1980).) (C.L.)

Seibel v. City & County of Honolulu, 61 Hawaii 253, 602 P.2d 532 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Appellants appealed from a dismissal of their complaint against the city for the alleged negligence of the prosecuting attorney in failing to adequately supervise a criminal defendant conditionally released from custody. While on conditional release and undergoing psychotherapy, the criminal defendant, who had a history of committing serious sex offenses, murdered appellants' daughter. The court affirmed the dismissal, reasoning that the city is not responsible for the behavior of a third person absent a special relationship between the city and either the third person or the victim. Such a relationship was not created by past prosecution, or by knowledge of the criminal defendant's suspected involvement in a new offense, or by the court order giving custody of the criminal defendant to the city or any

prosecutor. In reaching the further conclusion that the city had no implied duty, the court examined the basis for imposing duties upon a parent, master, institutional custodian, and doctor in their respective relationships with a child, servant, ward, and patient. A duty is created in those who are able to foresee the risk created by the other and who can or should be able to take precautions against that risk and warn or protect a foreseeable victim. In this case, appellee had neither custody nor control over the criminal defendant, and the prosecuting attorney's supervision over the conditionally released defendant did not compel a conclusion that the professional relationship between them constituted custody. (*Cited in* Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980); Figueroa v. State, 61 Hawaii 369, 604 P.2d 1198 (1979) (this index).) (C.L.)

State v. Abordo, 61 Hawaii 117, 596 P.2d 773 (1979).

Suspecting that an automobile parked on a vacant lot was stolen, a police officer entered the unlocked car, lifted the rear seat to expose the vehicle identification number, and confirmed the automobile's status as a stolen vehicle. Defendant sought to exclude the evidence obtained, contending that the warrantless search had violated his right to protection against unreasonable searches and seizures. The trial court held that the officer had probable cause to believe that the automobile was stolen, and exigent circumstances had rendered a search warrant unnecessary. Defendant was subsequently convicted of unauthorized control of a propelled vehicle. The court affirmed, applying the following principles: (1) The rights assured by the fourth amendment to the federal constitution are personal rights that may be enforced by the exclusion of evidence only at the instance of one whose own rights were infringed by the search and seizure. The proponent of a motion to suppress must establish not only that the evidence was unlawfully obtained, but also that his own fourth amendment rights were violated by the search and seizure; (2) the ability to invoke fourth amendment protection depends upon whether the person seeking such protection has a legitimate expectation of privacy in the invaded property or place; and (3) a legitimate expectation of privacy exists when the individual involved has shown an actual expectation of privacy, and the expectation is one society recognizes as reasonable. Although defendant may have had an actual expectation of privacy with respect to the stolen vehicle, it was not one which society is willing to recognize as legitimate. (*Cited in* State v. Kealoha, 62 Hawaii 166, 613 P.2d 645 (1980); State v. Custodio, 62 Hawaii 1, 607 P.2d 1048 (1980).) (S.D.S.)

State v. Adams, 61 Hawaii 233, 602 P.2d 520 (1979) (per curiam), *rehearing denied,* 61 Hawaii 661 (1979).

Defendant was convicted of promoting a dangerous drug. On appeal, he asserted that the trial court had erred in not giving notice before limiting defense counsel's time for closing argument. The court affirmed the conviction. The opportunity for final summation is inherent in a criminal defendant's basic right to present his defense, and if defendant is represented by counsel, a denial of this opportunity deprives the accused of effective assistance of counsel. A trial court, however, has broad discretion in controlling the duration and scope of closing arguments. In this case, the trial court did not abuse its discretion and defendant was not prejudiced by the limitation on defense counsel's closing argument. De-

fendant had conceded that the allotted time would have been reasonable with advance notice to defense counsel, and the record showed that an adequate summation had been presented in the alloted time. (N.H.)

State v. Afong, 61 Hawaii 281, 602 P.2d 927 (1979) (per curiam).

Defendants of three consolidated cases were convicted of burglary and sentenced to mandatory minimum prison terms for repeat offenders pursuant to Act 181, 1976 Hawaii Sess. Laws [now HAWAII REV. STAT. § 706-606.5 (Supp. 1978)]. The court affirmed the judgments and sentences of two defendants based on *State v. Freitas,* 61 Hawaii 262, 602 P.2d 914 (1979) (this index), and reversed the judgment for the third defendant and remanded for resentencing. Unless conceded by defendant, the State is required to show by satisfactory evidence defendant's prior conviction and representation by counsel, or the waiver thereof, at the time of the prior conviction. In this case, although the trial court had taken judicial notice of the complete file on defendant's prior conviction, the file was never presented to the trial court or defense counsel for examination. Certified copies of relevant court documents should have been made a part of the record. Such evidence is essential in Act 181 proceedings, because a defendant is being subjected to increased punishment by virtue of a prior conviction. (*Cited in* State v. Caldeira, 61 Hawaii 285, 602 P.2d 930 (1979) (this index). HAWAII REV. STAT. § 706-606.5 (Supp. 1978) (amended 1980).) (C.L.)

State v. Aipopo, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of robbery in the second degree and sentenced to imprisonment for twenty years, the maximum term allowed by HAWAII REV. STAT. § 765-11 (1976). The trial court ordered, pursuant to Act 188, 1975 Hawaii Sess. Laws 429, that defendant's sentence not be set under Hawaii Penal Code provisions. The court affirmed on appeal, relying on *State v. Ortez,* 60 Hawaii 107, 588 P.2d 898 (1978). Crim. No. 4097 (3rd Cir. Ct. Hawaii July 15, 1976). (F.H.)

State v. Alexander, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of possessing and carrying a loaded firearm on a public highway. His motion to suppress the rifle found in his car trunk was denied. The court reversed, holding that telephone calls by unidentified informants had not provided police officers with probable cause to justify a warrantless search. No. C1976-29 (Dist. Ct. 1st Cir. Hawaii June 2, 1976). (F.H.)

State v. Alo, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of assault in the second degree. On appeal, the court affirmed. Crim. No. 48940 (1st Cir. Ct. Hawaii Sept. 27, 1976). (F.H.)

State v. Amorin, 61 Hawaii 356, 604 P.2d 45 (1979).

Defendant moved to suppress as evidence an inculpatory statement that he had made without *Miranda* warnings in response to police questions following his arrest for the unauthorized control of a propelled vehicle. The trial court denied the motion on the ground that defendant's statement was spontaneously and voluntarily made. On appeal, the court reversed and remanded the case for a new trial

based upon the following conclusions: (1) The police officer's questioning of defendant constituted custodial interrogation, for defendant was placed under arrest after the police officer had learned that the car in which defendant was a passenger had been stolen; (2) defendant's inculpatory statement was a product of that custodial interrogation; and (3) the arresting officer's failure to issue the required *Miranda* warnings prior to questioning rendered the statement obtained inadmissible at trial. (*Cited in* State v. Huihui, 62 Hawaii 142, 612 P.2d 115 (1980); State v. Hong, 62 Hawaii 83, 611 P.2d 595 (1980); State v. Reese, 61 Hawaii 499, 605 P.2d 935 (1980).) (L.D.F.)

State v. Bachman, 61 Hawaii 71, 595 P.2d 287 (1979) (per curiam).

Defendant was convicted of promoting a detrimental drug despite his argument that marijuana relieves the symptoms of Chron's disease, from which he suffered. On appeal, the court rejected defendant's assertion that HAWAII REV. STAT. § 712-1249 (1976) is unconstitutional for making the use of marijuana a petty misdemeanor. The court conceded that defendant's claim of medical necessity could be a valid defense to the statute if competent medical testimony regarding the severity of defendant's medical condition, the efficacy of marijuana in improving the condition, and the absence or ineffectiveness of conventional medical alternatives had been adduced. Such testimony had been absent in defendant's trial presentation, however, and the statute could not be shown to be unconstitutional. (S.S.)

State v. Bannister, 60 Hawaii 658, 594 P.2d 133 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Defendant was convicted of first degree theft. On appeal, the court reversed the judgment because of an insufficiency of evidence and remanded the case with instructions to enter a judgment of acquittal for defendant. The State had failed to prove every element of the crime beyond a reasonable doubt, for the sole evidence submitted was inadmissible hearsay testimony of the business manager. *Sua sponte,* the court held that as opposed to reversal for trial error the double jeopardy clause of the federal constitution, applicable to the states through the fourteenth amendment, prevents a new trial if there is reversal for insufficiency of evidence. This right was not waived by defendant's motion for a new trial. The prohibition against double jeopardy is absolute; the court cannot remand the case for retrial even if a new trial appears equitable. (*Cited in* State v. Maxwell, 62 Hawaii 556, 617 P.2d 816 (1980); State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980); State v. Brighter, 61 Hawaii 99, 595 P.2d 1072 (1979) (this index); *In re* Doe, 61 Hawaii 48, 594 P.2d 1084 (1979) (this index).) (W.H.)

State v. Bayaoa, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of promoting a dangerous drug in the second degree. On appeal, the court affirmed. Crim. No. 49545 (1st Cir. Ct. Hawaii May 27, 1977). (F.H.)

State v. Bayer, 60 Hawaii 676 (1979) (mem.).

Defendant was fined for traffic violations. He was subsequently charged with and found guilty of criminal contempt for his failure to pay the fines. On appeal,

the court dismissed the charges and set aside the sentences based on a confession of error filed by the prosecuting attorney. Nos. 1975-303, 1975-306, and 608759M (Dist. Ct. 1st Cir. Hawaii Dec. 18, 1975). (F.H.)

State v. Bikle, 60 Hawaii 576, 592 P.2d 832 (1979).

The trial court entered an order pursuant to HAWAII REV. STAT. § 712-1255 (1976) granting defendant a conditional discharge after he was found guilty of possessing four different drugs. The State appealed, contending that a conditional discharge may be granted only to a first-time single offender and not to a multiple offender. The court dismissed the appeal because HAWAII REV. STAT. § 641-13(6) (1976), strictly construed, permits appeals only from final dispositions. A conditional discharge is not a final disposition, for a final disposition does not take place until the entry of a judgment and sentence or a discharge and dismissal. (HAWAII REV. STAT. § 641-13 (1976) (amended 1977, 1979).) (D.T.)

State v. Boreliz, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of obstructing government operations and sentenced. On appeal, the court affirmed. No. A-94679 (Dist. Ct. 3rd Cir. Hawaii Feb. 2, 1976). (F.H.)

State v. Borero, 60 Hawaii 675 (1979) (mem.).

Defendant was found guilty of resisting arrest and sentenced. On appeal, the court affirmed. No. B-3689 (Dist. Ct. 3rd Cir. Hawaii Jan. 3, 1977). (F.H.)

State v. Brandon, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of assault in the first degree. On appeal, the court affirmed. Relying on *State v. Bryson,* 53 Hawaii 652, 500 P.2d 1171 (1972), the court held that the preindictment delay did not warrant dismissal of the indictment or violate Hawaii R. Crim. P. 48(b). Crim. No. 48722 (1st Cir. Ct. Hawaii Feb. 9, 1977). (F.H.)

State v. Brezee, 61 Hawaii 185, 599 P.2d 290 (1979) (per curiam).

The court concluded that the circuit court proceedings held subsequent to an invalid waiver of jurisdiction by the family court were null and void in light of its decision in *In re Doe,* 61 Hawaii 167, 598 P.2d 176 (1979) (this index). In the absence of a valid waiver, the family court retained exclusive original jurisdiction over the juvenile as provided in HAWAII REV. STAT. § 571-22 (1976), thus divesting the circuit court of jurisdiction. (*Cited in In re* Doe, 61 Hawaii 561, 606 P.2d 1326 (1980). (HAWAII REV. STAT. § 571-22 (1976) (amended 1980).) (G.M.)

State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979).

Defendant was convicted of promoting a detrimental drug. He appealed, contending that the trial court should have suppressed as evidence marijuana plants seized from defendant's property pursuant to a search warrant in violation of his constitutional right to protection against unreasonable searches and seizures. The court affirmed the conviction on the following grounds: (1) The reasonableness of

a search conducted by visual observation depends upon whether defendant has a reasonable expectation of privacy from observation, and the viewing police officer's status as a possible trespasser at the time of observation is inconclusive as to the unreasonableness of the observation; and (2) although the view of the plants from defendant's open driveway was obstructed by hanging laundry at the time of police observation, the plants would have been visible under normal conditions by any person standing there, thus negating defendant's reasonable expectation of privacy. (*Cited in* State v. Texeira, 62 Hawaii 44, 609 P.2d 131 (1980).) (S.D.S.)

State v. Brighter, 61 Hawaii 99, 595 P.2d 1072 (1979).

After a police officer stopped an automobile for a traffic violation, he noticed approximately one pound of marijuana on the back seat. Defendant, the driver of the vehicle, was convicted of promoting a detrimental drug. In order to establish the element of defendant's "knowing possession" of marijuana, the prosecution relied upon the inference under HAWAII REV. STAT. § 712-1251 (1976) that the presence of any drug in a motor vehicle is prima facie evidence of knowing possession by every occupant. On appeal, the court upheld the constitutionality of the statute as restrictively construed, but reversed defendant's conviction because of inadequate jury instructions regarding such statutory inference. The statute is constitutional when applied to dealership quantities of drugs as opposed to quantities possessed merely for personal use, and the connection between facts proven and facts presumptively established by the statute is sufficient to satisfy either the "more likely than not" or "reasonable doubt" formulation of the constitutional requirement. Under this construction, a jury is required to find that the drug involved is clearly not of such quantity as ordinarily intended for personal use. Also, the court raised, *sua sponte,* the issue of proper jury instructions under HAWAII REV. STAT. § 701-117 (1976). A mere reading of the statutory definition of prima facie evidence, absent a clarifying instruction to ensure that the jury realizes that they may, but are not required, to draw the inference of guilt, does not comport with due process. (*Cited in* State v. Pimentel, 61 Hawaii 308, 603 P.2d 141 (1979) (this index).) (S.S.)

State v. Broad, 61 Hawaii 187, 600 P.2d 1379 (1979) (per curiam).

Defendant was arrested after having been observed in the act of fellatio by a police officer who had followed him. He was convicted of open lewdness in violation of HAWAII REV. STAT. § 712-1217 (1976). The court reversed the conviction, concluding that the trial court had erred in denying defendant's motion for judgment of acquittal at the close of the State's case. The State had failed to prove that defendant's act had occurred in a public place where it was likely to be viewed by casual observers, an essential element of the offense of indecent exposure. (*Cited in* State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980).) (G.C.)

State v. Bull, 61 Hawaii 62, 597 P.2d 10 (1979).

Defendants were convicted of open lewdness for nude sunbathing, nude swimming, and nude bodysurfing. In affirming the convictions of the nude sunbathers and reversing the convictions of the nude swimmer and bodysurfer, the court reached the following conclusions: (1) The intentional exposure of one's private

parts where they are likely to be observed by others is a lewd act within the meaning of HAWAII REV. STAT. § 712-1217 (1976); (2) the actor need only have a general intent to expose himself in a place where he is likely to be observed by the public; and (3) nude bodysurfers and swimmers, unlike nude sunbathers, may not be convicted of open lewdness if there is no clear indication that their private parts were likely to be exposed to public view. (*Cited in* State v. Luhnow, 61 Hawaii 70, 597 P.2d 15 (1979); State v. Crenshaw, 61 Hawaii 68, 597 P.2d 13 (1979).) (G.C.)

State v. Bush, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of assault in the third degree. The court affirmed on appeal finding sufficient evidence to support the verdict. No. 1977-6848 (Dist. Ct. 1st Cir. Hawaii Dec. 16, 1977). (F.H.)

State v. Caldeira, 61 Hawaii 285, 602 P.2d 930 (1979) (per curiam).

This consolidated appeal concerned the application of Act 181, 1976 Hawaii Sess. Laws 338 [now HAWAII REV. STAT. § 706-606.5 (Supp. 1978)], that provides mandatory minimum sentences for repeat offenders, to three defendants. The court, relying on *State v. Freitas,* 61 Hawaii 262, 602 P.2d 914 (1979) (this index), affirmed as to one and reversed and remanded for resentencing as to the other two defendants. The court rejected the contention that because the promotion of dangerous drugs is a nonviolent crime, the penalty for repeat offenders is grossly disproportionate. The gravity of the offense had been considered by the legislature which is competent to fashion appropriate penalties. One defendant had received adequate notice under the requirement that a defendant be notified of the State's intent to invoke Act 181. The other two defendants had not received timely notices, but notice requirements were satisfied in the absence of requests for a continuance and showings of prejudice. Additionally, one defendant's failure to object constituted a waiver of adequate notice. The court reversed and remanded, however, as to the two defendants who had not been accorded the procedural requirements under Act 181 as set forth in *State v. Afong,* 61 Hawaii 281, 602 P.2d 927 (1979) (this index). (HAWAII REV. STAT. § 706-606.5 (Supp. 1978) (amended 1980).) (C.L.)

State v. Chang, 61 Hawaii 660 (1979) (mem.).

Defendant was charged with rape. The trial court granted defendant's motion to suppress evidence. On appeal, the court affirmed, concluding that the warrantless search was improper. Crim. No. 49854 (1st Cir. Ct. Hawaii Jan. 5, 1978). (F.H.)

State v. Ching, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of promoting intoxicating compounds. On appeal, the court affirmed. No. C1976-1356 (Dist. Ct. 1st Cir. Hawaii June 22, 1976). (F.H.)

State v. Ching, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of two counts of assault in the third degree. On appeal, the court affirmed. Nos. C1976-1367 and C1976-1368 (Dist. Ct. 1st Cir. Hawaii July 1, 1976). (F.H.)

State v. Crenshaw, 61 Hawaii 68, 597 P.2d 13 (1979) (per curiam).

Defendants were arrested and convicted of open lewdness for sunbathing while wearing only bikini bottoms in a relatively secluded section of a beach, where scanty attire appeared to be the norm rather than the exception. In reversing defendants' convictions, the court reached the following conclusions: (1) A lewd act within the meaning of the statute as decided in *State v. Bull,* 61 Hawaii 62, 597 P.2d 10 (1979) (this index), is the intentional exposure of one's private parts to public view; (2) female breasts are not genitalia or private parts; and (3) exposure of female breasts, under the circumstances of this case, is not a lewd act proscribed by HAWAII REV. STAT. § 712-1217 (1976). (G.C.)

State v. Daigle, 61 Hawaii 660 (1979) (mem.), *rehearing denied,* 61 Hawaii 661 (1980).

Defendant was convicted of burglary, rape, and assault. The court affirmed the conviction on appeal, concluding that the victim's pretrial identification of defendant, offered under circumstances devoid of impermissible suggestiveness, was reliable. Crim. No. 50114 (1st Cir. Ct. Hawaii Jan. 13, 1978). (F.H.)

State v. Davidson, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of assault in the second degree and carrying a firearm without a permit or license. On appeal, the court affirmed. Crim. No. 49025 (1st Cir. Ct. Hawaii Nov. 19, 1976). (F.H.)

State v. Davis, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted by a jury of kidnapping and first degree rape. On appeal, the court affirmed. Although the jury instruction should have been more artfully drawn, it was sufficient when read in its entirety. Crim. No. 47611 (1st Cir. Ct. Hawaii May 16, 1975). (F.H.)

State v. Defeo, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of first degree sodomy and robbery. On appeal, the court affirmed, reaching the following conclusions: (1) The trial court did not abuse its discretion in granting a continuance, (2) defendant was adequately represented by counsel, and (3) evidence on the issue of identity was properly admitted. Crim. No. 48924 (1st Cir. Ct. Hawaii Dec. 27, 1976). (F.H.)

State v. Deguair, 61 Hawaii 659 (1979) (mem.).

Defendant appealed his conviction of two counts of theft, challenging the trial court's denial of his motion for judgment of acquittal. The court affirmed on appeal. Crim. No. 48703 (1st Cir. Ct. Hawaii Jan. 21, 1977). (F.H.)

State v. Dillingham Corp., 60 Hawaii 393, 591 P.2d 1049 (1979).

The State brought an eminent domain action to condemn a 40-foot by 2.5-mile strip of land near the Honolulu International Airport for public highway purposes. The sole factual issue at trial was the fair market value of the property. The court affirmed the jury verdict awarding $1.5 million to appellee as just compensation. The property, although zoned R-6 residential, had been designated for public highway use prior to 1967. Appraisers for the State estimated the fair market value of the property as zoned for residential and nonsubdividable at $336,000. An appraiser for appellee, on the assumption that the property could be rezoned to light industrial and was subdividable, and on the basis of a comparison of recent sales prices of similar properties, set a market value of $1.5 million. Despite the city's practice of measuring lot width by the narrowest dimension, the city's Comprehensive Zoning Code § 21-201 (1971) defined lot width as measurable along the streetline, rendering the property subdividable. Although the administrative construction of the statute is entitled to great weight, it is not controlling. Section 21-201 is not ambiguous as to its meaning, and therefore, use of the verbatim definition of the code as opposed to the city's administrative reading in the jury instructions was not prejudicial or erroneous. Fair market value is not limited to the present use value, and the jury may consider potential use value, one element being subdividability, and another, the possibility of rezoning. The competence, credibility, and weight of expert testimony are within the province of the jury, and the use of sales of similar parcels of land to establish fair market value was admissible either as substantive proof of value or in support of expert opinion as to value. (*Cited in* Chung v. Kaonohi Center Co., 62 Hawaii 594, 618 P.2d 283 (1980); State v. Kunimoto, 62 Hawaii 502, 617 P.2d 93 (1980).) (M.M.)

State v. Duncan, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of promoting a harmful drug in the first degree. The court affirmed on appeal. The trial court had properly denied defendant's motion to suppress and committed no error in allowing the chemical analyst to testify as an expert. Crim. No. 50334 (1st Cir. Ct. Hawaii Nov. 18, 1977). (F.H.)

State v. Endo, 61 Hawaii 659 (1979) (mem.).

Defendant's driver's license was revoked for his driving under the influence of intoxicating liquor. He appealed pro se and challenged the sufficiency of the evidence. The court affirmed. No. T1978-319A (Dist. Ct. 1st Cir. Hawaii Feb. 10, 1978). (F.H.)

State v. English, 61 Hawaii 12, 594 P.2d 1069 (1979).

Defendant was accused of committing two burglaries when he was sixteen years old and a resident of the Hawaii Youth Correctional Facility. After a hearing on a petition to waive jurisdiction, the family court took the petition under advisement and filed an interim order directing that defendant be put on a coordinated treatment plan. Subsequently, defendant was accused of robbery, and the State filed another petition for waiver of jurisdiction. Without holding a hearing, the family court granted the State's petition with respect to the robbery as well as the burglary offenses committed nearly fourteen months prior to the robbery. The trial

court granted defendant's motion to dismiss the burglary indictments because the family court's delay in waiving its jurisdiction had denied defendant his right to a speedy trial. The State appealed. The right to a speedy trial has no application until the putative defendant becomes an "accused," and defendant became an "accused" only upon the family court's waiver of jurisdiction. Delay in the preaccusatory stage, however, may violate a defendant's right of due process in the following situations: (1) Substantial prejudice to defendant resulting from the delay, balanced against the reasonableness of such delay; and (2) whether the delay was an intentional device to gain tactical advantage over defendant. The court reversed the dismissal of the burglary counts, noting that one may not complain of adverse effects and prejudice because of a preindictment delay resulting from a benefit granted to him by the interim order. The court affirmed the trial court's dismissal of the robbery count, however, for the family court's waiver without full investigation and a hearing had contravened defendant's constitutional right to due process of law. (*Cited in* State v. Johnson, 62 Hawaii 11, 608 P.2d 404 (1980); *In re* Doe, 61 Hawaii 48, 594 P.2d 1084 (1979) (this index).) (W.H.)

State v. Faimealelei, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of murder. The court affirmed on appeal. Crim. No. 49589 (1st Cir. Ct. Hawaii Apr. 21, 1977). (F.H.)

State v. Faulkner, 61 Hawaii 177, 599 P.2d 285 (1979) (per curiam).

Defendant was orally charged and convicted of attempted theft. The court reversed on the authority of *State v. Jendrusch,* 58 Hawaii 279, 567 P.2d 1242 (1977). Due process requires that an accusation sufficiently allege all the essential elements of the offense charged in order to advise a defendant of the nature of the accusation against him. In this case, the oral charge had failed to allege the essential element of intent and refer to the specific statutory provision under which defendant was charged. (W.H.)

State v. Feliciano, 60 Hawaii 675 (1979) (mem.).

The court affirmed defendant's conviction for burglary in the first degree. Crim. No. 50247 (1st Cir. Ct. Hawaii Jan. 13, 1978). (F.H.)

State v. Ferreira, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of attempted control of a propelled vehicle. On appeal, the court affirmed. Crim. Nos. 49389, 49428, 49498 (1st Cir. Ct. Hawaii Aug. 10, 1977). (F.H.)

State v. Frase, 61 Hawaii 660 (1979) (mem.).

Defendant was convicted of assault in the first degree. On appeal, the court affirmed. The trial court had committed no reversible error in denying defense counsel the right to impeach his own witness. Crim. No. 5327 (3rd Cir. Ct. Hawaii Oct. 25, 1977). (F.H.)

State v. Freitas, 61 Hawaii 262, 602 P.2d 914 (1979).

Defendants were twice convicted of burglary and sentenced to mandatory minimum sentences pursuant to the recidivist statute, Act 181, 1976 Hawaii Sess. Laws [now HAWAII REV. STAT. § 706-606.5 (Supp. 1978)]. Their cases were consolidated for appeal, and the court affirmed, finding that the trial court's sentencing under the act was proper. The court upheld the substantive constitutionality of Act 181 against challenges that the act violates the prohibitions against cruel and unusual punishment, violates the guarantees of equal protection and due process, and constitutes *ex post facto* legislation by considering convictions committed prior to the effective date of the act. The court distinguished *State v. Kamae*, 56 Hawaii 628, 548 P.2d 632 (1976), stating that because the sentencing was a separate, discretionary criminal proceeding in that case, extraordinary procedural safeguards were required. The sentencing in this case was mandatory, and the requirements of reasonable notice of the intended application of Act 181 and the opportunity to be heard were sufficient safeguards prior to the imposition of a sentence under Act 181. Defendant's prior conviction must be established by satisfactory evidence that defendant had been adequately represented by counsel or had knowingly and intelligently waived representation at the time of his prior conviction. (*Cited in* State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980); State v. Bennett, 62 Hawaii 59, 610 P.2d 502 (1980); State v. Caldeira, 61 Hawaii 285, 602 P.2d 930 (1979) (this index); State v. Afong, 61 Hawaii 281, 602 P.2d 927 (1979) (this index). HAWAII REV. STAT. § 706-606.5 (Supp. 1978) (amended 1980).) (L.H.)

State v. Fry, 61 Hawaii 226, 602 P.2d 13 (1979).

Defendant was convicted of two counts of robbery in 1971. His sentence required the first five years for each count to be served concurrently with a federal sentence for a federal offense, and the remaining times to be suspended. These sentences were erroneous because the trial court had no authority to suspend sentences for first degree robbery under the statute then in effect. Seven years later, the trial court granted the State's motion to amend the illegal sentences pursuant to Hawaii R. Penal P. 35 and impose the full term originally prescribed for each charge. The court affirmed. The correction of illegal sentences by reimposing the original valid prison terms does not violate the double jeopardy provisions of the federal and state constitutions. Further, the delay between erroneous sentencing and the correction did not violate the speedy trial provisions of the state and federal constitutions, for the right to a speedy trial does not extend to the resentencing procedure authorized by rule 35. Defendant waived his right to be present at the resentencing by deliberately failing to attend the hearing on the motion. The ordering of an updated presentence report is within the discretion of the trial court in resentencing cases. The resentencing did no more than remove the illegal suspensions, otherwise following the original judge's intent. (W.H.)

State v. Goers, 61 Hawaii 198, 600 P.2d 1142 (1979).

Defendant was convicted of burglary and attempted burglary. The court affirmed after addressing the issues of whether the trial court erred in failing to determine the voluntariness of defendant's confession before it was admitted into evidence and in concluding that the confession was made voluntarily. To avoid a

criminal conviction based upon an involuntary confession, constitutional due process requires that a trial court make a threshold determination of the voluntariness of a confession before the jury considers it. To avoid denial of constitutional and statutory rights, a motion for a voluntariness hearing may be brought at any time prior to the admission of the confession into evidence notwithstanding the general requirement of Hawaii R. Penal P. 12(b)(3) that all motions to suppress be raised prior to trial. The trial court had erred in denying defendant's motion for a voluntariness hearing before and during trial, but this error was harmless, for it was sufficiently remedied by the procedurally adequate post-trial voluntariness hearing, and no unfair consequences arose from the initial error. The factual determination that defendant's confession was made voluntarily was not disturbed because defendant had failed to include the transcript of the voluntariness hearing in the appellate record as required by Hawaii R. Civ. P. 75(b), and there was nothing in the record to warrant reversal of that determination. (R.M.)

State v. Goss, 60 Hawaii 526, 592 P.2d 38 (1979) (per curiam).

Defendant's request to have his sentence reduced was denied by the trial court. The court reversed and remanded the case for further proceedings consistent with its opinion in *State v. Ortez,* 60 Hawaii 107, 588 P.2d 898 (1978). (D.K.)

State v. Hall, 61 Hawaii 659 (1979) (mem.).

Defendants were convicted of second degree robbery and argued on appeal that the trial judge had committed error by admitting testimony. The court affirmed on the grounds that admissibility of evidence is within the trial court's sound discretion, and even if an error was committed, it was harmless. Crim. No. 48817 (1st Cir. Ct. Hawaii Mar. 8, 1977). (F.H.)

State v. Hawkins, 61 Hawaii 659 (1979) (mem.).

Upon a conviction of sodomy in the first degree, defendant appealed. The court affirmed. Crim. No. 49967 (1st Cir. Ct. Hawaii Aug. 16, 1977). (F.H.)

State v. Henriques, 61 Hawaii 660 (1979) (mem.).

Defendant was originally indicted for rape in the first degree and assault in the first degree, but convicted of assault in the third degree. The court affirmed on appeal. Crim. No. 48991 (1st Cir. Ct. Hawaii July 1, 1977). (F.H.)

State v. Hoohuli, 61 Hawaii 659 (1979) (mem.).

Defendants were convicted of theft in the third degree. In consolidated appeals, the court found no reversible error, but advised the trial judge to avoid making any statements that may give the appearance of bias. Nos. 1976-346, 1976-345, 1976-343, and 1976-344 (Dist. Ct. 1st Cir. Hawaii Oct. 18, 1976). (F.H.)

State v. Hopkins, 60 Hawaii 540, 592 P.2d 810 (1979).

Defendants were convicted of harassment pursuant to HAWAII REV. STAT. § 711-1106(1)(a) (1976) and sentenced to five days in jail. In affirming the convictions and sentences, the court reached the following conclusions: (1) When a case is

tried before a judge or a jury, the standard of review to ascertain the legal sufficiency of the evidence is whether, in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact; (2) the elements of harassment, intent and offensive physical contact may be proved by circumstantial evidence; (3) the police officer's testimony presented substantial evidence from which intent and offensive conduct could be inferred; (4) imprisonment for five days for a petty misdemeanor was within the statutory limitations; and (5) a statement of reasons and a presentence diagnosis and report are optional except where a defendant is under the age of twenty-two or has been convicted of a felony. (*Cited in* State v. Maxwell, 62 Hawaii 556, 617 P.2d 816 (1980); State v. Summers, 62 Hawaii 325, 614 P.2d 925 (1980); State v. Rushing, 62 Hawaii 102, 612 P.2d 103 (1980); State v. Hernandez, 61 Hawaii 475, 605 P.2d 75 (1980).) (D.K.)

State v. Huelsman, 60 Hawaii 71, 588 P.2d 394 (1978), *rehearing denied,* 60 Hawaii 308, 677, 588 P.2d 407 (1979) (per curiam).

Defendant sought a rehearing upon the question of the procedural steps contemplated by the court's construction of HAWAII REV. STAT. § 706-662(4) (1976) in *State v. Huelsman,* 60 Hawaii 71, 588 P.2d 394 (1978). The court denied the petition for rehearing, but clarified the procedural steps necessary to sentence an offender to an extended term of imprisonment. The determination that defendant's criminality justified a sentence of imprisonment for an extended term is subject to the procedural standards of ordinary sentencing. This determination is part of the second step of the two-step procedure described in *State v. Huelsman, id.* (*Cited in* State v. Freitas, 61 Hawaii 281, 602 P.2d 914 (1979) (this index). HAWAII REV. STAT. § 706-662 (1976) (amended 1978).) (D.K.)

State v. Irebaria, 60 Hawaii 309, 588 P.2d 927 (1979) (per curiam).

Defendant appealed a denial of his motion to reduce the sentences imposed for his convictions of robbery and the unlawful possession of a firearm. He alleged error on the part of the trial court in refusing to consider his good postconviction behavior in violation of the provisions of Act 188, 1975 Hawaii Sess. Laws ___. The court agreed and remanded the case for redetermination according to the provisions of the act. Relying upon its prior decision in *State v. Ortez,* 60 Hawaii 107, 588 P.2d 898 (1978), the court held that the act requires that the reviewing court give consideration to postconviction behavior, thus departing from the standard of review provided for in the act. Remand would not foreclose the reinstatement of the order denying a reduction of sentence. (F.H.)

State v. Ishimatsu, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of robbery in the second degree. The court affirmed on appeal. Crim. No. 50002 (1st Cir. Ct. Hawaii Nov. 18, 1977). (F.H.)

State v. Jackson, 61 Hawaii 660 (1979) (mem.).

Defendant, convicted of reckless driving, was fined $250. Upon defendant's motion for a reduction of sentence, the trial court set aside the fine on the condition that defendant perform fifty hours of community service. Although he fulfilled

the condition, the trial court held that only $100 of the total fine would be remitted. Defendant appealed, and the court found that the trial court had committed error in refusing to allow defendant to appeal in forma pauperis. Also, the court let the modified sentence stand. No. 1476-3279 (Dist. Ct. 1st Cir. Hawaii Mar. 29, 1977). (F.H.)

State v. Joao, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of promoting prison contraband in the first degree. The court affirmed on appeal. Crim. No. 50298 (1st Cir. Ct. Hawaii Dec. 19, 1977). (F.H.)

State v. Jones, 61 Hawaii 135, 597 P.2d 210 (1979) (per curiam).

Defendant was convicted of carrying a deadly weapon in violation of HAWAII REV. STAT. § 134-51 (1976). The court affirmed, finding that a shotgun—its primary design and purpose being the infliction of death or injury—is a dangerous weapon *per se* within the meaning of the statute. (S.M.)

State v. Kaneakua, 61 Hawaii 136, 597 P.2d 590 (1979).

In a consolidation of forty-seven prosecutions, the trial court granted defendants' motion to dismiss prosecutions for the violation of the cruelty to animals statute on the ground that the statute is unconstitutionally vague. It was stipulated that defendants had knowingly participated in a cockfight. On appeal by the State, the court reversed, reaching the following conclusions: (1) Under HAWAII REV. STAT. § 711-1109(1)(d) (1976), a gamecock is an "animal" and cockfighting is an act of "cruelty"; (2) defendants lack standing to assert that the statute might be vague or indefinite as applied to other persons in situations not before the court; and (3) the cruelty to animals statute is not overbroad, for it does not infringe upon any constitutionally protected right. (*Cited in* State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980).) (L.D.F.)

State v. Kaniho, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of harassment and sentenced. On appeal, the court affirmed. No. B-9230 (Dist. Ct. 3rd Cir. Hawaii May 11, 1977). (F.H.)

State v. Key, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of being a felon in possession of a firearm, and although originally charged with terroristic threatening, was convicted of attempted harassment. On appeal, he challenged the sufficiency of the evidence. The court affirmed. Crim. No. 50316 (1st Cir. Ct. Hawaii Dec. 8, 1977). (F.H.)

State v. Kicklighter, 60 Hawaii 314, 588 P.2d 929 (1979).

Defendant was sentenced to concurrent terms of imprisonment for robbery and escape. After consideration of defendant's post-offense behavior and condition, and recommendations of psychiatrists and social workers, the trial court denied a motion for reconsideration of the sentences. In affirming the denial, the court reached the following conclusions: (1) Guided by the standards set forth in

HAWAII REV. STAT. §§ 706-620 to -621 (1976), a sentencing court exercises broad discretion in deciding whether to impose imprisonment or probation; (2) the exercise of such discretion is reviewable on appeal only in the event of abuse of discretion, which the record did not reveal in this case; and (3) a sentencing court, in determining that a prison sentence is required to avoid depreciating the seriousness of the offense, need not weigh or consider the offender's potential for rehabilitation, but may rely upon the option of parole and not probation in the event of successful rehabilitation. (HAWAII REV. STAT. § 706-621 (1976) (amended 1980).) (D.K.)

State v. Kuoha, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of and sentenced for rape. He appealed from the judgment on the following grounds: (1) The prosecutor's alleged improper closing arguments deprived defendant of a fair trial, and (2) the court erred in giving a jury instruction and in refusing to give other instructions. On appeal, the court affirmed. Crim. No. 48561 (1st Cir. Ct. Hawaii Aug. 26, 1976). (F.H.)

State v. Kuuku, 61 Hawaii 79, 595 P.2d 291 (1979).

Two cases were consolidated for appeal. The court reversed the first case in which the trial court had granted defendant's motion to dismiss his indictment on the ground that he should have been charged under the more specific misdemeanor fraud statute rather than the more general felony theft statute. It affirmed the second case which had resulted in a conviction. The court rejected defendants' argument that prosecution under the felony statute for an offense already covered by a misdemeanor statute was a violation of due process and equal protection. A violation of the more specific misdemeanor fraud statute would not "invariably and necessarily" constitute an identical violation of the more general felony theft statute, for the character of the offense may violate several statutes simultaneously. Absent a clear legislative intent to limit prosecution of an offense to a particular statute exclusively, the prosecutor may exercise his discretion and charge defendant under one of several similar or overlapping theft statutes. (*Cited in* State v. Martin, 62 Hawaii 364, 616 P.2d 193 (1980).) (L.D.F.)

State v. Lau, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of third degree assault. On appeal, he challenged the sufficiency of the evidence. The court affirmed. No. 1976-5270 (Dist. Ct. 1st Cir. Hawaii Dec. 29, 1976). (F.H.)

State v. Lee, 61 Hawaii 313, 602 P.2d 944 (1979) (per curiam).

Defendant was indicted for robbery and theft. Based upon medical reports on defendant's apparent mental irresponsibility, defendant's counsel moved for a judgment of acquittal pursuant to HAWAII REV. STAT. § 704-408 (1976). The trial court determined that defendant was unfit to proceed, committed her to the custody of the director of health, suspended the proceedings, and indefinitely deferred action on the motion for acquittal. Defendant appealed, challenging the trial court's authority to suspend the proceedings, and the court affirmed. HAWAII REV. STAT. § 704-406(1) (1976) requires the suspension of proceedings until defen-

dant can assist her attorney in the selection of defense alternatives available to her. A judgment by reason of mental irresponsibility implies an admission that defendant is guilty of the offense charged, and such a verdict before trial forecloses later protests of defendant's innocence. The trial court was correct in hesitating to hand down such a judgment. Potential prejudice is neutralized by the provisions of HAWAII REV. STAT. § 704-406(2), which allows the resumption of proceedings when a defendant has regained fitness to proceed. (HAWAII REV. STAT. § 704-408 (1976) (amended 1980).) (L.D.F.)

State v. Lemmon, 60 Hawaii 675 (1979) (mem.).

Defendant was found guilty of harassment and sentenced. On appeal, the court affirmed. Nos. B-5004, B-5006, and B-5007 (Dist. Ct. 3rd Cir. Hawaii Apr. 19, 1977). (F.H.)

State v. Luhnow, 61 Hawaii 70, 597 P.2d 15 (1979) (per curiam).

Defendant was arrested while sitting naked on a public beach in the presence of three other clothed persons after being observed walking out of the water in the nude. He was convicted of open lewdness pursuant to HAWAII REV. STAT. § 712-1217 (1976). The court affirmed the conviction and rejected the contention that the statute is void for vagueness based upon its ruling in *State v. Bull*, 61 Hawaii 62, 597 P.2d 10 (1979) (this index), in which the court had held that the intentional exposure of one's private parts to public view is a lewd act within the meaning of the statute. (G.C.)

State v. Lui, 61 Hawaii 328, 603 P.2d 151 (1979) (per curiam).

Defendant was convicted of manslaughter for the fatal shooting of the victim despite his claim of self-defense. He urged that the trial court, by refusing to permit testimony and evidence of the deceased's record of violent behavior, had denied him the opportunity to show that his knowledge of the deceased's violent nature justified his retaliation against the deceased's threatening advances. The court affirmed the conviction, holding that defendant was required to know of specific acts of violence and not of vague or general references to the deceased's violent past. The trial court had also properly excluded circumstantial evidence of who the aggressor was, for the record did not reveal that it was someone other than defendant. It was within the trial court's discretion to exclude evidence of other acts of violence unrelated to the circumstances of this case which would have only unduly prejudiced the jurors. The trial court had also properly denied a request for the *in camera* inspection of the deceased's past records of arrest containing the names of potential witnesses of the deceased's violent character, for such testimony would not have been admissible to show the reasonableness of defendant's state of mind during the shooting. (N.H.)

State v. Maikai, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of kidnapping, rape in the first degree, and sodomy in the first degree. On appeal, the court affirmed. Crim. No. 4792 (3rd Cir. Ct. Hawaii Dec. 1, 1975). (F.H.)

State v. Malakaua, 61 Hawaii 659 (1979) (mem.).

Defendant appealed his conviction of assault in the third degree, challenging the sufficiency of the evidence. The court affirmed. No. 7110 (Dist. Ct. 3rd Cir. Hawaii June 7, 1977). (F.H.)

State v. Manloloyo, 61 Hawaii 193, 600 P.2d 1139 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Defendant was convicted of murder and assault in the first degree. The court affirmed both the conviction and the trial court's refusal to give defendant's requested instruction on the offense of manslaughter. The request for the instruction was based upon *State v. Warner,* 58 Hawaii 492, 573 P.2d 959 (1977), which provided that if there is any evidence that raises the question of whether an offense is murder or manslaughter, an instruction on manslaughter must be given. Defendant had raised a defense of mental incapacity, however, which did not require an instruction on manslaughter because given the facts, the insanity defense could not have reduced the offense of murder to manslaughter. Moreover, the verdict had been rendered before the *Warner* decision, and the rule was therefore not applicable; it is prospective and also dealt with a different issue. Even if *Warner* applied, the instructions given to the jury were sufficient. (C.Y.)

State v. Mann, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of kidnapping, rape, and robbery. The court affirmed on appeal. Defendant was not entitled to twelve peremptory challenges on voir dire on his theory that he might have been sentenced to life imprisonment under the extended-term statute. Crim. No. 50196 (1st Cir. Ct. Hawaii Nov. 18, 1977). (F.H.)

State v. Martinez, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of burglary in the second degree. On appeal, the court affirmed. The trial court had properly refused defendant's requested instruction on trespass as a lesser included offense, for the evidence did not support such a consideration by the jury. Crim. No. 50695 (1st Cir. Ct. Hawaii July 6, 1978). (F.H.)

State v. McCollum, 61 Hawaii 659 (1979) (mem.).

Defendant's driver's license was revoked. She contended that she had not knowingly refused to submit to a breath or blood test as required by statute. On appeal, the court affirmed. No. T-1976-2350 (Dist. Ct. 1st Cir. Hawaii July 26, 1976). (F.H.)

State v. McDowell, 60 Hawaii 675 (1979) (mem.).

The State appealed the trial court's order granting a new trial after defendant was found guilty of trespass in the first degree. The court reversed based on *State v. McNulty,* 60 Hawaii 259, 588 P.2d 438 (1978), and reinstated the judgment of guilt. No. 1976-4480 (Dist. Ct. 1st Cir. Hawaii Dec. 9, 1976). (F.H.)

State v. Mersberg, 61 Hawaii 1, 594 P.2d 1078 (1979) (per curiam).

Defendant was convicted of robbery and sentenced to prison for twenty years. The court affirmed, concluding that no reversible error existed. It was satisfied that the trial court had considered all possible alternative sentences including the provisions of HAWAII REV. STAT. § 706-667(2) (1976) for young adults. The court, however, advised that trial courts should clearly state on the record that such alternatives were considered, especially when a young adult defendant is criminally convicted. (HAWAII REV. STAT. § 706-667 (1976) (amended 1980).) (S.S.)

State v. Meyer, 61 Hawaii 74, 595 P.2d 288 (1979).

Defendants of two consolidated cases were convicted of promoting a dangerous drug, lysergic acid diethylamide (LSD), in violation of HAWAII REV. STAT. §§ 712-1241(1)(b)(i) and -1242(1)(c) (1976). The court reversed, reasoning that the statute in force at the time of the occurrences of the offenses prohibited the distribution of lysergic acid diethlamine, not the distribution of LSD. Legislative history of the statutes shows that the legislature intended to prohibit the distribution of LSD and to bring the state law in compliance with the Federal Uniform Controlled Substances Act, which lists LSD as a proscribed controlled substance. But by its spelling error, the legislature failed to carry into effect its intention to criminalize the promotion of LSD. HAWAII REV. STAT. § 701-104 (1976) prohibits the extension of statutes through the use of analogy to create new crimes not provided for therein. Thus, the court could not extend the scope of the statute to include LSD; only lysergic acid diethlamine was indicated. The judgment entered against the other defendant for promoting another harmful drug was affirmed. The court found no merit to the contention that defendant was prejudiced by extensive testimony relating to the LSD charges, for no objection had been made to the consolidation of trials. (HAWAII REV. STAT. § 712-1241 (1976) (amended 1979).) (N.H.)

State v. Meyer, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of kidnapping and appealed from the judgment and sentence. The court affirmed. Crim. No. 50193 (1st Cir. Ct. Hawaii Feb. 2, 1978). (F.H.)

State v. Milho, 61 Hawaii 124, 596 P.2d 777 (1979) (per curiam).

Defendant was convicted of murder. On appeal, he argued that blood samples recovered from the exterior of his automobile had been obtained pursuant to a defective search warrant and should have been suppressed. A confession he made to the police also should have been suppressed for it was the fruit of statements made prior to his receiving the *Miranda* warning. The court affirmed the conviction on the following grounds: (1) Where a police officer is on the outside looking at the exterior of defendant's automobile from a nonintrusive vantage point, the "open view" doctrine applies; (2) an immediate warrantless search of an automobile is reasonable under the fourth amendment if there is probable cause to search; the observation of bloodlike spots on the exterior of defendant's automobile authorized the police to conduct an immediate warrantless search; and (3) *Miranda* does not restrict the prosecutor's use of evidence that does not result

from custodial interrogation. Defendant's statements prior to his receiving the *Miranda* warning were not made in a custodial setting and thus not subject to the restrictions imposed by *Miranda*. (S.D.S.)

State v. Neves, 61 Hawaii 659 (1979) (mem.).

Defendant appealed the trial court's denial of his motion for judgment of acquittal after his conviction for attempting to exert unauthorized control of another person's propelled vehicle. On appeal, the court affirmed. Crim. No. 5268 (3rd Cir. Ct. Hawaii May 19, 1977). (F.H.)

State v. Okumura, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of escape in the second degree. The court affirmed on appeal. Crim. No. 49006 (1st Cir. Ct. Hawaii Apr. 27, 1978). (F.H.)

State v. Oliveira, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of burglary in the first degree and sentenced for a period of not more than ten years. On appeal, defendant raised constitutional questions with respect to Act 181, 1976 Hawaii Sess. Laws 338, a statute relating to sentencing of repeat offenders. Because defendant was not sentenced pursuant to Act 181, he had no standing, and the appeal was dismissed. Crim. No. 5316 (3rd Cir. Ct. Hawaii Oct. 6, 1977). (F.H.)

State v. Olivera, 60 Hawaii 675 (1979) (mem.).

The trial court denied the resetting of defendant's sentences imposed prior to January 1, 1973. Relying on *State v. Ortez*, 60 Hawaii 107, 588 P.2d 898 (1978), the court affirmed the consolidated cases on appeal. Crim. Nos. 3536, 3537, 3538, 3544, 3916 (3rd Cir. Ct. Hawaii Aug. 23, 1976). (F.H.)

State v. Osborn, 60 Hawaii 675 (1979) (mem.).

Defendant was found guilty of a violation of the Comprehensive Zoning Code. The court affirmed on appeal. Crim. No. C1976-529 (Dist. Ct. 1st Cir. Hawaii July 29, 1976). (F.H.)

State v. Pacarro, 61 Hawaii 84, 595 P.2d 295 (1979) (per curiam).

The State appealed from a pretrial order granting defendant's motion to suppress evidence and denying the State's oral motions to quash defendant's subpoenae duces tecum and for a continuance to file a motion to quash said subpoenae duces tecum. The court reversed the trial court's suppression of evidence and denial of the motion to quash based upon the following conclusions: (1) Probable cause existed for defendant's arrest, and the subsequent search producing the evidence was valid as a search incident to a lawful arrest; (2) a subpoena duces tecum authorized by Dist. Ct. R. Penal P. 31(c) must specify or particularize the documents required to be produced; and (3) the subpoena duces tecum in this case failed to meet the requirements of rule 31(c), for they were overbroad and lacking in specificity. The problem was compounded because the subpoenae duces tecum were served on the State shortly before trial. The court interpreted

the language of rule 31(c) to require that documents or objects requested be of an evidentiary nature meeting the tests of relevancy and admissibility. It determined that the provisions of the rule do not suggest or provide for a means of discovery of evidence or permit a fishing expedition. (G.C.)

State v. Pimentel, 61 Hawaii 308, 603 P.2d 141 (1979) (per curiam).

Defendant was convicted of promoting a dangerous drug. He appealed, raising the following objections: (1) The instruction failed to notify the jurors that a finding of knowing distribution was permissive, not mandatory; and (2) the instruction impermissibly shifted the burden of proving knowledge from the State to defendant. The court reversed. The due process clause of the fourteenth amendment to the federal constitution requires that a state prove every element of a criminal offense, including mens rea, beyond a reasonable doubt. Defendant's knowledge that the substance he distributed was heroin was a material element of the crime of which he was convicted; thus the jury instruction shifting the burden of proof to defendant violated his due process rights. The jury instruction was also ambiguous and capable of misleading the jury, so a clarifying instruction indicating that the inference was of a permissive rather than mandatory nature should have been given. (S.S.)

State v. Poliachik, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of promoting a detrimental drug in the first degree. On appeal, defendant claimed that the trial court had applied an improper standard in rejecting his motion to defer acceptance of a guilty plea. The court affirmed. Crim. No. 50221 (1st Cir. Ct. Hawaii Sept. 15, 1977). (F.H.)

State v. Powell, 61 Hawaii 316, 603 P.2d 143 (1979), *rehearing denied,* 61 Hawaii 661 (1979).

Defendant was arrested for driving under the influence of drugs after a police officer had observed his erratic driving. Shortly thereafter, defendant was again arrested on the scene for the promotion of a dangerous drug when cocaine and drug paraphernalia were discovered inside the automobile. The State appealed the trial court's grant of a motion to suppress evidence resulting from an unlawful search and seizure. The court reversed. The initial stop and arrest of defendant was validly conducted pursuant to the State's legitimate interest in traffic safety and control, for the police officer had articulable probable cause to make the stop and arrest. Likewise, probable cause for the second arrest existed when a police officer securing the contents of the vehicle saw drug paraphernalia in the car and discovered telltale needle marks upon inspection of defendant's arms. The "automobile exception" to the warrant requirement, rather than the "plain view" doctrine, applied to the search and seizure, so the contraband in transit could be lawfully detained. The use of a flashlight to aid the search did not undermine the reasonableness of the police officer's actions, as distinguished from the situation in *State v. Hanawahine,* 50 Hawaii 461, 443 P.2d 149 (1968). (*Cited in* State v. Agnasan, 62 Hawaii 252, 614 P.2d 393 (1980); State v. Bennett, 62 Hawaii 59, 610 P.2d 502 (1980).) (D.T.)

State v. Quiocho, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of burglary in the second degree and sentenced. On appeal, the court affirmed. Crim. No. 5187 (3rd Cir. Ct. Hawaii Mar. 23, 1977). (F.H.)

State v. Reiger, 61 Hawaii 660 (1979) (mem.).

Defendant was convicted of first degree rape, sodomy, and burglary. On appeal, the court affirmed. The lineup identification procedures had been proper and not unduly suggestive. Crim. No. 50043 (1st Cir. Ct. Hawaii Mar. 23, 1978). (F.H.)

State v. Reverio, 61 Hawaii 95, 595 P.2d 1069 (1979).

On the State's appeal, the court reversed the trial court's order granting defendant's oral motion to dismiss the indictment charging him with robbery. Prospective jurors had briefly and accidently viewed defendant in shackles on the morning of the trial. The court ruled that the trial court had granted the motion because of its displeasure with the prison officials' failure to comply with its instruction to have defendant brought into the courtroom without shackles, and not because there was a showing of juror prejudice. The trial court had asserted that it was concerned that delay would arise by impanelling a new jury. The court applied the rule that the momentary observation of defendant in shackles by prospective jurors does not *ipso facto* raise a presumption of prejudice, and a dismissal on such a ground requires an affirmative showing of prejudice by defendant. Further, the trial court could have conducted voir dire to eliminate prejudiced jurors and summoned additional jurors within a matter of days, thus minimizing any further delay. (S.S.)

State v. Roque, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of burglary in the first degree. On appeal, the court affirmed. Crim. No. 49017 (1st Cir. Ct. Hawaii Dec. 18, 1977). (F.H.)

State v. Salazar, 61 Hawaii 660 (1979) (mem.).

Defendant was convicted of second degree assault. The court affirmed, finding no violation of defendant's right to a speedy trial or an abuse of discretion with respect to evidentiary matters. Crim. No. 49544 (1st Cir. Ct. Hawaii June 24, 1977). (F.H.)

State v. Santos, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of theft in the first degree and appealed, challenging the sufficiency and reliability of the State's evidence on the question of value. The court affirmed. Crim. No. 48989 (1st Cir. Ct. Hawaii Sept. 15, 1976). (F.H.)

State v. Seu, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of carrying a deadly weapon and third degree assault. On appeal, the court reversed the conviction for possession of a deadly weapon, but affirmed the assault conviction. Crim. Nos. 76-2635 and 76-2636 (Dist. Ct. 1st

Cir. Hawaii July 7, 1976). (F.H.)

State v. Smith, 61 Hawaii 660 (1979) (mem.).

Defendant was convicted of assault in the first degree. The court affirmed. Under the circumstances of this case the trial court could, but was not required to, instruct the jury on the law relating to assault in the third degree. Crim. No. 50433 (1st Cir. Ct. Hawaii Mar. 3, 1978). (F.H.)

State v. Solomon, 61 Hawaii 127, 596 P.2d 779 (1979).

Defendant was initially charged with theft in the second degree, but was later indicted for theft in the first degree. Both charges arose out of the same incident, but the prosecutor had not become aware of enough facts to justify a charge of the greater offense until defendant had already pleaded guilty to the lesser offense. The trial court dismissed the indictment for theft in the first degree on the ground that the State could not escalate a charge once a lesser offense had been admitted. On appeal by the State, the court reversed. Under HAWAII REV. STAT. § 701-111(1)(b) (1976), a former prosecution and conviction bars a subsequent one only if the latter prosecution could have been pursued at the outset. The statute's term "prosecuting officer" refers to governmental prosecuting attorneys, not to policemen who may have known of the double charges. The prosecutor conducting the initial proceeding did not have the requisite knowledge that a greater offense could have been charged at that time. Knowledge is surmised by the totality of circumstances, including the timing of the disclosure of facts and the setting of charges. Nor was the subsequent indictment for the greater offense inconsistent with the legislative intent that the statute prevent harassment and vexatious litigation by the government. (S.M.)

State v. Somerville, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of driving under the influence of intoxicating liquor. The court affirmed. No. T1976-545 (Dist. Ct. 1st Cir. Hawaii Mar. 22, 1976). (F.H.)

State v. Soto, 60 Hawaii 493, 591 P.2d 119 (1979) (per curiam).

Defendant was convicted of prostitution after the trial court denied defendant's motion for a continuance. The court reversed and remanded for a new trial. A person accused of a crime is entitled to a fair and reasonable time to prepare a defense and to allow counsel sufficient time to prepare for trial. Although there is no *per se* rule on what is a constitutionally adequate time to prepare a case, sixteen hours between the client's first interview and the trial was too brief a period to assure defendant the effective assistance of counsel. The court distinguished *State v. Torres,* 54 Hawaii 502, 510 P.2d 494 (1973), in which the denial of a motion for continuance had been upheld. (F.H.)

State v. Stanley, 60 Hawaii 527, 592 P.2d 422 (1979), *cert. denied,* 444 U.S. 871 (1979).

Appellant was convicted of robbery and murder by the trial court after a family court waiver of jurisdiction pursuant to HAWAII REV. STAT. § 571-22 (1976). The

court affirmed. It initially denied the State's motion to dismiss the appeal on the ground that the issue of waiver could not be raised subsequent to trial. The court's newly stated rule that direct appeals from the family court's waiver of jurisdiction must be made prior to trial applies only prospectively. Appellant attacked the constitutionality of the waiver statute on the grounds of vagueness and inadequate standards. Vagueness may apply only to definitions of criminal conduct and not to judicial procedures. A family court must be allowed flexible standards in considering whether to waive its jurisdiction; the statute need not list all possible considerations. Appellant was not denied substantive due process for the family court's record revealed that full consideration and investigation of all evidence had been made. The waiver order sufficiently specified the reasons for the waiver to permit meaningful review. (*Cited in In re* Doe, 62 Hawaii 70, 610 P.2d 509 (1980); *In re* Doe, 61 Hawaii 561, 606 P.2d 1326 (1980); *In re* Doe, 61 Hawaii 364, 604 P.2d 276 (1979) (this index); *In re* Doe, 61 Hawaii 167, 598 P.2d 176 (1979) (this index); *In re* Doe, 61 Hawaii 48, 594 P.2d 1084 (1979); State v. English, 61 Hawaii 12, 594 P.2d 1069 (1979) (this index). HAWAII REV. STAT. § 571-22 (1976) (amended 1980).) (G.G.)

State v. Stone, 60 Hawaii 675 (1979) (mem.), *rehearing denied,* 61 Hawaii 661 (1979).

Defendant was arrested and charged with driving under the influence of intoxicating liquor. His driver's license was revoked because he had refused to submit to a test of his breath or blood as required by law. On appeal, the court affirmed. No. T1976-2353A (Dist. Ct. 1st Cir. Hawaii July 20, 1976). (F.H.)

State v. Swain, 61 Hawaii 173, 599 P.2d 282 (1979) (per curiam).

Defendant was convicted of assault in the third degree, a misdemeanor entitling defendant to a jury trial under the State Constitution. The trial court denied defendant's motion for a new trial alleging, *inter alia,* that he had been deprived of his right to a jury trial. The court reversed, basing its decision upon the following conclusions: (1) Under HAWAII REV. STAT. § 604-8 (1976) and Hawaii R. Penal P. 5(b), a defendant's waiver of his constitutional right to a jury trial must be knowing and voluntary; (2) a waiver of the right to a jury trial is ineffective if there is nothing in the record to show that a defendant was informed of his constitutional right to a jury trial by either the trial court or his counsel, or that he was otherwise aware of such a right; and (3) although an attorney may waive the right to a jury trial for his client, the waiver is ineffective unless the express or implied concurrence of a defendant is evident. (L.D.F.)

State v. Tauliili, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of rape in the first degree. On appeal, the court affirmed. Crim. No. 48550 (1st Cir. Ct. Hawaii May 21, 1976). (F.H.)

State v. Tavares, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of escape in the second degree. On appeal, the court affirmed. Crim. No. 49747 (1st Cir. Ct. Hawaii Oct. 14, 1977). (F.H.)

State v. Thiele, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted under a statute that was repealed subsequent to the entry of judgment. The court affirmed on appeal, relying on *State v. Cotton*, 55 Hawaii 135, 516 P.2d 709 (1973). The repeal had no effect upon the prosecution of this case. No. 1975-1020200M (Dist. Ct. 1st Cir. Hawaii Jan. 28, 1976). (F.H.)

State v. Torres, 60 Hawaii 675 (1979) (mem.).

Defendant was convicted of escape in the second degree. The court affirmed on appeal. Crim. No. 49583 (1st Cir. Ct. Hawaii Sept. 27, 1977). (F.H.)

State v. Unea, 60 Hawaii 504, 591 P.2d 615 (1979).

Defendant was convicted of assault. He appealed, alleging that the trial court had committed reversible error by refusing to give his self-defense instructions to the jury. The court affirmed. According to the rule in *State v. Reveira*, 59 Hawaii 148, 577 P.2d 793 (1978), defendant was not entitled to an instruction on self-defense because there was no testimony or evidence in the record that would support the jury's consideration of that issue. (*Cited in* State v. O'Daniel, 62 Hawaii 518, 616 P.2d 1383 (1980).) (W.H.)

State v. Vance, 61 Hawaii 291, 602 P.2d 933 (1979), *rehearing denied*, 61 Hawaii 661 (1979).

Defendant was arrested for assault and taken to a cellblock where a preincarceration search uncovered a small amount of cocaine. Defendant's brother came to post bail for defendant, behaved disruptively at the police station, and was arrested for disorderly conduct. A preincarceration search of the brother uncovered three tablets of secobarbital. The court affirmed the convictions of both defendants for promotion of dangerous drugs on the following grounds: (1) A warrantless arrest is valid if the police have probable cause to arrest a defendant under a specific statutory provision even though the offense was technically a different, but closely related one; (2) a disorderly person arrested for a misdemeanor or petty misdemeanor may be temporarily incarcerated, if justified, notwithstanding an offer of immediate bail made on his behalf, and a preincarceration search is permissible if there is justification and intent to incarcerate; (3) establishing a chain of custody of a drug or chemical in the form of a powder or liquid which is introduced as evidence, from the time of recovery by police until the laboratory test, is not required absent a specific allegation of tampering; and (4) any amount of a dangerous drug is sufficient for conviction under HAWAII REV. STAT. § 712-1243 (1976), and only where a literal application of the statute would compel an unduly harsh conviction may a court dismiss the charge as a *de minimus* infraction of the law under HAWAII REV. STAT. § 702-236 (1976). (*Cited in* State v. Antone, 62 Hawaii 346, 615 P.2d 101 (1980); State v. Langley, 62 Hawaii 79, 611 P.2d 130 (1980).) (D.K.)

State v. Warren, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of first degree rape and criminal trespass rather than the original charge of first degree burglary. On appeal, the court affirmed the trial court's denial of defendant's motion for judgment of acquittal on the burglary

count. Crim. No. 5051 (3rd Cir. Ct. Hawaii Apr. 11, 1977). (F.H.)

State v. Yangoren, 61 Hawaii 659 (1979) (mem.).

Defendant was convicted of attempted rape, burglary, sodomy, and rape. He appealed on the ground of ineffective assistance of counsel. The court affirmed. Crim. No. 50564 (1st Cir. Ct. Hawaii Mar. 31, 1978). (F.H.)

Thirty Voters v. Doi, 61 Hawaii 179, 599 P.2d 286 (1979) (per curiam).

In an original action, plaintiffs sought to set aside the results of a November 7, 1978 election on the grounds of improper ballot form and misconduct of the county clerk. An initiative proposal limiting the power of the county planning commission to grant height variances had been narrowly defeated. The court first found that plaintiffs' suit was barred by laches; plaintiffs had ample notice and opportunity to seek correction of any irregularities in the ballot or election process a month before the election, and plaintiffs' failure to act upon notice of the ballot format precluded them from bringing action after the election absent fraud or major misconduct. Additionally, the court determined that plaintiffs would have failed on the merits of their claims had their action been allowed, for the ballot was not improperly misleading or so unclear, and HAWAII REV. STAT. § 11-116 (1976), which mandates that ballot facsimiles be available for public inspection, did not require the county clerk to obtain plaintiffs' approval of a nonsubstantive change in ballot language. Also, absent fraud, election results will not be disturbed where there is substantial compliance with the governing election statute. (S.M.)

Wong v. Fong, 60 Hawaii 601, 593 P.2d 386 (1979) (per curiam).

A law firm represented petitioner dentist in a dental malpractice action and during part of the same period also represented a transportation leasing company in an action against petitioner in his status as loan guarantor. The court denied petitioner's request for the issuance of a writ of mandamus that would require the trial court to reverse its denial of a motion to disqualify the law firm from representing the leasing company. Adverse representation is prima facie improper if the relationship between an attorney and his client is an active and existing one. The malpractice action, however, was subsequently settled and dismissed with prejudice, thereby eliminating any concern for reduction of vigor and independence in representation of petitioner in that action. Further, the record showed neither that the law firm had acquired any confidential or prejudicial information during the existence of its attorney-client relationship with petitioner as a result of the malpractice representation, nor that irreparable or immediate harm could inure to petitioner in the loan action. An issuance of the extraordinary writ of mandamus was not warranted, for the conflict of interest had dissipated, and any lingering ethical considerations could be cleared in separate disciplinary proceedings. (*Cited in* Chuck v. St. Paul Fire & Marine Ins. Co., 61 Hawaii 552, 606 P.2d 1320 (1980).) (D.Y.)

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		Constitutional Issue	Other Issues	Affirmed	Reversed	Original Jurisdiction	Held for	Held for
Criminal:	44	18	26	21	22	1	28	16
Civil:	43							
Government:	26	2	24	9	10	7	11	15
Private:	17	0	17	11	6	0	6	11
TOTALS:	87	20	67	41	38	8	45	42
Full Opinion:	54							
Per Curiam:	33							
Memorandum:	67							

TABLE II

Justice	Majority Opinion	Concurring Opinion	Dissenting Opinion	Total
Richardson	16			16
Kidwell*	9	1	2	12
Kobayashi**	6	1		7
Lum (vacancy)	1			1
Marumoto	3			3
Menor	7			7
Ogata	12		1	13
TOTAL	54	2	3	59

*Justice Kidwell retired on February 2, 1979.
**Justice Kobayashi retired on December 29, 1978.

TABLE III

Substitute Justice: \ Replacing:	Kidwell	Kobayashi	Menor	Ogata	Vacancy	Total
Kobayashi					43	43
Marumoto	6				33	39
Lum				1	13	14
Kato	1	1	1		3	6
Kidwell					4	4
Chang					3	3
Fukushima	1					1
Huddy					1	1
Sodetani					1	1
TOTAL	8	1	1	1	101	112

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1980 HAWAII SUPREME COURT CASES

This alphabetical index provides a summary of each Hawaii Supreme Court case decided between January 1, 1980 and June 18, 1980, inclusive. Beginning with this index, memorandum decisions will no longer be included, as the editors felt that such summaries did not add to the informational content of the index. In all other respects, the format here is identical to that of the index of 1979 cases.

Ai v. Frank Huff Agency, Ltd., 61 Hawaii 607, 607 P.2d 1304, *rehearing denied*, 62 Hawaii _ (1980).

Appellant filed an interlocutory appeal from an order granting partial summary judgment. The trial court had found that appellant committed a per se violation of HAWAII REV. STAT. § 443-44(8) (1976) when he obtained from appellees a promissory note providing for attorney's fees of 33-⅓ % of the unpaid principal should appellees default on the note, whether or not suit had been filed. It had also recognized that pursuant to HAWAII REV. STAT. § 443-47 (1976), the commission by a collection agency of a practice prohibited by chapter 443 is an unfair or deceptive act. Accordingly, the trial court had decreed that the promissory note was null, void, and unenforceable under HAWAII REV. STAT. § 480-12 (1976) and awarded damages to appellees as provided by HAWAII REV. STAT. § 480-13(a)(1) (1976). Affirming in part and reversing and remanding in part, the court found no genuine issue of material fact and held that appellees had standing under HAWAII REV. STAT. § 480-13. The court made the following conclusions regarding the issue of standing: (1) A private action for damages is permissible under Hawaii's antitrust laws; (2) an allegation of injury to personal property is sufficient to gain standing; and (3) the public interest requirement is satisfied where, in a private action the allegations show a per se violation, and in a private treble damage action, plaintiff was damaged thereby. Turning to the merits, the court decided that while the clause providing for the payment of attorney's fees violates chapter 480 and is therefore unenforceable, that clause is severable and the remainder of the promissory note is enforceable. Consequently, because of appellees' continuing obligation to make payments under the note severed of its offending clause and because appellees had made no payments beyond the amount of their existing obligations, the court found no legal injury to appellees cognizable under HAWAII REV. STAT. § 480-13. Hence, appellees were not entitled to damages. (HAWAII REV. STAT. ch. 443 (1976) (repealed 1979); HAWAII REV. STAT. § 480-13 (1976) (amended 1980).) (L.Z.)

Chuck v. St. Paul Fire & Marine Insurance Co., 61 Hawaii 552, 606 P.2d 1320 (1980).

At trial, appellee moved to disqualify appellant's counsel pursuant to Disciplinary Rules 5-102(B) and 4-101. Appellant filed a cross-motion to disqualify appellee's counsel pursuant to Disciplinary Rule 5-102(A). The trial court granted both motions and both parties appealed. In addition, appellant moved for a stay of the lower court proceeding pending appeal. Also, appellee moved to dismiss appellant's appeal, petitioned the court for a writ directing the trial court to vacate the order disqualifying appellee's counsel, and moved to disqualify another law firm which was representing appellant. The court dismissed appellant's appeal because appellant failed to obtain the required leave to appeal from the trial court. HAWAII REV. STAT. § 641-1 (1976) allows an appeal in civil cases to be taken as a matter of right only from a final judgment, order, or decree. The court followed its prior decision that court orders granting or denying disqualifications are interlocutory and not appealable as a matter of right. Appellee's petition for a writ of mandamus was granted, however, because the trial court had based its order disqualifying appellee's counsel on a clearly insufficient basis, and a convincing showing was made by appellee that irreparable and immediate harm would result. Appellant's motion for a stay and appellee's motion to disqualify the other law firm representing appellant were also denied. (HAWAII REV. STAT. § 641-1 (1976) (amended 1979).) (R.M.)

Chun v. Employees' Retirement System, 61 Hawaii 596, 607 P.2d 415 (1980).

Appellant's spouse filed an application for service retirement with Employees' Retirement System but died prior to the specified effective date of retirement. The trial court found that decedent had died in service and prior to retirement and thus denied appellant substantial retirement benefits. Appellant appealed on the ground that, for purposes of the vesting of benefits, retirement occurs upon the execution and filing of an application for service retirement. The court affirmed, holding that appellant's interpretation of HAWAII REV. STAT. § 88-73(1) (1976) ignored the obvious meaning and purpose of that section. The court also held that HAWAII CONST. art. XVI, § 2 was not applicable, for that section was meant to protect employees from reductions in accrued benefits. The receipt of benefits in this case is governed by the applicable statutory provisions, among which is the condition expressed in HAWAII REV. STAT. § 88-73(1). (L.H.)

Cowan v. First Insurance Co., 61 Hawaii 644, 608 P.2d 394 (1980).

Plaintiff and defendant First Insurance Co. appealed from an order dismissing plaintiff's complaint for lack of personal jurisdiction over nonresident defendants Ardell Marina, Inc. (Ardell) and Cottle. In vacating the trial court's order and remanding the case, the court found that Ardell and Cottle had transacted business in Hawaii within the meaning of Hawaii's long-arm statute, HAWAII REV. STAT. § 634-35(a)(1) (1976). The following activities constituted the requisite transaction of business: (1) Ardell and Cottle entered into, through interstate communications, contracts in Hawaii with a Hawaii resident to advertise and manage the sale of a boat which was initially, and for a significant part of the contractual period, located in the state; and (2) they solicited business in Hawaii

through advertisements placed in national magazines distributed and sold in the state that gave rise to the cause of action. Ardell and Cottle purposefully availed themselves of the privilege of conducting business in Hawaii, and the court thus found that the minimum contacts requirement of due process, set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), was satisfied. The court also held that "reasonableness" further supported requiring Ardell and Cottle to present their defense in Hawaii. (L.Z.)

Feliciano v. City & County of Honolulu, 62 Hawaii 88, 611 P.2d 989 (1980) (per curiam).

Appellants appealed from a jury verdict awarding no damages in an action for trespass, assault, battery, and malicious prosecution allegedly committed by police officers employed by the city. The court affirmed. The admission into evidence of testimony describing some of the appellants as "beat characters" was not error. The general rule that evidence of good or bad character of either party to a civil action is inadmissible has the following two exceptions, both applicable in this case: (1) Where a defendant in a civil action for assault and battery pleads self-defense, he may introduce evidence of plaintiff's reputation for violent behavior if he proves it was known to him; and (2) where in a civil action for assault there is an issue as to who committed the first act of aggression, evidence of good or bad reputation of both plaintiff and defendant for peacefulness is admissible. The term "beat character" directly addressed the issue of appellants' violent reputation and was therefore admissible. Appellants' motion for a directed verdict for one assault count which was uncontradicted but supported only by oral testimony of a sole witness was properly denied. The lower court had properly submitted the issue of the witness' credibility to the jury, as the weight to be accorded the testimony was a question of fact. (G.T.)

Haines, Jones, Farrell, White, Gima Architects, Ltd. v. Maalaea Land Corp., 62 Hawaii 13, 608 P.2d 405 (1980).

Claimant appealed the denial of its application for the attachment of a mechanic's lien. The court affirmed the trial court's conclusion that the claimant had not established probable cause that a lien attached to the subject property pursuant to HAWAII REV. STAT. § 507-43 (1976). Probable cause for the attachment of a lien is shown by the existence of actual or visible improvement to real property according to HAWAII REV. STAT. § 507-41 to -42 (1976). Claimant's minor remodeling, marking of boundaries, and test borings had not resulted in any actual or visible improvement to the land. (L.Z.)

Hamm v. Merrick, 61 Hawaii 470, 605 P.2d 499 (1980) (per curiam).

Defendant appealed from the trial court's denial of a motion to amend his answer in a slander suit to include the defense of qualified privilege. The court reversed the verdict and judgment of the trial court and remanded for a new trial. When a party seeks to amend the pleadings pursuant to Hawaii R. Civ. P. 15(b), the critical question is whether that issue was tried by the parties' implied consent. Consent will be implied from one's failure to object to the introduction of evidence relevant to the unpleaded issue. Moreover, in this case, plaintiff himself introduced such evidence as part of his case. Thus, the trial court had abused its

discretion in refusing to allow defendant to amend his answer. (L.H.)

In re Doe, 61 Hawaii 561, 606 P.2d 1326 (1980) (per curiam).

Appellant, a juvenile, appealed from orders waiving family court jurisdiction pursuant to HAWAII REV. STAT. § 571-22(a) (1976) and denying appellant's motion to dismiss a grand jury indictment returned subsequent to the waiver. The court reversed the order waiving jurisdiction. A valid waiver requires a hearing, assistance of counsel, and a statement of the relevant facts and reasons for granting the waiver. The statement is necessary to demonstrate compliance with the statutory requisite of "full investigation and hearing" and to provide a basis for review. The family court had abused its discretion by granting the waiver two years after conducting brief inquiries and not holding a subsequent investigation or hearing. All waiver petitions taken under advisement should be acted upon within a reasonable time. Because the waiver in this case was invalid, the indictment was quashed as premature. (HAWAII REV. STAT. § 571-22 (1976) (amended 1980).) (R.M.)

In re Doe, 62 Hawaii 70, 610 P.2d 509 (1980).

A juvenile appealed from a family court order revoking her probation and committing her to the Hawaii Youth Correctional Facility. The court affirmed, reaching the following conclusions: (1) The petition to revoke probation was adequately specific under the circumstances to provide sufficient notice of the grounds for the action; and (2) hearsay evidence was properly admitted under HAWAII REV. STAT. § 571-41 (1976), and appellant's rights to due process and to confront adverse witnesses were not infringed because those rights under the statute were not exercised by appellant. It is preferable that a family court state the grounds for a possible adverse action in the petition to revoke probation with specificity and also state its reasons for revoking probation in writing with a degree of specificity that would aid review and avoid the appearance of arbitrariness. While in this case, the family court's written statement was insufficient, when read in conjunction with its oral remarks at the hearing's conclusion, the reasons to revoke probation were ample, and therefore, the statement was adequate. (HAWAII REV. STAT. § 571-41 (1976) (amended 1980).) (G.T.)

In re Hawaiian Telephone Co., 61 Hawaii 572, 608 P.2d 383, *rehearing denied*, 62 Hawaii ___ (1980).

Taxpayer is a public utility subject to taxation under Hawaii's Public Service Company (PSC) tax law. In 1970, 1971, and 1972, taxpayer reported its directory revenues consisting of advertising, rental, and salvage revenues as gross income on its PSC tax returns. In 1973, it filed its 1973 return and amended returns for 1970, 1971, and 1972, claiming that its directory revenues were not subject to the PSC tax but to a general excise tax. Upon rejection of its contentions by the director of taxation and the tax court, taxpayer appealed. The court affirmed in part and reversed and remanded in part, reaching the following conclusions: (1) The tax court erred in determining that directory revenues were subject to the PSC tax, because HAWAII REV. STAT. § 239-2(6)(B) (1976), which defines the gross income of telephone companies as "income from the conveyance or transmission of telephone messages or the furnishing of facilities for the transmission of intelli-

gence by electricity," excludes directory revenues from gross income; (2) the entire amount of directory revenues is taxable for excise tax purposes to the partnership or joint venture regardless of whether revenues were earned by the individual or the joint venture; (3) pursuant to HAWAII REV. STAT. § 237-1(2) (1976), an individual doing business in the state is taxed for excise tax purposes regardless of whether that individual was doing business as an individual or as an agent for another; and (4) the contentions regarding the statute of limitations and interest computation were moot once the court ruled that the directory revenues were taxable under the general excise tax law rather than under the PSC tax law. (HAWAII REV. STAT. § 239-2 (1976) (amended 1977).) (R.M.)

Life of the Land, Inc. v. City Council, 61 Hawaii 390, 606 P.2d 866 (1980).

Developers planned the construction of a 350-foot high condominium in an area subject to a moratorium on the issuance of building permits. Developers applied for and received a variance, with conditions, from the city council. They then filed an application for a building permit in order to commence construction. Meanwhile, the city council enacted a new ordinance that created a Historic, Cultural and Scenic District (HCSD) out of the area surrounding the condominium project. The maximum permissible height for buildings in such a district is 121 feet. Council members intended that the ordinance would operate only prospectively and not affect the condominium project or the building permit application. Plaintiffs then filed their complaint after which developers' building permit application was approved. They appealed from an order dismissing their complaint to declare invalid the city council's action approving the construction of the condominium. The following issues raised on appeal were resolved in favor of the city council: (1) The principle of checks and balances in the city government was not violated, for nonlegislative actions merely administering existing laws, including the council's approval of the application for a variance, need not be implemented by ordinance, but may be by resolution because the building permit moratorium had been validly enacted as law and included a provision authorizing variances; (2) the moratorium was not a zoning ordinance requiring administration by the Department of Land Utilization (DLU), an executive agency, rather than the council, because it did not contain any of the provisions of an ordinance but was an interim development control device, and DLU served as a consulting agency, thus maintaining a separation of powers; (3) the variance was not an illegal spot zoning because no zoning action was involved in the moratorium or variance, the council's action was procedurally correct, and the council did not disregard the requirements in the moratorium for granting a variance; (4) the effective date of the variance approval was the date that the developers' building permit application had been filed and accepted; (5) the HCSD ordinance did not affect the developers' project because it was enacted subsequent to the effective date of the variance approval and the council expressly intended that result; (6) a council member's vote in favor of the variance was valid even if that member had received a substantial campaign contribution from the developers' partner because there was nothing in the record to indicate that the contribution had been unlawful; and (7) the council's approval of the developers' application for variance or modification made the doctrine of equitable estoppel applicable to the condominium project as previously considered in *Life of the Land, Inc. v. City Council,* 60 Hawaii 446, 592 P.2d 26 (1979). (D.T.)

Loyalty Development Co. v. Wholesale Motors, Inc., 61 Hawaii 483, 605 P.2d 925 (per curiam), *rehearing denied*, 62 Hawaii _ (1980).

The lower court consolidated complaints filed by lessor and by lessee concerning a dispute over the binding effect of a "market value" determination by a majority of three appraisers that was provided for in the lease. Lessee appealed from the lower court's decision that the determination was final. The court affirmed on the basis of *Ching v. Hawaiian Restaurants, Ltd.*, 50 Hawaii 563, 445 P.2d 370 (1968), holding that the lease provision gave the majority of appraisers' decision the finality of a judgment by a court of law and that the function of the appraisal panel was the function of an arbitration board. Although the lease itself did not provide for vacating or modifying an appraisal, the appraisal could only be modified or vacated in accordance with HAWAII REV. STAT. ch. 658 (1976) because the legislative policy is to encourage arbitration. Lessee had failed to make an unconditional tender of the increased monthly rental, thus entitling lessor to interest on the unpaid rental from the first day of the renegotiated rental period in accordance with HAWAII REV. STAT. § 478-1(1) (1976). (L.H.)

Office of Disciplinary Counsel v. Johnson, 62 Hawaii 95, 611 P.2d 993 (1980) (per curiam).

Respondent attorney was charged with failure to cooperate with disciplinary proceedings, misappropriation of client funds, and neglect and abandonment of clients' legal matters. He failed to answer the petition and thus the charges were deemed admitted pursuant to Hawaii Supreme Court Rule 16.7(b). Although respondent did not receive the petition for discipline against him, notice was sufficient because of the following factors: (1) Service was properly made, (2) respondent failed to register his current address with the Disciplinary Board, and (3) respondent was clearly aware of the charges against him. Respondent's misappropriation of client funds violated Disciplinary Rule 9-102, and was ground for immediate disbarment regardless of the fact that one client eventually received his money. His neglect and abandonment of clients' legal matters violated Disciplinary Rules 6-101 and 7-101(2). (*Cited in* Office of Disciplinary Counsel v. Smith, 62 Hawaii 467, 617 P.2d 80 (1980).) (G.T.)

Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980).

Appellee sustained injuries in an automobile accident and sued the driver of the other vehicle alleging that she had negligently operated a motor vehicle. He also sued a tavern, Sand Trap, alleging that it had negligently supplied alcohol to the driver of the other vehicle who was already under the influence of liquor at the time she entered the bar and that it had negligently allowed her to leave its establishment in an intoxicated condition. After the trial court's denial of a motion to dismiss, a jury verdict was returned finding appellant Sand Trap 25% at fault. On appeal, the court affirmed. Even in the absence of dram shop legislation, a person who is injured by an inebriated automobile driver may recover from the tavern that provided alcohol to the driver in violation of this jurisdiction's liquor control law, HAWAII REV. STAT. § 281-78(a)(2)(B) (1976). Hawaii's liquor control statute imposes a duty upon a taverner not to serve a person under the influence of liquor, and thus a violation of the statute was properly submitted to the jury as evidence of negligence. A tavern's sale or service of alcohol to an intoxicated auto-

mobile driver may be the proximate cause of injuries inflicted upon a third party by the inebriated driver, and the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are foreseeable to a tavern owner. (*Cited in* Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980).) (P.T.Y.)

Perl v. IU International Corp., 61 Hawaii 622, 607 P.2d 1036 (1980).

Plaintiff, a minority shareholder of C. Brewer & Co. (Brewer), a Hawaii corporation, challenged the legality of a merger between Brewer and IUH Corp. (IUH), a Hawaii corporation. IU Investment Corp. (IUI), a wholly-owned Delaware subsidiary of IU International Corp. (IU), a Maryland holding company, owned approximately 54% of Brewer's capital stock. IUH was incorporated under Hawaii law as a wholly-owned subsidiary of IUI to facilitate a reverse triangular merger with Brewer, in which Brewer shareholders other than IUI exchanged their Brewer holdings for IU convertible preferred stock. Finding the transaction to have constituted a de facto merger between a domestic (Brewer) and a foreign (IU) corporation, the trial court held that the merger agreement failed to meet the 90% shareholder approval requirement of HAWAII REV. STAT. § 417-16 (1976). The trial court additionally found the agreement in violation of HAWAII REV. STAT. § 417-3 (1976) for its failure to distribute stock of the surviving corporation, Brewer, to Brewer shareholders. On appeal, the court reversed. Observing that the reverse triangular merger procedure is not prohibited by Hawaii law or corporate administrative regulations, the court held that the IUH-Brewer merger had been effectuated between two domestic corporations in accordance with the requisite statutory formalities and that application of the de facto merger doctrine was precluded by the availability of dissenters' appraisal rights. The court further ruled, however, that appraisal would not be the exclusive remedy available to dissenting shareholders notwithstanding HAWAII REV. STAT. § 417-29 (1976) if the merger had resulted in a cash out of the minority and had been effected for the sole purpose of freezing out the minority in violation of governing fiduciary principles. The merger would be set aside should such factual determination be made on remand. (HAWAII REV. STAT. § 417-3 (1976) (amended 1979); HAWAII REV. STAT. § 417-16 (1976) (amended 1979).) (S.M.)

Realty Mart, Inc. v. Aina Alii, Inc., 61 Hawaii 526, 607 P.2d 408 (1980) (per curiam).

Appellant sued to recover a realtor's commission from appellee, the seller of a hotel, pursuant to a contract for services rendered by appellant's broker. The trial judge directed a verdict for appellees which was affirmed on appeal. The Deposit, Receipt, Offer and Acceptance (DROA) which provided for the broker's commission, was never performed. The buyer and the seller subsequently prepared a new DROA with a lower price term which did not provide for a commission. Because the complaint alleged no other contract of payment or other obligation to appellant by appellee, the court confined its consideration to the terms of the first DROA. That DROA did not evidence employment of appellant to render services, but limited appellee's obligation to the broker to one-half of the buyer's deposit. Where a seller has employed a broker to sell his property at specified terms and

the property is sold at different terms, an obligation to pay a commission will arise only if the sale at the altered terms resulted from a bad faith effort by the seller to defeat the broker's claim to a commission. An inference of bad faith was not supported by the fact that in negotiations the parties questioned the possibility of appellant's claim to a commission. (J.K.)

Sapp v. Wong, 62 Hawaii 34, 609 P.2d 137 (1980).

Appellants/cross-appellees filed a class action suit to satisfy a judgment against one of the appellees/cross-appellants. When appellees could not be located and subpoenaed, appellees' attorney invoked the attorney-client privilege and refused to disclose the names of third parties who knew appellees' whereabouts. The court ruled on appeal that claimants asserting the attorney-client privilege carry the burden of establishing specific facts indicating it is warranted. In this case, the burden was not met where appellants had demonstrated a legitimate need for the information, appellees were parties to the proceeding in which their whereabouts were sought, and the attorney was representing them in the action. The court further ruled that the trial court had abused its discretion by failing to grant a continuance requested by appellants, because such continuance would not have prejudiced appellees but was substantially detrimental to appellants. The case was therefore reversed and remanded, and because no party could yet be considered the losing party, appellees' cross-appeal for attorney's fees could not be considered. (G.T.)

Schuler v. Wallace, 61 Hawaii 590, 607 P.2d 411 (1980) (per curiam).

In an action on a promissory note, appellee obtained summary judgment against appellants. Subsequently, an execution writ was issued and appellants' residential property was levied upon and sold. The trial court denied appellants' motion for an order to compel payment of $20,000 of the execution sale proceeds to appellants as exempt property pursuant to the former HAWAII REV. STAT. § 651-65 (1968). The court reversed and remanded. The exempt property statute contained no provision for notice or establishment of the exemption, and even if the statute had such a requirement, sufficient notice was given to preserve appellants' claim to the sale proceeds in this case. Also, the statute should be read liberally to preserve appellants' exemption although the assessed value may have exceeded the applicable exemption. The exemption statute does not expressly provide for an interest of a judgment debtor in the proceeds of the sale of exempt property, but the applicable exemption may be considered transferred to the proceeds once the sale is made. (HAWAII REV. STAT. § 651-65 (1968) (repealed 1976).) (R.M.)

State v. Alberti, 61 Hawaii 502, 605 P.2d 937 (1980) (per curiam).

Defendant's guilty plea to an extortion charge in federal court and admission to a role in an abduction formed the basis for a kidnapping charge in state court. He later moved to withdraw his guilty plea. While this motion was pending, defendant's admission was used against him in the state court trial for kidnapping. The court affirmed defendant's conviction. At the time of the trial on the kidnapping charge, the motion to withdraw the guilty plea had not been granted, and the judgment and sentence of the federal court remained in effect. Because defendant

was represented by counsel and his plea was intelligently and voluntarily made, his admission was properly admitted into evidence at the subsequent trial on separate charges arising out of the same incident. (C.Y.)

State v. Alexander, 62 Hawaii 112, 612 P.2d 110 (1980).

Defendant was convicted of three counts of promoting prostitution and sentenced to extended terms of ten years on each count to run concurrently. On appeal he challenged the sufficiency of evidence leading to his conviction and the imposition of extended terms under HAWAII REV. STAT. § 706-661, -662(4) (1976). The court affirmed. While HAWAII REV. STAT. § 712-1205 (1976) proscribes the conviction of an alleged panderer solely on the uncorroborated testimony of his prostitutes, the State's evidence met the statutory requirement for corroboration and thus provided a basis for conviction. Corroborative evidence in this case was testimony from an independent source that would tend to show that the crime charged was in fact committed and that defendant was the perpetrator of the offense. Such evidence could have been direct or circumstantial and, standing alone, did not have to be independently sufficient to support a conviction. The requirements of HAWAII REV. STAT. § 706-662(4) are satisfied when defendant is being sentenced for two or more felonies or is already under a sentence of imprisonment for a felony, and the sentencing court finds, from the defendant's past criminal history or from the nature and circumstances surrounding the commission of the offenses for which he has been convicted, that defendant exhibited a callous disregard for laws enacted for the safety and welfare of society and that an extended term is necessary for the public's protection. Defendant's criminality in this case was so extensive that the imposition of extended terms was warranted. (HAWAII REV. STAT. § 706-662 (1976) (amended 1978).) (P.T.Y.)

State v. Bennett, 62 Hawaii 59, 610 P.2d 502 (1980) (per curiam).

Defendant appealed his conviction for burglary. The court affirmed, holding the following: (1) The police officers' observations formed a basis for a reasonable person to conclude that defendant had been involved in criminal activity which made the stop of defendant's car, the subsequent order-out, frisk and scan of the car's interior with a flashlight appropriate; (2) the warrantless search of the car by police and the seizure of articles found were proper because exigent circumstances justified the search and the items seized were in plain view; (3) defendant's pretrial identification by the victim at a one-to-one showup did not give rise to a substantial likelihood of misidentification or violate defendant's right to due process of law under the factors adopted in *State v. Padilla,* 57 Hawaii 150, 552 P.2d 357 (1976); and (4) the trial court's exclusion of the hearsay statement by a codefendant was proper because it did not qualify as a statement against penal interest according to the requirements outlined in *State v. Leong,* 51 Hawaii 581, 465 P.2d 560 (1970). (*Cited in* State v. Agnasan, 62 Hawaii 252, 614 P.2d 393 (1980).) (G.T.)

State v. Bloss, 62 Hawaii 147, 613 P.2d 354 (1980).

Defendant was charged with violating HAWAII REV. STAT. § 445-43 (1976) which prohibits operators of pinball machine establishments from permitting unaccompanied minors "to loiter about" such game machines. The trial court found that

the statute is unconstitutionally vague and granted defendant's motion to dismiss. In affirming the trial court's judgment, the court reached the following conclusions: (1) The term "to loiter about" is not sufficiently clear to give reasonable notice of the prohibited conducted and to apprise the judge and jury of the proper standards for determining guilt and therefore, it is invalid for vagueness and thus contravenes due process; and (2) the statute no longer has a reasonable or substantial relationship to the harm sought to be avoided and violates equal protection. Modern pinball machines do not belong in a statute drafted to regulate the gambling influence of old style pinball and slot machines where skill was not required and are also indistinguishable from other skill-related amusement games which minors are allowed to play. (D.K.)

State v. Brighter, 62 Hawaii 25, 608 P.2d 855 (per curiam), *rehearing denied,* 62 Hawaii _ (1980).

In a consolidated trial, defendants were convicted of robbery. In affirming the convictions, the court held that the trial court had properly refused defendants' requested jury instruction based on HAWAII REV. STAT. § 708-834(1)(b) (1976) that a bona fide claim of right is a defense to robbery. The refusal was proper because defendants had failed to present evidence upon which such an instruction could have been predicated, not because the statute, by its terms, applies to theft. It is vital to the defense that the interest which the accused asserts under the claim of right be to specific property, and the interest claimed must be in complete derogation of the victim's rights in and to the property which is the subject of the alleged robbery. The court also upheld the trial court's denial of defendants' motions for judgment of acquittal as there was sufficient evidence to establish a prima facie case against them. (*Cited in* State v. O'Daniel, 62 Hawaii 518, 616 P.2d 1383 (1980). HAWAII REV. STAT. § 708-834(1)(b) (1976) (amended 1979, 1980).) (L.Z.)

State v. Custodio, 62 Hawaii 1, 607 P.2d 1048 (1980).

Defendant was charged with promoting detrimental drugs when a strip search conducted as a condition to entry into Hawaii State Prison uncovered a balloon containing marijuana lodged in defendant's vagina. The State appealed from the lower court judgment granting defendant's pretrial motion to suppress the drugs. The court reversed. In upholding the initial seizure of the balloon, the court distinguished *State v. Kaluna,* 55 Hawaii 361, 520 P.2d 51 (1974), and found that the search was not carried out in an oppressive or discriminatory manner and it was also conducted with defendant's full knowledge and freely given consent. The search of the contents of the balloon was also proper. Although the search of the balloon was not lawful as incident to arrest, the search was justified as falling outside the purview of fourth amendment safeguards. Defendant's expectation that the balloon would remain unopened once she consented to the strip search and recovery of the balloon was undertaken was not one that society would be prepared to acknowledge as reasonable. Given defendant's diminished expectation of privacy in the balloon once it had been properly recovered, coupled with the compelling state interests in internal order and discipline in prisons, the search was within constitutional limits. (P.T.Y.)

State v. Dias, 62 Hawaii 52, 609 P.2d 637 (1980).

The State appealed from the trial court's order granting defendants' motion to suppress evidence of gambling activity. The court affirmed in part and reversed in part. As squatters, defendants had no fourth amendment protection against warrantless searches and seizures, but long governmental acquiescence to their presence on government property gave rise to a reasonable expectation of privacy within their building. But if conduct is knowingly open to view and conversations are audible to persons outside the building, then it is not subject to fourth amendment protection. The evidence obtained by police from those sources was therefore improperly suppressed at trial. Because the State had failed to show the existence of any exigent circumstances, however, a warrant should have been obtained, and evidence seized following the warrantless entry into the building was therefore properly suppressed. (*Cited in* State v. Dorson, 62 Hawaii 377, 615 P.2d 740 (1980); State v. Rosborough, 62 Hawaii 238, 615 P.2d 84 (1980).) (G.T.)

State v. Elliott, 61 Hawaii 492, 605 P.2d 930 (1980) (per curiam).

Defendant appealed his conviction of promoting a detrimental drug on the ground that evidence seized from his vehicle without a warrant should have been suppressed at trial. The court affirmed. Warrantless searches of automobiles or holding vehicles until a warrant may be obtained are permissible where there is probable cause to search and the police believe that there is foreseeable risk that the vehicle may be moved or the evidence within it may be removed or destroyed before a warrant can be obtained. Probable cause existed to believe that a cloth bag plainly visible from outside the vehicle contained contraband. The fact that the vehicle was parked in an apartment parking lot adjacent to a public street provided the requisite exigency justifying the warrantless search. (*Cited in* State v. Jenkins, 62 Hawaii 660, 619 P.2d 108 (1980); State v. Dorson, 62 Hawaii 377, 615 P.2d 740 (1980); State v. Agnasan, 62 Hawaii 252, 614 P.2d 393 (1980); State v. Bennett, 62 Hawaii 59, 610 P.2d 502 (1980) (this index).) (L.H.)

State v. Freitas, 62 Hawaii 17, 608 P.2d 408 (1980).

Defendant was found guilty of manslaughter by a jury that also found him legally responsible for his conduct. Defendant appealed, claiming that the trial court had erred in denying his pretrial motion for judgment of acquittal made pursuant to HAWAII REV. STAT. § 704-408 (1976). The court affirmed. The three-member sanity commission had found that nonpsychotic brain syndrome, antisocial personality, and habitual excessive drinking collectively created a mental condition that rendered defendant substantially incapable of appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law. For the insanity defense, however, self-induced intoxication is not a substantial factor in determining legal competency because mental disability excusing criminal responsibility must be the product of circumstances beyond defendant's control. Only in the absence of evidence upon which the jury might fairly find defendant sane beyond a reasonable doubt will the motion for judgment of acquittal be granted. Medical experts were unable to say with any reasonable degree of medical certainty the extent that defendant's capacity would have been impaired at the commission of the offense if the fact of alcohol ingestion was excluded from their consideration. Based upon the evidence before the trial court, a jury could

have reasonable doubt of defendant's legal incapacity. (*Cited in* State v. Summers, 62 Hawaii 325, 614 P.2d 925 (1980). HAWAII REV. STAT. § 704-408 (1976) (amended 1980).) (L.Z.)

State v. Hernandez, 61 Hawaii 475, 605 P.2d 75 (1980) (per curiam).

Defendant appealed his conviction of sexual abuse and kidnapping, contending that it was based on insufficient evidence. The court affirmed in part and reversed in part. The applicable standard in determining the sufficiency of evidence is not whether the conviction was supported by the weight of evidence but whether there was substantial evidence tending to support the requisite findings for conviction. Although no direct evidence was offered on defendant's intent to restrain the victim or subject her to a sexual offense, such intent may be shown by a reasonable inference arising from circumstances surrounding the act. Thus, evidence that defendant restrained the victim and threw her to the ground, thus allowing his accomplice to continue sexually assaulting the victim, was sufficient to sustain the conviction of kidnapping and one count of sexual assault. The court also held that HAWAII REV. STAT. § 702-222 (1976) does not require a common plan to support a finding of complicity; a defendant may be liable where he simply aided the perpetrator in committing the offense. (*Cited in* State v. Maxwell, 62 Hawaii 556, 617 P.2d 816 (1980); State v. Summers, 62 Hawaii 325, 614 P.2d 925 (1980); State v. Rushing, 62 Hawaii 102, 612 P.2d 103 (1980) (this index).) (L.H.)

State v. Hong, 62 Hawaii 83, 611 P.2d 595 (1980) (per curiam).

Defendant appealed his conviction of theft. The court affirmed, first ruling that the *Miranda* warnings given to defendant had not conformed to constitutional standards because they failed to clearly and understandably convey the full panoply of his rights. Defendant's subsequent statements admitted at trial, however, were, if anything, exculpatory, and thus the inadequate *Miranda* warnings constituted harmless error. Defendant's further contention that mere possession of the stolen property was insufficient to support a prima facie case of theft, and therefore his motion to acquit should have been granted, was rejected by the court on the following grounds: (1) By operating an automobile with stolen license plates, defendant exerted sufficient control of the stolen property to fall within the scope of HAWAII REV. STAT. § 708-830(1) (1976); (2) defendant's intent to deprive another of property could be reasonably inferred from the circumstances; and (3) where the *corpus delicti* has been established, evidence of recent and exclusive possession of the stolen property by defendant, if unexplained, will sustain a finding of guilt. (HAWAII REV. STAT. § 708-830 (1976) (amended 1979).) (G.T.)

State v. Huihui, 62 Hawaii 142, 612 P.2d 115 (1980) (per curiam).

Defendant was convicted of robbery and the court reversed. During the course of the trial, an objection to the reference to the word "mug" in the phrase "police mug photographs" used by the prosecution was overruled by the trial court, and no prophylactic instruction was given. On appeal, the court agreed with defendant that the words "police mug photographs" used in a question asked by the State of one of its witnesses concerning defendant's identity reasonably infers to the jury that defendant had been previously routed through the arrest process as a suspect of other crimes and suggests that defendant had a prior criminal record. Although

the prosecutor's action may have been inadvertent, it was still an improper reference communicated to the jury, and it was error for the trial court not to have sustained the objection and follow it with a prophylactic instruction. The court found that there was a reasonable possibility that the error might have contributed to the conviction and determined that the error was not harmless beyond a reasonable doubt. (*Cited in* State v. Pulawa, 62 Hawaii 209, 614 P.2d 373 (1980).) (P.T.Y.)

State v. Ige, 61 Hawaii 517, 606 P.2d 83 (1980) (per curiam).

Defendant was sentenced on three separate indictments for robbery to a total of 60 years to be served consecutively. Pursuant to Act 188, 1975 Hawaii Sess. Laws 429, § 2(3), defendant moved for a review and reduction of the sentences to a total of 20 years. The trial court modified the original sentences by reducing one sentence, but retained the consecutive aspect of the original sentences. On appeal, the court affirmed by holding the following: (1) The trial court, in amending defendant's sentence, exercised its statutory discretion on whether to apply concurrent or consecutive terms and did not transform the pending terms into extended terms; (2) the full hearing requirements for extended term sentencing do not apply to adjustments of pre-Hawaii Penal Code sentences under Act 188, § 3 so the reviewing trial court is under no obligation to afford a hearing; and (3) minimum due process requirements were observed where defendant received a hearing on his motion, was represented by counsel, and neither requested nor was foreclosed from presenting evidence and argument in support of his motion. (C.N.)

State v. Joao, 61 Hawaii 571, 606 P.2d 1332 (1980) (per curiam).

The court affirmed the trial court's order revoking defendant's probation. Defendant was neither denied effective assistance of counsel nor entitled to *Miranda* warnings before being questioned by his parole officer regarding noncompliance with his probation order. (R.M.)

State v. Johnson, 62 Hawaii 11, 608 P.2d 404 (1980) (per curiam).

Defendant appealed his conviction of theft. In affirming the judgment, the court rejected defendant's contention that because his trial was not commenced within six months of the date of his initial arrest, charges filed against him should be dismissed pursuant to Hawaii R. Penal P. 48(b)(1). The court held that the initial investigatory arrest did not trigger the operative effect of rule 48(b)(1). The six-month period commences from the date of the filing of the charge. (L.Z.)

State v. Kea, 61 Hawaii 566, 606 P.2d 1329 (1980) (per curiam).

The State appealed from the trial court's order granting defendant's motion to suppress a handgun and unspent ammunition discovered in a warrantless search of defendant and his automobile. The court reversed. It ruled that where an informant's tip was substantial and specific and such information was corroborated by police observation, the police had a duty to make a brief investigative stop. After the stop, defendant had given his consent to the search of his automobile leading to the recovery of the handgun, and the propriety of the search was undisputed on appeal. The protective pat down which revealed the ammunition was

also proper because upon request, defendant refused to identify himself and did nothing to dispel the police's fear of danger. (*Cited in* State v. Ward, 62 Hawaii 459, 617 P.2d 565 (1980); State v. Madamba, 62 Hawaii 453, 617 P.2d 76 (1980); State v. Kuahuia, 62 Hawaii 464, 616 P.2d 1374 (1980); State v. Bennett, 62 Hawaii 59, 610 P.2d 502 (1980) (this index).) (R.M.)

State v. Langley, 62 Hawaii 79, 611 P.2d 130 (1980) (per curiam).

Defendant appealed his conviction for promoting a dangerous drug, arguing that the preincarceration search of his person following his arrest for a misdemeanor that resulted in the recovery of cocaine had violated his right to bail. The court relied on *State v. Vance,* 61 Hawaii 291, 602 P.2d 933 (1979), in which it had held that a person arrested for a misdemeanor has no absolute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail. Like the situation in *Vance,* defendant's unruly behavior at the station justified temporary incarceration, and because no evidence of police pretext was shown, the preincarceration search was proper. The admission into evidence of the fruits of the search was without error. (G.T.)

State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (per curiam).

Defendant appealed his convictions for promoting detrimental drugs on two counts. The court affirmed the conviction on the first count, holding that a warrantless entry into a home for the purpose of making an arrest is impermissible except when justified by exigent circumstances. In this case, police had probable cause to believe that defendant possessed marijuana. After they announced their presence at defendant's home, the police heard crashing and scurrying sounds in the house which gave rise to a reasonable belief that flight was in progress and contraband might be removed or destroyed, thus providing exigent circumstances. Having entered lawfully and arresting defendant on probable cause, the police were entitled to seize the evidence exposed to view. The court, however, overturned defendant's conviction on the second count. The only evidence on that charge depended on the identification of seeds as marijuana and the police officer lacked special expertise to make such an identification. (*Cited in* State v. Dorson, 62 Hawaii 377, 615 P.2d 740 (1980); State v. Rosborough, 62 Hawaii 238, 615 P.2d 84 (1980); State v. Dias, 62 Hawaii 52, 609 P.2d 637 (1980) (this index); State v. Texeira, 62 Hawaii 44, 609 P.2d 131 (1980) (this index).) (C.Y.)

State v. Mayo, 62 Hawaii 108, 612 P.2d 107 (1980) (per curiam).

Defendant alleged that retrial on rape and kidnapping charges would subject him to double jeopardy because his first trial was improperly terminated under HAWAII REV. STAT. 701-110(4) (1976). The court held the original trial court did not abuse its discretion in declaring a mistrial *sua sponte* as there was a manifest necessity to do so for the following reasons: (1) When it became reasonably clear to the original trial judge that defendant intended to testify on his own behalf, (2) the State intended to cross-examine defendant about his participation in offering a purported gift to the original trial judge in order to attack defendant's credibility because evidence regarding his identification was circumstantial, and (3) there was reason to believe that the trial judge could be called as a witness. Retrial would consequently not amount to double jeopardy. (G.T.)

State v. Neutzel, 61 Hawaii 531, 606 P.2d 920 (1980).

The trial court denied defendant's motion for a judgment of acquittal and defendant was convicted of murder. The court affirmed. The standard for a motion for judgment of acquittal where insanity is raised as a defense is whether the evidence, considered most favorably to the prosecution, was such as to permit a rational conclusion by a jury that defendant was sane beyond a reasonable doubt. The nature and quantum of rebuttal evidence sufficient to present a jury question is to some extent determined by the strength of the case for insanity. Expert testimony presented on defendant's behalf was such that a reasonable juror could conclude that defendant was sane beyond a reasonable doubt. The bizarreness of the alleged crime and its emotional impact were insufficient to establish legal insanity. Also, jury instructions should be flexible with wide discretion vested in the trial judge to clarify the terms in the definition of legal insanity. The instruction given in this case was effective in clarifying the meaning of "substantial" and in implementing the policy behind the legal insanity statute. (*Cited in* State v. Summers, 62 Hawaii 325, 614 P.2d 925 (1980); State v. Freitas, 62 Hawaii 17, 608 P.2d 408 (1980) (this index).) (F.H.)

State v. Palama, 62 Hawaii 159, 612 P.2d 1168 (1980).

In separate criminal proceedings, two defendants were convicted and sentenced to probation for five years. While on probation, defendants were jointly tried and convicted of further crimes; both appealed these latter convictions. Following these convictions, the trial court revoked their probations under HAWAII REV. STAT. § 706-628 (1976) which gives a sentencing court authority to revoke a probation at any time if a person "has been convicted of another crime" while on probation. The court, in affirming, first concluded that the language of HAWAII REV. STAT. § 706-628, clear and unambiguous, could be literally applied to this case where the offense upon which the revocation was based occurred prior to defendants' being placed on probation. This result was in accordance with the statute's underlying policies. Secondly, a conviction, even though on appeal, is a complete conviction for the purposes of revoking probation. (HAWAII REV. STAT. § 706-628 (1976) (amended 1980).) (D.K.)

State v. Reese, 61 Hawaii 499, 605 P.2d 935 (1980) (per curiam).

Defendant was convicted of attempted robbery. On appeal, the court reversed, holding that an inculpatory statement was inadmissible at trial where defendant was interrogated in police custody without first being advised of his *Miranda* rights. Also, defendant's failure to renew his objection to the introduction of the statement at trial did not constitute a waiver of the issue on appeal under HAWAII REV. STAT. § 641-16 (1976) because defendant had moved to suppress the statement pursuant to Hawaii R. Penal P. 12(b)(3) at a pretrial hearing. (*Cited in* State v. Sugimoto, 62 Hawaii 259, 614 P.2d 386 (1980); State v. Hong, 62 Hawaii 83, 611 P.2d 595 (1980) (this index). HAWAII REV. STAT § 641-16 (1976) (amended 1979).) (G.M.)

State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980).

Defendant was convicted of kidnapping and rape. The court affirmed defen-

dant's conviction. It concluded that the rape statute, HAWAII REV. STAT. § 707-730 (1976), is constitutional because the sex-based classification serves an important governmental objective and is substantially related to the achievement of that objective. This sex-based distinction and the resulting differentiation in treatment is based upon unique physical characteristics of men and women and those characteristics justify the classification. Therefore, the statute neither denies equal rights to men nor violates the Equal Rights Amendment. The trial court's exclusion of character evidence did not warrant a reversal. Where there is overwhelming and compelling evidence tending to show defendant's guilt beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless. Defendant's motion for judgment of acquittal was properly denied. The trial court had sufficient evidence to draw justifiable inferences of fact from which a reasonable man might fairly conclude a finding of guilt beyond a reasonable doubt. Defendant was not denied effective assistance of counsel. While the accused has a right to assistance of counsel under the federal and state constitutions, this right to counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." (*Cited in* State v. Antone, 62 Hawaii 346, 615 P.2d 101 (1980). HAWAII REV. STAT. § 707-730 (1976) (amended 1979).) (P.T.Y.)

State v. Rushing, 62 Hawaii 102, 612 P.2d 103 (1980) (per curiam).

Defendant was convicted of welfare fraud under HAWAII REV. STAT. § 346-34 (1976) for failure to report the receipt of additional income. On appeal, the court affirmed. The statute does not plainly indicate a legislative intent to impose absolute liability, required by HAWAII REV. STAT. § 702-212(2) (1976), to permit a penal statute to dispense with a state of mind requirement. The requisite intent to commit fraud may be proved and established if a defendant acts intentionally, knowingly, or recklessly pursuant to HAWAII REV. STAT. § 702-204 (1976) with respect to his failure to report income within thirty days of its receipt. Because intent can rarely be shown by direct evidence, the defendant's mind may be read from his acts and conduct and by reasonable inference arising from the circumstances surrounding the act. The evidence presented to the trial court supported a prima facie case of welfare fraud. (HAWAII REV. STAT. § 346-34 (1976) (amended 1978).) (J.L.)

State v. Ryan, 62 Hawaii 99, 612 P.2d 102 (1980) (per curiam).

Defendant was left unguarded after being placed under arrest for careless and heedless driving. Taking advantage of the arresting officer's absence, defendant slipped out of the police car and walked away. He was convicted of escape. On appeal, the court affirmed, holding that HAWAII REV. STAT § 803-6 (1976) does not require that a defendant be booked or charged with a crime before he can be found guilty of escape. A defendant is in "custody" under the escape statute once he has submitted to the police officer's control and the process of taking him to the police station or to a judge has commenced. (HAWAII REV. STAT. § 803-6 (1976) (amended 1978).) (J.L.)

State v. Smith, 61 Hawaii 522, 606 P.2d 86 (1980) (per curiam).

Defendant pleaded guilty to robbery and burglary. Prior to sentencing, pursu-

ant to Hawaii R. Penal P. 32(d), defendant moved to withdraw his guilty pleas. The trial court denied his motion, and he appealed. In reversing, the court held that where a defendant pleads guilty while simultaneously denying the acts constituting the crime charged, a trial court must assure itself that defendant completely understands the consequences and finality of his guilty plea if accepted. Only after a searching inquiry and satisfying itself that there is a strong factual basis for the plea should a trial court accept a guilty plea. These requirements were especially compelling in this case because defendant had just turned nineteen at the time he entered his pleas, and his formal schooling consisted of only an eighth grade education. In addition, fairness and justice mandated granting of the motion because it had been presented before sentencing and no substantial prejudice to the State had been shown. (S.S.M.)

State v. Sylva, 61 Hawaii 385, 605 P.2d 496 (1980) (per curiam).

The court affirmed the denial of defendant's motion for deferred acceptance of guilty (DAG) plea made pursuant to HAWAII REV. STAT. ch. 853 (1976). The trial court had not abused its discretion even though it erroneously ruled that defendant was statutorily disqualified from a DAG plea because of his juvenile record. HAWAII REV. STAT. 853-4(7) (1976), when read independently, appears clear and unambiguous, but when read in the context of the entire statute such a reading leads to palpably absurd consequences. In order to give the subsection a fair and reasonable construction consistent with the purposes of chapter 853, the court limited that subsection to those cases involving minors that were waived from family court to the criminal court to be tried as adults. For those defendants with juvenile records not before the criminal court on such waivers and not disqualified by the other subsections of chapter 853, such as defendant in this case, the statute vests trial courts with discretionary authority to deny or accept the DAG pleas. (*Cited in* State v. Palama, 62 Hawaii 159, 612 P.2d 1168 (1980) (this index). HAWAII REV. STAT. § 853-4 (1976) (amended 1980).) (L.H.)

State v. Texeira, 62 Hawaii 44, 609 P.2d 131 (1980) (per curiam).

The State appealed from an order granting defendants' motion to suppress and from judgments of acquittal entered in favor of defendants. The court affirmed in part, reversed in part, and remanded. Stipulation by the parties to consolidate a hearing on the motion to suppress with the trial on the merits did not constitute a waiver by the State of its statutory right to appeal from the adverse trial court ruling on the motion to suppress. The court also ruled that a technical trespass by officers upon neighboring property to gain a vantage point to observe defendants' alleged illegal activities was not necessarily determinative of whether a subsequent warrantless search was improper. The following twofold test was applied: (1) Whether defendants exhibited an actual expectation of privacy, and (2) whether the expectation is one which society deems to be reasonable. Because defendants' acts were in plain view to outsiders, they had no reasonable expectation of privacy, and the police's visual and aural observations were proper. No exigent circumstances, however, existed to exempt the police from the requirement of obtaining a warrant to enter into a private residence to effect a search and seizure. Because no warrant was obtained, police observations and evidence obtained following entry into the building were properly suppressed. (*Cited in*

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